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NO. 82690-1

SUPREME COURT OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,

Respondent,

v.

WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL,

Petitioner.

**RESPONSE TO AMICUS BRIEF OF
AMERICAN CIVIL LIBERTIES UNION**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT1

 A. The Court Should Reject ACLU’s Recommendation To Sidestep the Preemption Issue.1

 B. The GLBA Permits the AGO’s Subsequent Disclosure of Information After Nonpublic Personal Information Is Redacted.....3

 C. The GLBA Does Not Require Redaction of Names, Addresses, and Other Public Information.8

III. CONCLUSION9

TABLE OF AUTHORITIES

Cases

Confederated Tribes of the Chehalis Reservation v. Johnson,
135 Wn.2d 734, 958 P.2d 260 (1998)..... 2

Cowles Pub. Co. v. Spokane Police Dept.,
139 Wn.2d 472, 987 P.2d 620 (1999)..... 7

Hearst Corp. v. Hoppe,
90 Wn.2d 123, 580 P.2d 246 (1978)..... 7

Progressive Animal Welfare Soc’y (PAWS) v. University of Washington,
125 Wn.2d 243, 884 P.2d 592 (1994)..... 2, 6

Statutes and Regulations

15 U.S.C. §§ 680-16809 1

15 U.S.C. § 6802(c) 4

15 U.S.C. § 6802(e)(1)-(8)..... 4

15 U.S.C. § 6802(e)(8)..... 4, 5

16 C.F.R. § 313.3(p)(1)(i)..... 8

16 C.F.R. § 313.3(p)(3)(i)..... 8

16 C.F.R. § 313.11(c)(3)..... 5

16 C.F.R. § 313.14..... 5

16 C.F.R. § 313.15..... 5

16 C.F.R. § 313.15(a)(7)(iii)..... 5

RCW 42.56 1

RCW 42.56.070 6

RCW 42.56.070(1).....	2, 3
RCW 42.56.100	6
RCW 42.56.240(1).....	7
RCW 42.56.520	6

I. INTRODUCTION

The State of Washington, Attorney General's Office (AGO) answers the brief of Amicus Curiae, American Civil Liberties Union (ACLU). The AGO answers ACLU's arguments that (1) this Court should avoid deciding whether the federal Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6801-6809, preempts Washington's Public Records Act (PRA), RCW 42.56; (2) the GLBA prohibits the AGO from disclosing nonpublic information it received from Ameriquest pursuant to its investigation; and (3) publicly available information must be redacted from records prior to disclosure.

II. ARGUMENT

A. **The Court Should Reject ACLU's Recommendation To Sidestep the Preemption Issue.**

This Court granted review of a single issue: Whether federal law preempts or precludes disclosure of information in the client loan files held by the Office of the Attorney General. The ACLU contends that this Court need not decide whether the GLBA preempts the PRA because the ultimate issue of whether and to what extent the loan files should be disclosed is governed by the GLBA, which makes a preemption decision unnecessary. ACLU Brief at 4. What the ACLU's brief fails to grasp is that the interaction between the GLBA and the PRA is a matter of

substantial public interest. The interplay between the PRA and federal statutes that may exempt or limit disclosure of public records is an important issue that is likely to reoccur and that affects the scope of public disclosure in Washington. See, e.g., *Progressive Animal Welfare Soc’y (PAWS) v. University of Washington*, 125 Wn.2d 243, 265-67, 884 P.2d 592 (1994) (court considered an argument that federal law preempts PRA); cf. *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 754-57, 958 P.2d 260 (1998) (public disclosure of state Gambling Commission records did not violate federal Indian Gaming Regulatory Act). Rather than sidestep the issue, this Court should set forth the proper framework for analyzing how a federal law, like the GLBA, fits within the PRA.

Contrary to the ACLU’s argument, it matters whether the GLBA preempts the PRA or whether the GLBA is an “other” statute that exempts records or portions of records from public disclosure under RCW 42.56.070(1). If the GLBA expressly preempts the PRA as the Court of Appeals held, the effect is that all portions of the PRA are preempted, not just the provisions that would govern the disclosure or nondisclosure of the loan files at issue in this appeal. As noted by amicus Washington Coalition for Open Government, the PRA provides a framework for access to public records. WCOG Amicus Brief at 7-10.

By erroneously holding that the GLBA expressly preempts the PRA, the Court of Appeals also invalidates the rights, obligations, and procedures set forth in the PRA in any request involving information subject to the GLBA.

The Court of Appeals' erroneous preemption ruling also foreclosed a principled analysis of whether it is possible to harmonize the GLBA with the PRA through application of RCW 42.56.070(1). *See* AGO's Supplemental Brief at 5-14 (explaining why the Court of Appeals' preemption ruling is error). Under RCW 42.56.070(1), the GLBA (or other federal statutes) may exempt or prohibit disclosure of public records or information contained in public records. Unlike preemption, application of the "other statute" exemption preserves the PRA's framework for providing access to public records and protects private information contained in the loan files from public disclosure. *See* AGO's Supplemental Brief at 4 n.2 (describing the personal information the AGO redacted from the loan files).

B. The GLBA Permits the AGO's Subsequent Disclosure of Information After Nonpublic Personal Information Is Redacted.

The ACLU contends that the GLBA prohibits the AGO from disclosing the loan files to the requestor because such disclosure would exceed Ameriquest's authority to disclose the loan files to the requestor.

ACLU Amicus Brief at 9-13. However, a careful reading of the GLBA belies ACLU's argument.

The ACLU correctly states that the GLBA limits redisclosure of nonpublic personal information obtained by a nonaffiliated third party.

Id. at 8 (citing 15 U.S.C. § 6802(c)). The GLBA states:

Unless otherwise provided in this subchapter, a nonaffiliated third party that receives from a financial institution nonpublic personal information under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such person by the financial institution.

15 U.S.C. § 6802(c) (emphasis added). However, the GLBA contains several exceptions to this general limit on reuse and redisclosure of information. 15 U.S.C. § 6802(e)(1)-(8). Important for this appeal, the GLBA permits reuse and redisclosure:

[T]o 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; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

15 U.S.C. § 6802(e)(8).

The ACLU's interpretation of the redisclosure limitation renders meaningless the exemption set forth in Section 6802(e)(8). According to the ACLU, because Ameriquest has no authority to disclose information pursuant to the PRA, the AGO likewise cannot disclose information pursuant to the PRA because doing so would give the third party a greater ability to disclose the customer information than the financial institution. ACLU's Amicus Brief at 13. The ACLU fails to recognize that the exceptions apply to the general rule that otherwise limits the third party's disclosure to circumstances where it would be lawful if made directly by the financial institution. Thus, the AGO may redisclose the information in order to comply with the PRA. The fact that Ameriquest is not subject to the PRA and would never be required to disclose information subject to the PRA does not mean that the AGO is prohibited from redisclosing the information under the PRA as authorized by Section 6802(e)(8).

In its rules implementing the GLBA, the Federal Trade Commission permits redisclosure by a nonaffiliated third party "pursuant to an exception in § 313.14 or 313.15 in the ordinary course of business to carry out the activity covered by the exception under which you received the information." 16 C.F.R. § 313.11(c)(3) . The AGO received the information from Ameriquest pursuant to Section 313.15(a)(7)(iii), which

authorized Ameriquest to disclose the information “to respond to judicial process or government regulatory authorities having jurisdiction over [Ameriquest] for examination, compliance or other purposes as authorized by law.” Thus, the AGO may redisclose the information it received from Ameriquest in the ordinary course of its business of investigating Ameriquest, after redacting the borrowers’ personal information.

The ACLU contends that disclosing records and information received as part of an investigation under the PRA is not within the ordinary course of the AGO’s business. ACLU’s Amicus Brief at 12-13. The ACLU is wrong.

The ACLU states that the GLBA’s exemption only applies if disclosure will further a current investigation. *Id.* at 13. But the rule permits disclosure in the ordinary course of business and responding to public disclosure requests pertaining to its investigative activities is within the ordinary course of the AGO’s business. *See, e.g.*, RCW 42.56.070 (agencies shall make public records available for inspection and copying); 42.56.100 (agencies shall provide the fullest assistance to requestors of public records); 42.56.520 (agencies must promptly respond to requests for public records); *PAWS*, 125 Wn.2d at 251-52 (listing the PRA’s requirements for agency responses to public records requests);

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 129-31, 580 P.2d 246 (1978) (the PRA imposes a positive duty to disclose public records and agencies have no authority to determine the scope of exemptions).

The ACLU also contends that responding to public disclosure requests is not a routine part of carrying out investigations because the PRA has an exemption for investigative records. *Id.* at 13 (citing RCW 42.56.240(1)). However, the investigative records exemption does not categorically exempt all records contained in law enforcement files, particularly where the investigations are closed and resolved. *See, e.g., Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 477-79, 987 P.2d 620 (1999). When the AGO receives a request under the PDA for records contained in an investigative file, it must disclose those records unless nondisclosure is necessary for effective law enforcement or necessary to protect any person's right to privacy. *See* RCW 45.56.240(1). Therefore, disclosure of public records contained in closed investigative records is within the ordinary course of the AGO's business.

C. The GLBA Does Not Require Redaction of Names, Addresses, and Other Public Information.

The ACLU acknowledges that the GLBA does not protect publicly available information, ACLU Amicus Brief at 6, but nevertheless contends

that the GLBA permits only disclosure of blind data that does not identify a borrower by name. *Id.* at 13-15. Again, the ACLU is incorrect.

The GLBA does not permit disclosure only of anonymous information. To the contrary, as implemented, the GLBA expressly does not protect “publicly available information” that is available from federal, state, or local government records. 16 C.F.R. § 313.3(p)(1)(i). “Publicly available information” includes, by way of example, “publicly available information in government real estate recordings and security interest filings.” *Id.* at § 313.3(p)(3)(i). Because the name and address of the individual borrowers (and other information relating to mortgages and ownership of real property) is publicly available in these information sources in Washington, the GLBA does not prohibit the AGO from disclosing them.

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III. CONCLUSION

The Court should hold that the GLBA does not preempt the PRA. The Court also should hold that the AGO may redisclose the loan files pursuant to a public records request after redacting nonpublic personal information. Finally, the Court should reject ACLU's argument that publicly available information must be redacted prior to disclosure.

RESPECTFULLY SUBMITTED this 30th day of April, 2010.

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I certify under penalty of perjury under the laws of the state of
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DATED this 30th day of April, 2010, at Seattle, WA.

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