82690-1

No. 36245-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
08 APR 16 PM 3:28
STATE OF WASHINGTON
BY
DEPUTY

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 REPLY BRIEF

Erik D. Price
WSBA No. 23404
Laura T. Morse
WSBA No. 34532
Joanne N. Davies
Admitted Pro Hac Vice
CSBA No. 204100
Attorneys for Plaintiff Ameriquest
Mortgage Company

Lane Powell PC
111 Market Street, NE, Suite 360
Olympia, Washington 98501
Telephone: (360) 754-6001
Facsimile: (360) 754-1605

Buchalter Nemer
18400 Von Karman Avenue, Suite 800
Irvine, California 92612
Telephone: (949) 760-1121
Facsimile: (949) 720-0182

TABLE OF CONTENTS

Page

I. SUMMARY INTRODUCTION 1

II. ARGUMENT ON REPLY 3

A. A Reversible Error Occurred When the Trial Court Failed to Provide Prior Notice to the Parties of its Intended Adjudication of the Ultimate Merits of the Case at the Preliminary Injunction Stage 3

B. Pursuant to the Public Records Act, Ameriquest May Seek Judicial Review of Agency Action and Request that Disclosure be Enjoined 8

C. Ameriquest Met its Burden for the Grant of a Preliminary Injunction 10

1. Ameriquest Provided Uncontroverted Legal Authority that the GLBA Preempts Application of the Public Records Act and Prohibits Disclosure 11

a. GLBA Preempts Less Protective State Laws, Including the PRA 12

b. There are No Exceptions Under the GLBA that Would Allow Disclosure of Nonpublic Personal Financial Information in Response to a PRA Request 14

c. The GLBA's Reuse Prohibitions Bar the Attorney General From Disclosing Confidential Consumer Information in Response to a PRA Request 17

i. The Attorney General Does Not Need to be a Financial Institution to Qualify as a "Receiving Nonaffiliated Third Party" Subjecting it to the GLBA's Reuse Prohibitions 18

ii. Intervenor is Not an Affiliated Party of the Attorney General or Ameriquest, So Disclosure Under the GLBA Is Prohibited.....20

d. The Attorney General Intends to Disclose Information Otherwise Protected From Disclosure Under the GLBA 22

2. Ameriquest Properly Sought Judicial Review of the Attorney General's Decision to Completely Ignore Federal Privacy Law and Applicable PRA Exemptions 25-26

a. The Court has Authority to Review the Attorney General's Decision to Waive Applicable PRA Exemptions 26

b. The Attorney General's Pejorative Statements Underscore Ameriquest's Need to Conduct Meaningful Discovery on the Issue of Whether the Attorney General Acted in an Arbitrary and Capricious Manner Before There Can Be a Trial on the Merits.....30

i. The Attorney General's Pejorative Statements Evidence Its Animus Towards Ameriquest.....31

ii. The Attorney General's Attempt to Downplay the Issues at Stake Evidence the Attorney General's Arbitrary and Capricious Manner 33

c. The Attorney General's Decision to Disclose Documents Where a Listed Exemption Squarely Applies Appears to be Arbitrary and Capricious 35

III. CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) 10

Bracco Diagnostics, Inc. v. Shalala, 963 F. Supp. 20 (D.D.C. 1997) 28

Chao v. Community Trust, 474 F.3d 75 (3rd Cir. 2007) 25

Conway v. DSHS, 131 Wn. App. 406, 120 P.3d 130 (2006) 12

Dragonslayer, Inc. v. Washington State Gambling Commission, 139 Wn. App. 433, 161 P.3d 428 (2007) 9

Harris v. Pierce County, 84 Wn. App. 222, 928 P.2d 1111 (1996) 36

Hodes & U.S. Dep't of Hous. & Urban Dev't, 532 F. Supp. 2d 108 (D.D.C. 2008) 18, 19, 20, 25

Individual Reference Serv. Group, Inc. v. Fed. Trade Comm'n, 145 F. Supp. 2d 6 (D.C. Cir. 2001) 16, 17

League of Women Voters of Washington v. King County Records, Elections & Licensing Services Div., 133 Wn. App. 374, 135 P.3d 985 (2006) 10

Marks v. Global Mortgage Group, Inc., 218 F.R.D. 492 (S.D. W. Va. 2003) 15

Northwest Gas Ass'n v. Washington Utilities and Transp. Comm'n, 141 Wn. App. 98, 168 P.2d 443 (2007) 1, 3, 4, 6, 7

Pa. State Univ. v. State Employees' Ret. Bd., 935 A.2d 530 (Pa. 2007) 20, 21

Pierce County Sheriff v. Civil Serve. Comm'n of Pierce County, 98 Wn.2d 690 P.2d 648 (1983) 27

Rabon v. City of Seattle, 135 Wn.2d 278, 957 P.2d 621 (1998) 4, 10

Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council, 129 Wn.2d 787, 920 P.2d 581 (1996) 10, 28

Snohomish v. Joslin, 9 Wn. App. 495, 513 P.2d 293 (1973) 12

Soter v. Cowles Pub. Co., 162 Wn.2d 716, 174 P.3d 60 (2007) 8, 35, 36

State v. MacKenzie, 114 Wn. App. 687, 60 P.3d 607 (2002) 28, 30

Wilson v. Nord, 23 Wn. App. 366, 597 P.2d 914 (1979) 27

STATUTE AND COURT RULES

15 U.S.C. § 6802(c) 18, 22

15 U.S.C. § 6802(e) 16

15 U.S.C. § 6802(e)(3)(B) 16

15 U.S.C. § 6802(e)(8) 14, 15, 16

15 U.S.C. § 6807 ..... 12, 13

16 C.F.R. § 313.3(o)(1) 24

16 C.F.R. § 313.3(p)(3)(ii) 24

CR 26(b)(4) 36, 37

CR 65 ..... 1, 3, 4, 7

CR 65(a)(2) 3, 5, 6, 7

ER 201 14

RCW 42.56.080 20

RCW 42.56.240 31

RCW 42.56.290 ..... 36, 37

RCW 42.56.540 8

MISCELLANEOUS

145 Cong. Rec. H11 513 and 519 (daily ed. Nov. 4, 1999) (statements of Rep. Sessions and Rep. LaFalce) 13

145 Cong. Rec. H11513, H11516 (Nov. 4. 1999) (Rep. Mrs. Roukema) 14

145 Cong. Rec. S13913, S13915 (Nov. 4, 1999) (statement of Sen. Sarbanes) 14

http://www.ameriquestmultistatesettlement.com, pg. 7 32

http://www.atg.wa.gov/ConsumerIssues/ID-Privacy/IdentityTheft.aspx (March 27, 2008) 33

http://www.atg.wa.gov/Settlements/default.aspx#Ameriquest 32

http://www.ftc.gov/bcp/conline/pubs/buspubs/glbshort 14

I. SUMMARY INTRODUCTION

The Attorney General's Office ("AGO") and Intervenor Melissa Huelsman ("Intervenor") either miss or simply avoid the relevant issues in this appeal. First, both the AGO and Intervenor remain unable to escape the dispositive effect of CR 65(a)(2), which requires the trial court to give notice to the parties before adjudicating a case on its merits at the preliminary injunction stage. This Court's recent ruling in Northwest Gas Ass'n v. Washington Utilities and Transp. Comm'n, 141 Wn. App. 98, 168 P.2d 443 (2007), confirmed that a trial court's failure to give the necessary notice is reversible error. That the AGO failed to even acknowledge CR 65 is telling. And both the AGO and Intervenor's strained reading of Northwest Gas cannot change its explicit holding. This case should be reversed and remanded on the basis of the trial court's violation of CR 65 alone.

Second, the AGO and Intervenor refuse to acknowledge the explicit directive under the federal financial privacy law, the Gramm-Leach-Bliley Act ("GLBA"), that prohibits disclosure of the confidential personal financial information Intervenor seeks. Although this is an issue of first impression in Washington, Ameriquest provided a detailed analysis of the statute and applicable case law. The AGO and Intervenor fail to provide any meaningful challenge to Ameriquest's analysis, ignoring the

relevant cases and laboring to pull support from plainly inapposite cases. The directives in the GLBA are unambiguous and, because the GLBA unmistakably provides for more stringent privacy protections than the PRA, the GLBA preempts the PRA and prohibits disclosure. Ameriquest satisfied its burden for the grant of preliminary injunction, and the trial court erred in denying Ameriquest's motion.

Third, both the AGO and Intervenor continue to misstate or misapprehend Ameriquest's position regarding the AGO's decision not to invoke certain applicable exemptions to disclosure under the PRA. Ameriquest is not asserting that it has standing to assert those exemptions on its own behalf. Ameriquest has standing under the PRA to seek judicial review of the AGO's decision to ignore applicable exemptions and disclose documents. Further, Ameriquest maintains that the AGO's failure to apply exemptions suggests that the AGO was acting in an arbitrary and capricious fashion, an issue upon which Ameriquest is entitled to judicial review. The AGO's negative remarks in its brief to this Court further underscore Ameriquest's need for discovery into the AGO's decision. Only then can the necessary full trial on the merits be had.

It is worth noting that the AGO was quite dismissive about the release of the confidential personal financial information to the public at large, and was all too quick to take jabs at Ameriquest. But this case is

about whether the AGO is free to ignore applicable exemptions to the PRA and disclose confidential personal financial information provided by any financial institution about any number of consumers to anyone who makes a PRA request, subject only to those redactions the AGO determines are adequate. If the AGO's response is that it might exercise the exemptions in a different case, that just further illustrates that the AGO has acted in an arbitrary and capricious manner towards Ameriquest. Just as this Court remanded the Northwest Gas case for a full trial on the merits, so too does this issue deserve a more measured approach before unfettered disclosure begins and such a precedent for disclosure is set.

II. ARGUMENT ON REPLY

A. A Reversible Error Occurred When the Trial Court Failed to Provide Prior Notice to the Parties of its Intended Adjudication of the Ultimate Merits of the Case at the Preliminary Injunction Stage.

This Court's application of CR 65(a)(2) in Northwest Gas was unequivocal and is dispositive of this appeal:

> [In Northwest Gas] the trial court did not expressly inform the parties that it was consolidating the preliminary injunction hearing with a permanent injunction trial on the merits under CR 65(a)(2). Yet, in ordering the WUTC to disclose the Pipelines' Shapefile data to the Newspapers and [Intervenor], the trial court essentially considered and finally resolved the merits of the Pipelines' claims at the preliminary injunction hearing, at which it erroneously applied the permanent injunction standard of proof, contrary to CR 65.

141 Wn. App. at 114 (emphasis added). Here, without the requisite notice to the parties, the trial court ordered disclosure of documents including the confidential personal financial information, which finally resolved the merits of Ameriquest's claim at the preliminary injunction hearing contrary to CR 65. Just as in Northwest Gas, this procedural error mandates reversal and remand for a trial on the merits.[1]

Tellingly, the AGO did not even cite to CR 65 in its brief. Knowing CR 65(a)(2) and Northwest Gas require reversal, the AGO offered a creative interpretation of Northwest Gas that essentially writes new procedural standards to apply on preliminary injunction: (1) to be entitled to notice of full adjudication on the merits, the party opposing disclosure must make an "offer of proof" as to what evidence it would present at the trial on the merits; (2) notice of consolidation is really only necessary when there are "important" issues at stake (and the protection of confidential personal financial information is apparently not "important" enough for the AGO to require a full trial); and (3) the trial court has the

[1] The notice requirement reiterated in Northwest Gas is not new or novel. Our Supreme Court declared a decade ago that it is a "well-settled principle[]" that the trial court must give the parties notice prior to consolidating the preliminary injunction hearing with a ruling on the ultimate merits. Rabon v. City of Seattle, 135 Wn.2d 278, 286, 957 P.2d 621 (1998).

discretion to adjudicate the final merits based on the court's evaluation of the equities of the case. AGO Br. 10-18.

- "Offer of Proof." On this point, the AGO confused Ameriquest's right to notice under CR 65(a)(2) with its general burden on preliminary injunction. AGO Br. 10-14. The AGO's assertion that the trial court's final decision on the merits was justified based on Ameriquest's hastily marshaled evidence is simply wrong and displays a fundamental misunderstanding of the procedural requirements of CR 65(a)(2). Moreover, the AGO simultaneously claimed that Ameriquest has no proof to support its claim that the AGO acted arbitrarily and capriciously and then purports to deny Ameriquest any opportunity to obtain such proof.[2]

- "Important" Issues. The AGO made the baffling assertion that a premature and erroneous decision on the merits here would not be a problem because this is not an "important conflict." AGO Br. 15. First, notice is required under CR 65(a)(2) regardless of the "importance" of the underlying issue. Whether the case involves issues of consumer privacy or terrorism has no relevance to the court's necessary application of the CR 65(a)(2) notice requirement. Second, to say that the release of the

[2] The AGO dismissed Ameriquest's allegations of arbitrary and capricious behavior as "hypothetical" and a "fishing expedition." AGO Br. 14. As will be discussed below in Section II.C.2.b, the AGO's inflammatory statements in its Brief to this Court speak loudly about the need for further discovery on this issue.

confidential personal financial information of non-parties is not "important" is inexplicable. Ameriquest was entitled to notice or a full trial on the merits regardless of the AGO's dismissive attitude towards disclosing the documents, and the trial court's final adjudication on the merits deprived Ameriquest of both.

- Discretion of the Court. Contrary to the AGO's assertion, the equities of Ameriquest's underlying claims have no bearing on the court's required application of CR 65(a)(2), as this rule mandates a procedural process regardless of the trial court's perception of merits of the case. (This is, of course, different than the test for the grant of preliminary injunction, which considers the likelihood of success on the merits.) To hold that the CR 65(a)(2) notice requirement is discretionary would undercut the purpose of this rule, which is to provide the parties with ample opportunity to present their case at the permanent injunction hearing. Northwest Gas, 141 Wn. App. at 114. If what the AGO's saying is true, a trial court could simply dispense of the CR 65(a)(2) procedural requirements at its choosing solely based on its view of the merits of the case. When the purpose of CR 65(a)(2) is taken into consideration, the AGO's position makes no practical sense.

The AGO complained that Ameriquest's interpretation of Northwest Gas was too broad in that it would "guarantee a preliminary

injunction to every PRA litigant seeking to enjoin disclosure." AGO Br. 9. That is not the case. What CR 65(a)(2) requires is simply that the trial court must provide notice to the parties if it intends to make a decision on the merits of disclosure at the preliminary injunction stage so the parties have a full opportunity to present their case at the hearing. This is not form over substance, as this Court confirmed when it ruled that failure to provide prior notice is reversible error. Northwest Gas, 141 Wn. App. at 114-15.

In contrast to the AGO, the Intervenor acknowledged and agreed with the CR 65(a)(2) standard set forth in Northwest Gas but attempted to differentiate Northwest Gas from the present action by alleging CR 65(a)(2) was not implicated here because the trial court did not issue a final ruling. Intervenor Br. 14. Intervenor's argument is unavailing given the undisputed fact that documents are set to be disclosed. Moreover, this Court already rejected this argument when granting review.

As CR 65 is dispositive on the issue of remand, this Court could end its analysis here and remand to the trial court to reconsider Ameriquest's request for a preliminary injunction. Ameriquest is mindful that the Court may wish to address the requirements for injunctive relief, especially in light of the serious consumer financial privacy issues at stake. Also, since the GLBA's preemption of the PRA is a matter of first

impression before the courts in Washington, this Court may choose to provide some guidance.

B. Pursuant to the Public Records Act, Ameriquest May Seek Judicial Review of Agency Action and Request that Disclosure be Enjoined.

The AGO's claim that Ameriquest does not have standing under the PRA to challenge the AGO's decision to disclose this information is contrary to the plain language of the statute itself.[3] Under the PRA, Ameriquest may seek to enjoin the disclosure of any document that names or pertains to Ameriquest. RCW 42.56.540. This includes Ameriquest's ability to challenge the AGO's decision as to whether an exemption applies. Soter v. Cowles Pub. Co., 162 Wn.2d 716, 752, 174 P.3d 60 (2007) (providing that "it is clear that either agencies or persons named in

[3] There are two so-called "standing" questions present in this appeal. The first, addressed here, is whether Ameriquest has the right to bring any challenge to the AGO's disclosure pursuant to the PRA. The answer to this question is an unequivocal "yes." The AGO has also raised the specter of Ameriquest's "standing" to argue applicability of certain exemptions under the PRA. Again, the AGO fundamentally misapprehends Ameriquest's arguments regarding application of these exemptions. As discussed below in Section II.C.2, Ameriquest is not claiming standing to raise these exemptions on behalf of the AGO, but rather to challenge the AGO's failure to do so. The answer to the question of whether Ameriquest has standing to raise this latter type of challenge is another unequivocal "yes." Thus, the AGO's second "standing" issue is no issue at all.

the record may seek a determination from the superior court as to whether an exemption applies, with the remedy being an injunction").[4]

There is no question that Intervenor seeks documents relating to the AGO's investigation of Ameriquest and that all of the documents proposed to be disclosed by the AGO, including the loan files, emails, and attorney work product notes, name or relate to Ameriquest. Tiberend Decl.[5] (CP 117-24); Huey Decl. (CP 163-66). Based on the clear and plain language of the PRA, as well as applicable case law, it is evident that Ameriquest is an interested third party and is entitled to seek judicial intervention.[6]

---

[4] This Court has not only recognized a third party's right to challenge an agency's refusal to apply a PRA exemption, it also allowed the third party to challenge the agency's fundamental decision in deciding whether or not the document qualified as a "public record" in the first place. See Dragonslayer, Inc. v. Washington State Gambling Commission, 139 Wn. App. 433, 442-46, 161 P.3d 428 (2007). This Court also required that the trial court analyze the underlying documents and exemptions to see whether the documents were subject to disclosure and whether certain exemptions applied. Id. at 447, 450.

[5] To clarify regarding the declaration of Diane Tiberend, Intervenor is mistaken when she claims that Ameriquest is "overlooking" that Ms. Tiberend is a partner at Buchalter Nemer, outside counsel for Ameriquest. Intervenor Brief at 10-11. Ms. Tiberend is not, nor has she ever been, a partner at Buchalter. Moreover, Intervenor's CP citations do not support her claim and instead demonstrate that Ms. Tiberend is an Assistant Secretary for Ameriquest. It is unclear what the Intervenor relies on to make this assertion.

[6] In its brief the AGO largely ignored the standing conferred to Ameriquest under the PRA and raised a red herring by citing to the standard of review under the Washington Administrative Procedures Act.
(continued . . .)

C. Ameriquest Met its Burden for the Grant of a Preliminary Injunction.

Where, as here, the moving party has demonstrated a likelihood of success on the merits, entry of a preliminary injunction is required. Rabon v. City of Seattle, 135 Wn.2d 278, 285, 957 P.2d 621 (1998). Grant of preliminary injunction is also appropriate where the moving party raises "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)). Ameriquest has satisfied both standards:

- Ameriquest established that disclosure of documents which contained its customers' confidential personal financial information violated the privacy protections of the Gramm-Leach-Bliley Act ("GLBA") and that the GLBA preempted the PRA.

(. . . continued)
AGO Br. 19-20. In any event, Ameriquest has also satisfied the APA standard for review. Both the AGO and Intervenor acknowledge that Ameriquest would be harmed by disclosure and that an injunction would eliminate this prejudice. Moreover, the PRA contemplates that a third party named in or to whom the records pertain has a right to challenge the agency action, which makes it clear that by statute Ameriquest's interests are intended to be considered under the PRA. Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council, 129 Wn.2d 787, 793-94, 920 P.2d 581 (1996).

- Because GLBA preemption is an issue of first impression in Washington, and there is a dearth of case law interpreting the interplay between the GLBA and the PRA under these facts, this case raises a sufficiently serious question to make the case a prime candidate for litigation on the merits.

- Ameriquest demonstrated that there were numerous PRA exemptions that applied to the documents which were ignored by the AGO, and Ameriquest properly sought judicial review as to whether the AGO's actions were arbitrary and capricious.

Ameriquest amply satisfied its burden at the preliminary injunction stage, and the trial court should have issued an injunction preserving the status quo pending a trial on the merits.

1. Ameriquest Provided Uncontroverted Legal Authority that the GLBA Preempts Application of the Public Records Act and Prohibits Disclosure. As this is a matter of first impression in Washington, Ameriquest understands that the decisions made by this Court will affect the protections afforded to not only the confidential consumer personal financial information provided by Ameriquest to the AGO, but also to the same information provided by any other financial institution to the AGO or other agencies. This case may establish the precedent for how all PRA requests seeking confidential personal financial information are handled, not just the Intervenor's request for Ameriquest's customers' confidential personal financial information.

As a threshold matter, neither the AGO nor Intervenor dispute that Ameriquest has an obligation to protect its customers' confidential personal financial information pursuant to the GLBA. Moreover, they have not refuted, and based on existing law cannot refute, that the GLBA preempts and prohibits disclosure under the PRA.

a. GLBA Preempts Less Protective State Laws, Including the PRA. The AGO claimed that Ameriquest's preemption argument failed because it relied only on the "bare words of the statute" and complained that Ameriquest offered no insight into Congressional intent. AGO Br. 27. This argument is patently absurd. It is axiomatic that the words of a statute control. Conway v. DSHS, 131 Wn. App. 406, 416, 120 P.3d 130 (2006) ("in the absence of ambiguity or statutory/regulatory definition, 'words should be given their ordinary or plain meaning'"); see also Snohomish v. Joslin, 9 Wn. App. 495, 498, 513 P.2d 293 (1973) ("Plain words do not require construction."). If a regulation is clear and unambiguous the court should apply the plain language of the regulation. Conway, 131 Wn. App. at 418. The AGO cannot reasonably suggest that Ameriquest needed to go beyond the explicit wording of the "Relation to State Laws" provision of 15 U.S.C. § 6807, which plainly articulates that less protective state consumer

privacy laws are preempted because they would be inconsistent with the GLBA.[7]

In any event, any argument that Congress did not intend for the GLBA to preempt less restrictive state laws is baseless. The AGO completely ignored Ameriquest's lengthy discussion on the FTC's determination that the GLBA sets the "floor" for consumer privacy and failed to provide any evidence of Congressional intent that was contrary to that demonstrated by Ameriquest in its brief. Ameriquest Br. 22. When Congress passed the GLBA in 1999 it did so not only to modernize restrictions in the financial services industry but also to create much needed, comprehensive, federal privacy protections for consumers' personal financial information. 145 Cong. Rec. H11 513 and 519 (daily ed. Nov. 4, 1999) (statements of Rep. Sessions and Rep. LaFalce). Even the AGO acknowledged that the GLBA "created an extensive new financial privacy regime." AGO Br. 25. The FTC further articulated that "[p]rotecting the privacy of consumer information held by 'financial

[7] The AGO is incorrect when stating that Ameriquest cited to a "definitions section of the Act," to support its preemption claim. AGO Br. 27. The provision relied upon by Ameriquest for federal preemption, 15 U.S.C. §6807, was set forth by Congress in the "Relation to State Laws" section and is not simply a definition.

institutions' is at the heart of the financial privacy provisions," of the GLBA. http://www.ftc.gov/bcp/conline/pubs/buspubs/glbshort.[8]

The Congressional Record demonstrates that Congress intended that the GLBA would preempt less protective state laws but that more protective state laws would be allowed. 145 Cong. Rec. S13913, S13915 (Nov. 4, 1999) (statement of Sen. Sarbanes) (providing that "[o]n privacy, States can continue to enact legislation of a higher standard than the Federal standard") (emphasis added); 145 Cong. Rec. H11513, H11516 (Nov. 4. 1999) (Rep. Roukema) (finding that stricter state privacy laws were not preempted) (emphasis added). The plain language of the GLBA and the Congressional Record make clear that the GLBA preempts less protective state statutes such as the PRA.

b. There are No Exceptions Under the GLBA that Would Allow Disclosure of Nonpublic Personal Financial Information in Response to a PRA Request. In front of the trial court, the AGO and Intervenor argued that the first phrase in 15 U.S.C. § 6802(e)(8), which allows a financial institution to disclose information in order "to comply with Federal, State, or local laws, rule, and other applicable legal requirements," would also allow a receiving nonaffiliated third party such

[8] The Court may take judicial notice of the content of these publications, under ER 201.

as the AGO to disclose information to the Intervenor to comply with the PRA. AGO Response (CP 187); Intervenor Response (CP 204). Ameriquest addressed this anticipated argument in its opening brief on appeal and cited authority which affirmatively rejected this proposition. Ameriquest Br. 27-32. Notably, the AGO did not revive its old arguments on appeal. Although the Intervenor did repeat her arguments she completely ignored the authority cited by Ameriquest and did not cite to any contrary case law to support her position. Intervenor Br. 26.

Ameriquest acknowledged that under the second phrase of 15 U.S.C. § 6802(e)(8), which is the judicial process exemption, a financial institution may disclose nonpublic personal information in response to civil discovery once an appropriate protective order has been entered in the case. Marks v. Global Mortgage Group, Inc., 218 F.R.D. 492, 496-97 (S.D. W. Va. 2003). Ameriquest emphatically disagrees with Intervenor's contention that disclosure under the judicial process exemption is analogous to disclosure under the PRA. Intervenor Br. 27. Intervenor utterly disregards that the safeguards which are required to be in place in the context of discovery in civil litigation, such as the trial court's weighing of the relevance of the information against the possible harm to consumers, and the fashioning of protective orders limiting access to the

information, are not available in response to a PRA request. Ameriquest Br. 30-32.

Intervenor then claims that disclosure is allowed under the GLBA "fraud" disclosure exception, § 6802(e)(3)(B), under the premise that Intervenor has clients who have fraud claims against Ameriquest. Intervenor Br. 27. Again, Intervenor cites to no applicable legal authority to support her interpretation of this exception and ignores authority to the contrary.[9] This section allows a financial institution to disclose information to nonaffiliated third parties "to protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liabilities." 15 U.S.C. § 6802(e)(3)(B). This exception is limited to allowing disclosure when necessary to "protect the integrity of the financial institution," not to allow Intervenor to conduct a fishing expedition. Individual Reference Serv. Group, Inc. v. Fed. Trade Comm'n, 145 F. Supp. 2d 6, 35 (D.C. Cir. 2001).

Congress intended that exceptions under 15 U.S.C. § 6802(e) be limited in purpose and scope as the consumer has not had the option to opt out and it would be unfair to allow the receiving third party to take advantage of an exception to the GLBA when the GLBA otherwise

[9] Intervenor's citation to Marks in support of her argument is not persuasive as the court in Marks discussed disclosure under the judicial process exemption, not under 15 U.S.C. § 6802(e)(3)(B).

intended to give consumers control over their nonpublic personal information. Id. at 36. To rule otherwise would allow the exception to swallow the statute. Id. The Congressional purpose of the GLBA was to "ensure that consumers retain control over their nonpublic personal information," and that the information cannot be reshared by third parties to avoid privacy protections. Id. at 35.

Pursuant to the GLBA, the only way that Intervenor can obtain any information that is otherwise protected under the GLBA is through the judicial process exception, which exception does not include a request for production under the PRA.

c. The GLBA's Reuse Prohibitions Bar the Attorney General From Disclosing Confidential Consumer Information in Response to a PRA Request. The AGO's position that the GLBA's "reuse" prohibitions do not apply here is similarly unpersuasive. The AGO acknowledged that under certain circumstances the GLBA allows financial institutions (like Ameriquest) to share information with nonaffiliated third parties (like the AGO) but places limits on the reuse of that information by the nonaffiliated third parties (again, the AGO). AGO Br. 26. The GLBA's limitations on reuse are clear:

> [A receiving] nonaffiliated third party [like the AGO] . . . shall not . . . disclose . . . information to any other person [like Intervenor] that is a nonaffiliated third party of both the financial institution and the 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).

The AGO argued that since it is not a financial institution, the GLBA reuse prohibitions do not apply. In the alternative, the AGO argued that Intervenor (simply as a member of the Washington public) and the AGO are "affiliated" so the 15 U.S.C. § 6802(c) prohibitions on disclosure are not triggered. AGO Br. 27-29. The AGO's contentions are contradicted by law and, if followed, would negate the protections afforded under the GLBA rendering it worthless.

i. The Attorney General Does Not Need to be a Financial Institution to Qualify as a "Receiving Nonaffiliated Third Party" Subjecting it to the GLBA's Reuse Prohibitions. The AGO does not need to be a financial institution for the GLBA reuse prohibitions to apply as the reuse prohibitions cover any "receiving [nonaffiliated] third party." The AGO falls squarely within the GLBA definition of a "receiving nonaffiliated third party" as it was provided with nonpublic personal information by a financial institution in connection with an allowable exception under the GLBA. The court in Hodes v. U.S. Dep't of Hous. & Urban Dev't, 532 F. Supp. 2d 108 (D.D.C. 2008), was faced with an argument identical to that raised by the AGO, and the court determined that a government agency that receives information from a financial

institution is considered a receiving nonaffiliated third party under the GLBA. Hodes, 532 F. Supp. 2d at 115. The Hodes case involved a FOIA request submitted to an agency seeking disclosure of information that the agency had received from a financial institution. The agency refused to disclose the documents, raising the GLBA confidentiality provision. The plaintiff claimed the GLBA did not apply because the agency was not a financial institution. Id. at 111-14. The court found that, even though the agency was not a financial institution, "'any' entity may be considered a nonaffiliated third party, not just other financial institutions." Id. at 115.

The Hodes court realized that the practical result of the plaintiff's proposed interpretation of the GLBA would be "antithetical to [the GLBA's] stated purpose . . . to insure the security and confidentiality of customer records and information." Id. (citations omitted). It understood that if plaintiff's argument was correct, "information could be disclosed to any number of third party entities that would be unbound by the [GLBA's] restrictions on the use of that information rendering its confidentiality provisions largely meaningless." Id. The court rejected plaintiff's argument and enjoined disclosure. Id. at 114-16. Here, the AGO is a nonaffiliated third party and is subject to the GLBA confidentiality provisions.

ii. Intervenor is Not an Affiliated Party of the Attorney General or Ameriquest, So Disclosure Under the GLBA Is Prohibited. The AGO's next argument was that, because the AGO owes its duty to disclose under the PRA to the Washington public, the AGO and the public are "affiliated," and the GLBA nondisclosure prohibitions are not applicable. AGO Br. 27-29.[10] This argument was already addressed and rejected by the court in Hodes, which held that the GLBA did not exempt "government entities from its confidentiality provisions, nor would doing so comport with the purpose of the Act, which is to safeguard consumer information." Id. at 116.[11]

The AGO's reliance on Pa. State Univ. v. State Employees' Ret. Bd., 935 A.2d 530 (Pa. 2007) to support its proposition that it and the Intervenor are "affiliated" is not well founded. In Pa. State, the plaintiff issued a public records request seeking disclosure of salary information and service histories for employees who chose to participate in a state

[10] Again, Intervenor being a lawyer has no bearing on this case as disclosure to Intervenor is synonymous with disclosure to the public at large. Regardless of Intervenor's claims that she would not misuse the confidential personal financial information, once this Court authorizes disclosure under the PRA, anyone who wanted this information, for whatever purpose, could make a PRA request and obtain the information. RCW 42.56.080 (the AGO cannot distinguish among persons requesting the records and generally cannot inquire into the purpose of the request).

[11] The AGO surprisingly failed to address Hodes in its brief other than to provide the case name in a "but see" citation. AGO Br. 28.

operated retirement fund. Id. at 532-34. The state fund cited to the GLBA when objecting to disclosure. The court decided, consistent with FTC and SEC regulations, that (1) state funds are not financial institutions regulated under the GLBA; (2) individual participants in the plan are not consumers as defined by the GLBA; and (3) that the GLBA had no application to state funds. Id. at 538. The court found because it is the state's funds that are being disbursed through the retirement account, the salary and service history information should be disclosed. Id. at 534.[12] The Pa. State court did not determine that under the GLBA the public and a state agency are affiliated third parties thus allowing reuse. Although the court does discuss the relationship between the state and the general public, it does not cite to the GLBA or any other authority regarding the GLBA's definition of "non-affiliated third parties." Id. at 537. The AGO's attempt to extrapolate unrestrained disclosure of protected information under the GLBA to the general public is not supported by Pa. State.

Even assuming arguendo that the AGO and Intervenor are affiliated, the AGO ignores the second prong of the statutory test: it is not

[12] Notably, even in a situation where the broad GLBA privacy protections were not implicated, the Pa. State court still found that the public did not have the right to know information that was pertinent to an individual's security including addresses, telephone numbers, and social security numbers – notably two of the three categories mentioned by the court in Pa.State are set for disclosure here (the addresses and telephone numbers of Ameriquest's customers).

sufficient that the AGO and Intervenor are affiliated, Intervenor and Ameriquest would also have to be affiliated for disclosure to be allowed under the GLBA, and clearly Ameriquest and Intervenor are not affiliated. 15 U.S.C. § 6802(c). Since Ameriquest could not lawfully disclose its customers' confidential personally identifiable financial information to Intervenor, the AGO cannot do so either. Id.

d. The Attorney General Intends to Disclose Information Otherwise Protected From Disclosure Under the GLBA. What neither the AGO nor Intervenor want to concede is that all personally identifiable financial information contained within a loan file is protected from disclosure under the GLBA. Ameriquest Br. 23-25. The AGO plainly believes that it should be allowed to pick and choose, based solely on its interpretation of the PRA, and ignoring the GLBA, what information to keep versus redact.[13]

The problem here is that the documents set for disclosure are replete with information protected by the GLBA, which information has

[13] The AGO appears to suggest that Ameriquest waived its concern that the GLBA prohibited disclosure when it participated in discussions with the AGO about the AGO's redactions. AGO Br. 6. Any discussions that Ameriquest had with the AGO about the sufficiency of its redactions under the PRA occurred after the trial court's rejection of Ameriquest's GLBA argument and denial of its motion for preliminary injunction. Ameriquest has never conceded that any disclosure is allowed under the GLBA.

not been removed by the AGO through its redaction process and would remain in the loan file including. Even a cursory review of what information remains after redaction, demonstrates that redactions under the PRA do not equal nondisclosure under the GLBA.

- 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,[14]
- 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). Neither the AGO nor Intervenor contest that this enumerated information would remain in the file post

[14] Intervenor complains that Ameriquest is being disingenuous when it seeks to protect borrower's address because she claims the address for the loan is on the recorded mortgage. Intervenor's criticism assumes that a loan file contains just the subject property address and would not contain a residential history or a record of other investment properties held by the borrower.

AGO redaction and would be disclosed to Intervenor or anyone else who requested these documents. The GLBA squarely prohibits disclosure of this information.

The FTC Privacy Rule provides that any information provided by a consumer to a financial institution and any information about the resulting transaction is protected under the GLBA. 16 C.F.R. § 313.3(o)(1). The FTC went so far as to provide examples of information that would be protected under the GLBA, including telephone numbers. 16 C.F.R. § 313.3(p)(3)(ii). The AGO does not deny that it will not redact telephone numbers out of the loan files, in contravention of the GLBA. The AGO and Intervenor avoid and simply do not address that protecting telephone numbers from disclosure is but one example of where the GLBA is more protective than the PRA. Instead, they muddle the PRA and GLBA standards by restating their mantra that redactions have occurred per the PRA and that they think these redactions are good enough. Nor do they respond to Ameriquest's argument that redactions are not permitted. Indeed, neither the AGO nor the Intervenor can point to anything in the GLBA that authorizes redaction as an alternative to nondisclosure.

The only case Intervenor discusses regarding redactions is one where the court states as dicta in a footnote that if a document set for disclosure does not contain any protected GLBA information, then the

GLBA would not be triggered. Chao v. Community Trust, 474 F.3d 75, 87 n.6 (3rd Cir. 2007). Notably, the Chao court made this comment in the context of a case where a government agency had issued a subpoena to a financial institution, not a case where the public is seeking broad disclosure under a PRA request, and, perhaps more significantly, the Chao court was not ordering disclosure of documents protected under the GLBA. By contrast, in a case squarely on point with the facts at issue here, in Hodes, the court held that information protected under the GLBA could not be disclosed in response to a public records request. Hodes, 532 F. Supp. 2d at 113-19.

The sheer magnitude of the financial information contained within a loan file and the great harm that would be suffered by wrongful disclosure illustrates that disclosure in response to a PRA request for documents that contain confidential personally identifiable financial information is not authorized under the GLBA.[15] The AGO's offer to provide woefully inadequate redactions does not change this analysis.

2. Ameriquest Properly Sought Judicial Review of the Attorney General's Decision to Completely Ignore Federal Privacy Law

[15] One of the risks of disclosure is erroneous redactions, and Ameriquest identified serious deficiencies in the AGO's redaction process which would have resulted in the disclosure of customers' social security and account numbers. VRP (May 1, 2007) 12:3-25 and 13:1-8.

and Applicable PRA Exemptions. The PRA grants Ameriquest the right to seek judicial review of the AGO's decisions, and the court has the ability to determine whether the AGO's actions were arbitrary and capricious. Ameriquest has already demonstrated that the AGO decided to disclose documents even where PRA exemptions squarely applied, and serious concerns have been raised as to whether the AGO is treating Ameriquest differently than similarly situated parties. The AGO has curiously remained silent on the latter point. Rather, instead of focusing on the issues, the AGO made numerous inflammatory statements against Ameriquest that were completely unnecessary. These derogatory statements highlight the need for Ameriquest to conduct discovery on whether the AGO's decision to disclose documents relating to Ameriquest was arbitrary and capricious before there can be a trial on the merits. This matter should be remanded to be addressed by the trial court at a trial on the merits after discovery.

a. The Court has Authority to Review the Attorney General's Decision to Waive Applicable PRA Exemptions. The AGO claimed that Ameriquest cannot challenge the AGO's decision to waive exemptions because: (1) Ameriquest allegedly lacks standing to assert the AGO's exemptions; and (2) Ameriquest, even if harmed by the AGO, is

not entitled to question or seek judicial review of the AGO's decision to waive exemptions. AGO Br. 19.[16]

As discussed above in Section II.B., Ameriquest has standing under the PRA to challenge the AGO's decision to disclose documents that relate to Ameriquest, this includes challenging the AGO's decision to waive applicable exemptions. Ameriquest also has "a fundamental right to have the agency abide by the constitution, statutes, and regulations which affect the agency's exercise of discretion." Wilson v. Nord, 23 Wn. App. 366, 373, 597 P.2d 914 (1979). Moreover, it is a "fundamental right" for Ameriquest to both be free from any arbitrary and capricious administrative action and to have the AGO abide by the rules to which it is subject. Pierce County Sheriff v. Civil Srv. Comm'n of Pierce County, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983).

In conducting its judicial review, a court may review agency decisions to determine whether they are arbitrary and capricious or contrary to law. Wilson, 23 Wn.App. at 372; Pierce County Sheriff, 98 Wn.2d at 693 (finding that courts have inherent power to review "illegal or manifestly arbitrary and capricious actions violative of fundamental

[16] Intervenor claimed that the issues of judicial review and discovery were not discussed below so are not ripe for appeal. Intervenor Br. 17, 38-41. Intervenor contradicted her assertions by acknowledging that the issue of judicial review was addressed in Ameriquest's reply brief and both issues were discussed at oral argument. Id. at 16, 38-39.

rights"). The need for at least a limited inquiry by the trial court is necessary in situations where allegations are made that the agency failed to consider all facts and circumstances before determining that a regulation was not applicable. State v. MacKenzie, 114 Wn. App. 687, 696, 60 P.3d 607 (2002).

Importantly, treating similarly situated parties differently without providing any legitimate reason for failing to do so is prima facie evidence that an agency's action is arbitrary and capricious. Bracco Diagnostics, Inc. v. Shalala, 963 F. Supp. 20, 27-28 (D.D.C. 1997).[17] It is noteworthy that the Bracco court found that there was a strong public interest in requiring that an agency act lawfully, consistent with its obligations under the statute, and that it treat similarly situated and regulated parties the same. Id. at 30.

In its motion for preliminary injunction, Ameriquest identified the GLBA, a federal privacy law, and numerous PRA exemptions which squarely applied to the documents at issue. Ameriquest Mot. (CP 99-114). The AGO responded by dismissing the GLBA as non-preemptive and argued that, even if PRA exemptions apply, because the AGO views the

[17] Washington courts have relied heavily on federal case law when conducting judicial review of agency action. Seattle Bldg., 129 Wn.2d at 794.

exemptions as "permissive rather than mandatory" it can decide to ignore the exemptions and disclose the documents. AGO Response (CP 187-90).

The AGO provided no reasoning in its response as to why in this case it decided to disclose documents that are otherwise exempt from disclosure under the PRA.[18] On reply before the trial court, Ameriquest not only addressed the absurdity of the AGO's interpretation of "is exempt" under the PRA to mean "at agency's whim is exempt," it also stated that the AGO's actions in refusing to apply legitimate exemptions was arbitrary and capricious. Ameriquest Reply (CP 238-39). At oral argument, Ameriquest discussed its concerns and stated:

> What the AGO is really saying is it's in our discretion as to whether we want to raise these exemptions or not, and it said here we don't feel like it. And, here, [Ameriquest's] concern is really whether the Attorney General is treating Ameriquest as it would any other business that it's investigated.

VRP (May 1, 2007) 15:7-13. Ameriquest requested an opportunity to conduct discovery to determine whether the AGO's decision to waive applicable PRA exemptions in this matter was consistent with the AGO's general pattern and practice. Id. at 15:20-25 and 16:1-6. None of the issues raised by Ameriquest regarding the AGO's waiver of applicable

[18] Intervenor claimed that the AGO is treating Ameriquest exactly like it has treated similarly situated parties. Intervenor's Br. 40-41. The AGO, for its part, made no similar argument, yet it holds all the evidence of its treatment of others. The AGO's silence highlights the need for discovery on this point.

PRA exemptions were addressed because the trial court failed to recognize that Ameriquest could seek judicial review to determine whether the AGO had properly evaluated the applicable law, facts and circumstances before determining that the GLBA and PRA exemptions were not applicable and/or were waived. Order Denying Plaintiff's Motion for Preliminary Injunction (CP 320–23). Here, the trial court was clearly authorized to, and should have, conducted a review of the AGO's decision to reject application of the GLBA and waive applicable PRA exemptions. MacKenzie, 114 Wn. App. at 696.

b. The Attorney General's Pejorative Statements Underscore Ameriquest's Need to Conduct Meaningful Discovery on the Issue of Whether the Attorney General Acted in an Arbitrary and Capricious Manner Before There Can Be a Trial on the Merits. In its brief, instead of arguing the merits of its position, the AGO resorted to using inflammatory and derogatory language when describing Ameriquest. These pejorative statements were likely designed to appeal to the emotions of the Court rather than to state facts. The AGO's statements underscore the concerns Ameriquest has had since it first learned that documents (which were protected under federal privacy law as well as PRA exemptions) would be disclosed – that the AGO appeared to have a vendetta against Ameriquest and was willing to ignore applicable law to

further that end. By attacking Ameriquest, the AGO attempted to deflect from the serious issue at hand, which is that the vast majority of the documents at risk for disclosure contain confidential personal financial information that relate to Ameriquest's customers who are citizens of Washington, disclosure of which would invade their federally protected privacy rights and may expose them to identity theft.

i. The Attorney General's Pejorative Statements Evidence Its Animus Towards Ameriquest. The AGO's brief contained the following examples of disparaging statements:

- "Indeed, the idea that a company could prevent public disclosure of evidence of its own wrongdoing is antithetical to the underlying purpose of the PRA. This is particularly true when the wrongdoer has avoided a public trial by entering into a settlement." (AGO Br. 17) (emphasis added).
- "One can certainly imagine that Ameriquest might be embarrassed by the publication of evidence of its past predatory lending practices contained in the contested materials....Any "injury" that might follow public release of information collected during the investigation...flows not from the release of the information but from the...illegal practices revealed." (AGO Br. 21) (emphasis added).
- "Further, it is clear from the language of RCW 42.56.240 that the exemption for investigative records is intended to protect the interests of crime victims and effective law enforcement not those of law violators." (AGO Br. 22) (emphasis added).
- "[T]his case involves a mundane contest pitting the public's right to know against the private right of a business to suppress potentially embarrassing evidence concerning its conduct." (AGO Br. 15) (emphasis added).

As a participant to the settlement, the AGO knows that Ameriquest was not found to be in violation of any law, and the AGO's assertions to the contrary were made in direct disregard of the facts. The settlement agreement specifically provided that it shall not be "interpreted as an admission of wrongdoing by . . . the Ameriquest Parties or as an admission, concession, or evidence of any alleged fault, misrepresentation, act or omission or any other alleged violation of law, and it does not represent a formal finding of wrongdoing by any court or administrative agency." http://www.atg.wa.gov/Settlements/default.aspx#Ameriquest with link to http://www.ameriquestmultistatesettlement.com, pg. 7. The AGO's assertions that Ameriquest is a "wrongdoer" that "has avoided a public trial by entering into a settlement," and is a "law violator," clearly violate the spirit and express terms of the settlement agreement and are wholly inappropriate.

Moreover, these statements are illustrative of the venom directed at Ameriquest by the AGO -- calling into question the purported impartiality and prudence exercised by the AGO when evaluating the application of exemptions and later unfettered waiver of those exemptions. Although these statements are not part of the record below, they are relevant to this appeal. By including these comments in its brief, the AGO has brought these statements before this Court. Ameriquest highlights these biased

and hostile statements because the AGO all but claims that Ameriquest's argument regarding different or biased treatment is paranoid or spun from whole cloth. The AGO cannot have it both ways.

ii. The Attorney General's Attempt to Downplay the Issues at Stake Evidence the Attorney General's Arbitrary and Capricious Manner. The AGO's attempt to devalue the importance of this case by describing it as merely a "mundane contest" between the public's right to know and the attempt by a business to hide embarrassing evidence is not only a gross mischaracterization of the issues at hand but does a great disservice to the thousands of citizens of Washington whose confidential personal financial information is at risk for disclosure. AGO Br. 15.

Every year, identity theft wrecks havoc on citizens in Washington. On its website, the AGO states that "identity theft is one of the fastest growing consumer scams in America" and that Washington state is one of the top identity theft sites per capita in the United States. http://www.atg.wa.gov/ConsumerIssues/ID-Privacy/IdentityTheft.aspx (last visited April 15, 2008). For any consumer having their identity stolen and their entire financial future compromised it is an extremely serious and important issue. The AGO has acknowledged this growing epidemic and has set-up a dedicated section on its website to address these issues and has even created a guide for consumers on identity theft. Id. Surprisingly, the

information and documents that the AGO implores consumers to destroy to protect themselves from identity theft are identical to the information and documents contained in Ameriquest's customers' loan files. Ameriquest Motion for Preliminary Injunction, pp. 8-10 (CP 96-98).

What's more, this issue does not just affect Ameriquest and its customers, the AGO and other state agencies have the ability to obtain, and almost certainly have obtained, personally identifiable financial information from other financial institutions on a regular basis. A determination as to the scope of privacy protections afforded here not only affects how Ameriquest and its customers' information is treated, but also affects how other lenders' customers' information shall be treated once in the hands of a state agency.

As evidenced by the AGO's apparent hostility towards Ameriquest, and the fact that decisions were made by the AGO to disclose documents that otherwise would have been exempted from disclosure, Ameriquest believes that through discovery it will be able to demonstrate that the AGO acted in an arbitrary and capricious manner in its treatment of Ameriquest and its customers.[19]

---

[19] The AGO claims that it is only on appeal that Ameriquest raised the issue of discovery. AGO Br. 2 fn.1. The AGO's contention is contradicted by the record including VRP (May 1, 2007) 15:7-25 and 16:1-6 where Ameriquest sets out its need for discovery.

c. The Attorney General's Decision to Disclose Documents Where a Listed Exemption Squarely Applies Appears to be Arbitrary and Capricious. In addition to the obvious hostility embedded in the AGO's briefing, the AGO's failure to invoke the work product and attorney-client exemptions are evidence of arbitrary and capricious conduct when the underlying policies of these exemptions are considered. In this case, the AGO has claimed that even if it believes that an exemption applies, it can decide, at its whim, whether or not it wants to use the exemption to keep a document from being disclosed. AGO Br. 23-25. The AGO's decision to waive its attorney work product privilege is markedly inconsistent with other agencies that have responded to similar requests and is contrary to the purpose of having PRA exemptions. In a recent opinion, our Supreme Court, while acknowledging the legislature intended that the PRA be "liberally construed and its exemptions narrowly construed" determined that "where a listed exemption squarely applies, disclosure is not appropriate." Soter, 162 Wn.2d at 731 (citations omitted).

In Soter the media sent a PRA request to counsel for the county school district seeking interview notes created by the county when investigating the death of one of its students. The county refused to disclose the documents on the grounds that they were protected by the attorney-work product doctrine and attorney-client privilege and were exempt from

disclosure under RCW 42.56.290. Id. at 728. The Supreme Court agreed that the interview notes were protected as attorney work product under RCW 42.56.290 and CR 26(b)(4) and should only be disclosed in rare circumstances. Id. at 743. The Supreme Court recognized the importance of ensuring that the interview notes were not disclosed, even after a pending case was completed "because the looming possibility of disclosure, even disclosure after termination of the lawsuit, would cause clients and witnesses to hesitate to reveal details to the attorneys, and it would cause attorneys to hesitate to reduce their thoughts or understanding of the facts to writing." Id. at 733; see also Harris v. Pierce County, 84 Wn. App. 222, 235, 928 P.2d 1111 (1996) (finding that memorandum prepared by county's lawyer was not available for disclosure under the pretrial discovery rules so was exempt from disclosure under the PRA).

The important policy discussions in Soter are no less relevant here. The Supreme Court understood that even with respect to governmental agencies the "attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears," and that to allow an attorney's notes to be revealed will result in attorney's hesitancy in keeping such notes which may lead to inefficiencies in their practice of the law. Soter, 162 Wn.2d at 742. In this case, the interview notes that the AGO intends to disclosure are undisputedly attorney work

product and are exempt from disclosure under RCW 42.56.290 and CR 26(b)(4). Since the AGO was not required by the PRA to disclose its attorney work product interview notes, the only reason the AGO appears to have decided to do so is to facilitate Intervenor's discovery efforts. The AGO's decision to waive the attorney work product exemption here to assist a private party in litigation raises serious questions about the equality of its treatment of Ameriquest as compared to other parties with regard to whom the AGO has also prepared interview notes. These are the issues that need to be explored through discovery.

Intervenor challenged the application of many of the PRA exemptions in her brief but notably did not contest that the interview notes were not work product and subject to exemption. Intervenor's argument regarding the applicability of the other PRA exemptions is premature as the trial court did not get to the point of analyzing any underlying exemptions because it incorrectly ruled on the threshold issue of whether Ameriquest could request judicial review.[20] Because the trial court did not address the application of any PRA exemptions to the documents this issue should be remanded back to the trial court to determine whether any PRA exemptions apply, and, if so, disclosure should be enjoined.

---

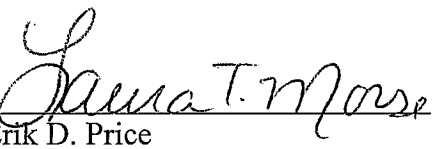
[20] Ameriquest addressed all of the applicable PRA exemptions in detail in its motion for preliminary injunction and reply. (CP 106-14).

III. CONCLUSION

Ameriquest respectfully requests that this Court reverse the trial court's ruling ordering disclosure of the documents and remand, directing the trial court to grant a preliminary injunction and proceed to trial on the merits on a schedule that will allow time for the parties to conduct the necessary discovery.

RESPECTFULLY SUBMITTED this 16th day of April, 2008.

LANE POWELL PC

By 

Erik D. Price
WSBA No. 23404
Laura T. Morse
WSBA No. 34532

Joanne N. Davies
Admitted Pro Hac Vice
CBA No. 204100
Attorneys for Plaintiff Ameriquest Mortgage Company

No. 36245-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
08 APR 16 PM 3:28
STATE OF WASHINGTON
BY
DEPUTY

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

Erik D. Price
WSBA No. 23404
Laura T. Morse
WSBA No. 34532
Joanne N. Davies
Admitted Pro Hac Vice
CSBA No. 204100
Attorneys for Plaintiff
Ameriquest Mortgage Company

Lane Powell PC
111 Market Street, NE, Suite 360
Olympia, Washington 98501
Telephone: (360) 754-6001
Facsimile: (360) 754-1605

ORIGINAL

Moneca McYnturff, 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 April 16, 2008, I caused to be served a copy of the following documents: (1) Appellant's Motion for Leave to Submit Overlength Reply Brief; and (2) Appellant's Proposed Reply Brief (upon counsel and court) on the following attorneys in the manner indicated below at the following address(es):

David W. Huey
Assistant Attorney General
Office of the Attorney General of Washington
Washington Building - 3rd Floor; WT-31
1019 Pacific Avenue
Tacoma, WA 98402-4443
Facsimile 253-593-2449
By U.S. Mail

Melissa A. Huelsman
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 501
Seattle, WA 98104-1715
Facsimile 206-447-0115
By U.S. Mail

David C. Ponzoha, Clerk of the Court
Washington State Court of Appeals - Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454
Facsimile 253-593-2806
By Hand Delivery

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

Signed this 16th day of April, 2008, at Seattle, Washington.

Moneca McYnturff