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STATE OF WASHINGTON
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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant,

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON, et al.,

Defendant/Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(HON. ANNE HIRSCH)

**BRIEF OF RESPONDENT, OFFICE OF THE ATTORNEY
GENERAL**

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I. INTRODUCTION

This matter was initiated by Ameriquest Mortgage Company (Ameriquest), seeking to enjoin the disclosure of certain public records pursuant to RCW 42.56, The Public Records Act (PRA). Specifically, Ameriquest requested a “preliminary injunction” under RCW 42.56.540 (formerly RCW 42.17.330). The records at issue are related to an investigation by the Office of the Attorney General of Washington (AGO) of the business and lending practices of Ameriquest and related entities. Ameriquest claimed that the documents were protected from disclosure under the federal Gramm-Leach-Bliley Financial Modernization Act of 1999 (GLBA), 15 U.S.C. § 6801, which shields from disclosure certain information concerning a financial institution’s customers.

After considering the submissions of Ameriquest, the Office of the Attorney General, and Intervenor Melissa A. Huelsman (who had made the public records request), the trial court denied the injunction. Notwithstanding Ameriquest’s arguments that the requirements of the Public Records Act are preempted by the federal GLBA and that the trial court reached certain questions prematurely, there is no legal basis to find that the records at issue are exempt from disclosure. This Court should affirm denial of the injunction, allowing the records to be disclosed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Ameriquest initiated this action under RCW 42.56.540, an expedited proceeding to enjoin the disclosure of public records. Did the trial court properly determine that Ameriquest did not meet its burden to enjoin disclosure based upon the record before the court?

2. Did the trial court correctly conclude that Ameriquest had no legally cognizable interest in the AGO's decision not to assert certain statutory exemptions to the Public Records Act?¹

3. Did the trial court properly determine that the Public Records Act is not preempted by the federal Gramm-Leach-Bliley Act's restrictions on the disclosure and use of nonpublic personal information by financial institutions?

III. COUNTERSTATEMENT OF THE CASE

Together with the Washington Department of Financial Institutions, the AGO in early 2003 opened an investigation under the Consumer Protection Act, RCW 19.86.020, into the mortgage lending practices of the Ameriquest Mortgage Company and two related entities. CP at 164 ¶ 7, Declaration of David W. Huey (Huey Decl.). This

¹ Ameriquest attempts to challenge the AGO's determinations as arbitrary and capricious and attempts to assert for the first time that the court prematurely determined enjoinderment under RCW 42.56.540 without allowing for discovery. Both arguments reflect a misunderstanding of the unique expedited proceeding contemplated in RCW 42.56.540.

investigation ultimately culminated in a landmark \$325 million settlement reached in November 2005 between Ameriquest and 49 states and the District of Columbia. Consent judgments memorializing the settlement were filed in each of the jurisdictions in March 2006, including a consent judgment with the State of Washington, filed in King County Superior Court on March 21, 2006, Civ. No. 06-2-0702-5. CP at 164 ¶ 6 (Huey Decl.).

As leading members of the multistate working group executive committee that negotiated and administered the settlement, the two Washington state agencies accumulated a substantial amount of information and a significant number of documents. These included three distinct categories of documents: (1) documents produced voluntarily by Ameriquest in response to the investigation; (2) documents provided to the AGO by third parties, including those provided by Washington consumers who filed complaints with the AGO's consumer resource centers; (3) and documents generated internally in the course of the investigation and prosecution of the case. CP at 164 ¶¶ 7-8 (Huey Decl.).

The Washington consent judgment included a provision that, in the event of a public records request for documents provided by Ameriquest relating to the subject matter of the consent judgment, (that is, documents in the first category), "the State [was to] comply with applicable public

disclosure laws and promptly provide notice to [Ameriquest] of the request” so as to afford Ameriquest “the reasonable opportunity to assert that the documents subject to the request are exempt from disclosure.” CP at 165 ¶ 12 (Huey Decl.). The consent judgment contained no provision regarding documents in the latter two categories.

On February 8, 2007, the AGO received a public records request from Christina Latta, on behalf of the Law Offices of Melissa Huelsman. The request sought “all records relating to [the] investigation of Ameriquest.” CP at 164 ¶ 4 (Huey Decl.).

Because the request was broadly worded and potentially encompassed a sizeable number of documents, the AGO immediately entered into discussions with Huelsman’s office to focus the request and to prioritize the order of document production. CP at 164-65 ¶¶ 9-11 (Huey Decl.).

Based upon those discussions, the AGO identified certain documents to be produced in the initial stage. These included documents from all three categories. As required by the consent judgment, notice was given to Ameriquest General Counsel by letter, dated March 1, 2007, of the Huelsman request and the proposed production of category one records. CP at 165 ¶ 13; 168 Ex. 1; 171 Ex. 2 (Huey Decl.). These

consisted of the loan files of specific Ameriquest borrowers and a number of the internal company e-mails for two Ameriquest employees.

Shortly after receiving the notice and before any documents had been produced by the AGO, Ameriquest filed this action for permanent injunction, under RCW 42.56.540, and obtained a Stipulated Temporary Restraining Order (TRO) precluding the AGO from producing “any records in response to any public records request related or pertaining to Ameriquest.” CP at 4-9, 36-38. (Stipulated Temporary Restraining Order & Order to Show Cause).

Shortly thereafter, Melissa Huelsman, the party requesting the records, intervened. CP at 149-154 (Mot. By Requestor Melissa A. Huelsman to Intervene as a Matter of Right). Both the AGO and the intervenor stipulated to entry of the TRO but opposed the subsequent motion for preliminary injunction. CP at 39-41, 182-190, 194-218.

In anticipation of having to produce documents, the AGO prepared redacted copies of the Ameriquest category one records, blotting out personal information in accordance with the AGO’s Consumer Protection Division’s redaction policy. CP at 166 ¶ 20; 179-180 Ex. 5 (Huey Decl.). This policy calls for the redaction of certain enumerated categories of personal information, consistent with the privacy provisions of the PRA. CP at 179 Ex. 5 (Huey Decl.) The AGO furnished these redacted copies

to Ameriquest for its review. Verbatim Report of Proceedings (VRP) (Court Ruling, May 1, 2007) at 11:18.22.

At the May 1 hearing, Ameriquest pointed out a number of redacting errors where information subject to redaction nevertheless remained visible. VRP (Court Ruling, May 1, 2007) at 11:23-13:8. In its May 18 order, the trial court directed the AGO and Ameriquest to work together to resolve the remaining redaction issues. CP at 323. VRP (May 18, 2007) at 34:19 – 41:15. At the time Ameriquest filed its Motion for Discretionary Review and the case was transferred to Division Two, the number of disputed redactions had been reduced to 47 individual items.

At the close of the May 18 hearing, the trial court directed the AGO to produce to the Intervenor the AGO consumer complaint documents (category two). VRP (May 18, 2007) at 53:13-55:17. Ameriquest had conceded in its reply brief in support of its motion for preliminary injunction that it did not object to production of those documents “so long as the files do not contain records the AGO received from Ameriquest in connection with the AGO’s investigation into Ameriquest’s lending practices or which the AGO obtained through the investigation.” VRP (May 18, 2007) at 53:13-55:17. The AGO also provided the Intervenor with a list containing a description of the remaining documents in the AGO’s possession that were considered

responsive to the public records request. CP at 166 ¶ 19 (Huey Decl.). No other documents have been produced as the trial court's order denying Ameriquet's Motion for Preliminary Injunction has been stayed pending the outcome of this appeal.

IV. ARGUMENT

A. Standard of Review.

Review of an injunction issued pursuant to the Public Records Act is *de novo*. *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989); *Dragonslayer, Inc. v. Washington State Gambling Comm'n*, 131 Wn. App. 433, 441-442, 161 P.3d 428 (2007). *See also* RCW 42.56.550(3). Where, as here, the record consists only of affidavits, memoranda of law, and other documentary evidence, “the appellate courts stands in the same position as trial court.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

In reviewing the trial court's ruling that disclosure should not be enjoined, this Court is guided by principles inherent in the Public Records Act. The Act directs state agencies to disclose any public record unless the record falls within a specific exemption to the PRA. RCW 42.56.070(1). Even then, most exemptions are permissive rather than mandatory.

The Supreme Court has said, “The Washington public disclosure act is a strongly worded mandate for broad disclosure of public records.” *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 745, 958 P.2d 260 (1998). Toward that end, the PRA’s provisions are to be liberally construed and its exemptions narrowly construed. RCW 42.56.030. The party seeking to prevent disclosure of a record bears the burden of proving the application of one of the Act’s specific exemptions. *Confederated Tribes of Chehalis Reservation*, 135 Wn.2d at 744.

To the extent Ameriquet challenges procedural issues or motions regarding discovery, review of the trial court’s decisions is conducted under an abuse of discretion standard. *Birch Bay Trailer Sales, Inc. v. Whatcom Cy.*, 65 Wn. App. 739, 746 n.6, 829 P.2d 1109 (1992).

B. The Trial Court Properly Declined to Enjoin Disclosure Because Ameriquet Failed to Demonstrate a Likelihood of Success on the Merits.

Ameriquet relies heavily on this Court’s recent decision in *Northwest Gas Ass’n v. Washington Utils. & Transp. Comm’n*, 141 Wn. App. 98, 168 P.3d 443 (2007),² as fundamental support for its principal assignment of error, that the trial court, in declining to issue a preliminary injunction, improperly issued a ruling that “was tantamount to a final decision on the merits.” Appellant’s Opening Br. at 2.

Ameriquest contends that the trial court here committed “the very same error” as the trial court in *Northwest Gas* and, further, that “[t]he facts before this Court now are nearly identical to those in *Northwest Gas*.” Appellant’s Opening Br. at 14-15. Ameriquest, however, misreads *Northwest Gas* and fails to appreciate a key factual difference between the two cases.

Under Ameriquest’s broad reading of *Northwest Gas*, it would be a rare event that a trial court could deny a motion for preliminary injunction in a PRA case except after a full blown trial on the merits. Because loss at the preliminary injunction stage of a PRA case almost always will result in immediate disclosure, Ameriquest’s interpretation would virtually guarantee a preliminary injunction to every PRA litigant seeking to enjoin disclosure (under RCW 42.56.540). Ameriquest would have this Court reduce the decision to grant a preliminary injunction to a mere ministerial act.

In fact, the holding in *Northwest Gas* is much narrower than Ameriquest suggests and the underlying facts of the two cases are distinguishable. Preliminary injunctions are neither automatic nor pro forma. Even under *Northwest Gas*, Ameriquest’s failure to demonstrate a

² *Northwest Gas* is subject to a pending petition for review by the Washington Supreme Court, Case No. 808830.

likelihood of success on the merits at the preliminary injunction stage is fatal to its case.

1. Ameriquest Made No Offer of Proof Comparable to That of the Pipelines in *Northwest Gas*.

Ameriquest seeks injunctive relief under RCW 42.56.540. This section provides an avenue for persons named in public records to prevent imminent disclosure of public records, but only if the litigants are able to establish “examination [of the public records at issue] would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.” RCW 42.56.540.

To prevail at the preliminary injunction stage, a party must demonstrate “only the *likelihood* that [the objecting party] will ultimately prevail at a trial on the merits.” *Northwest Gas*, 141 Wn. App. at 116 (emphasis in the original). To demonstrate the requisite likelihood of success, the party must establish (1) a clear legal or equitable right to prevent disclosure, (2) a well grounded fear of immediate invasion of the right, and (3) an actual and substantial injury. *Northwest Gas*, 141 Wn. App. at 115-116 (citing *Tyler Pipe Indus., Inc. v. Dep’t of Rev.*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)).

In *Northwest Gas*, the Pipelines met their burden by placing in the record “numerous substantive declarations” that were accepted by the appellate court as offers of proof of factual issues that the Pipelines could not develop fully because of the expedited time frame of a preliminary injunction hearing. *Northwest Gas*, 141 Wn. App. at 114, 125 n.23.

As a result, the *Northwest Gas* Court specifically found that “the Pipelines have met their preliminary injunction burden of showing a likelihood that they can demonstrate at trial a clear legal and equitable right to an exemption from disclosure under the Public Records Act of at least some of the requested shapeline data.” *Northwest Gas*, 141 Wn. App. at 120-121.

By contrast, the record here contains no similar offer of proof from Ameritrust. Ameritrust has not shown the capacity, even given additional time, to develop a factual record likely to prevail at trial on the merits. The declarations from its attorneys do not mention any undeveloped facts. And, where Ameritrust does argue the need to conduct discovery, the descriptions of the evidence to be developed through discovery are too insubstantial, vague or hypothetical to serve as an adequate offer of proof. *See Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections*, 122 Wn. App. 227, 246, 95 P.3d 764 (2004) (an

offer of proof should inform the court of specific nature of the offered evidence).

In support of its motions for injunctive relief and for preliminary injunction, Ameriquest submitted four declarations, two from in-house counsel, Dianne Tiberand, CP at 16-20, 117-224, and two from counsel in this litigation, Erik D. Price. CP at 12-15, 125-146. Tiberand's declarations contain comprehensive and detailed list of the types of information contained in the documents Ameriquest furnished the AGO during the investigation and the steps Ameriquest takes to protect that information from disclosure. But this is information that Ameriquest already possesses and is clearly able to prove through Tiberand. The declarations make no mention of missing or undeveloped facts.

The Price declaration is shorter, with even fewer facts, but again with no mention of undeveloped facts or evidence to be developed through discovery. Unlike the numerous declarations submitted by the Pipelines in *Northwest Gas*, Ameriquest's declarations do not "establish the [company's] intent and likely ability to prove at a trial on the merits" the applicability of a particular exemption or exemptions. *Northwest Gas*, 141 Wn. App. at 124.

Ameriquest claims that the trial court's denial of its motion for a preliminary injunction deprived it of the time it needed "to submit

additional evidence to demonstrate how the PRA is less protective than the GLBA . . .” Appellant’s Opening Br. At 17. Nonetheless, the record does not reflect what that additional evidence would be or how such evidence would be relevant to the largely legal issue of the relative scope of the two statutes. That is to say, this claim suffers for want of a suitable offer of proof by Ameriquest.

Ameriquest also claims that with additional time, it would submit evidence to demonstrate “whether the AGO’s treatment of the PRA request as it pertains to Ameriquest is consistent with the AGO’s treatment of similarly situated parties.” *Id.* Elsewhere, it professes the need to develop “[o]ther evidence of the AGO’s **potentially** arbitrary and capricious behavior . . .” Appellant’s Opening Br. at 18 (emphasis supplied).

Again, the record lacks an offer of proof setting forth what that evidence would be and how it would prove the allegations of arbitrary and capricious conduct, given that proof of something more than merely disparate conduct would be required to meet the high threshold of the arbitrary and capricious standard. This claim also suffers from Ameriquest’s lack of standing and the lack of a legally cognizable interest in the AGO’s exercise of statutory exemptions that are within the unique province of the office. *See infra* pp. 19-23.

Moreover, even if Ameriquest had a sufficient, legally cognizable interest to pursue its claim of “potentially” arbitrary and capricious conduct, the absence of anything more than hypothetical allegations suggests a fishing expedition aimed not at developing evidence supporting an existing claim but at finding new ones. The preliminary injunction standard is probability of success on the merits not mere possibility.

The trial court’s error in *Northwest Gas* was that, in denying the Pipelines’ motion for preliminary injunction, it prevented the Pipelines from developing the factual record their offers of proof promised they would be able to develop. *Northwest Gas*, 141 Wn. App. at 116. No similar error occurred here. Ameriquest made no comparable offer of proof. Ameriquest has identified no fact issues needing further development through discovery nor any material factual disputes requiring resolution at trial.

If, as Ameriquest claims, the trial court’s decision was tantamount to a final decision on the merits and prevented Ameriquest from developing its case, it was not because of any impropriety on the trial court’s part. It was because Ameriquest failed to carry its burden. It was because Ameriquest failed to make a sufficient offer of proof establishing its intent and ability to develop evidence that would likely prove its case on the merits.

2. *Northwest Gas* is Distinguishable Because the Serious Conflict Between Important Public Policies That Proved Decisive in That Case is Absent Here.

Ameriquet's argument that the two cases, theirs and *Northwest Gas*, are "nearly identical" ignores another fundamental distinction between the two; namely, the important and substantial public policy conflicts that drove the decision in *Northwest Gas* and that are conspicuously absent here.

As this Court pointed out in the opening sentence of its analysis in *Northwest Gas*, "[t]his appeal presents several important conflicts between the public's right to access information about governmental operations and the government's duty to protect the public from potential terrorist acts." *Northwest Gas*, 141 Wn. App. at 111. An erroneous decision on the merits in that case presented the very real possibility of grave injury to public safety and national security by aiding and abetting a terrorist attack on critical national infrastructure. *Id.*

No important conflict among public policies of even remotely similar gravity exists here. In marked contrast to *Northwest Gas*, this case involves a mundane contest pitting the public's right to know against the private right of a business to suppress potentially embarrassing evidence concerning its conduct.

3. Disclosure is Appropriate Because this Record Shows That the Equities Favor Disclosure, and the Trial Court Properly Denied the Attempt to Enjoin Disclosure.

“[B]ecause injunctions are addressed to the court’s equitable powers, the court must examine the . . . preliminary injunction requirements in light of competing equities.” *Northwest Gas*, 141 Wn. App. at 122 (citations omitted). While recognizing “the important and fundamental nature of the public right to know,” this Court, in *Northwest Gas*, weighed that public right against a competing public right, the substantial public safety and national security concerns attending disclosure, while noting that “essential portions of the requested pipeline information are already generally available to the public for everyday use.” *Northwest Gas*, 141 Wn. App. at 123.

When considered in this light, the relative equities in the instant case tip decidedly in favor of disclosure. There are no public policy concerns here to be weighed against the public’s right to know. No critical national infrastructure is threatened. No potential natural disasters loom. No saboteurs, no criminal terrorists and no potential pranksters lurk in the background of this litigation.

The only private interests to be balanced against the “important and fundamental” public right to know are the privacy interests of Ameriquest and those of its individual borrowers. The PRA, however,

contains no general privacy exemption. To the extent privacy rights are a consideration, the PRA provides that “[a] person’s right of privacy is invaded or violated only if disclosure of information about the person: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050. This two-part test requires the party seeking to prevent disclosure to prove both elements. *King Cy v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307(2002).

Neither the privacy rights of Ameriquest nor those of its borrowers meet both prongs of this test. Ameriquest’s lending practices and the substance of an investigation into those practices by the AGO are both matters of legitimate concern to the public. Moreover, Ameriquest offers no argument that disclosure of these records would be offensive to anyone other than Ameriquest, much less to a reasonable person. Indeed, the idea that a company could prevent the public disclosure of evidence of its own wrongdoing is antithetical to the underlying purpose of the PRA. This is particularly true where the wrongdoer has avoided a public trial by entering into a settlement.

The privacy rights of Ameriquest’s borrowers, on the other hand, are a closer question. It is to protect these rights that the Consumer Protection Division of the AGO routinely redacts personal information before releasing documents to the public. This personal information is

redacted according to the standards set forth in the Public Records Request Manual of the Consumer Protection Division. CP 179-180. Any potential harm to the interests of Ameriquest borrowers is ameliorated the AGO's compliance with this practice, which is consistent with the specific privacy protections of the PRA and the cases there under. Once the private information has been redacted the record is not exempt from disclosure.

Finally, as noted above, the *Northwest Gas* court, "detailed pipeline location maps are already available to the public." *Northwest Gas*, 141 Wn. App. at 123. That is not the case here. The information sought by the requester is not otherwise available to the public. Only through public disclosure will the public's right to know be vindicated. A balancing of the equities, then, supports the trial court's denial of the motion for preliminary injunction.

C. The Trial Court Did Not Abuse It's Discretion When It Denied Ameriquest's Request to Review Agency Disclosure Decisions.

Ameriquest seeks to invoke the "inherent power" of a trial court "to review an agency action to ensure that it is not arbitrary and capricious" when it challenges the AGO's decision not to assert certain

PRA exemptions.³ Appellant's Opening Br. At 32. Ameriquest claims that discovery of other similarly situated parties will demonstrate that "the AGO's stubborn unwillingness to exercise those exemptions on its own behalf was arbitrary and capricious and likely founded on animus toward Ameriquest." Appellant's Opening Br. at 21. Ameriquest's request to invoke the trial court's inherent powers of review should be rejected for at least two reasons. First, Ameriquest lacks any standing to assert exemptions that are solely within the province of the Attorney General. Second, it is inappropriate for a party, even if aggrieved, to invoke the "inherent power" of the court to review a discretionary decision by an agency complying with the PRA, and Ameriquest has not invoked the court's inherent power here.

1. Ameriquest Lacks Standing to Challenge the AGO's Decision Not to Assert an Exemption Under the PRA.

A party challenging administrative action under statutory or inherent authority must possess standing in order to do so. *Harris v. Pierce Cy.*, 84 Wn. App. 222, 230-233, 928 P.2d 1111(1996) (citizens group without standing to invoke inherent power); *Pierce Cy. Sheriff v. Civil Srv. Comm'n. of Pierce Cy.*, 98 Wn.2d 690, 696-697, 658 P.2d 648

³Notably, Ameriquest did not assign error to the trial court's findings and conclusions that Ameriquest lacked a clear legal or equitable right that would prevent disclosure of the Attorney General's investigatory documents. Ameriquest's failure to

(1983) (sheriff lacks standing to raise argument of inconsistency); *Bankhead v. City of Tacoma*, 23 Wn. App. 631, 635, 597 P.2d 920 (1979) (standing required). The issue here is not the trial court's powers but Ameriquest's right to invoke those powers. "The presence of some violation of law is not sufficient if the party challenging an action lacks standing to challenge the violation." *Bankhead*, 23 Wn. App. at 635.

a. Ameriquest Lacks Any Interest in the Attorney General's Decision Not to Assert an Exemption Under the PRA.

The doctrine of standing prohibits a litigant from raising the legal rights of another. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn. 2d 107, 138, 744 P.2d 1032 (1987) (citing *State v. Carroll*, 81 Wn.2d 95, 103-04, 500 P.2d 115 (1972)). The attorney work product and investigative records at issue are those of the Attorney General and they are peculiarly related to the Attorney General's unique role as the state's lawyer.

To challenge agency action, a complaining party must demonstrate that the agency action has invaded a legally protected interest that is concrete and particularized, rather than conjectural or hypothetical. *Allan v. Univ. of Wash.*, 92 Wn. App. 31, 959 P.2d 1184, review granted 137 Wn.2d 1019, 980 P.2d 1280, *aff'd* 140 Wn.2d 323, 997 P.2d 360 (1998).

assign error makes the trial court's findings and conclusions verities on appeal. RAP

One can certainly imagine that Ameriquest might be embarrassed by the publication of evidence of its past predatory lending practices contained in the contested materials, but the issue is what **legally protected** interest it has in suppressing release of the information. The PRA anticipates “free and open examination of public records . . . may cause inconvenience or embarrassment.” RCW 42.56.550(3). Any “injury” that might follow public release of information collected during the investigation of Ameriquest’s lending practices flows not from the release of the information but from the fact of the illegal practices revealed.

The Attorney General’s legally protected interest in the investigative and trial preparation records at issue here is self-evident. Ameriquest’s is not. Ameriquest’s failure to establish a legally protected interest is fatal to its argument that it is an affected party possessing standing to challenge the Attorney General’s decision to release the records.

b. Ameriquest’s Interests Are Not Protected by the Statutory Exemptions at Issue Here.

Even if Ameriquest were to demonstrate a sufficiently concrete, particular and legally protected interest “affected” by the AGO action, it

10.3(g).

still lacks standing because it has not demonstrated that its interests are within the interests intended to be protected by the exemption statutes at issue. Indeed, it is difficult to image how Ameriquest could ever make such a showing.

It is inconceivable that, by permitting law enforcement agencies, under certain circumstances, to protect from public disclosure an agency's investigative materials as well as the work product of the agency's attorneys, the Legislature intended to protect the interests of the *defendants* against whom the investigation and the attorney's work is directed. Such an argument turns the purpose of attorney work product doctrine on its head.

The fundamental purpose of the attorney work product doctrine, is to limit access to the work product by the **opposing** party, in this case, Ameriquest. Further, it is clear from the language of RCW 42.56.240 that the exemption for investigative records is intended to protect the interests of crime victims and effective law enforcement not those of law violators.

Because Ameriquest failed to articulate any legally protected interest in these records, this Court should deny its claim that it has standing to challenge the Attorney General's decisions in these matters. Accordingly, the trial court did not abuse its discretion of finding that Ameriquest lacked standing "to assert the intelligence information and

investigative records exemption, RCW 42.56.240, the deliberative process exemption, RCW 42.56.280, or the attorney-client privilege and attorney work product exemptions, RCW 5.60.060 and RCW 42.56.290, on behalf of the AGO”. CP at 322.

2. Any Remedies Available to Ameriquest are Limited Under the Public Records Act.

Ameriquest seeks to circumvent the remedial provisions of the Public Records Act by attempting to invoke, for the first time on appeal, this Court’s “inherent power” to review the AGO’s decision not to claim an exemption under the PRA. Counsel has found no cases that speak to the issue of whether any review outside the PRA is permissible. However, this Court need ascertain whether or not the PRA contains the exclusive remedy for addressing discretionary agency decisions to release public records.⁴

First, Ameriquest’s complaint in this matter was limited to a statutory injunctive action under the PRA. There was no indication in the Complaint, or in the motion for preliminary injunction, that Ameriquest was attempting to invoke the court’s inherent power to review agency action. CP at 4-9, 89-116. Second, contrary to Ameriquest’s contention

⁴ There is certainly authority to support a finding that courts should not review agency decisions to release documents beyond the statutory remedies in the PRA. See, e.g., RCW 42.56.060 (no liability for an agency that releases public records in good faith compliance with the PRA).

that a trial court must exercise its inherent powers when raised by a party,⁵ a trial court's decision to invoke its inherent powers is discretionary. *Harris*, 84 Wn. App. at 230. If review of an agency discretionary decision to release public records is permitted, there is no authority directing that review would be under inherent judicial authority.

In any event, should the court invoke a statutory or inherent power to review, the scope of review is narrow, requiring that the trial court engage in a limited inquiry. *State v. MacKenzie*, 114 Wn. App. 687, 696, 60 P.3d 607 (2002). Consequently, the party seeking to demonstrate that an agency action is arbitrary and capricious carries a heavy burden. *Pierce Cy. Sheriff*, 98 Wn.2d at 695. Arbitrary and capricious action requires a showing that the agency action was willful and unreasoning, without consideration and in disregard of facts and circumstances. *Id.* "Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Id.*

Given that the PRA "is a strongly worded mandate for broad disclosure of public records," *Confederated Tribes of Chehalis Reservation*, 135 Wn.2d at 745, it is difficult to conceive of a set of facts

⁵ Appellant's Opening Br. at 36.

in which disclosure of documents subject to a discretionary exemption, such as attorney work product, would be arbitrary and capricious.

D. GLBA Governs the Privacy Practices of the Financial Services Industry and Does Not Preempt State Public Records Acts.

Ameriquest contends that the broad public disclosure mandate of the Washington PRA is preempted by the Gramm-Leach-Bliley Financial Services Modernization Act (“GLBA”), 15 U.S.C. § 6801 *et seq.*⁶ Appellant’s Opening Br. at 20. GLBA is a federal law that repealed Depression-era restrictions on the marketing of financial services by banks and other financial institutions and also created an extensive new financial privacy regime, regulating the commercial use and sharing of the valuable “non-public personal information” collected by financial institutions from consumers in the course of providing them with financial services.

As one commentator has observed:

Congress listened to both the banking industry’s cry for a less restrictive marketing environment and to concerns of consumer privacy advocates, and passed the [GLBA].

....

The *quid pro quo* for the opportunity to cross-market services among affiliates and third-parties was the increased privacy protection that ‘financial institutions’ now owe their customers, as outlined in Title V of the GLBA.

⁶ RCW 42.56.070(1), recognizes that other state and federal statutes may exempt or prohibit from disclosure certain documents or information.

Lawrence A. Young, *The Landscape of Privacy*, 55 Consumer Fin. L. Q. Rep. 4, 5 (Winter 2001).

The privacy provisions of GLBA break down into three general categories, safeguarding consumer information from unauthorized access, preventing access under false pretenses (pretexting) and restricting information sharing among affiliates and non-affiliates in the commercial marketplace. *See generally* Federal Trade Commission, *Financial Initiatives*, <http://www.ftc.gov/privacy/privacyinitiatives/glbact.html>. It is the information sharing provisions of the Act that Ameriquest contends preempt the public disclosure mandates of the PRA.

Section 502 of the GLBA generally prohibits financial institutions from sharing nonpublic personal information with nonaffiliated third parties, with certain exceptions and conditions. *See* 15 U.S.C. § 6802. “Nonaffiliated third parties” are defined as entities that are not related by common ownership or corporate control to the financial institution possessing the information. 15 U.S.C. § 6807(5).

In those instances when the Act permits information sharing by financial institutions with nonaffiliated third parties, it places limits on the reuse of that information by the nonaffiliated third parties. *See* 15 U.S.C. § 6802(c). It is this provision restricting reuse of the financial information that Ameriquest relies on for its contention that “the AGO is subject to the

same use restrictions as was TransUnion.” Appellant’s Opening Br. at 30. TransUnion is a private credit reporting agency that hoped to profit from the commercial use of certain nonpublic personal information it obtained under the exception for credit reporting agencies contained at 15 U.S.C. § 6802(e)(6). See *Individual Reference Services Group, Inc. v. Fed. Trade Comm’n*, 145 F. Supp.2d 6 (D.C. Cir. 2001).

There is a strong presumption against preemption and “[s]tate laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.” *Progressive Animal Welfare Soc’y*, 125 Wn.2d at 265 (1994) (quoting *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993)).

Citing to the definitions section of the Act, 15 U.S.C. § 6807, Ameriquest argues the GLBA expressly preempts the disclosure mandate of the PRA. Appellant’s Opening Br. at 22-23. Ameriquest offers no insight into Congressional intent beyond the bare words of the statute and cites to no examples where the Act has been held to preempt state law other than in the context of laws regulating financial institutions. Neither the AGO nor the State of Washington are financial institutions and the PRA does not apply to financial institutions, only to government agencies.

Ameriquest’s argument rests on its implicit assumption that the public, the “entity” to whom the AGO owes its disclosure obligation under

the PRA, is an unaffiliated third party with respect to the State of Washington. This is because the limits on reuse of information contained at 15 U.S.C. 6802(c) apply only where the person to whom the information is disclosed (under the PRA, the Washington public) is “a nonaffiliated third party of . . . such receiving third party [i.e., the AGO].” 15 U.S.C. § 6802(c).

In a case brought under the Pennsylvania counterpart of the PRA, the Supreme Court of Pennsylvania held that “[t]he GLBA is designed to protect consumers’ non-public personal information while in the coffers of institutions within the financial services industry.” *Pa. State Univ. v. State Employees’ Ret. Bd.*, 935 A.2d 530, 538 (Pa. 2007). The GLBA, it said, had no application to the production of records by the state employee retirement system. *Id. But see Hodes v. U.S. Dep’t of Hous. & Urban Dev.*, ___ F.Supp. 2d ___, 2008 WL 246358 (D.D.C. Jan. 31, 2008).

In that case, a newspaper had requested, under the Pennsylvania Right to Know Act, information on the salaries and service histories of legendary football coach Joe Paterno and other university officers. *Id.* at 532. Coach Paterno and others filed a petition for review of the SERS Board decision to grant the newspaper’s public records request. *Id.*

Petitioners argued that disclosure of the information was restricted by GLBA in that disclosure to a “non-affiliated party” was prohibited.

Pointing out that the requesting newspaper “stands in the shoes of the general public,” the Court declined to hold “that the general public is a ‘non-affiliated third party’ with respect to any [state] agency.” *Id.* at 537. Instead, the Pennsylvania Court concluded that “our government and the general public could hardly be more closely affiliated.” *Id.*

The Court went on to state:

[W]e note that the GLBA regulates disclosure of nonpublic personal information in the financial services industry. The purpose of the United States Congress in enacting the GLBA was ‘to enhance competition in the financial service industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers . . .’ H.R.CONF. REP. 106-434, 1, 1999 U.S.C.C.A.N. 245 (1999). Along these lines, the federal legislature was concerned with information sharing practices among financial institutions and affiliates, as affecting the customers of those financial institutions. *See* 15 U.S.C. § 6808. Having carefully reviewed Appellant’s argument, we are not convinced that the federal legislature intended the GLBA to regulate a non-profit, non-competitive, state government agency in the administration of its state employee benefit plan.

Id. at 537-538.

Ameriquest has failed to overcome the “strong presumption” against preemption. Ameriquest has not demonstrated the “clear and manifest” intent of Congress to regulate disclosure under state public records acts. Because neither the State, the AGO nor the Washington

public are financial institutions or nonaffiliated third parties as to each other, GLBA has no application here.

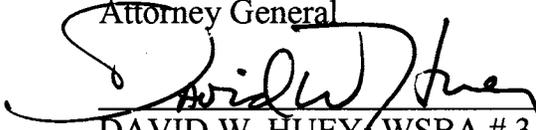
V. CONCLUSION

This Court should find disclosure of the public records in this case is appropriate because: (1) Ameriquest has not shown that it is likely to succeed on the merits of its claim to enjoin their disclosure; (2) it lacks standing to seek review of discretionary document disclosure decisions made by the Attorney General; and, (3) the federal Gramm-Leach-Bliley Act does not preempt the Washington Public Records Act. For these reasons, the decision of the trial court denying Ameriquest's Motion for Preliminary Injunction should be affirmed.

Respectfully Submitted this 11th day of February, 2008.

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STATE OF WASHINGTON
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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

AMERIQUEST MORTGAGE COMPANY,

Plaintiff-Appellant,

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON, et al.,

Defendant-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(HON. ANNE HIRSCH)

CERTIFICATE OF SERVICE

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I, Brenda Nichols, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am a resident of the State of Washington, residing in Pierce County.

2. I am over the age of eighteen, I am not a party to the above-entitled action and I am competent to be a witness herein.

3. On February 11, 2008, I caused to be served a true and correct copy of Respondent's Reply Brief and Certificate of Service of Brenda Nichols to the parties listed below via U.S. Mail:

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Respectfully Submitted this 11th day of February, 2008.

A handwritten signature in cursive script, appearing to read "Brenda Nichols", written over a horizontal line.

BRENDA NICHOLS, Legal Assistant