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SUPREME COURT
STATE OF WASHINGTON

No. 82690-1

2009 MAR -9 P 3:16

Court of Appeals No. 36245-7-II

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FILED
MAR 9 2009

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Defendants/Respondents.

ANSWER TO PETITION FOR REVIEW

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A. Identity of Answering Party.

Appellant Ameriquest Mortgage Company (“Ameriquest”) requests that this Court deny Respondent Attorney General’s Office’s (“AGO”) petition seeking review of the Court of Appeals’ decision.

B. Counterstatement of the Issues Raised by the Petition.

Whether the petition for review should be denied because:

1. The AGO has failed to satisfy the rigorous standard for granting review under RAP 13.4(b).

2. The Court of Appeals’ decision based on CR 65 is consistent with its prior ruling in Northwest Gas Ass’n v. Washington Utilities & Transportation Commission, 141 Wn. App. 98, 168 P.3d 443 (2007), rev. denied, 163 Wn.2d 1049, 187 P.3d 750 (2008) and thus review is improper under RAP 13.4(b)(2).

3. The Court of Appeals’ decision properly interpreted the federal Gramm Leach Bliley Act (“GLBA”) and the Washington Public Records Act (“PRA”) and does not raise a significant question of law under the state or federal Constitution pursuant to RAP 13.4(b)(3) nor does it meet the stringent requirement of an issue of substantial public interest.

4. The Court of Appeals appropriately set forth a notice procedure that is tailored to this specific case and does not conflict with any decision of the court of appeals or this Court.

5. The Court of Appeals’ decision that the discretionary decisions of the AGO is reviewable under the court’s inherent authority is

grounded in long-standing legal precedent and does not conflict with any decision of this Court.

C. Counterstatement of the Case.

1. Background Facts.

The dispute between the parties concerns the AGO's potential disclosure, in response to a Public Records Act (PRA) request, of documents that it received from, and generated about, Ameriquest during the course of its examination into Ameriquest's lending practices.

Ameriquest moved for a preliminary injunction to prevent the AGO's disclosure of these documents. Ameriquest argued: (1) the GLBA prohibited the disclosure of its customers' nonpublic personal information; and (2) the AGO's decision to disclose its own attorney work product notes, which are otherwise exempt from disclosure under the PRA, may have been made as a result of animus towards Ameriquest. As to the latter argument, Ameriquest requested that it have an opportunity to conduct discovery so that the trial court could review the AGO's decision to disclose to determine whether that decision was arbitrary and capricious.

On May 1, 2007, the trial court issued an oral ruling, ostensibly denying Ameriquest's motion for preliminary injunction. On May 18, the trial court issued its written ruling, clarifying the oral ruling and directing disclosure of all documents at issue in the lawsuit ("May 18 Order"). The trial court's May 18 Order governed all of the documents at issue in the lawsuit and directed release of all documents that Ameriquest sought to protect from widespread disclosure. All of these documents could have

been disclosed pursuant to the trial court's May 18 Order. Thus, the trial court effectively determined the action and the May 18 Order constituted a "Final Order." The Court of Appeals properly heard this matter as an appeal as of right pursuant to RAP 2.2(a)(3) resulting in its January 6, 2009, decision.

2. The Decision Below.

On January 6, 2009, the Court of Appeals issued its decision in Ameriquist Mortgage Co. v. State Attorney General, --- Wn. App. ---, 199 P.3d 468 (2009) (the "Opinion") (attached to the AGO's Petition). In its Opinion, the Court of Appeals concluded that, just as in its recent decision Northwest Gas, "the trial court here similarly conflated the preliminary injunction hearing with a full hearing on the merits." Opinion pp. 6-7. In reversing on the CR 65 issue, and using virtually identical language to that in Northwest Gas, the Court of Appeals confirmed: "We could end our analysis here and remand to the trial court to reconsider Ameriquist's request for a preliminary injunction in accordance with CR 65." Opinion, p. 7; cf. Northwest Gas, 141 Wn. App. at 115 (stating "[w]e could end our analysis here and remand to the trial court to reconsider the Pipelines' request for a preliminary injunction in accordance with CR 65."). The Court of Appeals did, however, offer further guidance to the trial court on remand (just as it did in Northwest Gas):

The Court of Appeals then instructed the trial court to "make *reasonable* provision for at least attempted notice to all of the Ameriquist loan customers whose information is being sought for public disclosure."

Opinion, p. 8 (emphasis added). The Court of Appeals, citing the holding in Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (“PAWS”), concluded that the GLBA preempts the PRA in this case because the PRA is inconsistent with the GLBA. Opinion, pp. 9-10. The Court of Appeals rejected the AGO’s argument that it was a non-affiliated third party (an argument that the AGO has not raised in its Petition). Opinion, pp. 12-14. The Court also determined that the “judicial process” exemption under the GLBA, 15 U.S.C. § 6802(e)(8), did not apply and that the intervenor could not obtain the information through that exemption. Finally, the Court of Appeals acknowledged that the trial court could hear further evidence or argument as to whether the AGO acted arbitrarily and capriciously in waiving the applicable exemptions in the PRA. Opinion, pp. 19-20.

D. Why Review Should Be Denied.

1. Standard of Review. RAP 13.4(b) sets forth the very limited circumstances under which review of a decision of the Court of Appeals might be had. The AGO fails to satisfy these strict requirements and the petition should be denied.

2. The Petition for Review Should Be Denied Because the Court of Appeals’ CR 65 Ruling Is Consistent With Settled Precedent.

The AGO tellingly waits to the very end of its argument to discuss the Court of Appeals’ ruling on CR 65. Petition, pp. 18-20. Yet, CR 65 is the heart of the Opinion. Opinion, p. 7 (noting that the Court could have ended its analysis on the CR 65 issue). Given the direct and recent

authority provided by Northwest Gas, the Court of Appeals decision here is consistent with precedent and treads no new ground. In both instances, the trial court improperly combined the preliminary injunction with the permanent injunction by utilizing the incorrect standard and failing to apprise the parties. Again, the Court of Appeals used virtually identical language reversing the trial court in the Opinion as it did in Northwest Gas, and the AGO cannot reasonably suggest that the Opinion here is inconsistent with Northwest Gas. Accordingly, the AGO has not satisfied its burden under RAP 13.4(b)(2).

In its Petition for Review, the AGO attempts to distinguish Northwest Gas by arguing, as it unsuccessfully argued below, that the trial court's order was somehow not a "final order." First, it should be noted that the standard under RAP 13.4(b)(2) is not that the two court of appeals opinions might be distinguishable. Instead, the two opinions must be in conflict. RAP 13.4(b)(2). Second, despite the AGO's attempt to otherwise confuse the issue, the bottom line is that disclosure has been ordered, even if only temporarily delayed by the redaction exercise. RAP 2.2(a)(3) (a party can appeal from any decision of the trial court "that in effect determines the action"). Indeed, the AGO cannot point to any other avenue at the trial court that Ameriquest had to prevent disclosure of the documents. The Court of Appeals has already rejected this argument twice, and it is not well taken here under the requirements of RAP 13.4(b)(2).

The cornerstone of the Court of Appeals' decision is the trial court's reversal under CR 65. In this respect, this case is on all fours with

Northwest Gas; there is no compelling reason to review this case. Indeed, this Court denied a similar petition to review Northwest Gas and the CR 65 ruling. 163 Wn.2d 1049 (2008).

3. The Court of Appeals Correctly Determined that the GLBA Preempts the PRA and Protects Nonpublic Personal Information From Disclosure. The AGO claims that the Court of Appeals unnecessarily invoked the Supremacy Clause of the U.S. Constitution when it held that the GLBA preempts the PRA. The AGO argues, for the first time, that the PRA actually incorporates the GLBA through the PRA's "other statutes" provision and claims that in doing so the PRA dispenses with any need for analysis under the doctrine of preemption. Not only does the AGO breach the principle that new arguments should not be raised for the first time on appeal, the AGO's new position is particularly surprising because at every previous stage of these proceedings, the AGO has taken the position that the GLBA *does not* apply to this case in any way. Regardless, as set forth by the Court of Appeals in the Opinion and affirmed in PAWS, principles of preemption, not the PRA's "other statutes" provision, govern the GLBA's control over the PRA. The AGO's position is an attempt to create an appeal issue where none exists.

Not only does the AGO introduce a new argument with respect to the "other statutes" exemption of the PRA, it seeks a new way around the protections required by the GLBA. The AGO argues, again for the first time, that the GLBA exception for reuse or redisclosure in the "ordinary course of business" permits it to disclose all of the financial information it

possesses in response to a PRA request. This argument is entirely without merit as it is directly contradicted by the federal regulations governing the GLBA.

Simply put, the GLBA preempts the PRA. The GLBA, not the PRA, governs the disclosure of financial records in this case. This recognition by the Court of Appeals is accurate and drove its holding on preemption. The AGO tries to make an end run around the requirements of RAP 13.4(b) by suddenly raising the specter of the Supremacy Clause and the catch all “substantial public interest” test. This is apparently an effort to avoid the “conflict[s] with another decision of the Court of Appeals” test, which it plainly could not satisfy. Specifically, in Northwest Gas, the Court of Appeals expressly contemplated that federal statutes might preempt the PRA. And again, this Court denied the Petition for Review in Northwest Gas.

In the following discussion of these points, the fact that the AGO’s newly minted “other statutes” arguments is not grounds to grant review will be addressed first. The AGO’s other new theory, the “ordinary course of business” claim, will be discussed -- and dismissed -- next. Finally, the fundamental preemption principles supporting the Court of Appeals’ decision will be addressed.

a. “Other Statutes” Exemption Under PRA Is Not Applicable to the GLBA. The issue of whether the “other statutes” exemption under the PRA, RCW 42.56.070(1), would incorporate the GLBA into the PRA and exempt or prohibit disclosure of specific

information or records is not an issue that was briefed on appeal. Besides, this novel argument is not supported by the law. Washington courts have found that where other statutes *mesh* with the PRA they operate to supplement it. However, where there is a conflict between the PRA and other statutes, the PRA would govern, *absent preemption*. PAWS, 125 Wn.2d at 261-62.

The AGO's reliance on PAWS is puzzling; not only does PAWS fail to support the AGO's argument, it actually undermines it. In PAWS, the court held that two *state* statutes qualified as "other statutes" under the PRA where the state legislature clearly intended that the other statutes would operate as independent limiters on disclosure, such as the state Uniform Trade Secrets Act. Id. at 262-63.

When asked to address whether certain federal statutes act to limit disclosure under the PRA, the PAWS court analyzed the federal statutes under preemption principles and not under the PRA "other statutes" exemption. The PAWS court found that federal preemption of the PRA may occur if "Congress passes a statute that expressly preempts state law." Id. at 265.

Here it is not necessary to speculate as to whether the state legislature intended to include federal statutes in the PRA "other statutes" exemption because the GLBA expressly preempts the PRA. 15 U.S.C. § 6807. Moreover, *even if* the state legislature contemplated that federal statutes could act as independent limiters of disclosure under the PRA, that would only occur, consistent with PAWS, in cases where the federal statute

“meshed” with the PRA and that is not the case here – the GLBA soundly clashes with the PRA’s mandate for broad disclosure because the GLBA emphatically prohibits from disclosure a large scope of information that is otherwise unprotected from disclosure under the PRA. Individual Reference Services Group, Inc. v. Federal Trade Commission, 145 F. Supp. 2d 6, 27 (D.C. Cir. 2001). The Court of Appeals properly determined that the GLBA preempted the PRA and the AGO’s argument to the contrary is wholly without merit. The AGO’s novel “other statutes” argument comes nowhere near passing muster for a grant of review under RAP 13.4(b).

b. “Ordinary Course of Business” Language in the GLBA Regulations Acts to Further Limit, Not Expand, the AGO’s Reuse and Redisclosure of Protected Information. The AGO grossly misapprehends the GLBA’s reuse and redisclosure limitations. The GLBA provides that before a financial institution can disclose nonpublic personal information to nonaffiliated third parties,¹ it must provide notice to the consumers and provide them with an opportunity to opt out of the disclosures. 15 U.S.C. § 6802(a) and (b). The GLBA, however, has certain exceptions where the financial institution can disclose information to a nonaffiliated third party without providing consumer notice or choice in certain situations. 15 U.S.C. § 6802(e); Individual, 145 F. Supp. 2d at 35. Ameriquest relied upon an exception which allowed it to disclose information to the AGO “to comply

¹ The AGO has abandoned its argument that it is not a nonaffiliated third party, and the Court of Appeals’ rejection of that argument is not before this Court.

with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities.” 15 U.S.C. § 6802(e)(8), 16 C.F.R. § 313.15(7)(ii).

The FTC, a federal agency tasked with promulgating rules to implement the GLBA and fill in any gaps, recognized that under 15 U.S.C. § 6802(e) exceptions, a customer has no right to prohibit the disclosures and does not even know more than that disclosures may be made “as permitted by law.” 65 Fed. Reg. 33667. However, the FTC found that the protection afforded by GLBA for disclosures made under an exception was inherent through the *limited nature of the exceptions*. Id. The FTC further stated that “[i]t would be inappropriate to undermine the key privacy requirements of the Act that ensure a consumer can generally control the disclosure of his or her nonpublic personal information by allowing the recipient of nonpublic personal information under the . . . exceptions to reuse the information for any purpose.” Id.

The FTC issued regulations which specifically address the limits on redisclosure and reuse of information provided pursuant to an exception. See 16 C.F.R. § 313.11. Section 313.11(a)(1) provides that if a nonaffiliated third party receives information pursuant to an exception its disclosure and use of that limitation is limited above and beyond the general use provisions of the GLBA -- it can only (i) disclose the information to affiliates of the producing financial institution; (ii) disclose the information to affiliates of the third party except the affiliates use and disclosure is limited to the extent of the third parties use and disclosure; or

(3) “disclose or use the information pursuant to an exception in § 313.14 or § 313.15 in the ordinary course of business *to carry out the activity covered by the exception under which [the third party] received the information.*” 16 C.F.R. § 313.11(a)(1) (emphasis added).

The AGO acknowledges that it received the information at issue from Ameriquest under an exception to the GLBA for the purpose of conducting a consumer protection investigation into Ameriquest’s marketing and lending practices. Petition, pp. 2 and 7. The AGO now, for the first time, appears to claim that under section 313.11, its “ordinary course of business” in conducting consumer protection investigations includes disclosing documents received pursuant to a GLBA exception to the public at large in response to a PRA request. Petition, pp. 8-9. The AGO’s argument is preposterous -- it ignores the fundamental purpose of the GLBA -- to protect a customer’s privacy -- as well as the FTC rules implementing the GLBA and applicable case law.

Section 313.11(a)(2) demonstrates that use in the “ordinary course of business” must be tied directly to the exception relied upon. The example given in the rules shows that if the exception relied upon was to provide “account processing services,” then the use and disclosure must be limited to providing “account processing services.” 16 C.F.R. § 313.11(a)(2); see also <http://www.ftc.gov/bcp/online/buspubs/glbshort>. The FTC also discussed this issue in connection with consumer reporting agencies who were advocating that they be allowed to reuse and redisclose information received from a financial institution for a purpose outside of

the activity contemplated in the exception. The FTC rejected the consumer reporting agencies' demand and found that to allow them to disclose information outside the activity in the exception would work at cross purposes with the GLBA and would not be consistent with the privacy provisions of the GLBA. 65 Fed. Reg. 33668.

The court in Individual affirmed that Congress intended the GLBA exceptions to be limited in scope and purpose and found that the exceptions could not be used to swallow the statute, which was created as means to ensure that consumers could retain control over their nonpublic personal information. Individual, 145 F. Supp. 2d at 35-36. The legislative intent was expressed by Representative Vento who explained that the GLBA was intended to “[p]rohibit repackaging of consumer information. Consumer information remains protected. It cannot be resold or reshared by third parties or profiled or repacked to avoid privacy protections.” Id. at 35 (citations omitted).

Under the GLBA, the AGO was permitted to utilize the information that it received from Ameriquest in connection with its consumer protection investigation for the purpose of that investigation. Had the AGO proceeded to litigation against Ameriquest, it could have used the information or documents in the litigation pursuant to the GLBA's judicial process exception discussed at length in Ameriquest's Opening Brief -- and the trial court could have issued a protective order limiting the reuse and redisclosure of GLBA protected information. Opening Brief pp. 27-32.

To interpret broadly the language of the GLBA so as to allow disclosure of the nonpublic personal information pursuant to a PRA request would contravene the very purpose of the GLBA – to safeguard consumer privacy. The court in Hodes v. U.S. Dep’t of Hous. & Urban Dev’t, 532 F. Supp. 2d 108 (D.D.C. 2008), a case repeatedly ignored by the AGO, dealt squarely with the issue of whether the GLBA prohibited the disclosure of nonpublic personal information provided to a nonaffiliated third party, such as the AGO, through a FOIA request (the federal equivalent to a PRA request). The court in Hodes found that the GLBA “nowhere exempts government entities from its confidentiality provisions, nor would doing so comport with the purpose of the [GLBA], which is to safeguard consumer information.” Id. at 116. The AGO’s argument that the “ordinary course of business” provision in the FTC regulations would allow it to disclose nonpublic personal information in response to a PRA request is without merit.

c. The Court of Appeals Properly Invoked the Supremacy Clause of the U.S. Constitution When It Found that the GLBA Expressly Preempts the PRA. Another novel theory raised for the first time in the Petition is the AGO’s claim that the Court of Appeals unnecessarily found that the GLBA preempted the PRA. This argument demonstrates a fundamental misunderstanding of basic preemption principles.

There is no question that the scope of information protected from disclosure under the GLBA is significantly broader than the scope of

information protected from disclosure under the PRA. The GLBA essentially protects from disclosure all information provided by a customer to a lender when applying for a loan. Individual, 145 F. Supp. 2d at 27.² Assuming an exemption to the PRA is not implicated, the PRA only protects the disclosure of a limited scope of information covered under the holding in Hearst Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978) -- the GLBA protections are significantly broader.

Here, the Court of Appeals recognized that the GLBA's prohibition on the disclosure of the information sought was broader than that offered under the PRA and thus directly conflicted with the PRA. Opinion, p. 13. The AGO claims that the Court of Appeals unnecessarily found preemption (thereby invoking the Supremacy Clause) when making this determination. The AGO argues that the Court of Appeals did not analyze whether the GLBA and PRA could be "reconciled or consistently stand together," and cited to Kelly v. State of Wash. ex rel. Foss Co., 302 U.S. 1, 10, 58 S. Ct. 87 L. Ed. 3 (1937), for the proposition that the Court of Appeals had a duty to try to harmonize the two statutes. Petition, pp. 3-4. Kelly does not stand for this proposition. At issue in Kelly was whether state regulations governing the inspection of tug boats were enforceable where there was *no direct conflict with an express federal*

²If this Court decides to review the Court of Appeals decision it should revisit the issue of redactions including if, when, and to what extent redactions are appropriate under the GLBA as redactions are not expressly provided for in the language of the GLBA and since all the information provided by the customer is protected.

regulation but where there were federal regulations in the same field. Kelly, 302 U.S. at 9. The U.S. Supreme Court found that so long as Congress has only occupied a limited field, state regulation outside that field is not forbidden. Id. at 10. However, even if there is no express preemption under the federal regulation, if the state regulation conflicts directly and positively in such a way that there can be no reconciliation between the state and federal regulation, the state regulation shall be superseded by the federal regulation. Id.

Kelly has no application to the facts at issue in this case. Here, preemption is not simply implied by the existence of conflicting state and federal law -- preemption of less protective state laws is expressly stated in the language of the GLBA. Opinion, p. 10; 15 U.S.C. § 6807 (plainly stating that less protective state laws are preempted). “Where a state statute conflicts with, or frustrates, federal law, the former must give way.” CSX Transp. v. Easterwood, 507 U.S. 658, 663, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993) (citing U.S. Const. Art. VI, cl. 2). Where the federal statute on its face clearly provides for preemption there is no need for the court to engage in a conflict preemption analysis. Id. at 664 (holding that “[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue. If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause which necessarily contains the best evidence of Congress’ pre-emptive intent”) (citation omitted). Especially given the preemption discussions found in PAWS and Northwest Gas (discussed

above), the Court of Appeals properly concluded that the GLBA preempts the PRA.

d. The Court of Appeals Properly Construed the GLBA to Require that Notice and in Essence an Opportunity to Opt Out be Provided to the Affected Customers. As the AGO points out, the Court of Appeals instructed the trial court in this case to provide notice to the individuals whose financial information was subject to the AGO's planned disclosure. While the Court of Appeals did not cite to the authority that it was relying upon when it provided this instruction, the instruction is consistent with the requirements of the GLBA and the Court of Appeals acknowledged the same. Opinion, p. 11.

The GLBA requires that before a financial institution can disclose nonpublic personal information it must provide notice to the consumers and provide them with an opportunity to opt out of the disclosures. 15 U.S.C. § 6802(a) and (b). This provision was inserted into the GLBA by Congress for the purpose of ensuring that consumers maintained control over their nonpublic personal information which is illustrated by the following statements made during Congressional hearings:

“[F]or the first time ever we will require that financial institutions give their customers a right to just say no to the sharing of what most Americans hold very, very dear: private information about themselves and their families,” including “addresses and phone numbers.”

“These privacy provisions are a pioneering, landmark advance forward by Congress in ensuring that consumers' personal information is protected from unwanted disclosures by financial institutions.”

Individual, 145 F. Supp. 2d at 19 (citations omitted).

Since the AGO is attempting to reuse and redisclose information that it received from Ameriquest in a manner outside of the relied upon exception (i.e., the AGO's consumer protection investigation), it is consistent with the provisions of the GLBA that the AGO would be required to notify the affected customers of its intent to disclose their nonpublic personal information and to provide the customers with an opportunity to opt out of the disclosure.

Furthermore, the AGO mischaracterizes the Court of Appeals' instruction as creating an extra-statutory mandate that would be imposed in all cases. This is an exaggeration of the scope of the Court of Appeals' decision. Fundamentally, the actual holding in this case was simple. The Court of Appeals reversed on the basis of CR 65 and the trial court's failure to utilize the proper standards of review -- the reversal was not based on the failure to provide notice to the affected individuals. The Court of Appeals then determined that the GLBA preempted the PRA which effectively means that the GLBA, not the PRA governs if, when, and how any nonpublic personal information can be disclosed by the AGO.

Clearly, the Court of Appeals was troubled by the fact that the individuals whose personal information is earmarked for disclosure by the AGO had not been notified on the planned disclosure. Opinion, p. 8. The Court of Appeals also recognized that this case was one of first impression involving nonpublic personal information subject to the protections of the federal GLBA. The Court of Appeals prudently provided for notice to

these individual borrowers. Not only is this procedure consistent with the high risk of dire consequences in this case, such as identity theft, but it is also consistent with the overall approach taken by the GLBA itself.

The Court of Appeals' instruction to the trial court was just that -- an instruction to *this* trial court for the nonpublic personal information at issue in *this* case. There is no indication that this instruction was intended to become a far reaching, extra-statutory, requirement in all PRA cases and the AGO's argument to the contrary is not persuasive. The Court of Appeal's decision represents a solution to this particular situation in keeping with GLBA provisions and, as such, it provides no compelling reason to accept review.

The AGO's argument, boiled down, is that because the PRA strongly favors disclosure, a decision that possibly limits disclosure satisfies the "substantial public interest" test in RAP 13.4(b)(4). This Court implicitly rejected any such argument in denying the Petition for Review in Northwest Gas and should similarly do so here.

4. Permitting Review of Arbitrary and Capricious Decision-Making Is a Cornerstone of Checks and Balances. The Court of Appeals held that arbitrary and capricious decision-making by government agencies can be reviewed by the courts. There is nothing remarkable about this holding as proven by its support in long-standing legal precedent. This case involved documents pertaining to, and derived from, Ameriquest. The PRA, itself, clearly confers standing on Ameriquest to seek review from the court under these circumstances. See RCW 42.56.540. Further, Ameriquest has "a fundamental right to have the

agency abide by the constitution, statutes, and regulations which affect the agency's exercise of discretion." Wilson v. Nord, 23 Wn. App. 366, 373, 597 P.2d 914 (1979). It is a "fundamental right" for Ameriquest to both be free from any arbitrary and capricious administrative action and to have the AGO abide by the rules to which it is subject. Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983). Relying on this established line of authorities, the Court of Appeals properly found that Ameriquest had standing to challenge the failure of the AGO to exercise its discretionary exemptions.

Yet, with no legal analysis or citation, the AGO simply asserts that its decision-making should not be reviewable by the courts. The AGO essentially demands that government agencies have the right to make every discretionary PRA decision under a shroud of immunity from judicial review. Unless its actions are non-reviewable, the AGO argues, the PRA's preference for "prompt" disclosure is frustrated. This is too high of a price for "prompt."

The AGO characterizes the court's inherent authority (and duty) to review arbitrary and capricious behavior of government as the "functional equivalent" of a general exemption to PRA disclosure in violation of PAWS, 125 Wn.2d at 260-61. Petition, p. 18. Although couched in reasonable sounding rhetoric, this position is troubling if its natural extensions are considered. The AGO is urging that the Courts be powerless to review and prevent the disclosure of records held by government even when the decision to disclose is purely arbitrary and capricious.

A court must be entitled to review agency decisions to determine whether they are arbitrary and capricious or contrary to law. Wilson, 23 Wn. App. at 372; Pierce County Sheriff, 98 Wn.2d at 693 (finding that courts have inherent power to review “illegal or manifestly arbitrary and capricious actions violative of fundamental rights”). There must be an avenue for at least a limited inquiry by the trial court in situations where allegations are made that the agency failed to consider all facts and circumstances before determining that a regulation was not applicable. State v. MacKenzie, 114 Wn. App. 687, 696, 60 P.3d 607 (2002).

The Court of Appeals understood that the courts have a critical role in ensuring that government treats its citizens fairly. The AGO makes no legal argument, but rather makes a policy argument that *unfairness* should be an acceptable risk for *prompt* disclosure of arguable public records. The Court of Appeals rightfully disagreed with this position and embraced black letter legal principles when it did so. The Court of Appeals’ decision stands on a bedrock of solid precedent and need not be reviewed.

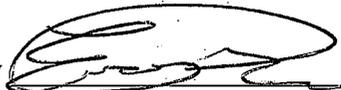
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E. Conclusion.

For all of the reasons stated above, this Court should deny the
AGO's Petition for Review.

RESPECTFULLY SUBMITTED this 9th day of March, 2009.

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CERTIFICATE OF SERVICE

2009 MAR -9 P 3: 16

The undersigned hereby certifies that on March 9, 2009, a copy of
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the within Answer to Petition for Review was served on all parties as CLERK

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