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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON,

Petitioner,

v.

AMERIQUEST MORTGAGE COMPANY,

Respondent

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2010 APR 20 P 3:10  
BY RONALD R. CARPENTER  
b/jh

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES

UNION OF WASHINGTON

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## I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation and defense of constitutional civil liberties and civil rights. It supports the right of any member of the public to promote government transparency and accountability through public records requests, and believes that those who exercise their right to access should not be limited by prohibitive costs. The ACLU is also a leading proponent of informational privacy. Where both these interests are implicated, the ACLU believes that privacy interests and the value of disclosure should be balanced to achieve the greatest public disclosure and the least privacy invasion. The ACLU believes that both interests can be accommodated through minimization techniques such as redaction.

*Amicus* has reviewed the documents and pleadings in this case and is familiar with the issues and arguments of the parties.

## II. INTRODUCTION

This tussle between the Attorney General’s Office and Ameriquest should not result in the disclosure of Ameriquest’s customers’ personal financial information. *Amicus* respectfully asks this Court to hold that redaction of all information that could be used to personally identify the customer is required before a state may disclose customer records under

the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809. Anything less would require notice to the customers and opportunity for them to represent their interests before disclosure is allowed. As the Court of Appeals noted, the Ameriquest loan customers are not even aware of this “tug of war” over their confidential information.

### **III. ISSUES PRESENTED**

1. To what extent does the Gramm-Leach-Bliley Act (“GLBA”) limit the Attorney General’s Office from disclosing information it obtained from Ameriquest in an investigation when responding to a Public Records Act (“PRA”) request for Ameriquest customer records?

2. If the Attorney General’s Office is allowed to disclose customer records that contain personally identifying information and customers are unaware of such disclosure, must customers first be notified and given an opportunity to represent their interests before disclosure is made?

### **IV. STATEMENT OF THE CASE**

The facts of this case have been fully set forth by the parties and the Court of Appeals’ decision below. *Amicus* provides only a brief summary of the key facts.

Ameriquest released confidential customer loan files to the Washington Attorney General’s Office (“AGO”) as part of the AGO’s investigation into Ameriquest’s mortgage lending practices. *See*

*Ameritrust Mortgage Co. v. The Attorney General of Washington*, 148 Wn .App. 145, 151-52, 199 P.3d 468 (2009). The parties do not dispute that the disclosure was made under an exception to the GLBA’s notice and opt-out procedures. The customer loan files include a variety of sensitive information such as credit scores, monthly income, employer’s name, names and ages of children, identification of assets and all the terms and conditions of the customer’s loan transaction. *Id.* at 151. After the AGO’s investigation was completed and the suit was settled a private citizen, made a Public Records Act request to the AGO for “all records relating to [the] investigation of Ameritrust.” *Id.* at 152. The AGO proposes to release the records with redactions, but will leave the customer’s name, address, and other personally identifying information. *See* Petitioner’s Supp. Brief at 4, fn. 2. Ameritrust filed a complaint for injunctive relief, and the trial court denied Ameritrust’s motion for preliminary injunction. Ameritrust appealed. *Ameritrust*, 148 Wn. App. at 153-54.

The Court of Appeals below held that the GLBA preempts the state PRA where nonpublic information is concerned and on remand directed the trial court to order redaction of nonpublic personal information from the records before they are disclosed. *Ameritrust*, 148 Wn. App. at 168. The Court of Appeals also required the trial court to make reasonable provision for notice to the Ameritrust loan customers

whose records are at issue and provision for those customers to be heard if they wish. *Id.* at 157.

## V. ARGUMENTS OF AMICUS CURIAE

### A. This Court Need Not Decide Whether the GLBA Preempts the PRA Because the Parties Ultimately Agree that the GLBA Controls

The parties continue to vigorously dispute whether the GLBA preempts the state PRA law. This Court need not decide the question, however, because both parties ultimately agree that the GLBA controls in one way or another.

Ameritrust argues that the federal GLBA law preempts the state PRA law. Respondent's Supp. Brief at 12-14. If so, the information may not be disclosed if such disclosure would violate the privacy protections afforded by the GLBA. 15 U.S.C. § 6807(a)-(b) (GLBA preempts inconsistent state law to the extent that state law provides less privacy protection than the GLBA). The AGO has taken multiple positions, but ultimately argues that the GLBA is an "other statute" incorporated into the PRA. Petitioner's Supp. Brief at 14. If so, the information may be disclosed but only if such disclosure complies with the GLBA. *See* RCW 42.56.070 ("Each agency ... shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions ... this chapter, or *other statute* which exempts or prohibits disclosure of specific information or records.") (emphasis added); *see also*

WAC 44-14-060 (“documents are exempt from disclosure if any ‘other statute’ exempts or prohibits disclosure”).

Since the GLBA controls under either argument, *amicus* submits that the dispositive issue here is to what extent the GLBA limits the AGO from redisclosing information it obtained from a financial institution as a “nonaffiliated third party” under the GLBA.

**B. The GLBA Protects Non-Public Personal Information of Customers of Financial Institutions**

The purpose of the Federal Financial Modernization Act, commonly known as the Gramm-Leach-Bliley Act, is to enhance competition in the financial services industry. *French v. American General Financial Services (In re French)*, 401 B.R. 295, 310 (Bankr. E.D. Tenn. 2009), *citing* H.R. Conf. Rep. No. 106-434, at 245 (1999). To ensure that enhanced competition in the financial services industry would not trump customers’ privacy, Congress declared that “[i]t is the policy of Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ non-public information.” 15 U.S.C. § 6801.<sup>1</sup>

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<sup>1</sup> During the adoption of the GLBA, consumer advocacy groups including *amicus* argued for stronger privacy protections to ensure that increased competition would not violate personal privacy rights of consumers. Congress settled on an “opt-out” procedure that requires a financial institution to provide the customer with notice of the institution’s

**1. The GLBA Broadly Defines Non-Public Personal Information**

“Non-public personal information” is defined as “personally identifiable financial information (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution.” 15 U.S.C. § 6809. The FTC’s regulations implementing the GLBA state that “personally identifiable financial information” includes the fact that an individual is a customer of a financial institution or has obtained a financial product from a financial institution, 16 C.F.R. § 313.3(o)(2)(i)(C), and also includes any information about a customer if the information is disclosed in a manner that indicates that the individual is or has been a customer of a financial institution, 16 C.F.R. § 313.3(o)(2)(i)(D).

Publicly available information is not protected by the GLBA. 15 U.S.C. § 6809. However, a list, description or grouping of consumers (and publicly available information pertaining to them) derived using any personally identifiable financial information that is not publicly available would be protected from disclosure under the GLBA. 16 C.F.R. § 313.3(n)(3)(i). Since the records requested here specifically relate to

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disclosure policies and the opportunity for the consumer to “opt out” of disclosure of the customer’s information. *See* 15 U.S.C. § 6802 (a)-(b).

customers of a financial institution, GLBA protects those records to the extent they identify the consumers.

**2. The GLBA Protects Non-Public Personal Information of Customers Maintained by a Financial Institution**

Specifically, the GLBA provides that “a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any non-public personal information,” unless such financial institution has provided to the consumer notice of possible sharing and an opportunity to opt out of that disclosure. 15 U.S.C. § 6802 (a). To “opt out” means “a direction by the consumer that [the financial institution] not disclose non-public personal information about that consumer to a nonaffiliated third party ....” 16 C.F.R. § 313.10(a)(2).

The notice and opt out requirement does not apply to enumerated exceptions including, “to comply with a properly authorized civil, criminal, or regulatory investigation.” 15 U.S.C. § 6802 (e)(8). In other words, even if a customer “opts-out” of any notified disclosure or has not been notified of a potential disclosure, the financial institution may still disclose the information “to comply with a properly authorized civil ... investigation.” *Id.* It is pursuant to this exception that the records were provided to the AGO—with no notice to the consumers, or opportunity for them to opt out.

**3. The GLBA's Protections Extend to Any "Nonaffiliated Third Party" That Obtains Non-Public Information from a Financial Institution**

In the event that a financial institution discloses non-public information to a nonaffiliated third party—either pursuant to the notice and opt-out procedure or pursuant to an enumerated exception that does not require such procedure—the GLBA restricts the third party's redisclosure.

The GLBA states that "[e]xcept as otherwise provided in this subchapter, a nonaffiliated third party that receives from a financial institution non-public personal information under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, *unless such disclosure would be lawful if made directly to such other person by the financial institution.*" 15 U.S.C. § 6802 (c) (emphasis added).

In other words, the nonaffiliated third party has no greater rights to disclose the information than the financial institution it obtained the information from. *See, e.g.*, 16 C.F.R. § 313.5 (nonaffiliated third party may disclose information to affiliates of financial institution, to its own affiliates who are limited in their use to the same extent as the third party

or “in the ordinary course of business to carry out the activity *covered by the exception for which it was received*”) (emphasis added).

This is understandable given Congress’s policy to impose on financial institutions an affirmative and continuing obligation to protect the confidentiality of their customer’s non-public information. *See* 15 U.S.C. § 6801; *see also* 15 U.S.C. § 6805 (enforcement of GLBA privacy provisions against financial institutions and other persons subject to jurisdiction of the Federal Trade Commission). Any interpretation of the GLBA that gives a nonaffiliated third party a greater ability to disclose customer information than the financial institution would create a gap in the GLBA’s privacy protection and enforcement scheme.

**C. The GLBA Limits the AGO’s Ability to Rediscover Customer Information it Received from Ameriquest in the Course of its Investigation, and the AGO’s Ability to Rediscover can be No Greater than Ameriquest’s**

This case presents an unusual situation because the “nonaffiliated third party” is a state agency. Unlike a nonaffiliated collections agency or a marketing company, the AGO is subject to public disclosure laws. Furthermore, the AGO obtained the financial institution’s customer records as part of an investigation of the financial institution. This disclosure was made outside the notice and opt-out requirements, pursuant to an exception enumerated in the GLBA. *See* 15 U.S.C. § 6802 (e)(8).

But the GLBA broadly defines a nonaffiliated third party. 15 U.S.C. § 6809(5) (“any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution.”); *see also* 16 C.F.R. § 313.3(m). The AGO unsuccessfully argued before the Court of Appeals that it was not a nonaffiliated third party. *See Ameriquest*, 148 Wn. App. at 160-61. On appeal to this Court, the AGO accepts the Court of Appeals’ holding but argues for a nuanced reading on the restrictions on it as a nonaffiliated third party to accommodate the AGO’s public nature. *Amicus* urges this Court not to dilute the GLBA protections simply because the present non-affiliated third party is a state agency.

**1. The Court of Appeals Properly Rejected the Attorney General Office’s Arguments that the GLBA Does Not Apply to it**

The AGO has made a number of arguments through the litigation as to why GLBA does not apply, but the Court of Appeals properly rejected those arguments. First, the AGO claimed that GLBA applies only to financial institutions, citing *Pennsylvania State University v. State Employees’ Retirement Board*, 935 A.2d 530 (Pa. 2007) (“*Penn State*”). There, a newspaper requested salary info about university officers under Pennsylvania’s public records law, and the state claimed that the GLBA barred disclosure. The court held the GLBA inapplicable because the

state-operated retirement fund is not a “financial institution” under GLBA. The Court of Appeals correctly stated that the information on state employees maintained by a state-operated retirement fund “cannot realistically be compared to the private loan information Ameriquest collected from its customers.” *Ameriquest*, 148 Wn.App. at 162 fn 8. Unlike the situation in *Penn State*, where the records at question were *never* covered by the GLBA, there is no reasonable argument here that the records requested did not originally come from a financial institution—Ameriquest—and therefore fall under the GLBA’s ambit.

The AGO also claimed that it could disclose the records to the private citizen who requested the records because she was an affiliate of the AGO—again citing *Penn State*, which said that “our government and the general public could hardly be more closely affiliated.” *Penn State*, 935 A.2d at 537. This belies the actual definitions in the GLBA. An affiliate is not any entity with similar interests, but instead is limited to one “that controls, is controlled by, or is under common control with another company.” 15 U.S.C. § 6809(6). Again, the Court of Appeals was correct in rejecting this argument.

**2. The AGO's Ability to Redisclose Information can be No Greater than Ameriquest's Ability to Disclose Those Customer Loan Files**

The AGO raises yet another new argument before this Court, that redisclosure is allowed here “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 you received the information.” *See* Petition for Review at 9; 16 C.F.R. § 313.11(a)(1)(iii). This argument too should be denied.

The only exception under 16 C.F.R. § 313.14 or § 313.15 that applies here is “[t]o comply with a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by Federal, State or local authorities.” *See* 16 C.F.R. § 313.15(7)(ii).<sup>2</sup> The AGO’s primary claim that the redisclosure of the customer information via the PRA is “in the ordinary course of business” ignores the statutory language limiting redisclosure to “carry[ing] out the activity covered by the exception under which [the non-affiliated third party] received the information,” which in this case was to investigate consumer protection claims. 16 C.F.R. § 313.11(a)(1)(iii).

The AGO’s other argument that public disclosure is a “routine part of carrying out the investigation” recognizes the limiting statutory

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<sup>2</sup> The AGO certainly does not claim that it needs to process or service financial transactions. *See* 16 C.F.R. § 313.14.

language, but is not supported by facts or law. First, the investigation is over, and a settlement has already been reached. *Ameriquest*, 148 Wn. App. at 150. How does disclosure now further the investigation? Second, the PRA itself has an exemption for investigative records, indicating that disclosure is *not* a routine part of carrying out investigations. RCW 42.56.240(1).

The AGO's interpretation would effectively give the third party (the AGO) a greater ability to disclose the customer information than the financial institution (*Ameriquest*). *See, supra*, Part III.B.2. Here, *Ameriquest* disclosed the customer records to the AGO as part of the AGO's consumer protection investigation into *Ameriquest's* lending practices. *Ameriquest* was exempted from the notice and opt-out requirements. It would not be lawful for *Ameriquest* to disclose the customer records to the private citizen records requestor here, so neither is it lawful for the AGO to do so.

### **3. Redaction of All Personally Identifying Information Would Satisfy the GLBA**

The AGO argues correctly in theory that it can redact certain information so that the disclosure of customer files does not invoke the GLBA's privacy protection. Contrary to *Ameriquest's* position, disclosure of redacted documents would comply with the GLBA as long as the redaction fully de-identifies the records. Blind data that does not contain

personal identifiers like account numbers, names, or addresses are not protected under the GLBA. *See* 16 C.F.R. § 313.3(o)(2).

In practice, however, the AGO's proposed redactions fall short. The AGO claims it will redact "bank account numbers, Social Security numbers, account balances, dates of birth, bank statements, salary or wage information, driver license numbers, credit scores, and credit reports," but admits that it will not redact names or addresses. *See* Petitioner's Supp. Brief at 4. Ameriquest asserts that unredacted information will include, in addition to names and addresses: phone numbers, creditor information, sources of income, employment information (both past and present), names and ages of children, identification of other assets, terms and conditions of loans, maiden names, information about marriages, payment histories, appraisals, and delinquency histories. Respondent's Supp. Brief at 6-7. Whether or not Ameriquest's assertion is correct, the information that is admittedly unredacted by the AGO falls easily within the GLBA's broad definition of personally identifiable financial information.

At a minimum, the GLBA prohibits disclosure of personal identifiers, such as names and addresses. 15 U.S.C. § 6809(4)(A); 16 C.F.R. § 313.3(o)(2)(ii). Furthermore, any information about a consumer that is disclosed in a manner that indicates that individual is or has been a consumer of a financial institution is deemed personally identifiable

financial information. 16 C.F.R. § 313.3(o)(2). Here, disclosure of customer files in response to a PRA request for Ameriquest customer files would indicate that the customers were customers of Ameriquest. Thus, at a minimum, the names and addresses and all other information that personally identifies the customers must be redacted to allow disclosure of the customer loan files under the GLBA.

On remand, this Court should give guidance on redaction.

Redaction may be sufficient to allow disclosure of information, but only if the redaction completely removes all information from the files that could be used to identify the customers.

**D. In the Event Notice to Customers is Required, the Requester Should Not be Forced to Bear the Costs**

*Amicus* is cognizant of this Court's scope of review. The parties have briefed an additional issue decided by the Court of Appeals, regarding notice to customers. In the event this Court considers this issue, *amicus* offers the following briefing.

The Court of Appeals required the trial court on remand to "make reasonable provision for at least attempted notice to all of the Ameriquest loan customers, whose information is being sought for public disclosure." *Ameriquest*, 148 Wn. App. at 157. The Court of Appeals also required "reasonable provisions for those loan customers wishing to intervene or otherwise be heard." *Id.*

*Amicus* submits that if the customer records are fully de-identified before being disclosed, there is no need for notice at all. The records will not be associated with any individuals and their disclosure is not protected under the GLBA. Nor is any individual's privacy implicated, since none of the disclosed information will be related to an individual.

If, however, the Court desires to allow the AGO to release documents with any personally identifying information whatsoever left unredacted, then notice to the affected customers must be required in order to comply with the GLBA's notice and opt-out scheme. The Court of Appeals' requirement of notice and opportunity to intervene is best seen as a simple effectuation of the GLBA's scheme.<sup>3</sup>

The Court of Appeals did not indicate *who* should bear the responsibility and costs of its requirements. On appeal to this Court, Ameritrust argued that it is within the spirit of the GLBA to require the AGO to assume this responsibility and costs for these requirements. *See* Resp. Answer to Petition for Review at 17. The AGO argued that the notice provisions in 15 U.S.C. § 6802 do not apply to it because it is not a financial institution. *See* Petitioner's Supp. Brief at 17.

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<sup>3</sup> As the Court of Appeals pointed out, the customers have not been contacted nor have been invited to represent their own interests. 148 Wn. App. at 156-157.

Assuming notice is required here, *amicus* does not take a position on whether the AGO or Ameriquest should have the responsibility to comply with the Court of Appeals' requirements. On one hand, Ameriquest, as the financial institution, has an affirmative and continuing obligation to respect the privacy of its customers. 15 U.S.C. § 6801 (a). On the other hand, it is the AGO that is attempting to redisclose information it obtained from Ameriquest outside the notice and opt-out requirements. *Amicus* urges this Court to make abundantly clear, however, that the requester must not be required to shoulder the burden of paying for notice. The PRA allows an agency to notify the subjects of requested records, RCW 42.56.540, but may not pass the cost of notice on to the requester. Such a burden would be cost prohibitive and contrary to the PRA's prohibition on charging any fee for the inspection of public records. RCW 42.56.120. The best solution, of course, is as discussed above: the complete de-identification of the requested customer records, obviating the need for (and cost of) notice to the customers.

## VI. CONCLUSION

As the parties illustrate, the public's right to disclosure and the individual's right to privacy can be at odds. The ACLU believes that both principles can be harmonized here by redacting all personally identifying information from the customer records before disclosure is allowed. This

minimization technique would strike a balance between the greatest public disclosure and the least privacy invasion.

Respectfully submitted this 12th day of April, 2010.

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