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DIVISION II
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STATE OF WASHINGTON
DEPUTY

No. 36245-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Defendants/Respondents

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

APPELLANT'S OPENING BRIEF

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I. SUMMARY INTRODUCTION

This case involves a request pursuant to Washington's Public Records Act ("PRA"), Chapter 42.56 RCW, that seeks disclosure of highly confidential personal financial information provided to Ameriquest by its customers. Ameriquest provided this information to the Attorney General's Office ("AGO") while cooperating with an examination of Ameriquest's lending practices. The PRA request also seeks disclosure of the Attorney General's own investigative documents, including but not limited to, attorney work product interview notes and other documents that fit squarely into PRA exemptions.

Ameriquest sought a preliminary injunction to halt disclosure and maintain the status quo pending a trial on the merits. Specifically, Ameriquest argued that the Gramm-Leach-Bliley Act, enacted by Congress specifically to protect the sort of confidential, financial information at issue here, preempted the broad provisions of the PRA and precluded disclosure of the customer information. Ameriquest also argued that it needed time to conduct discovery into the AGO's decision to willingly disclose information otherwise protected by various exemptions under the PRA, which Ameriquest believes is inconsistent with the AGO's practice involving other PRA requests.

Although the parties were before the court only on preliminary injunction, the trial court issued what was tantamount to a ruling on the ultimate merits of the issues and denied the motion for preliminary injunction. Just last month in Northwest Gas Ass'n v. Washington Utilities

and Transp. Comm'n, --- Wn. App. ---, 168 P.3d 443, 451 (2007), this Court ruled that consolidating the preliminary injunction hearing with a trial on the merits in this fashion was reversible error. Thus, this case should be reversed and remanded on the basis of this violation of CR 65 alone.

The trial court's decision on Ameriquest's substantive arguments were equally erroneous. The trial court erred in finding that the Gramm-Leach-Bliley Act did not preempt the PRA. The question of preemption, an issue of first impression in Washington, must be examined on the basis of a complete record, and the trial court's premature conclusion should be reversed pending a trial on the merits. The trial court also erred by misapprehending Ameriquest's second argument: that the AGO's waiver of the several applicable exemptions warranted judicial review under an arbitrary and capricious standard. Ameriquest requests that this Court reverse the trial court's order authorizing immediate disclosure of the disputed documents, and instruct the trial court to enter a preliminary injunction pending trial on the merits.

II. ASSIGNMENTS OF ERROR

Ameriquest makes the following assignments of error:

1. The trial court erred when it denied Ameriquest's motion for preliminary injunction, as that ruling was tantamount to a final decision on the merits.

2. The trial court erred when it determined that the Gramm-Leach-Bliley Act ("GLBA"), a federal financial privacy law that prohibits

disclosure, did not preempt the request made pursuant to Washington's Public Records Act.

3. The trial court erred when it failed to address whether Ameriquest could seek judicial review of the Attorney General's Office's actions as being arbitrary and capricious.

III. STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Whether the trial court erred by consolidating a permanent injunction trial into the preliminary injunction hearing without giving the required notice to the parties, and thereby adjudicating the ultimate merits of the case at the preliminary injunction stage of the proceedings. (Assignment of Error No. 1.)

2. Whether the trial court erred when concluding that the GLBA, a federal financial privacy law, did not preempt application of the Washington's Public Records Act with respect to the Attorney General's release of nonpublic personal financial information. (Assignment of Error No. 2.)

3. Whether the trial court erred when concluding that a federal financial privacy law did not prohibit the Attorney General's release of nonpublic personal financial information in response to the PRA, even considering the proposed redactions. (Assignment of Error No. 2.)

4. Whether the trial court erred in reaching the issue of standing as to the PRA exemptions the AGO waived, where Ameriquest made no such argument. (Assignment of Error No. 3.)

5. Whether the trial court erred when it failed to address the question of whether Ameriquest was entitled to judicial review of an agency's decision to waive exemptions under the Washington Public Records Act, including the fundamental privilege of attorney work product, as being arbitrary and capricious. (Assignment of Error No. 3.)

6. Whether the trial court erred by denying Ameriquest an opportunity to conduct meaningful discovery. (Assignment of Error No. 3.)

IV. STATEMENT OF THE CASE

A. The Parties.

1. Original Parties to the Complaint. Plaintiff/Appellant Ameriquest Mortgage Company is a national residential mortgage lender, that has offered and made loans to numerous Washington consumers. The Public Records Act request for the documents related to Ameriquest was directed to the Office of the Attorney General of Washington. Declaration of David W. Huey ("Huey Decl."), ¶ 4 at 2 (CP 164). The AGO is an original party in this matter. See Plaintiff's Complaint for Injunctive Relief (CP 4-9).

2. Intervenor, Melissa A. Huelsman. Melissa A. Huelsman is the individual who directed the submission of the Public Records Act request to the AGO, and to whom leave to intervene was granted by the trial court. Declaration of Melissa A. Huelsman, Intervenor, in Opposition to Plaintiff's Motion for Preliminary Injunction ("Huelsman Decl."), ¶ 2 at 1-2 (CP 219-20); Stipulated Order Permitting Intervention of Melissa A.

Huelsman (CP 346-47). Ms. Huelsman litigates against mortgage and real estate companies. Huelsman Decl., ¶ 5 at 3 (CP 221).

B. The Genesis of the Documents at Issue.

1. In the Course of Cooperating with the Attorney General's Office's Inquiry, Ameriquest Provides the AGO with Confidential Information. The AGO initiated an examination of Ameriquest's lending practices. Declaration of Diane Tiberend in Support of Ameriquest's Motion for Preliminary Injunction ("Tiberend Decl."), ¶ 2 at 1 (CP 117). In the course of the examination, the AGO requested from Ameriquest a broad variety of documents including consumer loan files containing confidential customer information, internal Ameriquest communications (also containing confidential customer information), as well as voluminous proprietary information about Ameriquest's operations, training materials, policies and procedures, and systems manuals. Id., ¶¶ 3-5 at 2-3 (CP 118-19).

Ameriquest fully cooperated with the AGO's request for information, and provided copies of the requested documents. Id. This included the customer loan files and internal Ameriquest employees' e-mails. Id. The customer loan files included:

- a customer's full legal name
- social security number (possibly an actual copy of the social security card as well)
- driver's license number (possibly a copy of the actual license as well)
- date of birth

- credit (FICO) score
- credit report (which would identify mortgages and consumer credit information such as name of credit card company, amount charged, amount paid, outstanding balance, timeliness of payments)
- monthly income
- sources of monthly income (which could include a copy of the borrower's paystub, W2, personal and business tax returns, business profit and loss statement)
- employer's name
- employer's address
- length of employment
- nature of employment
- name and age of any children
- checking and savings account information (bank statements, deposit verification)
- identification of other assets (stocks, bonds, life insurance net cash value, retirement fund holdings, net worth of business)
- residential address
- residential telephone number
- personal wireless telephone number
- as well as all terms and conditions of the customer's transaction (e.g. loan amount, interest rate etc.).

Id., ¶ 3 at 2 (CP 118). Many of the employees' internal emails Ameriquest produced also contained confidential customer information. Id., ¶ 4 at 2-3 (CP 118-119). However, Ameriquest shared this information with the AGO 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. Tiberend Decl., ¶ 2 at 1-2 (CP 117-118).

2. During the Course of the Examination, the AGO Also Prepared Its Own Investigative Documents. The AGO not only reviewed the myriad of documents Ameriquest provided, but also prepared its own internal investigative documents. Declaration of Erik D. Price In Support of Ameriquest's Motion for Preliminary Injunction ("Price Decl."), ¶ 3 at 2 (CP 126).

C. Public Records Request from Attorney Huelsman for the Disclosure of the Confidential Documents.

On February 6, 2007, the AGO received a Public Records Act request from Christina Latta of the Law Office of Melissa Huelsman, seeking the release of "all records relating to investigation of Ameriquest." Price Decl., Exh. B (CP 131-32). The request was submitted pursuant to Washington's Public Records Act ("PRA"), Chapter 42.56 RCW.[1]

D. The AGO Notifies Ameriquest of the Request and Pending Disclosure of the Records.

By letter of March 1, 2007, approximately one month after Ms. Huelsman's request, the AGO informed Ameriquest that, in order to comply with the PRA, the AGO would release the confidential documents Ameriquest had supplied. Price Decl., Exh. A (CP 129-30). According to the AGO's letter, the office would disclose the documents on March 15, 2007, absent a court order precluding production based on one of the

[1]Chapter 42.56 RCW recodified the applicable provisions of Chapter 42.17 RCW.

exemptions in the PRA. Id. The AGO attached a list that showed the documents it had earmarked for disclosure, including Ameriquest's customer loan files for 35 Washington citizens and internal e-mail communications of two of Ameriquest's employees. Huey Decl., Exh. 2 (CP 170-171). The AGO did not provide Ameriquest with a copy of the PRA request, did not describe the PRA request, nor did it identify any other documents pertaining to Ameriquest that it planned to disclose in response to the request that may pertain to Ameriquest. Id.

On March 6, 2007, Ameriquest's counsel contacted the AGO to discuss the disclosure request. Price Decl., ¶ 3 at 2 (CP 126). At that time the AGO indicated that it intended to produce other documents pertaining to Ameriquest that had not been identified in the AGO's March 1, 2007 letter. Id. By letter of March 30, 2007, the AGO informed Ameriquest that the AGO also planned to disclose additional consumer loans files as well as "investigative and negotiation materials" generated during the course of the investigation. Price Decl., Exh. F (CP 145-46).

E. Ameriquest Promptly Files a Complaint For Injunctive Relief Barring Such Disclosure and the Parties Agree to a Temporary Restraining Order.

Upon learning of the AGO's imminent disclosure of the documents in response to the PRA, Ameriquest filed its complaint for injunctive relief in Thurston County Superior Court. See Plaintiff's Complaint for Injunctive Relief (CP 4-9), and Plaintiff's Motion for Injunctive Relief (CP 21-34). Ameriquest sought a temporary restraining order and preliminary injunction preventing the AGO from disclosing documents pertaining to Ameriquest.

Id. Ms. Huelsman, (hereafter "Intervenor"), filed a motion to intervene in the proceedings. See Motion by Requestor Melissa A. Huelsman to Intervene as a Matter of Right (CP 149-54).

Ameriquest, the AGO, and the Intervenor stipulated to, and the trial court entered, a temporary restraining order that enjoined the AGO from disclosing documents pertaining to Ameriquest until a hearing was held on its motion for preliminary injunction. See Stipulated Temporary Restraining Order & Order to Show Cause (CP 36-38).

F. Ameriquest's Motion For Preliminary Injunction; the AGO and Intervenor Oppose the Motion.

On April 4, 2007, with the stipulated TRO in place, Ameriquest filed its preliminary injunction motion. See Plaintiff Ameriquest Mortgage Company's Motion for Preliminary Injunction (CP 89-116). Ameriquest maintained that the records the AGO intended to disclose were protected from disclosure by the applicable federal financial privacy law, the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., and were also exempt from disclosure under several exemptions under the PRA. Id. Specifically, Ameriquest argued first that disclosure of its customers' financial information would conflict with and be preempted by the GLBA, which governs the security and confidentiality of nonpublic personal information provided to financial institutions. Ameriquest further argued that judicial review of the AGO's decision to waive numerous exemptions available under the PRA was necessary. Ameriquest maintained that it had serious concerns that the AGO's disclosure decision concerning Ameriquest was inconsistent with the

AGO's treatment of similarly situated companies or requests for similar types of documents and sharply diverged from the established precedent. Id., at 6-26 (CP 94-114); Plaintiff's Reply Brief in Support of Motion, 1-12 (CP 227-238). At oral argument, and prior to the trial court's issuance of its ruling, Ameriquest also explained that it had no opportunity to conduct any discovery to determine (1) how the AGO has responded to similar requests; and (2) whether the AGO's office is in the pattern and practice of waiving attorney work product doctrine protections. Ameriquest also explained that it would need time to conduct discovery to determine whether the standard regarding disclosure used by the AGO here is the same standard it has applied in other cases, or whether the AGO acted in a manner that was "arbitrary and capricious." VRP (May 1, 2007) 15:7-17:9.

1. The AGO Admits that the Loan Files Contain Confidential Customer Information as Contemplated by the GLBA, But Opposes Ameriquest's Motion. The AGO opposed Ameriquest's motion for preliminary injunction. See Defendant's Response to Motion for Preliminary Injunction ("AGO Response"), at 1-9 (CP 182-190). In its response, the AGO affirmed that loan files contain confidential personal financial. Id. at 5 (CP 186). The AGO did not contest Ameriquest's assertion that it is a financial institution subject to GLBA or that the loan files are confidential personal financial records protected by the GLBA. Instead, the AGO argued that the GLBA did not preempt the PRA based on the exception in the GLBA that permits disclosure "to comply with Federal, State, or local laws, rules, and other applicable legal requirements." Id. at 6 (CP 187). The AGO

argued in the alternative, that even if the GLBA does preempt the PRA, the AGO's redaction policy for "personal information" as defined by Hearst v. Hoppe, 90 Wn.2d 123, 133, 580 P.2d 246 (1978), would satisfy the GLBA's prohibitions on disclosure. Id. at 5, 6 (CP 186-87); Huey Decl., Exh. 5., at 39-40 (CP 180-81).

The AGO agreed that there are numerous exemptions under the PRA that would apply to the documents at issue, including (1) the intelligence information and investigative records exemption; (2) the deliberative process exemption; and (3) the attorney-client privilege and attorney work product exemptions. AGO Response at 8 (CP 189). The AGO argued that it, as the responding agency, has the sole discretion to disclose a record, even if it would otherwise be permitted to withhold it, and that Ameriquest has no right to compel the AGO to assert these exemptions. Id. at 8 (CP 189). However, the AGO acknowledged that the trial court did have the right to order the AGO to exercise its discretionary authority in a particular manner if the trial court determined that the AGO had acted in an arbitrary and capricious manner. Id. at 8-9 (CP 189-90).

2. Intervenor Also Opposes the Motion For Preliminary Injunction. Intervenor also filed an opposition to the motion. See Opposition to Plaintiff's Motion for Preliminary Injunction ("Intervenor's Opposition"), at 1-24 (CP 194-218). Intervenor's arguments essentially mirror those of the AGO. Intervenor confirmed that she "regularly obtains and maintains numerous individuals' personal and financial information in

[sic] of litigating her caseload," which have been provided by her clients or produced in discovery. Id., at 10 (CP 203).

G. The Trial Court Denies The Motion For Preliminary Injunction, Authorizing the Disclosure of the Disputed Documents Prior to a Trial on the Merits.

The trial court denied Ameriquest's motion for preliminary injunction. See Order Denying Plaintiff's Motion for Preliminary Injunction ("Order"), at 1-4 (CP 320-323). In a single sentence, without citation to authority, the trial court concluded that the GLBA did not preempt the PRA. Id. ¶6 at 3 (CP 322). Although Ameriquest had argued that the trial court should permit discovery and review the AGO's disclosure decision under an arbitrary and capricious standard, the trial court ruled on the grounds of standing, and concluded that Ameriquest did not have standing to assert numerous exemptions on behalf of the AGO. Id. ¶7 at 3 (CP 322).

The court acknowledged that the information to be redacted was "exempt personal and confidential information." Id., at 4 (CP 323). The court went on to rule, however, that disclosure was allowed once the AGO had completed its redactions. Id. Ameriquest immediately filed its Notice of Appeal and an Emergency Motion for Stay, which were ultimately granted by this Court.[2]

[2] There was extensive motions practice before this court regarding the stay and the question of appealability. These procedural events are not germane to the merits of Ameriquest's appeal and will not be detailed here.

V. STANDARD OF REVIEW

The PRA mandates that "[j]udicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3); Northwest Gas Ass'n v. Washington Utilities and Transp. Comm'n, --- Wn. App. ---, 168 P.3d 443, 451 (2007). This Court reviews de novo the trial court's denial of an injunction brought pursuant to the PRA where, as here, the record consists of declarations, memoranda of law, and other documentary evidence. Dawson v. Daly, 120 Wn.2d 782, 788, 845 P.2d 995 (1993) (citing Spokane Police Guild v. Liquor Control Bd., 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989)).

VI. ARGUMENT

A. This Court Will Reverse the Denial of a Preliminary Injunction Where the Trial Court Improperly Rules on the Merits of the Case at the Preliminary Injunction Stage.

In conformance with CR 65(a)(2), it is a "well-settled principle[]" that a trial court hearing a motion for a preliminary injunction is not permitted to adjudicate the ultimate merits of the case. Rabon v. City of Seattle, 135 Wn.2d 278, 286, 957 P.2d 621 (1998). Just last month, this Court reaffirmed this longstanding principle in nearly identical circumstances and held that a trial court commits reversible error "when it conflate[s] the permanent injunction trial into the preliminary injunction hearing without notice to the parties, contrary to CR 65." Northwest Gas, 168 P.3d at 452.

In Northwest Gas, an individual made a PRA request to the Washington Utilities and Transportation Commission for high level, detailed "shapefile data," which included detailed mapping information for

almost all of the pipeline infrastructure in the state. Id. at 449. Several local newspapers intervened and also demanded the detailed data. Id. The pipeline companies whose confidential, proprietary and highly sensitive data was at issue, sought a preliminary injunction, arguing (1) that, under the federal Freedom of Information Act ("FOIA"), the data was exempt from disclosure; and (2) that several exemptions to the PRA applied to the data being sought. Id. at 450. Nonetheless, the trial court denied the motion at the hearing on the preliminary injunction, effectively handing the requestors the ultimate relief sought -- unfettered release of the highly sensitive information. Id. at 452. On appeal, the pipeline companies successfully argued that the trial court erred by conducting a trial on the merits at the preliminary injunction stage with no notice to the parties. This Court concluded that it "could end [its] analysis here and remand to the trial court to reconsider the [plaintiffs'] request for a preliminary injunction in accordance with CR 65." Id.

Here, the trial court committed the very same error. Without notice, it "essentially considered and finally resolved the merits of [Ameriquest's] claims at the preliminary injunction hearing, at which it erroneously applied the permanent-injunction standard of proof contrary to CR 65." Id. And the trial court's order here results in the very same injury: the disclosure of the highly confidential customer information that cannot be made confidential again, once released. The trial court erred in Northwest Gas and the trial court here similarly erred. The trial court's order denying Ameriquest's motion for preliminary injunction should be

reversed and the matter remanded for a full trial on the merits pursuant to this Court's holding in Northwest Gas.

B. As This Court Has Recognized, the Need for a Trial on the Merits Is Not Just Form Over Substance; Parties Are Entitled to a Trial on the Merits to Fully Develop a Record Before Confidential Information Is Irretrievably Disclosed.

This Court's reasoning in Northwest Gas was not simply a hypertechnical application of CR 65. In considering the purpose of the preliminary injunction versus permanent injunction stage, the Court recognized that the purpose of CR 65, "as with its federal counterpart, is to give the parties notice so that they will have a full opportunity to present their case at the permanent injunction hearing." Id. at 451-52 (citing University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981) (applying Federal Rules of Civil Procedure 65(a)(2), which mirrors CR 65(a)(2)). This Court acknowledged that the pipeline companies were "unable to develop their evidence fully for the preliminary injunction hearing because of the expedited timeframe," and had provided declarations that showed some of the evidence they were preparing to present at a trial on the merits. Northwest Gas, 168 P.3d at 452. Most importantly, this Court recognized that the trial court's denial of the preliminary injunction "following this summary procedure defeated the purpose of a preliminary injunction -- to preserve the status quo."[3] Id. The facts before this Court now are nearly identical to those in Northwest Gas.

[3] The Court defined "status quo" as "the 'last actual, peaceable, noncontested condition which preceded the pending controversy.'" Northwest Gas, 168 P.3d at 452 n.16. In the present case, the "status quo" (continued . . .)

1. By the Time of the Expedited Preliminary Injunction Hearing, Ameriquest Had Little or No Time to Engage in Discovery. Our Supreme Court has recognized that "the exigent circumstances under which a preliminary injunction is issued frequently preclude the full development of a record." Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life, 106 Wn.2d 261, 267, 721 P.2d 946 (1986) (emphasis omitted). Indeed, it is precisely the "urgency that necessitates a prompt determination of the preliminary injunction application" that impairs the parties' ability to proceed as if at the permanent injunction stage. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2949 (2d ed. 1995). As persuasively stated in Kennedy ex rel. NLRB v. Sheet Metal Workers Int'l Ass'n Local 108:

> Speed is often extremely important in proceedings for restraining orders and temporary injunctions, and both the movant and the opposing party are often unable to obtain and marshal their evidence in a manner that would be proper for a summary judgment hearing or for an actual trial.

Kennedy, 289 F. Supp. 65, 90 (C.D. Cal. 1968) (emphasis added).

In the present case, just as in Northwest Gas, the trial court erred by disposing of the case on the merits without affording Ameriquest an opportunity to conduct discovery necessary to prove its entitlement to a permanent injunction. Just like the pipeline companies in Northwest Gas,

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(. . . continued)
would be that the information pertaining to Ameriquest be kept confidential and not disclosed by the AGO.

Ameriquest had to marshal what evidence it could for the expedited preliminary injunction hearing with all alacrity. Indeed, Ameriquest filed its motion for preliminary injunction within but a few weeks of its conversation with the AGO regarding the actual scope of proposed disclosure (as compared to the vague references in the AGO's March 1, 2007 letter). Ameriquest filed its motion just five days after the AGO's March 30, 2007 letter, which, for the first time, fully revealed the expansive scope of documents the AGO intended to disclose. Price Decl., Exh. F (CP 145-46). During oral argument at the preliminary injunction hearing, Ameriquest's counsel specifically advised the trial court that it needed an opportunity to engage in discovery. VRP (May 1, 2007) 16:1-6. Yet the trial court foreclosed any possibility that Ameriquest could gather the additional evidence it needed to prevail on the merits, and abruptly resolved the merits of the case by denying the motion for preliminary injunction.

Had Ameriquest had additional time to gather supporting evidence with the protection of the status quo preserved by a preliminary injunction, it would have the opportunity to submit additional evidence to demonstrate how the PRA is less protective than the GLBA and whether the AGO's treatment of the PRA request as it pertains to Ameriquest is consistent with the AGO's treatment of similarly situated parties. This Court rejected this procedural error in Northwest Gas, and should do so here also. Ameriquest should be able to conduct discovery to allow it to further support its arguments.

2. Ameriquest Provided a Declaration Illustrating the Scope of the Confidential Personal Financial Information at Issue. Just as in Northwest Gas, Plaintiff provided a detailed declaration illustrating the scope of the confidential personal financial information in the documents. Specifically, Diane Tiberend's declaration set the groundwork for the evidence Ameriquest would provide regarding the nature of the confidential information. Tiberend Decl., ¶¶ 2-17 at 1-7 (CP 117-23). Other evidence of the AGO's potentially arbitrary and capricious behavior could not be properly gathered prior to the preliminary injunction hearing, but the Tiberend declaration gave the trial court a glimpse into what discovery could be had with sufficient time.

3. The Trial Court Failed to Preserve the Status Quo and Issued a Final Judgment on the Merits. The trial court did here exactly what this Court forbade in Northwest Gas: It irretrievably altered the status quo by ordering disclosure of all of the disputed documents prior to a trial on the merits. This ruling "defeat[s] the purpose of a preliminary injunction," and is reversible error. Northwest Gas, 168 P.3d at 452. The trial court should have preserved the status quo, granted the preliminary injunction, and given Ameriquest the opportunity to gather the necessary evidence for a trial on the merits. By not preserving the status quo, the trial court acted prematurely and on a limited record, and denied Ameriquest any meaningful opportunity to gather and present evidence in support of a permanent injunction. The law is now unequivocal on these facts, and the court's ruling should be reversed and a preliminary

injunction granted so that Plaintiff can adequately prepare for and present its case at a trial on the merits.

C. Standard For Granting a Preliminary Injunction.

The similarities to Northwest Gas do not end at the procedural error of resolving the ultimate issue in violation of CR 65. In Northwest Gas, this Court recognized the need to conserve the parties' and the courts' resources, so it reviewed the record de novo, addressed the requirements for injunctive relief, and found that the trial court erred in refusing to issue a preliminary injunction. 168 P.3d at 452-55. Ameriquest's issues on appeal here present similarly unique circumstances, and may benefit from further guidance on Ameriquest's substantive arguments. Specifically, that the trial court erroneously concluded that the GLBA did not preempt the PRA and that Ameriquest had "no standing" to assert certain exemptions to the PRA. Just as the plaintiffs did in Northwest Gas, Ameriquest has satisfied its burden of showing of a likelihood of success on the merits, as well as presenting a sufficiently serious questions going to the merits to make the case a fair ground for litigation.

A party seeking a preliminary injunction must show (1) a clear legal or equitable right; (2) that there is a well grounded fear of immediate invasion of that right; and (3) that the acts complained of have or will result in actual and substantial injury. Tyler Pipe Indus., Inc. v. Department of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). When determining whether a party has the requisite "clear legal or equitable right," the court must examine the likelihood that the party will

prevail on the merits. Rabon v. City of Seattle, 135 Wn.2d 278, 285, 957 P.2d 621 (1998).

Grounds for the grant of a preliminary injunction also exist where the moving party demonstrates "sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in its favor." League of Women Voters of Washington v. King County Records, Elections & Licensing Services Div., 133 Wn. App. 374, 384-85, 135 P.3d 985 (2006) (internal quotation mark omitted) (quoting Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1100 (9th Cir. 1998) (internal quotation mark omitted)). Ameriquest satisfied both standards.

D. Ameriquest Has Satisfied Its Burden for the Grant of a Preliminary Injunction on the Preemption Question and the Necessity of Judicial Review of the AGO's Decision to Waive the Various Applicable PRA Exemptions.

The trial court hastily and erroneously ruled that the GLBA did not preempt the PRA, an issue of first impression in Washington. In Northwest Gas, this Court recognized that it could not pass on whether, as a matter of first impression, federal law (in that case, FOIA) preempted the PRA "until such time as the parties have an opportunity to develop a full record at trial." Northwest Gas, 168 P.3d at 457. This Court faces virtually identical circumstances here, and should reverse and remand for a full trial on a complete record on the GLBA preemption issue.

In addition to prematurely ruling on the preemption issue, the trial court also fatally misapprehended Ameriquest's arguments regarding the

AGO's waiver of the myriad applicable PRA exemptions. Ameriquest was not arguing that it has standing to assert any privilege on the AGO's behalf. Rather, Ameriquest argued that the AGO's stubborn unwillingness to exercise those exemptions on its own behalf was arbitrary and capricious, and likely founded on an animus toward Ameriquest. For these reasons, beyond the failure to comply with CR 65's notice requirements, the trial court erred.

1. Ameriquest Has Amply Demonstrated a Likelihood of Success of Establishing that the GLBA Preempts Application of the Washington Public Records Act. The trial court erred in reaching its summary conclusion that the GLBA does not preempt the PRA. Ameriquest satisfied its burden of showing a likelihood of success on the merits on this issue of first impression.

State laws may be preempted by Congress in three basic fashions: express preemption, field preemption, and conflict preemption. Progressive Animal Welfare Soc'y v. Univ. of Washington ("PAWS"), 125 Wn.2d 243, 265, 884 P.2d 592 (1994). The Supreme Court of Washington has summarized the principles of preemption as follows:

> Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.

Id. (emphasis added).

Here, the GLBA is a federal financial privacy law that mandates nondisclosure of confidential personal financial information. The GLBA provides that every 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' "nonpublic personal information." 15 U.S.C. § 6801(a). As a mortgage lender, Ameriquest is a "financial institution" as defined in the GLBA. 15 U.S.C. § 6809(3). Ameriquest's customers are individuals who obtain financial products and services that are to be used primarily for personal, family, or household purposes. Accordingly, Ameriquest's customers are consumers within the meaning of the GLBA, and are entitled to the full extent of its protections. 15 U.S.C. § 6809(9).

a. The GLBA Expressly Preempts State Laws that Are Less Protective Than the GLBA. Section 507(a) of the GLBA, 15 U.S.C. § 6807, preserves a state "statute, regulation, order or interpretation" that is not "inconsistent" with the provisions of the GLBA. 15 U.S.C. § 6807(a). In adopting section 507, Congress established the privacy protections of the GLBA as a "floor," or minimum protection for consumer privacy, that could be exceeded by the states. See, e.g., Letter from Donald S. Clark, Sec. of FTC, to Gary D. Preszler, Comm. Dept. of Banking and Financial Institutions, State of North Dakota (June 28, 2001), available at http://ftc.gov/os/2001/06/northdakotaletter.htm. State law provisions that add to the privacy protections of the GLBA are not preempted. However, a state law is "inconsistent" under section 507(a),

and therefore preempted, if: (1) it frustrates the purpose of the federal law, or (2) compliance with both laws is physically impossible. Id. If compliance with the PRA requires disclosure of records that the GLBA intends must remain private, then the PRA frustrates the purpose of the GLBA and is preempted.

b. The GLBA Prohibits Disclosure of **Any** Information Provided by a Consumer to a Financial Institution. GLBA Section 15 U.S.C. § 6809(4)(A) provides that "nonpublic personal information" means "personally identifiable financial information." The court in Individual Reference Services Group, Inc. v. Federal Trade Commission, 145 F. Supp. 2d 6, 26 (D.C. Cir. 2001), acknowledged that, while the GLBA provided no definition of personally identifiable financial information, the regulations promulgated by the agencies, including the Federal Trade Commission ("FTC"), filled in this gap as intended.[4] Personally identifiable financial information includes:

> [a]ny information: (i) [a] consumer provides to [financial institution] to obtain a financial product or service . . . (ii) [a]bout a consumer resulting from any transaction involving a financial product or service between [financial institution] and a consumer; or (iii) [financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer.

16 C.F.R. § 313.3(o)(1). During the FTC's development of the "Privacy Rule," many commentators wanted certain information, like telephone

[4] Section 6804 of the GLBA directs the FTC, the federal banking agencies, and others to prescribe "such regulations as may be necessary to carry out the purposes of [the Act] . . . ." 15 U.S.C. § 6804.

numbers, not to be treated as financial information. The FTC rejected this proposal and determined that it "would be inappropriate to carve out information that a particular financial institution might rely on when providing a particular financial product or service." Privacy of Consumer Financial Information, 65 Fed. Reg. 33,646, 33,658 (May 24, 2000) (to be codified at 16 C.F.R. § 313).

The FTC Privacy Rule provides specific examples of the nature of the information covered including any information a consumer provides on a loan application, account balance information, and information obtained from a consumer report. 16 C.F.R. § 313.3(o)(2)(A), (B) and (E); see also Trans Union, LLC v. Federal Trade Comm'n, 295 F.3d 42, 49-50 (D.C. Cir. 2002) (identifying "any personally identifiable information as financial if it was obtained by a financial institution in connection with providing a financial product or service to a consumer"). The court in Individual explained that information used in, or derived from, a financial context is nonpublic personal information under the GLBA even if it may not be if used in a different context. 145 F. Supp. 2d at 27.

The FTC Privacy Rule further illustrates the broad scope of this definition: a customer's telephone number is presumed to be "nonpublic" unless the disclosing party has (1) located the telephone number in the telephone book; or (2) the customer has informed the disclosing party that the telephone number is not unlisted. 16 C.F.R. § 313.3(p)(3)(B).

Indeed, both the AGO and the trial court itself acknowledged that the information in the loan files and internal e-mails is exempt confidential financial information. Order at 4 (CP 323); AGO Response at 5 (CP 186). The GLBA is clear and unyielding on these facts: the protected information here is completely protected from disclosure under the GLBA. The broad disclosure principles of the PRA are patently in conflict with these protections, thus the GLBA preempts the PRA, prohibiting disclosure of the protected information Intervenor requests and the AGO is quick to release.

c. The GLBA Does Not Permit Redaction as an Alternative to Nondisclosure of the Confidential Personally Identifiable Financial Information at Issue Here. Neither the AGO nor Intervenor can point to any provision of the GLBA that permits redaction of personal financial information in lieu of nondisclosure if the information was provided by the consumer. Here, the AGO's PRA redaction proposal contemplates the redaction of some, but not all, of the personally identifiable financial information contained within a customers' loan file. The FTC rejected the suggestion that redaction or exclusion was an appropriate approach to personally identifiable financial information.

> Many commenters, including several hundred private investigators, expressed concern about the need for ready access to identifying information to locate people attempting to evade their financial obligations. These commenters consistently suggested that names, addresses, and telephone numbers should not be treated as financial information. However, financial institutions rely on a broad range of information that they obtain about consumers, including information such as addresses and telephone numbers, when providing financial products or services. . . . The

> Commission concluded that it would be inappropriate to carve out certain items of information that a particular financial institution might rely on when providing a particular financial product or service.

Privacy of Consumer Financial Information, 65 Fed. Reg. at 33,658 (emphasis added); see also Individual, 145 F. Supp. 2d at 22. Thus, redaction of only certain customer information simply does not pass muster under the GLBA. Accordingly, the AGO's PRA redaction proposal provides less than the minimum protections afforded under the GLBA, as the AGO contemplates redaction of only certain information that the AGO has selected. Huey Decl., Exh. 5, 39-40 (CP 180-181). By simply comparing the AGO's redaction proposal against Ameriquest's description of information commonly maintained in a loan file, what remains includes, but is not limited to:

- a customer's full legal name,
- credit information such as name and address of creditor,
- sources of monthly income,
- employer's name,
- employer's address,
- length of employment,
- nature of employment,
- name and age of any children,
- identification of other assets (stocks, bonds, life insurance net cash value, retirement fund holdings, net worth of business),
- residential address,
- residential telephone number,
- personal wireless telephone number,

- as well as all terms and conditions of the customer's transaction.

Tiberend Decl., ¶ 3 at 2 (CP 118), as well as a sundry of other information such as the borrower's maiden name, information regarding current and prior marriages, full employment history, mortgage delinquency information, payment histories, appraisals (some with pictures of home interiors), etc. The AGO's bare bones redaction policy flouts the rigid protections of the GLBA and offers customers little or no privacy from prying eyes. Thus, the GLBA clearly preempts the PRA as the privacy protections afforded under the GLBA are far broader than those provided under the PRA, even presuming the AGO redacts certain information of its choice.

d. The GLBA's Judicial Process Exemption Is the ONLY Exemption Available to the Intervenor for Obtaining Nonpublic Personal Information – Disclosure Pursuant to a Public Records Act Request Is Prohibited. Congress enacted the GLBA to ensure that financial institutions had an affirmative and continuing obligation to both respect the privacy of its customers and to protect the security and confidentiality of the customers' nonpublic personal information. 15 U.S.C. § 6801(a). The GLBA provided that a financial institution was prohibited from disclosing its customers' nonpublic personal information unless proper notice had been provided to the consumer and the consumer had an opportunity to opt out. 15 U.S.C. § 6802(a) and (b).

The statute goes on to state that a nonaffiliated third party (such as the AGO) who receives nonpublic personal information from a financial

institution (like Ameriquest) "shall not, directly or through an affiliate . . ., 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). This prohibition on disclosure underscores the purpose of the GLBA as "a means to ensure that consumers retain control over their nonpublic personal information." Individual, 145 F. Supp. 2d at 35.

Congress recognized that there were certain limited situations where the financial institution might need to disclose its customers' nonpublic personal information to nonaffiliated third parties without giving the required notice to consumers so Congress penned 15 U.S.C. § 6802(e). Some of the exceptions include disclosures necessary to enforce the transaction, to provide information to rating agencies, and in connection with the sale or merger of the business. 15 U.S.C. § 6802(e)(1), (4) and (7). Under 15 U.S.C. § 6802(e)(8), a financial institution, like Ameriquest, could also disclose nonpublic customer information in order "to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities." (emphasis added).

The AGO argued that the language of 15 U.S.C. § 6802(e)(8), which allows nonpublic customer information to be disclosed by a financial institution in order "to comply with Federal, State, or local laws,

rules," meant that the AGO could disclose the nonpublic customer information in order to comply with Washington law, the PRA. AGO Response, 6 (CP 187). Courts have rejected the AGO's argument. The language in 15 U.S.C. § 6802(e)(8) permitting disclosure "to comply with Federal, State, or local laws," is limited to allowing the underlying financial institution to comply with financial industry regulations. Marks v. Global Mortgage Group, Inc., 218 F.R.D. 492, 496 (S.D. W. Va. 2003); Ex parte National Western Life Ins. Co., 899 So.2d 218, 222 (2004) (finding that the "purpose of this exception is to allow financial institutions to comply with these various laws and requirements without fear of violating the GLBA").

In Individual, TransUnion, one of the major credit reporting bureaus, sued the FTC claiming that the GLBA regulations promulgated by the FTC wrongfully limited TransUnion's ability to use nonpublic personal financial information that is provided to TransUnion by financial institutions. Individual, 145 F. Supp. 2d at 14. Specifically, TransUnion was upset because the regulations would prevent it from selling "credit header" information, which commonly refers to identifying information such as the name, address, social security number, and telephone number of the consumers. Id. The court in Individual was adamant that a nonaffiliated third party could not use the exceptions provided for in Section 6802(e)(8) to swallow the other protections of the statute, and found that the FTC's use restrictions were consistent with the purpose of the GLBA. Id. at 36.

Here, the AGO is subject to the same use restrictions as was TransUnion. The FTC's Final Privacy Rule makes clear that all of the information provided by a customer to a financial institution is deemed to be nonpublic personal financial information. There is no carve-out that would allow the AGO to make a determination as to what it could or could not redact. Also, there is no exception in the GLBA that would allow the AGO to disclose nonpublic personal financial information in response to a PRA request.

The only exception to the GLBA that would allow the AGO to disclose nonpublic personal financial information to a third party, like the Intervenor, is the judicial process exemption. 15 U.S.C. § 6802(e)(8) (providing that disclosures are allowed "to respond to judicial process"); Marks, 218 F.R.D. at 496 (finding that the judicial process exemption found in 15 U.S.C. § 6802(e)(8) permits a financial institution to disclose nonpublic personal financial information in response to a civil discovery request).

The court in Martino v. Barnett, 215 W. Va. 123, 130, 595 S.E.2d 65 (2004) acknowledged the availability of the judicial process exception, but it emphasized that disclosure under this exception is not without limitation and recognized that "the judicial process exception to the general privacy purposes of the GLBA does not provide a license to undercut the express interest of Congress in protecting the privacy of consumers' financial information." Id. Trial courts have both a right and a duty to first balance the interests at stake when evaluating a discovery

request seeking nonpublic personal financial information and they must fashion protective orders which both "limit access to necessary information only and uphold such principles of nondisclosure as attorney-client privilege and work product immunity." Id.; Marks, 218 F.R.D. at 497 (finding that it is appropriate for the court to exercise its broad discretion to fashion protective orders to protect the privacy of consumers' financial information); Ex parte Mut. Sav. Life Ins. Co., 899 So.2d 986, 993 (Ala. 2004) (holding that a court which orders the disclosure of a customers' nonpublic personal financial information "should also issue a comprehensive protective order to guard the customers' privacy").

Necessarily included in the discovery process are safeguards which include the trial courts' weighing of the relevance of the information and the possible harm to consumers as well as issuing protective orders that significantly limit the use and dissemination of the nonpublic personal financial information obtained in discovery. This differs significantly from the wholesale disclosure of this information under the PRA, which permits just anyone to obtain and disseminate this confidential information without having to either justify the request or explain the reason for it.

Production of the information in response to a PRA request is not authorized under the GLBA and would not provide any of the protections contemplated by the courts in Marks or Ex parte Mutual. The Intervenor is putting the cart before the horse here. Should Intervenor have a lawsuit that she believes involves certain of Ameriquest's documents protected by the GLBA, she is free to exercise the judicial process exemption to obtain

that information, subject to a trial court's scrutiny for relevance, and issuance of an appropriate protective order. Otherwise, the GLBA will act as intended to protect that confidential information from wholesale disclosure. The trial court erred in finding that the GLBA did not preempt the PRA. Ameriquest has satisfied its burden and the case should be remanded.

2. The Trial Court Erred in Misapprehending -- and Ultimately Not Addressing -- Ameriquest's Request for Judicial Review of the AGO's Decision to Disclose the Confidential Documents. As discussed above, the trial court concluded that Ameriquest had no standing to exercise various exemptions of the PRA on behalf of the AGO. This was not Ameriquest's argument. Instead, Ameriquest argued that discovery was necessary to determine whether the AGO acted arbitrarily and capriciously in deciding to disclose the Ameriquest documents. This issue should be remanded to be addressed by the trial court at a trial on the merits after discovery.

a. Courts Have Inherent Power to Review an Agency Action to Ensure That It Is Not Arbitrary and Capricious. There are numerous exemptions provided under the PRA that the AGO acknowledges it could exercise, in its discretion, to protect the documents from disclosure, including: the commercial purpose exemption, deliberative process exemption, investigative file exemption, and the attorney-client privilege and attorney work product exemptions. AGO

Response at 8:9-16 (CP 189). Indeed, there has been no dispute that the AGO could properly exercise these exemptions.

To be clear, Ameriquest did not argue to the trial court that it (Ameriquest) had standing to assert these exemptions. Rather, Ameriquest argued that the AGO's waiver of all of these exemptions was a sharp divergence from the AGO's established precedent, and that the AGO's treatment of Ameriquest and its documents was markedly different from how the AGO has treated similarly situated parties, documents, and requests. Ameriquest maintained that the AGO's decision was arbitrary and capricious. The trial court misapprehended Ameriquest's argument and instead addressed whether Ameriquest had standing to assert the AGO's exemptions. The trial court never reached Ameriquest's arbitrary and capricious argument. The issues should be remanded to the trial court for resolution.

At oral argument, Ameriquest discussed in detail, its concerns with respect to the AGO's decision to waive allowable PRA exemptions, and asked the trial court for time to conduct discovery on this issue before any disclosure was allowed:

> And, here, our concern is really whether the Attorney General is treating Ameriquest as it would any other business that it's investigated. We are concerned that there are people in the Attorney General's office who may have personal feelings against the company that are impacting the decisions that they made, to the point where their decisions may very well be the very arbitrary and capricious standard that the Attorney General mentioned itself. . . . and we would need an opportunity to be able to [propound] discovery and figure out whether the standard that they are using in this particular case is consistent with the standard that they've used in other cases, as well.

VRP (May 1, 2007) 15:10-25-16:1-6. When questioned by the trial court as to what rights Ameriquest had to challenge the AGO's decision making, Ameriquest's counsel explained the rights of an affected party and the trial court's inherent power of review:

> [T]he Court does have the power through the arbitrary and capricious standard to evaluate whether the decisions that the Attorney General is making are being made with an understanding of the facts and circumstances of the case. And under that standard, if the Court finds that the decisions are willful and unreasonable in light of the totality of the circumstances, it is indeed entitled to review that.

VRP (May 1, 2007) 16:11-20. The trial court never reached the arbitrary and capricious issue raised by Ameriquest and instead ruled on a wholly separate and irrelevant issue -- that Ameriquest had no standing to assert the AGO's exemptions on behalf of the AGO. Order, ¶ 7 at 3 (CP 322).

Ameriquest was not asking to be put into the AGO's shoes so that it could raise exemptions on the AGO's behalf. What Ameriquest was seeking was the trial court's scrutiny of the AGO's failure to raise exemptions that the AGO otherwise could have made. Given an opportunity to conduct discovery, it could be shown that the AGO's actions were a complete divergence from the AGO's normal policy and were inconsistent with the AGO's treatment of similarly situated parties and documents, so as to be considered arbitrary and capricious. Rather than focus on, and respond to, Ameriquest's request, the trial court answered a completely separate question. As such, its ruling was error and should be reversed.

b. An Affected Party Has the Right to Seek Judicial Review of an Agency Action. An affected party has the right to raise the claim that an agency decision is reviewable pursuant to the inherent power of the court. Eng'rs v. State Pers. Bd., 47 Wn. App. 465, 472, 736 P.2d 280 (1987); see also Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council, 129 Wn.2d 787, 793, 920 P.2d 581 (1996). Contrary to the misconception of the trial court, Ameriquest is not arguing that it has standing to raise these exemptions on behalf of the AGO. But Ameriquest does have the right to request review of the AGO's failure to do so – and the trial court had the power to conduct this review. See State v. Ford, 110 Wn.2d 827, 829, 755 P.2d 806 (1988) (holding that "the courts have inherent power to review an administrative action to assure that it was not arbitrary and capricious."); Sherman v. Moloney, 106 Wn.2d 873, 880, 725 P.2d 966 (1986) (finding that courts "always" have authority to review arbitrary and capricious behavior by agencies); Eng'rs, 47 Wn. App. at 472-73 (providing that the "court's inherent power of review extends to administrative action which is contrary to law as well as that which is arbitrary and capricious"); State v. MacKenzie, 114 Wn. App. 687, 695-96, 60 P.3d 607 (2002) (affirming the inherent power of the courts to review agency action to assure that it is not arbitrary and capricious or contrary to law). Clearly, Ameriquest had a right to seek review of, and the trial court had a right to review, the AGO's decision here.

c. Judicial Review of Agency Action Is Required Where an Administrative Agency Is Alleged to Have Engaged in Arbitrary and Capricious Conduct; The Trial Court Failed to Address This Argument. Not only does the court have an inherent power to review agency action, if agency action is contested in a case, a trial court must engage in an inquiry regarding these actions. MacKenzie, 114 Wn. App. at 696. In MacKenzie, the court was asked to review an agency decision regarding the use of alcohol breath test machines. Id. at 691-95. Certain motorists who had been charged with driving under the influence contested the use of the results from the breath test machines under the premise that no quality assurance procedures were performed after software changes were made to the machine. Id. The issue before both the trial court and appellate court was whether the state toxicologist had acted contrary to law or in an arbitrary and capricious manner by not requiring a complete quality assurance procedure. Id. at 697. The appellate court recognized that

> [I]n a contested case, to the extent that an administrative agency is alleged to have determined a regulation not applicable without considering the facts or circumstances before it . . . , such action is arbitrary and capricious and a trial court must engage in limited inquiry regarding these allegations.

Id. at 696 (emphasis added).

Ameriquest explained the serious harm that would be suffered by Ameriquest's customers if their confidential information was disclosed and described in detail the numerous exemptions under the PRA available to the AGO that the AGO could rely on to preclude disclosure of the

documents. Ameriquest also advised the trial court that the AGO failed to provide any evidence that it had evaluated the specific facts of this case or had considered the highly confidential information involved. Ameriquest's Reply Brief in Support of Motion for Preliminary Injunction, 13 (CP 239). Based on Ameriquest's allegations regarding the AGO, the trial court should have recognized that Ameriquest was entitled to some inquiry into its allegations. Rather than undertake even a minimal inquiry, the trial court merely answered a question that Ameriquest was not even asking – whether it had standing to assert the various PRA exemptions on behalf of the AGO. The trial court's failure to address the issue before it was erroneous and mandates reversal.

d. Judicial Review of Agency Action is Fact Specific and Not Suitable for Resolution in Preliminary Adjudications. Our Supreme Court in State v. Ford instructs that inquiry as to whether an agency action is arbitrary and capricious is fact-intensive. The Ford case involved the allegation that the state wrongfully approved a method for analyzing a person's blood alcohol level. The Legislature delegated approval of such methods to the state toxicologist. When certain individuals were charged with driving while intoxicated based on evidence from a blood/alcohol measuring device, the validity of the toxicologist's approval of the device was challenged. Our Supreme Court in Ford restated the well-established definition of "arbitrary and capricious" as "willful and unreasoning action in disregard of facts and circumstances." But it also underscored the factual nature of the court's inquiry.

> Here ... we are concerned with the actions of the state toxicologist. We are not determining whether he acted beyond his authority, but rather whether he acted in disregard of the facts and circumstances before him. The very nature of the inquiry is what the toxicologist did, what facts he relied upon, whether he acted without any rational relation to the facts before him.

Id. at 831.

Because the trial court's review of an agency action under the arbitrary and capricious standard is complex and fact specific, discovery is necessary. The Ford Court confirmed that the "'arbitrary and capricious' review defies generalized application and demands," and that the "stringency of [the court's] review, in a given case, depends upon the analysis of a number of factors." Id. at 832 (citing Natural Resources Defense Council v. S.E.C., 606 F.2d 1031, 1050 (1979)). The court went on: "Only through such flexible approach can we review the multifarious types of agency actions as responsible participants in an enterprise of practical governance." Id.

The flexibility of this analysis and the importance of the factual inquiry required of the court make the question of "arbitrary and capricious" agency behavior particularly ill-suited for resolution on a motion for preliminary injunction. Cf. Northwest Gas, 168 P.3d at 452 (finding that the purpose of a preliminary injunction --preserving the status quo -- was defeated by trial court's order to release documents when pipeline companies were "unable to develop their evidence fully for the preliminary injunction hearing because of the expedited timeframe"). This

is based, in large part, on the parties' inability to conduct meaningful discovery. Id.

Whether the AGO was acting in an arbitrary and capricious manner when deciding to disclose documents is directly linked to the propriety of disclosure. The agency act being questioned is the AGO's underlying decision to disclose documents in the face of exemptions it admits it could have used. While it may be the AGO's decision to use or not use its available exemptions from disclosing these documents, that does not insulate the AGO's decisions from court scrutiny. Indeed, agency abuse of discretion is, by definition, arbitrary and capricious action. See Conway v. DSHS, 131 Wn. App. 406, 419-20, 120 P.3d 130 (2005).

Moreover, when an agency exercises this discretion to treat one party different from another, it behaves in an arbitrary and capricious manner. Bracco Diagnostics v. Shalala, 963 F. Supp. 28, 31 (D.D.C. 1997). In Bracco, the FDA was treating virtually identical products differently. The plaintiff's products were injectable contrast imaging agents for use with ultrasounds. The FDA treated the plaintiff's products as "drugs" but treated a competitor's similar product as a "device." The process for obtaining FDA approval for a device was significantly less stringent than the approval process for a drug. Id. at 23-25. The court found that the FDA's failure to treat similar products in the same fashion was arbitrary and capricious. Id. at 31. An agency also acts arbitrarily and capriciously when it departs from established precedent without a reasoned explanation. This includes situations where the agency departs

from precedent or treats similar situations differently. ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n, 71 F.3d 897, 901 (D.C. Cir. 1995) (finding that the agency's failure to provide reasoned explanation as to why it was treating intrastate gas pipelines more favorably than interstate gas pipelines required that the agency's decision be vacated as arbitrary and capricious).

Ameriquest has raised concerns that it is being treated differently than similarly situated parties and that the AGO is diverging from its established precedent by deciding to waive its allowable PRA exemptions. Only through discovery will Ameriquest be able to flesh out its arbitrary and capricious argument. The trial court's premature ruling on the merits foreclosed Ameriquest's right to pursue this discovery, and the issue should be remanded for a full trial on the merits.

3. Ameriquest Has Established a Well-Grounded Fear of an Immediate Invasion of Its Rights. The Order currently directs disclosure of this highly sensitive information, which evidences Ameriquest's fear of an immediate invasion of its rights. Ameriquest has satisfied the second-prong of the preliminary injunction standard. Tyler Pipe, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

4. Ameriquest Has Established an Actual or Substantial Injury. In Northwest Gas, this Court recognized that disclosure of highly confidential information prior to a trial on the merits would cause "[i]rreparable damage." 168 P.3d at 455. Similarly here, the proverbial cat would be out of the bag upon release of the documents. "Under these

circumstances, prevailing at a trial on the merits would be meaningless," for both Ameriquest, and for the public, who the GLBA was intended to protect. Id.

Ameriquest has satisfied all three prerequisites for the grant of a preliminary injunction, and the trial court erred in denying the motion.

E. The Balance of the Equities Tips Decidedly in Ameriquest's Favor.

Irreparable injury would result if the AGO were allowed to disclose the private financial information provided to it by Plaintiff with respect to its customers, resulting in an invasion of the privacy of those customers that exposes them to the possibility of identity theft. Once the information is disclosed by the AGO to the Intervenor via the PRA request, it becomes public record. Any person may obtain copies of the documents and disseminate them at their whim without any controls being placed on their use. There is no monetary or other relief that could compensate for such a loss. To allow disclosure pursuant to a PRA request would eviscerate the privacy protections afforded under the GLBA and prohibited by judicial prohibitions on arbitrary and capricious agency acts. To be sure, Ameriquest has satisfied its burden on preliminary injunction and raised a "sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in its favor." League of Women Voters, 133 Wn. App. at 384-85.

VII. CONCLUSION

The trial court erroneously ruled on the merits of Ameriquest's motion for preliminary injunction, which in itself mandates reversal and remand for a full trial on the merits. The trial court also erred in its conclusions that the GLBA does not preempt the PRA and by failing to address Ameriquest's arbitrary and capricious argument. Ameriquest respectfully requests that this Court vacate the trial court's order denying the preliminary injunction, and provide direction to the trial court to enter a preliminary injunction pending trial on the merits on these issues.

RESPECTFULLY SUBMITTED this 26th day of November, 2007.

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STATE OF WASHINGTON

BY _____ DEPUTY

No. 36245-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant

v.

OFFICE OF THE ATTORNEY GENERAL
OF WASHINGTON, ET AL.,

Defendants/Respondents

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

CERTIFICATE OF SERVICE

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ANGELINA DE CARACENA, certifies:

I am over the age of eighteen years and not a party to the within action. My business address is 1420 Fifth Avenue, Suite 4100, Seattle, WA 98101.

On November 26, 2007, I caused to be served a copy of the following document:

1. Appellant Ameriquest Mortgage Company's Opening Brief

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 26th day of November, 2007, at Seattle, Washington.

Angelina de Caracena