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2009 MAY 13 A 7:40

No. 82690-1

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FILED
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STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,
Respondent,

v.

WASHINGTON STATE
OFFICE OF THE ATTORNEY GENERAL,
Petitioner.

MEMORANDUM OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government (“WCOG”), a Washington nonprofit organization, is an independent, nonpartisan organization dedicated to promoting and defending the public’s right to know in matters of public interest and in the conduct of the public’s business. WCOG’s mission is to help foster the cornerstone of democracy: open government processes supervised by an informed and engaged citizenry. WCOG represents a cross-section of the Washington public, press, and government. Its board of directors exemplifies this diversity. A description of WCOG’s board of directors is attached to this motion as an **Appendix**.

II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the parties’ briefs and in the Court of Appeals’ opinion in *Ameriquest Mortgage Co. v. State Atty. Gen.*, 148 Wn. App. 145, 199 P.3d 468 (2009).

III. ISSUES TO BE ADDRESSED BY AMICUS CURIAE

A. Whether the Gramm-Leach-Bliley Act (GLBA), 15 USC § 6801 et seq., is an “other statute” under the PRA.

B. Whether the PRA or GLBA requires notification to Ameriquest customers.

C. Whether the Court should review the issue of judicial review of agency action.

WCOG takes no position on whether the Court of Appeals correctly interpreted and applied CR 65. *See Petition* at 18-20; *Answer* at 4-6.

IV. ARGUMENT

A. **The GLBA does not preempt the PRA; it is merely an “other statute” within the PRA framework.**

The Court of Appeals concluded that the GLBA preempts the PRA. *Ameriquest*, 148 Wn. App. at 159. But the Court of Appeals never explained how the PRA conflicts with the GLBA, and no such conflict is apparent. The Court of Appeals simply ignored two provisions of the PRA which clearly state that other statutes, such as the GLBA, may create additional exemptions from disclosure:

Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of . . . this chapter, *or other statute* which exempts or prohibits disclosure of specific information or records. (Emphasis added).

RCW 42.56.070(1).

Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) *or other statute* which exempts or prohibits disclosure of specific information or records to certain persons.

RCW 42.56.080. As the AGO has explained, the GLBA is simply an “other statute” for purposes of the PRA. *Petition* at 6.

If, as Ameriquest argues, the GLBA restricts the release of records by the AGO, then the GLBA is an “other statute” within the PRA framework. There was no reason for the Court of Appeals to address preemption because there is no real conflict between the GLBA and the PRA regardless of how the GLBA is interpreted.

Ameriquest erroneously asserts that the “other statute” provisions amount to a new argument raised for the first time on appeal. *Answer* at 6. A review of the briefs and clerk’s papers reveals that the “other statute” framework was addressed in the lower courts. In fact, Ameriquest’s own trial court motion was incoherent with respect to whether the GLBA applied by virtue of

(i) preemption, or (ii) the “other statute” exemption in RCW 42.56.070(1).

The GLBA expressly preempts the Act. 15 U.S.C. § 6807; *Progressive Animal Welfare Soc’y, (PAWS) v. University of Washington*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (providing that Congress may preempt state law by passing a statute that expressly preempts state law). Under the “other statute” exception of RCW 42.56.070(1) the GLBA prohibits disclosure of the Requested Records.

CP 25. In response, both the AGO and the intervenor characterized the issue as whether the GLBA is an “other statute” under the RCW 42.56.070(1). CP 187, 204.

It appears that the Court of Appeals overlooked the “other statute” provisions of the PRA because the issue was not well briefed by the parties. After raising the issue in its own motion in the trial court, Ameriquest subsequently ignored the “other statute” provisions of the PRA. Similarly, the AGO argued against Ameriquest’s interpretation of the GLBA. But the AGO never suggested, in the alternative, that if the GLBA applied to the AGO, then it would apply by virtue of the “other statute” exemption in the PRA rather than by preemption of the PRA. However, the intervenor’s brief made explicit reference to the “other statute” provision in RCW 42.56.070(1). *Intervenor Br.* at 26.

By failing to address the “other statute” provisions in the PRA, the Court of Appeals engaged in a preemption analysis that is both unnecessary and erroneous. While further review is necessary to correct this error, there is no reason for this Court to hear argument on an issue that was not adequately addressed by the lower courts. This Court should grant review and immediately remand the case to the Court of Appeals without additional briefing or argument in this Court. The Court should instruct the Court of Appeals to reconsider its opinion in light of the “other statute” provision in the PRA. *See Tacoma Public Library v. Woessner*, 136 Wn.2d 1030, 972 P.2d 101 (1998) (order granting review and remanding to the Court of Appeals with instructions to reconsider issue of attorney’s fees).¹

B. The PRA does not require notice to third parties.

The Court of Appeals ordered the trial court 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 legal

¹ The Court of Appeals also held that (i) the AGO is a “nonaffiliated third party” for purposes of 15 USC § 6802(c), and (ii) an exception allowing disclosure under 15 USC § 6802(e)(8) was not applicable. *Ameriquest*, 148 Wn. App. at 160-65. WCOG takes no position on whether the Court of Appeals correctly interpreted these federal statutes, and WCOG questions whether the interpretation of the statutes warrants further review by this Court.

basis for this notice requirement is not stated in the opinion. *Id.* The AGO correctly points out that the PRA, specifically RCW 42.56.540, does not require agencies to provide notice to third parties to whom records pertain when those records are requested. *Petition* at 11-14. Ameriquest asserts that the notice requirement announced by the Court of Appeals is based on the GLBA, not the PRA. *Answer* at 16-18. That may or may not be correct, but the Court of Appeals' opinion is likely to be mistakenly interpreted to create a mandatory notice requirement under the PRA.

Again, further review is necessary to correct this error in the Court of Appeals, but there is no reason for this Court to address the issue. This Court should grant review and immediately remand the case to the Court of Appeals without additional briefing or argument in this Court. The Court should instruct the Court of Appeals to reconsider its opinion and address the legal basis of the notice requirement. *See Tacoma Public Library*, 136 Wn.2d 1030.

C. The Court should deny review on the issue of judicial review of agency action.

In the trial court, Ameriquest objected to the AGO's decision to release records that might have been exempt under the

attorney-client privilege, work product, or investigative records exemptions. The trial court stated that “Ameriquest did not have standing to assert exemptions on behalf of the AGO.” *Ameriquest*, 148 Wn. App. at 166. On appeal, Ameriquest explained that it was not asserting exemptions on behalf of the AGO, but seeking review of the AGO’s decision to waive the applicable exemptions. *Id.* The Court of Appeals held that Ameriquest had standing, and noted that the courts have inherent power (under Wash const. art IV, §, 6) to review agency action that is arbitrary and capricious. *Ameriquest*, 148 Wn. App. at 166-67. However, the court expressed doubt as to whether Ameriquest would prevail on remand.

To prevail at a trial on the merits, Ameriquest must prove that the AGO’s behavior was arbitrary and capricious. Ameriquest claims that through discovery, it will be able to find the necessary information to prove its claim... This is an extraordinarily high bar for Ameriquest to meet at trial, as neither party disputes that the decision to disclose the AGO work product was a discretionary decision.

Ameriquest, 148 Wn. App. at 167.

In its *Petition*, the AGO asserts that the Court of Appeals did not analyze Ameriquest’s standing, and suggests that the Court of Appeals’ decision conflicts with the policy of the PRA by

creating additional barriers to access and additional delays. *Petition* at 13-15. Nevertheless, it is undisputed that the superior court has inherent power to review administrative decisions for illegal or manifestly arbitrary and capricious acts pursuant to article IV, section 6 of the Washington State Constitution. *Harris v. Pierce County*, 84 Wn. App. 222, 230, 928 P.2d 1111 (1996). Unfortunately, the AGO's legal analysis of this inherent review authority is sorely lacking in a number of respects.

First, the AGO's argument focuses on the laudable policies of the PRA to the exclusion of a meaningful analysis of the actual legal issue. The AGO's *Petition* implies, but does not clearly state, that agencies should have unfettered discretion to waive their own discretionary exemptions and/or that no party would have standing to challenge the exercise of such discretion. WCOG would certainly agree that agencies may (and often should) waive exemptions such as privilege and work product. But it does not follow that an agency's decision to waive exemption should be immune from judicial review. Nor has the AGO explained how the statutory provisions of the PRA could supersede the constitutional powers of the superior courts.

Second, the AGO fails to grasp that the dispositive legal issue has nothing to do with the PRA itself. The superior court's authority to review the AGO's decision to waive its legal privileges comes from Const. art IV, § 6, and not the PRA. Although a challenge to an agency's decision to waive privileges may arise in a PRA case (as it did here), the same issue might arise in ordinary litigation or in another context not involving a request for records under the PRA. It is important to note that the PRA provides for *de novo* review of agency actions, RCW 42.56.550(3), which is very different from the highly deferential standard that applies to the inherent review authority of the courts.

Third, neither party appears to have considered the well-established rule that agencies may not consider either the identity of the requester or the purpose of a request in responding to a request for records under the PRA. *See* RCW 42.56.080; *Livingston v. Cedeno*, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008); *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002). Yet the AGO's position would appear to give agencies unfettered, unreviewable discretion to engage in exactly the sort of discrimination that the PRA forbids.

For all these reasons, the Court should deny review on this issue pursuant to RAP 13.6. It is possible that one or more parties will be dissatisfied with the trial court's decision on remand and appeal again. If so, the Court might consider review on this issue after the parties' positions and arguments on this issue are more fully developed.

V. CONCLUSION

The court should grant review and remand this case to the Court of Appeals to (i) reconsider its opinion in light of the "other statute" provision in the PRA, and (ii) address the legal basis for the requirement of notice to third parties. The Court should deny review on the issue of judicial review of agency action.

RESPECTFULLY SUBMITTED this 12th day of May, 2009.



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CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of May, 2009, a true and correct copy of the *Motion For Leave to File Memorandum of Amicus Curiae*, and *Memorandum of Amicus Curiae* were served on each of the parties below as follows:

Via U.S. Mail and Email (PDF):

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OFFICE RECEPTIONIST, CLERK

To: William John Crittenden
Cc: Price, Erik; Melissa Ann Huelsman; Huey, David (ATG)
Subject: RE: Ameriquest v. Wash. Attorney General, No. 82690-1

Rec. 5-13-09

From: William John Crittenden [mailto:wjcrittenden@comcast.net]
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To: OFFICE RECEPTIONIST, CLERK
Cc: Price, Erik; Melissa Ann Huelsman; Huey, David (ATG)
Subject: Ameriquest v. Wash. Attorney General, No. 82690-1

Dear Clerk-

Enclosed for filing in the above-captioned case please find:

- (i) Motion for Leave to File Memorandum of Amicus Curiae;
- (ii) Memorandum of Amicus Curiae; and
- (iii) Certificate of Service

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