

F I L E D
JUN 15 2009

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 JUN 15 P 2:14

NO. 82690-1

BY RONALD R. CARPENTER

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,

Respondent,

v.

WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL,

Petitioner.

**ANSWER TO MEMORANDUM OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT**

ROBERT M. MCKENNA
Attorney General

Shannon E. Smith
Senior Counsel
WSBA #19707
800 5th Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2104
ShannonS@atg.wa.gov

Alan D. Copsey
Deputy Solicitor General
WSBA #23305
P.O. Box 40100
Olympia, WA 98504-0100
(360) 664-9018
AlanC@atg.wa.gov

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT1

 A. The AGO Does Not Challenge the Superior Court’s
 Inherent Authority or Argue That It Has Unfettered
 Discretion to Waive Exemptions.1

 B. WCOG Fails to Acknowledge the AGO’s Argument That
 Ameriquet Lacked Standing to Invoke the Superior
 Court’s Inherent Authority to Review the AGO’s
 Decision to Waive Exemptions.....4

 C. Under the Circumstances of this Case, the AGO’s
 Decision to Waive Discretionary Exemptions Should Not
 Be Reviewed Under Art. IV, sec. 6.6

III. CONCLUSION8

TABLE OF AUTHORITIES

Cases

<i>Ameriquest Mortgage Co. v. Attorney General</i> , 148 Wn. App. 145, 199 P.2d 468 (2009).....	passim
<i>Amren v. City of Kalama</i> 131 Wn.2d 25, 929 P.2d 389 (1997).....	2
<i>Bridle Trails Community Club v. City of Bellevue</i> , 45 Wn. App. 248, 724 P.2d 1110 (1986).....	7
<i>Clark Cy. Pub. Util. Dist. No. 1 v. Wilkinson</i> , 139 Wn.2d 840, 991 P.2d 1161 (2000).....	7
<i>Harris v. Pierce Cy.</i> , 84 Wn. App. 222, 928 P.2d 1111 (1996).....	5
<i>Saldin Securities, Inc. v. Snohomish Cy.</i> , 134 Wn.2d 288, 949 P.2d 370 (1998).....	7
<i>Torrence v. King Cy.</i> , 136 Wn.2d 783, 966 P.2d 891 (1998).....	8

Statutes

RCW 42.56.060	3
RCW 42.56.070(1).....	2
RCW 42.56.210(1).....	2
RCW 42.56.240(1).....	5
RCW 42.56.270	4, 5
RCW 42.56.360	4
RCW 42.56.540	3, 6

RCW 42.56.550(4)..... 3

Rules

RAP 13.4(b)..... 8

I. INTRODUCTION

The State of Washington, Attorney General's Office (AGO) answers the memorandum submitted by amicus curiae Washington Coalition for Open Government (WCOG). The AGO answers only WCOG's argument that this Court should not review the court of appeal's decision allowing any person affected by the potential release of public records to invoke the superior court's inherent authority and bring an action to challenge an agency's decision to waive discretionary exemptions and disclose public records pursuant to the Public Records Act (PRA), RCW 42.56.

II. ARGUMENT

A. **The AGO Does Not Challenge the Superior Court's Inherent Authority or Argue That It Has Unfettered Discretion to Waive Exemptions.**

WCOG misapprehends the AGO's argument that the court of appeals erred when it decided that any person affected by the potential release of public records has standing to invoke the superior court's inherent authority to review an agency's waiver of discretionary exemptions and release public records.¹ According to WCOG, the AGO

¹ The court of appeals did not clearly articulate whether it was relying on its own inherent power or that of the superior court. *Ameriquist Mortgage Co. v. Attorney General*, 148 Wn. App. 145, 166-67, 199 P.2d 468 (2009). Because standing must exist for judicial review in the superior court in the first instance, before an appeal to the court

implies that agencies have “unfettered discretion to waive their own discretionary exemptions” and that “no party would have standing to challenge the exercise of such discretion.” WCOG Br. at 8. That is not the AGO’s argument. Rather, the AGO argues that Ameriquest did not have standing in this case to challenge the AGO’s decision to waive work product, attorney-client privilege, and investigative records exemptions for records the AGO created during the course of its investigation into Ameriquest’s lending practices.

The PRA establishes a broad presumption that public records should be disclosed upon request, a presumption that can be overcome only where a requested record is exempted from disclosure by a specific statute. RCW 42.56.070(1). Even where an exemption applies, the PRA often requires disclosure of records if information contained in the records can be redacted to protect personal privacy or a vital government interest. RCW 42.56.210(1). Agencies subject to the PRA therefore have a duty to determine in the first instance whether a requested record falls within an exemption and then whether it can be disclosed anyway with redactions to protect personal privacy or a vital government interest. RCW 42.56.070(1), RCW 42.56.210(1); *see also Amren v. City of Kalama*, 131 Wn.2d 25, 31-32, 929 P.2d 389 (1997). With only a few

of appeals, the AGO understands the inherent authority at issue to be that of the superior court.

exceptions, however, statutory exemptions are permissive—i.e., they authorize an agency to withhold a requested record or part of a record, but they do not compel withholding. An agency may, in the exercise of its discretion—and consistent with the strong public policy of open government—decline to assert an exemption. This discretion is not “unfettered,” but is exercised consistent with the PRA’s strong public policy of open government. The PRA imposes strict penalties on agencies that impermissibly withhold requested records (RCW 42.56.550(4)), but it also explicitly protects agencies from liability for releasing public records in good faith under the Act (RCW 42.56.060).

The PRA contains specific provisions governing judicial review of agency compliance with the Act, including a provision specifying who may seek judicial protection of public records that otherwise would be disclosed in response to a public records request. RCW 42.56.540. Without reference to the statutory framework for judicial review, the court of appeals here simply invoked the superior court’s inherent authority to conclude that Ameriquest had standing to challenge the AGO’s decision to disclose requested records. *Ameriquest Mortgage Co. v. Attorney General*, 148 Wn. App. 145, 166-67, 199 P.3d 468 (2009).

The AGO’s petition for review does not challenge the superior court’s inherent authority to review the waiver of the discretionary

exemptions, but raises the issue of whether the court of appeals' decision to invoke the superior court's power of review was appropriate under the facts of this case, and given the specific statutory framework established for obtaining judicial review of records disclosure decisions under the PRA.

B. WCOG Fails to Acknowledge the AGO's Argument That Ameriquest Lacked Standing to Invoke the Superior Court's Inherent Authority to Review the AGO's Decision to Waive Exemptions.

WCOG contends that the AGO inadequately analyzes the superior court's inherent review authority. WCOG Br. at 8. However, the AGO is not challenging the court's inherent review authority. Rather, the AGO is challenging the standing test formulated by the court of appeals: that any party affected by the disclosure of public records has standing to invoke the superior court's inherent authority to challenge an agency's decision to waive permissive exemptions. AGO Pet. for Review, at 16; *Ameriquest*, 148 Wn. App. at 145.

At issue is the AGO's decision to waive possible work product, attorney-client privilege, and investigative records exemptions. In contrast to exemptions for trade secrets (RCW 42.56.270) or health care information (RCW 42.56.360), these exemptions are not designed to protect private interests of third parties, such as Ameriquest. Rather, they

protect the AGO's legal work product, its privileged communications, and its investigative records.²

A party must be more than "affected" by the disclosure of public records in order to have standing; it must be in the zone of interest protected by the statute and must allege injury-in-fact (i.e., that he or she has been specifically and perceptibly harmed by the proposed action). *Harris v. Pierce Cy.*, 84 Wn. App. 222, 230-33, 928 P.2d 1111 (1996). Ameriquest is not within the interests protected by the AGO's work product, attorney-client privilege, and investigative records exemptions, nor has Ameriquest alleged any specific and perceptible harm it will suffer by the AGO's waiver of the exemptions. Those exemptions protect the AGO's (or its clients') interests, not Ameriquest's. While Ameriquest may have standing to challenge an agency's waiver of exemptions designed to protect private interests, such as trade secrets or other proprietary information (*see* RCW 42.56.270), it has no cognizable interest that would allow it to challenge the AGO's decision to waive work product or attorney-client privilege exemptions.

By presuming that Ameriquest had standing to challenge the AGO's waiver of the exemptions because Ameriquest would be "affected"

² Information in investigative records may be exempt from public disclosure where essential to protect a person's right to privacy. RCW 42.56.240(1). In this case, the AGO redacted the records at issue to protect the privacy of Ameriquest's customers.

by the potential disclosure of the records, the court of appeals invites any affected person to challenge an agency's decision to waive exemptions, even where the exemption bears no relationship to the person's interests, and even when the waiver may have little or no effect on whether the records ultimately are disclosed. Because the "affected person" standard is undefined, the court of appeals has set no principled limit as to how attenuated a person's interest must be to assert that that he or she is "affected" by a disclosure. The court of appeals' decision eviscerates RCW 42.56.540, which permits "a person who is named in the record or to whom the record specifically pertains" to obtain an injunction preventing the disclosure of public records by demonstrating that disclosure "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."

C. Under the Circumstances of this Case, the AGO's Decision to Waive Discretionary Exemptions Should Not Be Reviewed Under Art. IV, sec. 6.

WCOG inaccurately casts the AGO's argument as contending its decision to waive the discretionary exemptions is "immune from judicial review." WCOG Br. at 8. This is not the AGO's argument. Rather, the AGO simply contends that under the facts of this case, there is nothing for the superior court to review under article IV, section 6 of the Washington

Constitution. Therefore, the court of appeals erred by remanding the issue to the superior court on that basis.³

The court of appeals did not cite, and the AGO has not found, a case in which a court exercised its inherent, constitutional judicial review authority absent a record or facts about the agency action at issue. *See, e.g., City of Bellevue v. East Bellevue Community Council*, 138 Wn.2d 937, 943, 983 P.2d 602 (1999) (judicial review under article IV, section 6 is not full appellate review, but instead involves consideration of whether, based on the administrative record, the tribunal's decision was arbitrary or capricious). Here, the AGO is not a "tribunal" and there is no record pertaining to the AGO's waiver of the exemptions.⁴ Notwithstanding the lack of a record to review, the court of appeals appears to have remanded this issue to the superior court to allow Ameriquest to conduct discovery so that the superior court could then review whatever evidence Ameriquest may find. *Ameriquest*, 148 Wn. App. at 167-68.

In deciding that the superior court had inherent authority to review the AGO's waiver of the exemptions, the court of appeals held, "[T]he

³ Moreover, the superior court's decision to issue a constitutional writ of review is discretionary and "cannot be mandated by anyone, including a higher court[.]" *Bridle Trails Community Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986).

⁴ The purpose of a constitutional writ under article IV, section 6 is "to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." *Clark Cy. Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 845-46, 991 P.2d 1161 (2000) (quoting *Saldin Securities, Inc. v. Snohomish Cy.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998)).

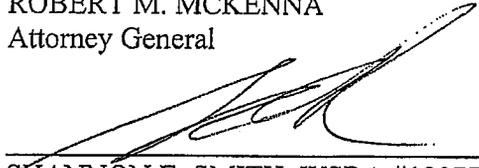
trial court may take further evidence or argument on this point and grant a preliminary injunction against this disclosure if some additional evidence of abuse of discretion is presented.” *Ameriquest*, 148 Wn. App. at 167-68. This statement is confusing because a court conducting review pursuant to article IV, section 6 should be conducting an appellate review, not a trial de novo. Indeed, where there is a statutory provision for judicial review, such as that afforded by the PRA, courts should refrain from engaging in judicial review pursuant to article IV, section 6. *Torrence v. King Cy.*, 136 Wn:2d 783, 788, 966 P.2d 891 (1998) (“If either a statutory writ of review or direct appeal of the decision is available, discretion to issue a constitutional writ of certiorari generally does not exist.”).

III. CONCLUSION

Pursuant to RAP 13.4(b), this Court should grant the AGO’s petition for review.

RESPECTFULLY SUBMITTED this 15th day of June, 2009.

ROBERT M. MCKENNA
Attorney General



SHANNON E. SMITH, WSBA #19077
Assistant Attorney General
ALAN D. COPSEY, WSBA # 23305
Deputy Solicitor General