

No. 42566-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Defendants/Respondents

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Paula Casey)

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. SUMMARY INTRODUCTION..... | 1 |
| II. ARGUMENT ON REPLY | 2 |
| A. The Amerquest Decision Is Unequivocal – Documents Containing GLBA-Protected Information Cannot Be Disclosed By The AGO | 2 |
| 1. The Amerquest Decision Prohibits The AGO From Redacting GLBA-Protected Information | 3 |
| 2. The Amerquest Decision Allows Amerquest To Repackage GLBA-Protected Information But Prohibits The AGO From Doing So..... | 5 |
| 3. The Amerquest Decision’s Prohibition On Redactions Applies As Equally To E-mails As To Loan Files..... | 7 |
| 4. The Amerquest Decision Held That There Is No Exception Under The GLBA That Would Allow The AGO To Disclose Documents With GLBA-Protected Information | 9 |
| B. The Amerquest Production Is Protected From Disclosure Under The PRA’s “Investigative Records” Exemption | 10 |
| 1. The Nondisclosure Of E-mails Containing GLBA-Protected Information Is Necessary To Protect Consumers’ Right To Privacy | 11 |
| 2. Nondisclosure Of The Amerquest Production, Including The E-mails, Is Essential For Effective Law Enforcement | 12 |
| a. Case Law And Statutory Law Require That This Court Consider Federal Authorities..... | 12 |
| b. The Federal Authority Helps In Answering The Question Presented Here..... | 15 |
| c. The AGO’s Speculation About Incentives Of Targets Is Not Persuasive – Investigations Will Be Chilled..... | 16 |

| | | |
|------|---|----|
| 3. | Discovery Should Be Allowed..... | 18 |
| C. | The AGO's Discovery Demands Operated As A Civil Investigative Demand Which Confidentiality Provision Protects The Amerquest Production From Disclosure | 20 |
| 1. | The Discovery Requests Served On Amerquest Comply With The CPA's CID Requirements | 20 |
| 2. | The AGO's Ability To Enforce The CID Is Irrelevant To The Confidentiality Provisions Afforded To A Producing Party..... | 22 |
| 3. | The AGO's Assertion That It Does Not Have The Power To Deem Produced Documents Confidential Is Simply Incorrect..... | 23 |
| III. | CONCLUSION..... | 24 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|---------|
| CASES | |
| <i>A. Michael's Piano, Inc. v. F.T.C.</i> , 18 F.3d 38 (2d Cir. 1994)..... | 22, 23 |
| <i>Alex. Brown & Sons, Inc.</i> , 169 F.R.D. 532 (S.D.N.Y. 1996)..... | 15, 16 |
| <i>Ameriquest Mortgage Company v. Atty. Gen. of Washington</i> , 148 Wn. App. 145, 199 P.3d 468 (2009)..... | 10 |
| <i>Ameriquest Mortgage Co. v. Washington State Office of the Att'y Gen.</i> , 170 Wn.2d 418, 241 P.3d 1245 (2010)..... | passim |
| <i>Aspin v. Department of Defense</i> , 491 F.2d 24 (D.C.Cir. 1973)..... | 14 |
| <i>Blewett v. Abbot Laboratories</i> , 86 Wn. App. 782, 938 P.2d 842 (1997)..... | 13 |
| <i>Cowles Publishing Co. v. State Patrol</i> , 109 Wn.2d 712, 748 P.2d 597, <i>reconsideration denied</i> (1988)..... | 13, 14 |
| <i>Critical Mass Energy Project v. Nuclear Regulatory Comm'n</i> , 975 F.2d 871 (D.C.Cir. 1992)..... | 16 |
| <i>M/A Com Information Systems, Inc., v. U.S. Dept. of Health & Human Services</i> , 656 F. Supp. 691 (D.D.C. 1986)..... | 16 |
| <i>Maccafferi Gabions, Inc. v. United States</i> , 938 F. Supp. 311 (D. MD 1995)..... | 21, 24 |
| <i>Newman v. King County</i> , 133 Wn.2d 565, 947 P.2d 712 (1997)..... | 13 |
| <i>Steele v. State of Washington</i> , 85 Wn.2d 585, 537 P.2d 782 (1975)..... | 21 |

Tacoma News, Inc. v. Tacoma-Pierce County Health Dept.,
55 Wn. App. 515, 778 P.2d 1066 (1989)..... 14

STATUTES

FOIA 13, 14, 16, 22
RCW 19.86.110 24
RCW 19.86.110(7)..... 19
RCW 19.86.920 13

OTHER AUTHORITIES

16 C.F.R. § 313.3(o)(1)..... 8

I. SUMMARY INTRODUCTION

In the *Ameritrust* Decision, the Washington Supreme Court unequivocally determined that the GLBA and FTC rule prohibit the redaction, repackaging, and disclosure of **any** document that the AGO received from Ameritrust, if the document contains GLBA-protected information. The AGO articulates no rationale of how the trial court's order is consistent with the *Ameritrust* Decision's absolute bar on the redaction of GLBA-protected information from any document. The AGO simply does not address it. Our Supreme Court, *however*, left a clear roadmap for this Court to follow — any document, including e-mails, which contain GLBA-protected information, cannot be redacted and disclosed by the AGO.

The AGO also ignores the application of the *Ameritrust* Decision to the PRA's privacy prong of the investigative records exemption. The Supreme Court made clear that when GLBA-protected information is involved, the GLBA's privacy protections govern. As a result, the GLBA privacy provisions prohibit the redaction and disclosure of investigative records that contain GLBA-protected information. Furthermore, the "essential for effective law enforcement" prong is satisfied because the disclosure of documents that Ameritrust produced to the AGO, with promises of confidentiality, would chill cooperation in future investigations.

Finally, the discovery requests that the AGO served upon Ameriquest complied with the CPA's civil investigative demand requirements and to reach any other conclusion would hold form over substance. Accordingly, all of the documents produced by Ameriquest to the AGO are protected from disclosure pursuant to the CPA's confidentiality provision.

II. ARGUMENT ON REPLY

A. The Ameriquest Decision Is Unequivocal – Documents Containing GLBA-Protected Information Cannot Be Disclosed By The AGO.

The *Ameriquest* Decision has addressed and rejected all of the arguments the AGO makes to support its redaction of GLBA-protected information and disclosure of documents.

First, the *Ameriquest* Decision makes clear that any document, *e.g.*, e-mail, loan file, or the AGO's internal work product, which contains GLBA-protected information, cannot be redacted and disclosed. *Id.* at 435-36, and 441. The AGO's argument to the contrary, that the GLBA protects "information, not records," and therefore redactions may occur (Response, pp. 18-19), flies in the face of the *Ameriquest* Decision.

Next, the *Ameriquest* Decision's prohibition on the AGO's redaction of GLBA-protected information does not change because GLBA-protected information has been "repackaged" by Ameriquest into e-mails.

Response, p. 12. Our Supreme Court recognized that while the GLBA allows Ameriquest to repackage GLBA-protected information, it prohibits the AGO from doing so. *Id.* at 432-35.

Lastly, the *Ameriquest* Decision underscores that documents that contain GLBA-protected information can only be disclosed pursuant to limited exceptions and the AGO's response to a PRA request is not one of them. *Id.* at 436-39. Applying the unambiguous holding of the *Ameriquest* Decision, the AGO is prohibited from disclosing any e-mail that contains GLBA-protected information.

1. The *Ameriquest* Decision Prohibits The AGO From Redacting GLBA-Protected Information. The *Ameriquest* Decision answered the question of redaction: the AGO is not allowed to redact documents containing GLBA-protected information. *Id.* at 435-36, and 441. That means if a document contains GLBA-protected information, it is protected in its entirety and cannot be redacted. *Id.* The AGO has ignored clear directive after clear directive in the *Ameriquest* Decision and cherry-picked a single phrase in the *Ameriquest* Decision that provides that “the GLBA and the FTC prohibit specific information, not entire records’ from public disclosure.” Response, p. 11 (*Ameriquest*, 170 Wn.2d at 441).

This citation, however, is not only notably incomplete, it is grossly taken out of context resulting in a perversion of its purpose and meaning in

the *Ameriquest* Decision. When that portion of the *Ameriquest* Decision is read in its entirety and in context, it is plain that the single quotation does not permit redaction as the AGO would have this Court believe.

The sentence the AGO cites to is from the “preemption” section of the *Ameriquest* Decision where the Supreme Court analyzed whether the GLBA preempts the PRA. The *Ameriquest* Decision’s quote that “the GLBA and the FTC prohibit specific information, not entire records,” comes directly on the heels of the Supreme Court’s discussion about how to marry the GLBA’s prohibition on redaction with the PRA’s requirement for redaction, if possible. The Supreme Court concluded that there was no conflict requiring preemption because the PRA redaction requirement only applies if “information ... can be deleted” and allows an “other statute” to preclude the disclosure of “‘specific information’ or entire ‘records.’” *Id.* at 440. The Supreme Court then explained that if a record was provided to the AGO that does not contain *any* GLBA-protected information *at the time it was provided* to the AGO, then the GLBA would essentially not apply. In other words, the Supreme Court was merely making the uncontroversial point that an e-mail completely devoid of consumer information *at the time when it was given* to the AGO does not somehow enjoy GLBA protection.

Moreover, the AGO’s cited language purporting to allow redactions directly follows the Supreme Court’s clear reaffirmation that the GLBA

does not permit redactions. *Id.* at 440 (in the immediately preceding paragraph, the Supreme Court states “[t]he GLBA and the FTC prohibit the AGO’s redactions or repackaging of information ...”). The AGO acknowledges that the e-mails at issue here contain GLBA-protected information. Nothing about the AGO’s quoted language changes the conclusion that it simply cannot redact these e-mails without violating the protections afforded under the GLBA.

2. The *Ameriquest* Decision Allows Ameriquest To Repackage GLBA-Protected Information But Prohibits The AGO From Doing So. The *Ameriquest* Decision also explained that while Ameriquest could “repackage information” (*i.e.*, take information obtained from a consumer and change it from its original format), the AGO is not allowed to do so. *Id.* at 432-35.

The AGO is re-arguing issues that it already lost before the Supreme Court. Specifically, the assertion that the use of GLBA-protected information by Ameriquest permits the AGO to later redact and/or repackage the information is flatly contradicted by the *Ameriquest* Decision and pure invention by the AGO. Recognizing the business necessity of such an exemption, the GLBA specifically permits Ameriquest to use GLBA-protected information for loan purposes, via e-mail communication

and otherwise. Thus, such use does not, in any way, alter the protection of the information.

Indeed, our Supreme Court recognized that financial institutions have the flexibility to use GLBA-protected information in ways that the AGO cannot.¹ For that reason, a financial institution may redact or repackage information, but a third-party like the AGO may not. *Id.* at 436. As an example, a financial institution could take GLBA-protected information and prepare a report that contains blind data and identifier-free information and disclose it. However, a third-party like the AGO cannot take the same action, it “may only disclose blind data and identifier-free information if it has already been created” by the financial institution. *Id.*

The *Ameritrust* Decision expressly relied upon the GLBA’s re-use restrictions promulgated by the FTC rule discussed by *Ameritrust* in its Opening Brief at pp. 23-25.² The *Ameritrust* Decision thoughtfully

¹ The *Ameritrust* Decision relied upon the FTC rule’s rationale for distinguishing between how a financial institution can use information versus the more limited ability of a third party to use the information. *See id.* at 434.

² Again, the *Ameritrust* Decision provides that, per the FTC rule, the AGO can only redisclose documents containing GLBA-protected information if it is doing so “in the ordinary course of business to carry out the activity covered by the exception under which it received the information.” *Ameritrust*, 170 Wn.2d at 438-39. Public disclosure is not consistent with the AGO’s receipt of the information as part of an investigation. As a result, “the AGO is **not permitted** to use any nonpublic personal information for purposes of public disclosure. We think ‘use’ includes redactions and repackaging of information because the AGO is required to leave the information and the consumer’s privacy undisturbed unless the AGO needs to use it in the ordinary course of business to carry out the investigation.” *Id.* at 436 (emphasis added). This Court already rejected any argument that disclosing the documents is part of the AGO’s investigatory function. *Id.* at 438-39.

discussed these re-use restrictions and clearly based its decision on their application of these rules to all of the Ameriquest documents containing any GLBA-protected information. *Id.* at 435-39. The AGO does not dare discuss these re-use restrictions because nothing about its argument is consistent with them. Simply put, the AGO's argument that alleged "repackaging" by Ameriquest diminishes the broad protections afforded to e-mails containing GLBA-protected information is contrary to the law and should be rejected.

3. The *Ameriquest* Decision's Prohibition On Redactions Applies As Equally To E-mails As To Loan Files. By ignoring the *Ameriquest* Decision's application to the e-mails, the AGO attempts to take this argument back to square one on issues that have already been litigated and decided against the AGO. The AGO argues that e-mails, as opposed to loan files, deserve no protection from redaction because "Ameriquest itself has 'repackaged' nonpublic personal information, by referencing it in e-mails." Response, p. 12.

As discussed previously, this "repackaged" argument has zero support in the law. But, in addition, there is absolutely no reasonable way to read the *Ameriquest* Decision to not apply to e-mails. Indeed, references to e-mails are consistent throughout the opinion. The very first paragraph of the opinion acknowledges that the AGO obtained loan files, **e-mails**, and

other papers from Ameriquest. *Id.* at 424. Further, in its discussion about the application of the GLBA to the documents produced by Ameriquest to the AGO, the Supreme Court mentions e-mails **no less than seven times** (loan files are mentioned eight times - almost an identical number of references and generally they are mentioned together in the same phrase). The only logical reading of the case clearly shows that the Supreme Court's decision applies to all types of documents, with no distinction between GLBA-protected information contained in loan files versus e-mails.

Under the *Ameriquest* Decision and the FTC rule, there is no basis for distinguishing between loan files and e-mails. The AGO's citation to 16 C.F.R. § 313.3(o)(1) is misleading as this FTC rule provides no support for the AGO's argument that loan files are themselves GLBA-protected information and so deserve enhanced protection over e-mails. Instead, this provision of the FTC rule explains the scope of information that falls within the term "personally identifiable financial information" which is one of the three definitional filters of nonpublic personal information. *Ameriquest*, 170 Wn.2d at 431. The FTC rule provides "personally identifiable financial information" means any information "that (1) a consumer gives to a financial institution, (2) is about a consumer's transaction, or (3) a financial institution obtains from a consumer." *Id.* Notably, there is no distinction in the *Ameriquest* Decision or FTC rule of providing more or less protection to

GLBA-protected information depending on where the financial institution uses the information – e.g., in an e-mail, mortgage, promissory note, loan application, etc. What matters is whether the information in a document qualifies as GLBA-protected information, not the form of document.

4. The *Ameriquest* Decision Held That There Is No Exception Under The GLBA That Would Allow The AGO To Disclose Documents With GLBA-Protected Information. In a transparent effort to convince this Court that special treatment should be afforded to these e-mails, the AGO spends an inordinate amount of time describing the content of the e-mails and accusing Ameriquest of seeking a “broad shroud of secrecy” by inserting GLBA-protected information into the e-mails.³ Response, pp. 13 and 18. The suggestion that anyone at Ameriquest deliberately inserted GLBA-protected information into an e-mail to avoid disclosure is ludicrous. There is nothing anywhere to support this contrived and preposterous allegation.

Further, the proposition that the GLBA was designed to protect financial institutions rather than consumers is without merit. On the one hand, as the *Ameriquest* Decision recognized, there are numerous

³ Considering the e-mails were submitted under seal, the detail of the AGO’s descriptions is disturbing, especially the AGO’s characterization of several of the e-mails as relating to specific allegations of “income falsification.” Response, p. 16. Because such characterization is completely irrelevant to the legal issues presented in this appeal, the tactic is disappointing.

exceptions that allow a financial institution to disclose documents containing GLBA-protected information, including disclosure to the AGO in order to comply with a regulatory investigation. *Id.* at 425-26.⁴ On the other hand, the statute is written broadly to define *any* information obtained from a consumer as GLBA-protected. *Id.* at 431. The protections are for the consumer – not the financial institution. Moreover, this Court acknowledged that a financial institution can also disclose GLBA-protected information to a plaintiff in a civil action in response to judicial process. *Ameriquest Mortgage Company v. Atty. Gen. of Washington*, 148 Wn. App. 145, 163, 199 P.3d 468 (2009). What the *Ameriquest* Decision does not allow is for a third-party to arbitrarily decide that it can disclose documents, where no exception to the GLBA applies, and redact those documents as it sees fit. Accordingly, any redactions are prohibited by the *Ameriquest* Decision.

B. The Ameriquest Production Is Protected From Disclosure Under The PRA's "Investigative Records" Exemption.

As discussed in its Opening Brief, Ameriquest's second issue, the "Investigative Records Exemption" has two separate prongs (1) privacy; and (2) essential for effective law enforcement. The AGO's arguments are unpersuasive on both prongs.

⁴ In reliance on this exception, Ameriquest produced to the AGO over 1.2 million pages of documents, including hundreds of thousands of e-mails, which is hardly equivalent to a shroud of corporate secrecy.

As an initial matter, the AGO acknowledges that the e-mails are, in fact, “investigative records.” Response, p. 19. Nevertheless, the AGO argues that the e-mails should not be withheld from disclosure because (1) consumers’ privacy rights are protected through the redaction of the GLBA-protected information from the e-mails (Response, pp. 29-30); and (2) the “essential for effective law enforcement” prong is not satisfied because the federal cases providing that disclosure would discourage cooperation with future investigations and chill settlements are unpersuasive. The AGO also argues that the trial court did not err in denying Ameriquest’s request for discovery. Response, pp. 33-34. The AGO’s arguments fail for the reasons explained below.

1. The Nondisclosure Of E-mails Containing GLBA-Protected Information Is Necessary To Protect Consumers’ Right To Privacy. As explained in Ameriquest’s Opening Brief, the privacy concerns and prohibitions of the GLBA set forth above apply equally to the privacy prong of the investigative records exemption to provide a second barrier to disclosure. Ameriquest Opening Brief, pp. 28-29.

In response, the AGO essentially ignored Ameriquest’s arguments, and merely repeated that by redacting consumer information, no violation of privacy would occur. Response, pp. 29-30. The AGO misses the point – breach of the GLBA is the source of the privacy violation. As explained

above, the GLBA prevents any redaction of documents containing GLBA-protected information. Release of documents in violation of the GLBA consumer privacy provisions would be “highly offensive” and violate the privacy prong of the investigative records exemption. Indeed, not to characterize such a violation as “highly offensive” completely ignores the source of the GLBA’s restrictions – a Congressional determination that the consumers’ financial information deserves special and rigid protection. Accordingly, for the e-mails that contain GLBA-protected information it is clear that these e-mails cannot be redacted and disclosed by the AGO for the additional reason of this exemption.

2. Nondisclosure Of The Ameriquest Production, Including The E-mails, Is Essential For Effective Law Enforcement. With respect to the “essential for effective law enforcement” prong of the investigative records exemption, the AGO’s response is primarily denial of the impact of disclosure on law enforcement, coupled with an involved attempt to distinguish the case law supporting Ameriquest’s position. Neither aspect of the AGO’s response is compelling.

a. Case Law And Statutory Law Require That This Court Consider Federal Authorities. First, federal jurisprudence is applicable here. When the Ameriquest documents were initially demanded by the AGO, the agency was acting pursuant to the authority granted to it

under the Washington Consumer Protection Act. The CPA is modeled after federal antitrust statutes. In fact, the Washington legislature expressly provided that the CPA's purpose was to complement federal law and that the courts should be "**guided by**" federal law when interpreting the CPA:

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. **It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters . . .**

RCW 19.86.920 (emphasis added); *see also Blewett v. Abbot Laboratories*, 86 Wn. App. 782, 783, 938 P.2d 842 (1997) (finding that "[t]he state Consumer Protection Act directs us to be guided by federal precedent in our interpretation of the Act.").⁵

Second, the AGO's attempt to minimize federal jurisprudence ignores the fact that the PRA has long been analogized to federal FOIA laws. *Newman v. King County*, 133 Wn.2d 565, 573, 947 P.2d 712 (1997). In fact, our Supreme Court has expressly found that the PRA investigative records exemption expresses a "broader purpose" than FOIA. *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 732, 748 P.2d 597,

⁵ The Legislature's "guided by" federal law directive is important because it demonstrates an intention by the Legislature to "minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct." *Id.* at 788. Therefore, any departure from federal law must not be rooted in general policy arguments but in our statutes or case law. *Id.*

reconsideration denied (1988). As our Supreme Court confirmed in *Cowles*, the PRA's investigative records exemption is designed to protect "law enforcement agencies and 'effective law enforcement' from destructive intrusion." *Id.* *Cowles* relied heavily on federal law, applying *Aspin v. Department of Defense*, 491 F.2d 24 (D.C.Cir. 1973), which noted that these broad protections apply regardless of whether the investigation is pending or concluded. *Id.* *Cowles* found the federal court's observations cautioning that there is a limit on the disclosure of investigative records particularly apropos:

If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. The agency's investigatory techniques and procedures would be revealed. The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. **The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since the agencies rely, to a large extent, on voluntary cooperation and on information from informants.**

Id. (citation omitted and emphasis added).⁶

⁶ Our Supreme Court in *Cowles* also recognized that an important consideration was that during the internal investigation there was an assumption that the information gathered would remain confidential unless criminal charges were brought and that concerns about due process safeguards were implicated. *Id.* at 730-31. Furthermore, an agency's concerns about its ability to protect confidential sources of information is a legitimate basis for determining that nondisclosure is essential for effective law enforcement. *Tacoma News, Inc. v. Tacoma-Pierce County Health Dept.*, 55 Wn. App. 515, 522-23, 778 P.2d 1066 (1989). Not only do similar considerations of trust and confidentiality apply here, but these cases also speak to the breadth of our PRA's investigative records exemption – a breadth that exceeds the similar FOIA provisions.

b. The Federal Authority Helps In Answering The Question Presented Here. The AGO inexplicably spends a significant amount of time pointing out the differences between the federal authorities cited and the facts here, as if any distinction would render those cases wholly unpersuasive. In so doing, the AGO misses the bigger point – the policy of these cases is relevant notwithstanding the factual and statutory differences.

Cases do not derive their persuasiveness to a particular situation by being mirror images, but rather by representing thoughtful consideration of similar issues. In this case, the reasoning of the federal cases cited by Ameritrust has direct application. Their strong statements of concern for the effect on law enforcement of the release of these types of documents have equal applicability to these facts and Washington's law.

For example, in order to avoid the clear guidance provided by the federal court in *Alex. Brown & Sons, Inc.*, 169 F.R.D. 532 (S.D.N.Y. 1996), the AGO attempts to distinguish the case on its facts and essentially side steps the *Alex. Brown* court's overarching findings regarding the negative impact of disclosure on antitrust investigations:

Routine disclosure of the materials Plaintiffs seek would deter future defendants from entering into negotiated settlements with the Government, and, perhaps, from cooperating in investigations that are likely to lead to such negotiations.

...

The cost to antitrust enforcement, particularly in an era of declining government resources, could be substantial. Most of the Government's civil antitrust cases are now settled rather than tried. If more cases are required to be litigated because the substance of

settlement negotiations are discoverable, fewer of them can be brought.

Id. at 544 (citations omitted). The *Alex. Brown* court's sentiments regarding nondisclosure are further supported in other cases dealing with FOIA requests for disclosure of documents voluntarily provided to the government with expectations of confidentiality as occurred here with Ameriquest. See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (finding that common sense dictates that disclosure of information provided to the government on a confidential basis will harm the government's ability to obtain information in the future); and *M/A Com Information Systems, Inc., v. U.S. Dept. of Health & Human Services*, 656 F. Supp. 691, 692-93 (D.D.C. 1986) (determining that nondisclosure of information that was explicitly obtained in confidence furthers the public interest of encouraging settlement negotiations). In short, these federal cases support the logical conclusion that disclosure of documents produced by Ameriquest with the explicit understanding that they would remain confidential will have a negative impact on the level of cooperation that the AGO experiences in future investigations.

c. *The AGO's Speculation About Incentives Of Targets Is Not Persuasive – Investigations Will Be Chilled.* Next, the AGO tries to muddle the difference between targets of an investigation (like Ameriquest

here) and a “defendant.” According to the AGO, targets of future investigations will not be discouraged from providing documents to the AGO because a “defendant” in a Consumer Protection action is strongly incentivized to settle with the AGO. Thus, the “target” (now a “defendant”) will provide documents regardless of whether or not disclosure is later allowed. This argument makes little sense.

Ameriquest was not a defendant in a CPA action at the time it produced the records or at the time it entered into settlement with the AGO. There was no “pending case” of which to control the outcome, or “pending ruling” by any court finding that Ameriquest was at risk of treble damages. This matter, as with most actions taken under the CPA, was an “investigation” and did not result in litigation. Cooperation is essential to the AGO’s ability to determine what cases to pursue at all costs versus investigations that are better resolved without litigation. Here, cooperation without litigation was the route elected by the AGO. If Ameriquest had known that the AGO would disclose records it received during the course of the investigation, it would have asked the AGO to limit the scope of its request and would have sought a formal protective order before production. CP at 176 (Tiberend 7/28/11 Decl.). In keeping with applicable federal jurisprudence and the purpose behind the CPA and PRA, nondisclosure of

documents produced by Ameriquest to the AGO is essential for effective law enforcement.

3. Discovery Should Be Allowed. Since the AGO has chosen to simply deny the impact upon its law enforcement activities of wholesale release of these documents, Ameriquest has naturally requested discovery to probe the support for this denial.⁷ The AGO's response is not persuasive.

The AGO claims that neither of the two settlements identified by Ameriquest in its Opening Brief are inconsistent with the AGO's position regarding the records produced by Ameriquest, and accordingly, no discovery is needed. Response, p. 34. The AGO's arguments are self-serving and actually underscore the necessity for discovery in this case.

First, the AGO submitted evidence, in the form of a Declaration from Douglas Walsh, about its own practices regarding disclosure. In his declaration, Mr. Walsh claims that he has "not been exposed to a situation where a defendant agreed to enter into settlement negotiations on the condition that records it provided would be confidential or exempt from

⁷ The AGO claims Ameriquest has changed its argument for discovery, and that it is only now requesting an opportunity to probe the AGO's conclusion that nondisclosure is not essential for effective law enforcement. Response, p. 32. The AGO is wrong. Ameriquest's argument has remained consistent throughout this case: Ameriquest must be afforded the opportunity to develop facts in support of its case, that the AGO's waiver of this discretionary exemption is inconsistent with its treatment of similarly situated documents, thus bolstering Ameriquest's argument that nondisclosure is essential for effective law enforcement.

disclosure.” Walsh 8/24/11 Decl., ¶ 15. Ameriquest has pointed out three separate evidentiary sources that contradict Mr. Walsh’s conclusory statement: (1) in her 7/28/11 Declaration, Diane Tiberend explained in detail the confidentiality that Ameriquest required which was explicitly agreed to by the AGO (CP at 171-94); (2) the Wells Fargo Assurance of Discontinuance where the AGO agreed “that all confidential information . . . shall be kept confidential (CP at 359);” and (3) the Countrywide Consent Judgment where the AGO again agreed “that all confidential information . . . shall be kept confidential (CP at 363).”

Second, despite multiple opportunities to do so, the AGO has never once submitted any evidence, via declaration or otherwise, contradicting Ameriquest’s detailed evidentiary support that the AGO promised Ameriquest confidentiality — something that the CPA allows the AGO to freely provide to targets of investigations, including Ameriquest, without limitation. RCW 19.86.110(7).

With respect to the AGO’s promises of confidentiality to Wells Fargo and Countrywide, the AGO claims simply that these confidentiality agreements do not override the AGO’s obligations to comply with the PRA. Response, p. 34. The AGO’s response is meaningless because it avoids answering the question at the heart of the inquiry: in light of its promises of confidentiality, what position is the AGO committed to take under the CPA

confidentiality provision (discussed below) and PRA investigative records exemption? Ameritrust should be permitted discovery to challenge the AGO's purported "evidence." Indeed, the investigative records analysis can only be complete if discovery is permitted.

C. **The AGO's Discovery Demands Operated As A Civil Investigative Demand, Which Confidentiality Provision Protects The Ameritrust Production From Disclosure.**

The third major issue of this appeal is whether the AGO's request for documents constitutes a Civil Investigative Demand ("CID") under the CPA and, accordingly, the documents produced to the AGO, as group, may not be disclosed. In response, the AGO's arguments can be summarized as follows: (1) the Discovery Requests do not qualify as a CID because the cover letter accompanying them said they were not; (2) a party's document production is only covered under the CPA's confidentiality provision if the AGO can ultimately enforce the request; and (3) under the PRA, the AGO is prohibited from providing assurances of confidentiality to Ameritrust. For the reasons set forth below, the AGO's arguments fail.

1. **The Discovery Requests Served On Ameritrust Comply With The CPA's CID Requirements.** Ameritrust's Opening Brief explained each step of how the AGO's demand met the requirements to be a CID – notwithstanding the demand's language that it was "in-lieu of" such a demand. In response, the AGO essentially ignores the substance of

Ameriquest's arguments and focuses myopically on the "in-lieu of" language. Response, p. 37 (citing CP at 178). The AGO's argument should be rejected because it elevates form over substance, and plainly ignores the holdings of the case law set forth in Ameriquest's Opening Brief. For example, the Court in *Maccafferi Gabions, Inc. v. United States*, 938 F. Supp. 311 (D. MD 1995), explained that it is appropriate for the Court to consider more than just the four corners of the CID when determining whether the statutory requirements have been satisfied: "It appears well established that the requisite detailed information can be provided informally other than in the CID itself." *Id.* at 314-15 (citation omitted).

The Court need not look far beyond the four corners of the request here to see that it qualifies as a CID. Indeed, the AGO makes no meaningful challenge to Ameriquest's argument that the *Steele* factors establish that this is a CID. See *Steele v. State of Washington*, 85 Wn.2d 585, 590, 537 P.2d 782 (1975). For example, regarding the alleged violation prong, Diane Tiberend testified that Ameriquest was in communication with the Attorney General's Offices involved in the Multi-State investigation of Ameriquest and knew through these communications that its lending practices were being investigated. CP at 172, ¶ 3 (Tiberend 7/28/11 Decl.). Ameriquest also understood through these communications that if it did not comply with the Discovery Requests, the Multi-State would

move to compel production of documents. CP at 173, ¶ 3. When these facts are properly considered, as instructed by the case law, the “in-lieu of” language becomes a misleading inaccuracy, rather than a dispositive label when the request here must be deemed a CID.

2. The AGO’s Ability To Enforce The CID Is Irrelevant To The Confidentiality Provisions Afforded To A Producing Party. The AGO’s response also dwells at length on the concept that, since it believes it could not judicially enforce the demand, it cannot be a CID. This argument makes no sense.

The confidentiality provisions of the CPA would be rendered meaningless if nondisclosure rules are dependent on whether or not it was guaranteed that the AGO would ultimately have prevailed in enforcing production under the statute. If a party receives a request for documents from the AGO, and it is willing to comply with the request, it would be completely against the purposes of the CPA to require that the party first seek assurances of the enforceability of the document request under the CPA from a court of law before proceeding with providing documents to the AGO.⁸ It defeats the CPA’s whole purpose for allowing pre-complaint

⁸ With respect to the “voluntariness” of this production, the AGO again attacks Ameritrust’s case law, specifically the case of *A. Michael’s Piano, Inc. v. F.T.C.*, 18 F.3d 38 (2d Cir. 1994). The AGO argues that the case has no application because, unlike the CPA, the federal antitrust statute at issue expressly exempted voluntarily-produced documents from disclosure in response to a FOIA request. Response, pp. 41-42. (continued . . .)

discovery, *i.e.*, promoting cooperation and avoiding the necessity of court intervention.⁹ That the AGO may lose a challenge to the enforceability of a CID cannot act to undermine the protections afforded to a party who complies with a CID and does not challenge its validity and enforceability.

3. The AGO's Assertion That It Does Not Have The Power To Deem Produced Documents Confidential Is Simply Incorrect. As noted in Ameritrust's Opening Brief, the critical backdrop to this entire CID issue is the continual promises of confidentiality that the AGO (and other states) made to Ameritrust. The AGO never directly denies that these agreements were made.¹⁰ Rather the AGO dances around the allegation by protesting that it could not have promised Ameritrust that the documents would remain confidential because Washington law does not permit the AGO to override the PRA. Response, p. 44. This is incorrect. The CPA

(... continued)

Ameritrust has always recognized that the federal antitrust law was amended to expressly clarify that its confidentiality provisions applied to information voluntarily produced. CP at 12, fn. 4. However, when amending the federal antitrust act, the FTC expressed a compelling policy consideration, to protect voluntary production from disclosure so as to eliminate the fears of cooperating businesses that confidential information would be disclosed, a policy consideration with application here. *A. Michael's Piano*, 18 F.3d at 145. When coupled with the CPA's express purpose of avoiding conflict with federal law, recognition by this Court of the policy behind protecting confidentiality of voluntary productions is grounded in the law. *Id.*

⁹ Moreover, the AGO cannot reasonably suggest that this was truly voluntary. It was voluntary only in the sense that Ameritrust did not force the AGO to seek a court order compelling production.

¹⁰ Notably, the AGO fails to cite to any evidence to support its claim that it never told Ameritrust that the documents would remain confidential as permitted under the CPA.

specifically allows the AGO to investigate and trigger confidentiality provisions. RCW 19.86.110.

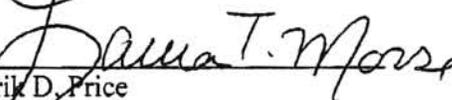
Since *Maccafferi* makes clear that a CID can be supplemented by informal communications, the AGO's promise to Ameriquest to maintain the confidentiality of the documents is consistent with the CPA's confidentiality provisions and does not violate Washington law, including the PRA. *Maccafferi*, 938 F. Supp. at 314-15.

III. CONCLUSION

Ameriquest respectfully requests that this Court vacate the trial court's orders and enter an injunction prohibiting disclosure of the documents at issue, consistent with the arguments presented herein.

RESPECTFULLY SUBMITTED this 26th day of March, 2012.

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DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Defendants/Respondents

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Paula Casey)

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