

Original

No. 36245-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY, Appellant

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON
Respondents,

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Anne Hirsch)

INTERVENOR'S BRIEF

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ORIGINAL

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INTRODUCTION

Intervenor Melissa A. Huelsman is an attorney licensed to practice in the State of Washington who is acting on behalf of several of her clients involved in litigation separate from this proceeding against Ameriquest Mortgage Company (“Ameriquest”).

Ameriquest is seeking to prevent Ms. Huelsman from obtaining documents under the Washington Public Records Act (“PRA”), which the Washington Attorney General’s Office (“ATG”) is attempting to disclose, consistent with the PRA. Ameriquest has cloaked its objections in the veil of an interest in the financial privacy of their clients. However, such assertions are entirely disingenuous. The only entity or person on whose behalf Ameriquest is acting is its own. It is seeking to prevent its bad acts from seeing the light of day, and that is not the proper purpose for withholding documents under Washington’s very liberally construed PRA. This Court should not be misled by Ameriquest’s arguments about the implications of the Gramm-Leach-Bliley Act (“GLBA”) in protecting the financial privacy of customers of financial institutions. Rather, it should pay particular attention to the information that Ameriquest is really trying to keep from the public eye – investigative materials prepared by the ATG and Ameriquest’s internal emails which will support the assertions made about the manner in which Ameriquest conducted its business prior to

settling the claims brought by the Washington ATG and the attorneys general of 49 other states and the District of Columbia. The trial court did not err when denying a preliminary injunction requested by Ameriquest and this case should be remanded back to the trial court for full disclosure of the records that have been requested, and for the ATG to complete the production process, which has only just begun.

STATEMENT OF THE CASE

Prior to March 2006, the ATG was conducting an investigation into the business and lending practices of Ameriquest and its affiliated and/or subsidiary companies. At the same time, numerous regulatory agencies in other states were conducting the same or similar investigations about Ameriquest's business and lending practices. (CP 163-181)

Ultimately, the attorneys general of 49 states and the District of Columbia combined their efforts and began negotiating with Ameriquest for resolution of the complaints. *Id.* The ATG entered into a Consent Judgment with Ameriquest which was filed in the King County Superior Court on March 21, 2006. A copy of the Consent Judgment ("Consent Judgment") is included with the Declaration of David Huey filed in support of the Opposition to the Motion for Preliminary Injunction ("Huey Dec."). (CP 163-181). Of Note in that document is a portion of the "Stipulated Recitals" wherein Ameriquest admits the numerous

investigations which were being conducted by the State Attorneys General, state Financial Regulators and the District Attorneys of those states. Even though there was no admission of wrongdoing in the Consent Judgment, it is important to note the breadth and scope and the number of open investigations into Ameriquest's business and lending practices when considering the merits and honesty of Ameriquest's position in this case. *See, Consent Judgment, IIIA.*

As part of the Consent Judgment, Ameriquest agreed not to "make false, misleading or deceptive representations regarding Loan terms and agreed to make oral disclosures in a clear manner. This provision also contained particular descriptions of the terms used and how they were to be described to consumers. There were also detailed descriptions of the nature of the written disclosures and specific prohibitions on making misleading statements. There are specific instructions about providing the same interest rate and discount points to borrowers who are similarly situated (C. Same Rate Available). And other very specific requirements designed to prevent the continuation of the lending practices which had been utilized by Ameriquest throughout the United States. *See, V. Injunctive Relief; 13:14-25:3.* It was no coincidence that multiple investigations were being conducted across the country.

The Consent Judgment speaks for itself. In spite of Ameriquest's

denial of wrongdoing in the document, the seriousness and number of violations of state and federal law committed by Ameriquest are clearly outlined in the prohibitions included therein. Nevertheless, the ATG apparently believed it was in the best interests of the citizens of Washington to enter into the Consent Judgment and the state and Ameriquest are bound by its terms. However, noticeably absent from the Consent Judgment is there any agreement to ignore and void the PRA, or that the ATG would protect Ameriquest from the disclosure of information demonstrating its business and lending practices. The only mention of public records disclosure is at Paragraph IX. Miscellaneous, F. Disclosure of Information. (54:11-54:18 of the Consent Judgment). In that paragraph, the ATG agrees to comply with the applicable state statute and to provide Ameriquest with notice of any request made under the PRA. The ATG has complied with this requirement, but there is nothing else in the document which prohibits disclosure of the information to the public upon request. The ATG has indicated in its briefing in this case that it did not include this language because it would be in direct contravention of the PRA. (CP 165)

Ms. Huelsman, through her office, made a written request of the ATG in February 2007 asking for all information relating to the investigation of Ameriquest. (CP 157) Ms. Huelsman had a discussion

with an investigator at the ATG about the documents that she might want, in an attempt at reducing the volume of information that might be produced. Huelsman Dec., ¶3 (CP 220) At no time did Ms. Huelsman agree to limit the scope of her request except in such a fashion as to avoid unnecessary production. *Id.* The ATG's office advised Ms. Huelsman that the documents would be produced unless Ameriquest objected, and it did object by filing a lawsuit and seeking a preliminary injunction. (CP 170; 21-34; 89-116) Ameriquest contended that the provisions of the PRA precluded the provision of documents to Ms. Huelsman. RCW 42.56. (CP 39) There was substantial negotiation with counsel for all parties in order to reach agreement on a Temporary Restraining Order so that the parties could ascertain the scope of the documents that the ATG was attempting to produce and such an Order was ultimately entered. (CP 39-46)

Thereafter, the parties continued to discuss the production process and to try to identify the first round of documents that would be produced to Ms. Huelsman. (CP 125-128) There was a significant disagreement among the attorneys about the "Index" which was supposed to be provided to Ms. Huelsman by the ATG which described at least a characterization of the documents to which Ameriquest objecting. (CP 127 and 89-116) Ameriquest went so far as to argue that Ms. Huelsman did not have a right

to even know the identity of the documents it was contending could not be produced. (CP 127; 89-116) It even asserted at one point in the pleadings that she was not entitled to obtain a copy of the loan file for one of her clients. Huelsman Dec., ¶4. (CP 220-221)

Ultimately the ATG advised that for the “first round” of production, it intended to produce all of the customer loan files in its possession, with personal financial information redacted, its own investigation and negotiation materials and the internal Ameriquest emails that had been produced during the investigation. (CP 166) and Price Dec., ¶3 and Exh. F (CP 126, 145-146). Ameriquest therefore filed a motion for preliminary injunction contending that all of the documents which the ATG sought to disclose in this “first round” to Ms. Huelsman were precluded from production because they contained personal, financial information that could not be disclosed under the GLBA, 15 U.S.C. § 6801, *et seq.* and that they were precluded from production even under the PRA. (CP 89-116). It is important to remember at this juncture the exact items that the ATG indicated it would produce: (1) customer loan files, which would necessarily contain personal financial information except that the ATG had indicated it would redact the information; (2) the ATG’s own investigation documents for which there could be no assumption that they would contain customers’ personal financial information; and (3)

Ameritrust's internal emails which would not contain a customer's personal financial information. (CP 225-226) Nevertheless, Ameritrust argued that there **might** be some possibility that the documents in categories (2) and (3) – investigation documents and internal emails – would have customers' personal financial information and would therefore be precluded from production under GLBA. (CP 228-254) It is also important to note that Ameritrust did not include any contentions in its briefing that it had a right to make inquiry regarding whether the ATG had treated Ameritrust in the same fashion as other similarly situated companies. *See*, Ameritrust's Motion for Prelim. Inj. and in its Reply (CP 94-114 and 227-238). It made some vague references to this purported injustice at oral argument, but nowhere in its substantial and lengthy briefing did it raise this argument in briefing. VRP (May 1, 2007) 15:7-17:9. (CP 89-116; 227-243) (The fact is the ATG was treating Ameritrust in exactly the same fashion as Household Finance, who had been the previous subject of a similar investigation into predatory lending practices by the ATG and other attorneys general nationwide.) (CP 149-154) The ATG agreed to produce documents regarding its investigation of Household Finance. Household tried to block the disclosure by making argument similar to those made by Ameritrust here, and that request was denied by the trial court in King County and by Division I. Thereafter, the

Household documents were produced to the requesting parties. *Id.*

The ATG and Ms. Huelsman filed responses opposing the motion for preliminary injunction by Ameriquest. (CP 182-190; 194-218). In the briefing by those parties, they both pointed out the legal insufficiencies of Ameriquest's arguments as well as the factual inaccuracies in the representations made by Ameriquest. *Id.* The trial court conducted a hearings on May 1, 2007 and on May 18, 2007 where it listened to the lengthy arguments and disagreements regarding the scope of the information that had been exchanged between Ameriquest and the ATG and the bases for the disclosure or non-disclosure. (CP 320-343) Ameriquest contended that it did not understand the scope of the information that would be produced by the ATG and that it had not yet been able to review its own internal emails because the ATG had not produced them back to Ameriquest. *Id.* The ATG indicated that it was in the process of redacting the personal financial information from the customer loan files and admitted that it had not been completed with any degree of certainty or correctness to that point. *Id.* As a result, the Court refused to issue a preliminary injunction on both occasions, but she left the TRO in place while the parties were still identifying which information would be produced to Ms. Huelsman and which documents contained personal financial information of Ameriquest's customers. *Id.* However,

the Order the trial court ultimately entered on May 18, 2007, which included her oral ruling from May 1, 2007, was specifically limited only to those types of documents that had been identified as being produced by the ATG – customer loan files, ATG investigation documents and Ameriquest internal emails. *Id.* Ameriquest had specifically asked that proprietary and trade secret information not be disclosed to Ms. Huelsman and the Court refused to enter such a ruling because none of that type of information had been identified yet as being produced by the ATG. *Id.* The Court stated that she would leave that issue for another day and the additional rounds of potential disclosure by the ATG to Ms. Huelsman, and in fact, the May 18, 2007 Order specifically states that “The Court does not reach any issue with respect to proprietary information issues based on the AGO’s assertion than (sic) that no such information is going to be disclosed in this round of disclosures.” Order Denying Plaintiff’s Motion for Preliminary Injunction (CP 320-343) The trial court clearly articulated her reasoning for the decision, which was founded upon consideration of the provisions of the GLBA weighed against the requirements of the PRA, and her oral ruling was specifically incorporated into the Order at paragraph 9. *Id.* In a statement that is directly contravened by the Order itself, Ameriquest contends its briefing to this court that the trial court entered its ruling “without citation to authority”.

Appellant's Brief, p. 12, ¶G. As indicated, the trial court made reference to the applicable statutes in its oral ruling which was made a part of the Order. (CP 320-343) Further, the trial court identified her greatest area of concern as being whether the ATG was sufficiently redacting the personal financial information that was required to be redacted.

On May 11, 2007, Ameriquest filed an Emergency Motion for Stay with this Court, seeking to avoid the trial court's ruling. (CP 252-256) A series of motions were filed regarding whether this appeal was timely and eventually this Court determined that Ameriquest was entitled to an appeal as a matter of right under RAP 2.2(a)(3), even though there have been very clear admissions by Ameriquest and the ATG (and concurrent findings by the trial court) that the document production in question is only the "first round" and that there will be more documents proposed to be produced by the ATG. (CP 344-345).

In its briefing to this Court, Ameriquest has contended that it provided the information regarding its customers to the ATG "with the belief that the documents would be used by the AGO solely for the purpose of the examination, and that the AGO would maintain the confidential nature of these materials." Appellant's Brief, 6-7, referencing the Tiberend Dec. (CP 117-118). What Ameriquest conveniently overlooks is that Ms. Tiberend is not only a lawyer who concurrently

served as an officer of the corporation, but she is a partner in the firm which provides outside counsel to Ameriquest (Buchalter Nemer Fields, which is one of the firms representing Ameriquest in this appeal). (CP 16-20; 117-124) Neither Ms. Tiberend nor apparently any one of the multitude of lawyers working on the investigation and advising Ameriquest regarding the entry into the Consent Judgment obtained written confirmation of their “belief” from the ATG. *Id.* Further, the Consent Judgment specifically references the PRA, yet includes no provisions which would prohibit the ATG from disseminating the information to the inquiring public under the PRA. Even if Ameriquest had such a “belief” (and it is highly doubtful that it did except for the wishful thinking of its officers), there is no basis in any of the contractual agreements entered into between the parties which support this “belief”, nor does Ameriquest’s “belief” about how the information would be used have any bearing upon the actions of the ATG or the courts of this state.

The rather simple issue facing this Court is that under the very liberal provisions of the PRA, Ameriquest bears the burden of convincing a trial court, and now this Court, that Ms. Huelsman is precluded from obtaining any documents under the PRA. Specifically, it is required to articulate with specificity the documents that are precluded from the presumed production under the PRA and the reasons for that preclusion.

Focusing again on the categories of production identified above, Ameriquest has simply made broad based statements about what might or might not be contained in the three categories (customer loan files, ATG investigation documents and Ameriquest internal emails). Intervenor would certainly concede that customers' personal financial information is contained in the loan files, but that it is being redacted by the ATG with the propriety of the redaction being overseen by the trial court. (CP 320-343) However, as to categories (2) and (3) – ATG investigation documents and Ameriquest's internal emails – there is not one single word in any of the voluminous pleadings which specifically identifies ANY personal financial information of Ameriquest customers or employees contained in the documents in those categories – only Ms. Tiberend's vague statements. As of the hearing on May 18, 2007, Ameriquest had not received the internal investigation documents that were supposed to be produced by the ATG, so as of yet, it cannot offer any information whatsoever regarding where confidential information is actually contained in those documents. As for the internal emails, Ameriquest has simply stated, in Ms. Tiberend's Declaration, that based upon her alleged personal experience "as to what is generally contained in such internal emails, at least a portion of the emails produced to the AGO also contain confidential customer information, personal information containing the

employees who sent them, and/or trade secret or proprietary data.”

Tiberend Dec., ¶4. (CP 118-120) This general statement is so overly broad and non-specific that it is essentially worthless, nor does it meet the standard necessary to prevent disclosure under the PRA. Ms. Tiberend certainly did not review the internal emails before signing this Declaration because at both of the hearings on May 1, 2007 and May 18, 2007, following the filing of her declaration on April 4, 2007, Ameriquest was contending that in spite of the fact that it had originally produced the email documents to the ATG, it had not had a chance to review them. (CP 330-343) Ameriquest did not convince the trial court after much briefing and many hearings, and this court should affirm the decision below.

ARGUMENT

1. The Trial Court properly refused to grant a motion for preliminary injunction to Ameriquest and its order was not a final determination on the merits.

Ameriquest is correct in its statement of the requirements of compliance with CR 65(a)(2) – a preliminary injunction hearing is not a trial on the merits. However, its citation to the recently decided case of *Northwest Gas Ass’n v. Washington Utilities and Transportation Commission*, 141 Wn. App. 98, 168 P.3d 443 (2007) is not on point. This Court in *Northwest Gas* did not find that “consolidating the preliminary injunction hearing with a trial on the merits . . . was reversible error.”

Appellant's Brief, p. 2. Rather, it found that it was improper to do so without notice to the parties as required under CR 65. *Id.* at 124. This Court went to great lengths to analyze the particular facts and legal issues in the case (which involved a PRA request) in conjunction with the well settled standards established for issuance of a preliminary injunction, including whether federal preemptions applied. Specifically, this Court found that the trial court: issued a final ruling without notice to the parties; did not consider some evidence on important issues (specifically the Pipelines' declarations) which supported the issuance of a preliminary injunction; that it foreclosed the parties from presenting evidence on the merits at trial pertaining to the PRA and possible federal exemptions; that it did not balance the equities and interests of the parties and the public and that it ordered the disclosure which prevented trial on the merits. *Northwest Gas Ass'n v. WUTC, supra*, at 127. Further, this Court found that there was insufficient consideration of the federal preemption argument and the case was remanded to the trial court for further hearings on that issue. *Id.* at 126. Such is most clearly not the case here.

The trial court did not issue a final order in this case. In fact, following the trial court's two hearings on the merits, it included references to the current document production being the first "round" of disclosure, thereby confirming that the case was by no means completed.

The trial court kept the TRO in place pending further hearings regarding the correctness of the ATG's redactions and further identification with specificity of the alleged personal financial information contained in the emails and/or ATG investigative materials. (CP 320-343) In fact, at the May 18, 2007 hearing it specifically denied the motion for preliminary injunction because Ameriquest could not meet the standard, but even still kept the TRO in place until the redaction issue had been resolved. At that hearing on May 18, 2007, the trial court again noted that the ATG's proposed redactions were incomplete and there needed to be much more clarity with regard to identifying the emails and/or investigative documents that purportedly contained personal financial information. (CP 320-343) The manner in which this case was handled by the trial court is strikingly different from that undertaken in the *Northwest Gas* case.

Further separating this case from the *Northwest Gas* case is the fact that at both hearings in this case, as evidenced by the briefing, the trial court absolutely considered the federal preemption argument, but decided that it did not preclude production under the PRA once the redactions had been correctly completed. The trial court considered all of the evidence before it and did not exclude or refuse to consider any evidence at all. It is clear from a review of the transcripts of both hearings that the trial court seriously considered all evidence and all legal arguments. (CP 330-343)

And certainly the trial court specifically weighed the rights and interests of the parties against that of the public and the preference for public disclosure in this state before entering her orders. *Id.* While the trial court indicated it would permit the production of the documents to the Intervenor after the appropriate redactions had been completed, that did not prevent Ameriquest from proving their case at trial. The trial court properly considered the standards for imposition of a preliminary injunction and determined that Ameriquest had not met that standard.

Ameriquest also argued to this Court that it advised the trial court that it needed to conduct discovery in order to proceed to trial on the merits. Yet tellingly the only place in the record where Ameriquest identified this need was briefly at an oral argument. Appellant's Brief, p. 17; VRP (May 1, 2007) 16:1-6. All other references to the need for this additional discovery occurred only in appellate briefing. *Id.* More importantly for this Court to consider the genuineness of Ameriquest's position on this issue was its repeated insistence that the ATG needed to provide it with copies of its own internal emails for review. *Id.* and (CP 320-343) Ameriquest never explained to the trial court why the ATG needed to give it emails that it had produced originally to the ATG, why its multitude of lawyers could not find the time to review the emails given the several months involved in the briefing and hearings in this case (nor

why Ameriquest was able to have three lawyers at the hearing on May 1, 2007 – one of whom flew in from California to attend). Instead, it now wants to convince this Court that it was precluded from conducting discovery which might have supported its case, even as it refused to review and specifically identify those emails which is contended included personal and confidential financial information. *Id.* The fact is Ameriquest was playing games with the trial court and it is doing so with this Court. It never asked the trial court for time to conduct this purported discovery in its pleadings, and it had no interest in doing so, as demonstrated by its complete refusal to review even its own internal emails. Of course, Intervenor contends that it did not review the emails because it knew it could not identify any substantial amount (if any at all) of personal information in the emails and that those portions of Ms. Tiberend's Declaration would be proven untruthful. *Id.* and (CP 16-20). Ameriquest should be precluded from making any arguments about this purported need for discovery nor any purported disparate treatment of Ameriquest as opposed to other subjects of ATG investigation because neither issue was briefed below. RAP 2.5.

At important component of the finding in *Northwest Gas* is that this court held that the Pipelines had “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 sharefile data.” *Id.* at 120. Ameriquest has not met and cannot meet even that preliminary burden and is therefore not entitled to a preliminary injunction.

2. Ameriquest did not demonstrate that it met the standard for issuance of a preliminary injunction.

This case was brought by Ameriquest under RCW 42.17.330, which allows for enjoining of an examination of a specific public record by the superior court. In this situation, the plaintiff, as the party seeking to prevent disclosure of a public record, has the burden of proof. *Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 769 P.2d 283 (1989).

The Washington Supreme Court first addressed issuance of a preliminary injunction in *State ex rel. Miller v. Lichtenberg*, 4 Wn. 407, 411 (1892), and later clarified its position in *Blanchard v. Golden Age Brewing Co.*, 188 Wn. 396, 415 (1936). The *Blanchard* Court held that, “[T]he object and purpose [of a preliminary injunction] is to preserve and keep things in *statu quo* until otherwise ordered and to restrain an act which, if done, would be contrary to equity and good conscience.” The Court provided further clarification in *Isthmian Steamship Co. v. National Marine Engineers' Beneficial Assoc.*, 41 Wn.2d 106, 117 (1952), holding that the moving party must show a “clear legal or equitable right and a

well grounded fear of immediate invasion of that right." *See also, Tyler*

Pipe Industries, Inc. v. Dept. of Revenue, 96 Wn.2d 785 (1982);

Washington Federation of State Emp. v. State, 99 Wn.2d 878 (1983).

Thus, in order to obtain an injunction, a plaintiff must show that: (1) he has a clear legal or equitable right; (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.

Kucera v. State, Dept. of Transportation, 140 Wn.2d 200, 209, 995 P.2d

63 (2000). Such criteria is evaluated by balancing the relative interests of

the parties, and if appropriate, the interests of the public. *Id.* Ultimately,

the decision to grant a preliminary injunction is within the sound

discretion of the trial court, with such discretion to be exercised according

to the circumstances of each particular case. *Washington Fed'n of State*

Employees v. State, 99 Wn.2d 878, 887 (1983) (citations omitted).

In order to determine whether a party has a clear legal or equitable right, the Court must analyze the moving party's likelihood of prevailing

on the merits. *Id.*, citing *Tyler Pipe Indus. v. Dept. of Rev.*, *supra*.

Ameriquest cannot demonstrate that it is likely to prevail on the merits.

First, it lacks standing to assert it has any "rights" in this case to the

information it seeks to prevent from disclosure under the GLBA

(customers' personal and financial information). Ameriquest has not only

argued that it has a right to dispute the disclosure of all of the information it provided to the ATG, it is also contending that it may prohibit the disclosure of information obtained from third parties, including other consumers, or to dispute the production of the ATG's own internal documentation. Ameriquest may well have a well-grounded fear of immediate invasion of its perceived right to prohibit that disclosure (even though it does not exist at law) because the ATG would disclose the information to Ms. Huelsman absent a court order prohibiting it from doing so, and it might even be able to convince this Court that the disclosure of the information will cause it harm since it will certainly be embarrassing for all of Ameriquest's bad business and lending practices to see the light of day. However, Ameriquest cannot meet the most important prong of the analysis for issuance of a preliminary injunction. Ameriquest cannot and has not demonstrated to this Court that it has a "clear legal or equitable right" which will be impacted. *Washington Fed'n of State Employees*, 99 Wn.2d at 888. Ameriquest does not have a "right" to the ATG investigative information. The information does not belong to them and was never even in their possession. Ameriquest may have a "right" to make an argument about the internal emails since those were transmittals made by its employees, but for reasons more clearly articulated below, it has never provided any facts in support of its

contention that the emails contain personal or financial information of its employees and/or customers.

Ameriquest has also argued to this Court that it should consider the potential “hardships” in a particular case involving a preliminary injunction, citing to *League of Women Voters of Washington v. King County Records, Electronics & Licensing Services Div.*, 133 Wn.App. 374, 384-85, 135 P.3d 985 (2006) (quoting *Baby Tam & Co. v. City of Law Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998)). Appellant’s Brief, p. 20. The problem with this assertion by Ameriquest is that it has never identified the hardships it will suffer if the information is disclosed, except that it might be embarrassing. (CP 89-116; 227-243; 252-256) There certainly is nothing in any of the case law which considers disclosures under the PRA that prohibits a disclosure simply because it might be embarrassing. If Ameriquest were truly concerned about the disclosure of its customers’ financial information, then it would be satisfied by the redactions that were being undertaken by the ATG and supervised by the trial court. (CP 320-343) It is the possible dissemination of this personal information which is the only “harm” that Ameriquest has ever identified in its briefing, and yet it argues to this Court that somehow this “tips” the hardships in its favor. Appellant’s Brief, p. 20. Meanwhile, the Intervenor has articulated the need for the information (in order to

adequately represent her clients and to disclose potentially helpful information to other consumers in Washington) in her Declarations. (CP 82-88; 219-223; 155-157)

For all of the reasons described herein, it is clear that Ameriquest cannot prevail on the merits because there is no basis in the law for it to prevent the disclosure to Ms. Huelsman once all of the borrowers' personal and financial information has been redacted. As such, its motion for preliminary injunction was properly denied.

3. Ameriquest's insistence that it may prevent the disclosure of the requested information, if granted, will render the Public Records Act useless.

Washington's Public Records Act (RCW 42.56) presumes that a citizen may obtain the "broad disclosure of public records" through the use of a "strongly worded mandate". *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 745, 958 P.2d 260 (1998); *PAWS v. UW*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994). However, there are exceptions to the requirement which are designed to protect the "rights of individuals to privacy" and to maintain the "efficient administration of government." RCW 42.17.010(11). The PRA's provisions are to be liberally construed in favor of disclosure and its exemptions narrowly construed. RCW 42.56.030. To prevent disclosure, the burden is on the moving party to prove one of the PRA's exemptions. *Confederated Tribes*

of *Chehalis v. Johnson*, 135 Wn.2d at 744. The agency has the burden to establish the applicability of the relevant exceptions. RCW 42.17.340(3). Here, it is unclear if the ATG has applied any of the exceptions but certainly as to any documents it proposes to produce to Ms. Huelsman, it must be assumed that it has made such a determination and deemed the proposed documents as subject to disclosure. The Washington Legislature left no room for doubt in drafting and amending the PRA.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.17.251.

A. The Intervenor does not seek and the ATG does not propose to disclose customers' and employees' personal information.

The ATG has made it clear that its office will delete or redact all of the exempt information before disclosure to Ms. Huelsman. It is required to do so under the PRA and given that redaction is available, the ATG may not decline to produce a public record for this reason. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, at 133. Ms. Huelsman's request and discussion with ATG personnel prior to Ameriquest's involvement presumed that such information would be redacted. Further, the privacy

interests asserted by Ameriquest are not the type of privacy interests that are intended to be protected by this statute. The term “right to privacy” as used in the Public Records Act is defined to mean information about a person that is “highly offensive to a reasonable person” and “is not of legitimate concern to the public.” RCW 42.17.255. This has been further discussed by the Washington Supreme Court in the case of *Hearst Corp. v. Hoppe, supra*, which adopted the Restatement (Second) of Torts standard as controlling:

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man’s life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Hearst, supra, at 135-26. When RCW 42.17.255 was amended in 1987, the legislature provided in the intent section that “privacy” as used in that statute “is intended to have the same meaning as the definition given that word by the Supreme Court in “*Hearst v. Hoppe*, 90 Wn.2d 123, 135 (1978)” Laws of 1987, Chapter 403, Section 1. In *Cowles Publishing, supra*, the Court discussed whether criminal allegations should not be

disclosed to protect a defendant's privacy. The court stated that "Rarely would criminal allegations so devastate the reputation of the suspect that nondisclosure would be necessary to protect against the effect of false accusation." *Cowles, supra*, at 479. It is questionable whether Ameriquest's concerns even rise to the level of criminal allegations, but clearly their concerns are not covered by the protection of privacy interests found in the Public Records Act. Although Ameriquest may find it inconvenient or embarrassing to have the report disclosed, these reasons do not override the policy of the act that "free and open examination of public records is in the public interest." RCW 42.17.340(3).

Ameriquest has contended without any factual or legal support that the Intervenor is seeking to use this information for commercial purposes or that she might disclose the redacted and unseen personal financial information to third parties. (CP 117-124) However, since the information will be redacted by the ATG before production and as required by the trial court's orders and further instructions, this is a disingenuous assertion by Ameriquest. *See*, WAC 44-14-04004(4)(b)(i). In fact, as noted in *PAWS v. UW*, 125 Wn.2d at 259, the Legislature specifically amended the PRA in 1987 (RCW 42.17.260) specifically requiring the redacting of personal information "To the extent required to

prevent an unreasonable invasion of personal privacy interests under RCW 42.17.310 and 42.17.315 . . .” *Id.* at 259, citing to RCW 42.17.260.

Further, in general, the PRA does not permit agencies to withhold documents that can be redacted and instead it must parse records to only withhold those portions of records that come under a specific exception.

RCW 42.17.310(2); *see also*, *Progressive Animal Welfare Society v. Univ. of Washington*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994).

B. The Gramm-Leach-Bliley Act does not preempt the PRA in this case nor the production of the requested documents.

Ameriquest also argues to this Court that the GLBA, 15 U.S.C. §1001, *et seq.*, prohibits the disclosure of all of the documents which have been proposed for production by the ATG (in spite of its complete and utter refusal to identify with any particularity those emails and/or investigative materials which contain personal financial information) and as such, RCW 42.56.070(1) prohibits the disclosure under “other state which exempts or prohibits disclosure of specific information or records”. (CP 89-116) However, the GLBA specifically excepts from its prohibitions disclosures that are necessary to comply with “Federal, State, or local laws, rules, and other applicable legal requirements.” 15 U.S.C. § 6802(e)(8). Even if the GLBA were an “other” statute which would prohibit the disclosure to Ms. Huelsman, the prohibition on disclosure

would be overcome because the ATG will be redacting all personal and financial information and this is the sort of information that the GLBA is designed to protect.

Intervenor agrees with the trial court's findings that to the extent that non-public personal information is contained within the documents requested, the documents could be redacted. However, another exception to the protection provided to non-public personal information applies here. 15 U.S.C. § 6802(e)(3)(B) provides an exception "to protect against or prevent actual or potential fraud, unauthorized transactions, claims or liability." In *Marks v. Global Mortgage Group, Inc.*, the District Court for the Southern District of West Virginia found that the privacy provisions of the GLBA did not preclude a financial institution from disclosing non-public personal financial information of its customers to comply with discovery requests by non-affiliated third party in action accusing institution of predatory lending practices, where protective order prevented third party from disclosing information. *Marks v. Global Mortgage Group, Inc.*, 218 F.R.D. 492 (S.D. W.Va. 2003). The situation here is analogous. The Intervenor is making the request for information on behalf of several of her clients from the ATG's office rather than making an individual request in each case, but the effect is the same. (It should also be noted that Ameriquest is objecting to providing the information in the individual cases as well so its assertions that

Intervenor need only make the request in discovery is disingenuine.)

As recent as January 2007, the Third Circuit decided in *Chao v. Community Trust Co.*, 474 F.3d 75 at *10 n.6 (3d Cir. January 19, 2007) that where personal information has been redacted, the GLBA is not implicated because there is no release of “personal financial information”. *Id.* The GLBA was not designed to protect corporations from the discerning eye of the public following investigation by state regulatory agencies. More importantly, the disclosures are required to be made under applicable Washington state law, the PRA, and are therefore specifically exempted from the GLBA. Ameriquest argues that the GLBA preempts the PRA because it provides “lesser consumer protections”. However, it provides nothing in support of that argument to contravene the assertion made by the ATG in its briefing below that all personal and financial information will be redacted nor does it explain sufficiently why such redaction does not correspond with the requirements of the GLBA. In fact, the redaction of the information so that it is not available to Ms. Huelsman or anyone else and is exactly what is intended by the GLBA.

Ameriquest even asserted in its Emergency Motion for Stay (CP 293-319), that it cannot disclose a customer’s loan amount or it will be in violation of the GLBA because it is “non-public, personal information”, even though the amount of any loan made by Ameriquest is **always**

disclosed in the public records of the county wherein Ameriquest records its Deed of Trust after making a mortgage loan. Similarly, Ameriquest contends that the addresses of its customers is “non-public” information, even though anyone who owns real property has to provide evidence of that ownership to the county in which they reside for real estate tax purposes and again, because a Deed of Trust signed by the borrower in favor of Ameriquest is recorded in the county where the real property lies.

In *PAWS v. UW*, 125 Wn.2d at 261, citing to RCW 42.56.070(1), the Washington Supreme Court affirmed that the disclosure may be prohibited if there is another statute which prohibits it, but the GLBA does not do so. Ameriquest spends many pages in its Brief providing a history of the GLBA and how it has operated to preclude disclosure of consumers’ personal financial information, and certainly that was Congress’ intent in passing the legislation. Ameriquest also argues that the GLBA does not permit redaction, yet that begs the question of why it would need to provide permission for redaction – by definition redaction removes the information from being available to the third party. There was no need for Congress to “permit” redaction because by its very nature, it does exactly what the GLBA intended – prohibits the disclosure of personal financial information to a third party. More importantly, Ameriquest cannot cite to any case law which supports its position. It does cite to the *Individual*

Reference Services Group, Inc. v. FTC, 145 F.Supp.2d 6, 26 (D.C. Cir. 2001) and *TransUnion, LLC v. FTC*, 295 F.3d 42, 49-50 (D.C. Cir. 2002) cases, but those cases merely provide a definition of the information covered by the GLBA. Neither stands for the propositions asserted by Ameriquest in this case. Interestingly, Ameriquest does cite to the *Marks* case and to *Ex parte National Western Life Ins. Co.*, 899 So.2d 218, 222 (2004) and *Martino v. Barnett*, 215 W. Va. 123, 130, 595 S.E.2d 65 (2004) in support of its position, even though those cases held that disclosure was permitted so long as there were protections in place. Ameriquest fails utterly to articulate why those courts' use of a protective order is any different than redaction of the information, as was required here by the trial court. Ameriquest goes so far as to describe the trial court's order as permitting "wholesale disclosure of this information under the PRA", which is in direct contravention of the very specific requirements of its Order. Appellant's Brief, p. 31. CP 320-343)

Finally, Ameriquest's attempt to insulate itself from embarrassment for its business and lending practices are dressed up in the sheep's clothing of concern for its customers. If Ameriquest, the wolf, was concerned about its customers, it would not have systematically defrauded them and been investigated by 49 states and the District of Columbia. Ameriquest should not be permitted to use a statute designed

to protect consumers to harm them. Ameriquest's customers, including Ms. Huelsman's clients, have the right to know under the PRA just exactly what sort of false, misleading and deceptive practices it was utilizing in conducting its business.

C. The ATG properly determines whether its investigative files are exempt from disclosure, not the subject of the investigation.

Materials collected by the ATG in its administrative investigation of Ameriquest are not automatically exempted from disclosure under RCW 42.56.240(1). However, in contending that the ATG should be precluded refusing to exempt them from disclosure, Ameriquest ignores the very clear language of the statute which provides for the withholding of only those documents that are "essential to effective law enforcement or for the protection of any person's right to privacy." RCW 42.56.240(1). Thus, it is proper for the ATG, the investigative agency in question, to properly determine whether any of its investigative records must be kept from public disclosure because they are "essential to effective law enforcement". There is no provision in the statute for the subject of the investigation to make this determination nor could it do so, since that is purely the province of the investigating agency. But that is exactly what Ameriquest seeks to do by way of its motion. As noted by the Washington Supreme Court, "The agency's decision to voluntarily turn

over these records, made as it was by the law enforcement agency which itself prepared the records, convinces us in this case that the nondisclosure of the records is not essential to effective law enforcement.” *Police Guild v. Liquor Control Board, supra*, 112 Wn.2d 30, 37.

Ameriquest has argued that disclosure of this sort of information to the public would have a chilling effect on the cooperation of lenders in future investigations. Ameriquest does not rely upon the case of *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, but it is nevertheless illustrative. There, the Court commented that nondisclosure was an important factor in encouraging officers to participate in internal investigations. However, that factor is irrelevant in this case, as the ATG does not need to rely on the voluntary cooperation of consumer loan companies like Ameriquest in order to effectively perform its regulatory function. Further, in *Cowles*, the Court permitted the disclosure of the investigative information once a redaction had occurred. *Id.* The same thing should happen here.

Ameriquest cited previously to two cases involving a child abuse case and requests for information about an expert witness often used by criminal defense attorneys. *Dawson v. Daly*, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993); *City of Tacoma v. Tacoma News, Inc.*, 65 Wn.App. 140, at 144. In *Dawson*, the Court declined to even consider whether the

investigative exemption applied since the documents identified as subject to the request did not include investigative documents. However, the Court did emphasize the need to presuppose disclosure and required the disclosure of most of the documents identified in the request. In *City of Tacoma*, the newspaper was seeking to review the personnel file of a city employee and was denied access to that information. The Court of Appeals upheld the agency's refusal to disclose the information based upon the totality of the facts present in that case. The decision was not a wholesale prohibition on the dissemination of investigative information. In its briefing below, Ameriquest cited to *Newman v. King County*, 133 Wn.2d 565, 572-73, 947 P.2d 712 (1997), which is also inapplicable here as it involved the Court of Appeals' refusal to require the county to turn over investigative records regarding an open and unsolved homicide of a civil rights leader dating back to 1969. The factor that was of overriding concern by the Court in *Newman* was the fact that the case was still open and that the prosecutor was invoking the exemption in order to prevent harm to the investigative process. That is most certainly not the case here. Rather, Ameriquest and the ATG have entered into a Consent Judgment which was filed in the King County Superior Court. That Judgment has numerous conditions by which Ameriquest must abide and allows the ATG to take action if they do not comply with the requirements.

However, such enforcement will be the subject of a separate action and the current investigation of Ameriquest, which is the subject of Ms.

Huelsman's request, is closed. (CP 163-181)

Ameriquest repeatedly makes the disingenuous argument that the ATG is precluded from disclosing the requested information in the name of protecting a person's right to privacy (i.e., its customers). However, when the Court is considering the prohibition on disclosure of investigative records contained in RCW 42.56.240(1), it is not considering the personal loan files of individuals. Rather, it is considering whether the ATG may disclose its investigative files regarding several corporations, collectively referred to herein as Ameriquest. There is no evidence before this Court that the ATG's investigative files contain any personal information about Ameriquest's customers. Instead, the files, by their very nature, will likely have information about Ameriquest which is certainly subject to disclosure. Therefore, Ameriquest's assertions that privacy concerns should apply to prevent disclosure because they relate to their customers are disingenuous.

In a case upon which Ameriquest no longer relies in its briefing to this Court, *Tiberino v. City of Spokane*, 103 Wn.App. 680, 689, 13 P.3d 1104 (2000), the court considered two media sources' requests to get emails written by a city employee who was fired. The *Tiberino* Court

declined to allow the disclosure but only because the emails' content contained nothing of public significance. *Id.* In fact, the Court in *Tiberino* noted that "Even if disclosure of the information would be offensive to the employee, it shall be disclosed if there is a legitimate or reasonable public interest in its disclosure." *Id.* at 689, citing to *Dawson, supra*, 120 Wn.2d at 797-98. Based upon this analysis, the case is helpful here. This Court must decide a very serious legitimate and reasonable public interest at issue – citizens of the state of Washington are trying to ascertain just exactly how much harm was done to them by Ameriquest and to verify how the harm occurred, and the ATG has records which will substantiate their claims. That is certainly permissible and even desirable as a basis for making a PRA request, as identified and defined by the Legislature. If the Legislature had desired to provide blanket protection to those who are subject to investigations by the ATG and other agencies, then it would have included that language in its very carefully crafted exemptions. It has not done so.

D. The ATG also determines whether to exempt records from its "deliberative process"; however, the "deliberative process" exception expires once the matter is closed.

The ATG is the proper arbitrator of whether to try to exempt from production its records regarding the deliberative process. It has not chosen to make such an exception from its production. Further, the "deliberative

process” exception does not apply once the matter is closed. Here, Ameriquest and the ATG have entered into a Consent Judgment. The matter is closed so there can be no exception under the “deliberative process” exemption. RCW 42.56.280. Ameriquest cites to cases where the Supreme Court or the Court of Appeals interprets the definition of what constitutes “deliberative process” documents but none of the cases cited support its position that documents that are part of a closed investigation by the ATG can be excepted from disclosure as part of the “deliberative process”. In fact, the case law supports the opposite of Ameriquest’s assertions.

In *PAWS v. UW*, 125 Wn.2d 243, 884 P.2d 592 (1994), the Court elaborated on what is covered by the exemption:

The purpose of this exemption “severely limits its scope”... Its purpose is to “protect the give and take of *deliberations necessary to formulation of agency policy*”.*We have specifically rejected the contention that this exemption applies to all documents in which opinions are expressed regardless of whether the opinions pertain to the formulation of policy....* Moreover, unless disclosure would reveal and expose the deliberative process, as distinct from the facts upon which a decision is based, the exemption does not apply.

PAWS v. UW, 125 Wn.2d at 256 (italics added). The Court then listed four criteria that must be satisfied for a document to be covered by this exemption.

In order to rely on this exemption, *an agency must show* that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the *exemption reflect policy recommendations and opinions* and not the raw factual data on which a decision is based.

PAWS v. UW, 125 Wn.2d at 256 (italics added). Here, the ATG has apparently determined that there would not be an inhibition of the flow of recommendations, observations, etc. such that it needed to assert this exception. Therefore, it cannot now be asserted by Ameriquest.

The common denominator in the *PAWS* discussion of this exemption is that documents must express opinions about or formulate policy in order to be covered by the exemption. The information compiled and prepared by the ATG does not pertain to the formulation of policy or expose a deliberative process. Presumably, the information contains complaints made by citizens, evaluates Ameriquest's response to those complaints, and documentation provided by Ameriquest in response. The information is not about formulating policy – it is about applying the policies expressed by the Legislature in the Consumer Loan Act. The information held by the ATG is similar to other documents that Washington courts have held are not covered by the deliberative process

exemption. See, *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, (records specifying reasons for teacher certificate revocations were not covered because the exemption does not protect factual data, only actual opinion.); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123 (the exemption did not cover files containing field appraisers' work notes and information relevant to determining market value for appraisal and assessment of property); *Cowles Publishing Co. v. City of Spokane*, 69 Wn. App. 678 (opinions in routine police reports are not exempt under the deliberative process exemption, reports pertained to policy implementation, not to policy-making.) Further, although Ameriquest has referenced a number of federal FOIA cases discussing the deliberative exemption, it is not necessary to review these cases because the Washington case law makes clear that the exemption does not apply to factual investigative reports.

4. Ameriquest did not argue to the trial court that it was entitled to “judicial review” of the ATG’s decision to disclose confidential documents and therefore, this court should not consider its arguments on this issue.

As evidenced by the substantial briefing submitted by Ameriquest to the trial court, all of which was included in the Clerk’s Papers, it did not brief its argument that it was entitled to a “judicial review” of the ATG’s decision to disclose the documents. There was a brief mention during oral argument on May 1, 2007, but that is insufficient for it to now ask this

court to consider a decision on this issue. VRP (May 1, 2007) 15:10-25-16:1-6 and 16:11-20. RAP 2.5.

In its Motion for Preliminary Injunction, Ameriquest did not argue that the ATG was acting “arbitrarily and capriciously” in waiving any privilege, rather, it contended that it had standing to assert the ATG’s attorney client and/or work product privileges. (CP 89-116) It was the ATG who opposed the motion and pointed out that only it has the right to make that determination on behalf of itself and its client, the State of Washington, except if it does so in an “arbitrary and capricious” manner. (CP 182-190) In its Reply, Ameriquest then made a short reference to the standard articulated by ATG and contended that the burden is shifted to the ATG to prove that its waiver of the privilege is *not* arbitrary and capricious. The trial court rejected Ameriquest’s argument by not only refusing to grant the preliminary injunction, but by ruling specifically that Ameriquest did not have standing to assert the attorney-client privilege on behalf of the Attorney General’s Office. Clearly, the trial court and all of the opposing parties understood that Ameriquest was seeking to enforce the privilege on behalf of the ATG and was not arguing that it had operated in an arbitrary and capricious manner until the appellate level briefing.

In its Motion for Emergency Stay and again to this Court, Ameriquest contends that the trial court had a misconception of the legal arguments it made regarding the need for preclusion of the ATG's internal and work product documents in its briefing. However, the briefing speaks for itself. (CP 293-319) Ameriquest contended in its emergency motion that it "asked the trial court for time to conduct discovery on this issue before disclosure of the attorney work product notes was allowed." Yet, it did not provide a transcript of a hearing where this request was made because it did not do so until after the trial court had issued its ruling on the motion, and it only did so in oral argument. VRP 15:10-16:20. There is no one instance in any of the briefing filed with the trial court where Ameriquest asked the court for time to conduct discovery on the issue of the purported "arbitrary and capricious" decision-making by the ATG. This is an entirely new request being presented to this Court after only a brief mention at oral argument once it realized it had lost its motion. *Id.* Ameriquest wrote lengthy and substantive briefing for the trial court, and there is absolutely no request for time to conduct discovery on the issue of the supposed arbitrary and capricious standard that was purportedly being applied by the ATG because of some "personal feelings against the company that are impacting the decisions that they [ATG] made." VRP 15:10-25. Ameriquest conveniently ignores the fact that Household

Finance was treated in exactly the same fashion by the ATG (it agreed to produce the records regarding its investigation once a request was made), nor did it identify with any specificity the basis for this assertion of impropriety on the part of the staff of the ATG except, apparently, counsel for Ameriquest's own personal feelings. *Id.* (CP 149-154) It is inappropriate for this Court to even consider Ameriquest's arguments on these points since they were not properly raised below and they should be disregarded. RAP 2.5.

CONCLUSION

For these reasons, the relief sought by Ameriquest from this Court should be denied. The trial court's denial of a preliminary injunction should be upheld, the stay imposed by this Court should be lifted and the matter should be remanded back to the trial court for further proceedings consistent with the trial court's previous rulings and the findings of this Court.

Respectfully submitted this 22nd of January 2008.

LAW OFFICES OF MELISSA A.
HUELSMAN, P.S.

 per telephone authorization

Melissa A. Huelsman, WSBA # 30935
Intervenor, on behalf of her clients

CERTIFICATE OF SERVICE

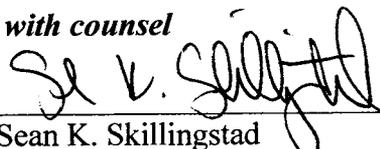
The undersigned hereby certifies that on January 23, 2008, a copy of the within Intervenor's Brief was served on all parties as follows:

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