

No. 82690-1

SUPREME COURT OF THE STATE OF WASHINGTON

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AMERIQUEST MORTGAGE COMPANY,  
*Respondent,*

v.

WASHINGTON STATE  
OFFICE OF THE ATTORNEY GENERAL,  
*Petitioner.*

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BRIEF OF AMICUS CURIAE  
WASHINGTON COALITION FOR OPEN GOVERNMENT

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## **I. IDENTITY AND INTEREST OF AMICUS**

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

## **II. STATEMENT OF THE CASE**

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

## **III. ISSUES TO BE ADDRESSED BY AMICUS CURIAE**

A. Whether the Gramm-Leach-Bliley Act, 15 USC § 6801 et seq. (GLBA), is an “other statute” under RCW 42.56.070.

B. Whether the GLBA preempts the Public Records Act, Chapter 42.56 RCW (PRA).

C. Whether the Court should decline to address the Attorney General's (AGO's) arguments regarding trial court procedure on remand.

#### IV. ARGUMENT

**A. The GLBA is an “other statute” within the PRA framework.**

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

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

RCW 42.56.070(1). As the AGO has explained, the GLBA is simply an “other statute” for purposes of this section of the PRA. *Petition* at 6.

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

It appears that the Court of Appeals overlooked the “other statute” exemption in the PRA because the issue was not well briefed by the parties. By failing to address the “other statute” exemption, the Court of Appeals engaged in a preemption analysis that is both unnecessary and erroneous.<sup>1</sup> To avoid repeating the mistakes reflected in the Court of Appeals’ *Opinion*, this Court should carefully consider the origin and function of the “other statute” exemption.

The PRA was enacted by Initiative 276 in 1972. *Hearst v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978); Laws of 1973, ch. 1. As originally enacted, the PRA required disclosure of all public records unless such records were exempt pursuant to specific exemptions within

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<sup>1</sup> Contrary to Ameriquest’s arguments, the application of the “other statute” exemption is not a new argument raised by the AGO for the first time in this Court. In fact, Ameriquest’s own trial court motion was incoherent with respect to whether the GLBA applied by virtue of (i) preemption, or (ii) the “other statute” exemption in RCW 42.56.070(1). Ameriquest argued:

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

CP 25. In response, both the AGO and the intervenor characterized the issue as whether the GLBA is an “other statute” under the RCW 42.56.070(1). CP 187, 204. After raising the issue in its own motion in the trial court, Ameriquest subsequently ignored the “other statute” exemption of the PRA in its briefs to the Court of Appeals. While the AGO only mentioned the other statute exemption in a footnote, *Resp. Br.* at 25. n.6, the intervenor’s brief explicitly argued that the GLBA was an “other statute” under RCW 42.56.070(1). *Intervenor’s Br.* at 26.

the PRA itself. Laws of 1973, ch. 1, § 31; former RCW 42.17.310.<sup>2</sup> But there were (and still are) numerous other statutes outside the PRA that restrict or prohibit the disclosure of various records and information. This structural deficiency in the PRA was highlighted by this Court's decision in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). *Nast* held that the PRA did not apply to court case files. *Nast*, 107 Wn.2d at 307. In reaching that result, this Court observed that application of the PRA to court case files would appear to eliminate various statutory restrictions on access to such files. *Id.*

The following year, the 1987 legislature amended the PRA, adding the "other statute" exemption to the PRA. Laws of 1987, ch. 403, § 3; RCW 42.56.070 (former RCW 42.17.260(1)).<sup>3</sup> The effect of the "other statute" exemption is simple and straightforward. If an "other statute," codified outside the PRA itself, "exempts or prohibits disclosure of specific information or records" then such information or records are also exempt from disclosure under the PRA.

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<sup>2</sup> The public records provisions of Chapter 42.17 RCW were re-codified as the Public Records Act, Chapter 42.56 RCW, in 2005. Laws of 2005, ch. 274.

<sup>3</sup> The legislature also added the "other statute" language to RCW 42.56.080 (former RCW 42.17.270). Laws of 1987, ch. 403, § 4. That section, which forbids agencies from inquiring into the purpose of a PRA request, is not at issue in this case.

**1. A federal statute, such as the GLBA, may be an “other statute” for purposes of RCW 42.56.070.**

As the AGO explains, the “other statute” exemption is not limited to state statutes. Nothing in the language or purpose of RCW 42.56.070 suggests that the legislature intended such a limitation. See *AGO Supp. Br.* at 5. A federal statute, such as the GLBA, may be an “other statute” for purposes of RCW 42.56.070.

Ameriquist never explains why the “other statute” exemption should not be equally applicable to federal statutes. Instead, Ameriquist insists that the issue has already been decided in *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 884 P.2d 592 (1995). Ameriquist cites *PAWS II* for the proposition that “a court must analyze the federal statute under preemption principles and not under the PRA’s ‘other statutes’ exemption.” *Ameriquist Supp. Br.* at 15. But *PAWS II* does not actually say that, and this Court should reject Ameriquist’s interpretation of *PAWS II*.

It is true that *PAWS II* analyzed two state statutes under the “other statute” exemption, and then separately addressed the agency’s argument that various federal statutes preempted the PRA. *PAWS II*, 125 Wn.2d at 261-65. But nothing in *PAWS II* supports Ameriquist’s assertion that the Court actually rejected the application of the “other statute” exemption to

federal statutes. Ameriquest misleadingly implies that the *PAWS II* court chose to use preemption analysis “when asked to address whether certain federal statutes act to limit disclosure under the PRA.” *Ameriquest Supp. Br.* at 4. In fact, no such choice was made. *PAWS II* clearly states that the Court was specifically addressing a preemption argument made by the agency. “The University argues that various federal laws preempt the [PRA].” *PAWS II*, 125 Wn.2d at 265.

Ameriquest assumes that the *PAWS II* court must have had a reason for its failure to analyze the “other statute” exemption when addressing the federal statutes relied on by the agency. Nothing in *PAWS II* supports that assumption. *PAWS II* simply did not address the question, apparently because no party argued that federal statutes fell within the ‘other statutes’ exemption. Consequently, *PAWS II* is not authority on that issue. *Kish v. Insurance Company N.A.*, 125 Wn.2d 164, 172, 883 P.2d 308 (1994); *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996).<sup>4</sup>

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<sup>4</sup> This Court should also disregard the curious language in *Northwest Gas Ass’n v. Wash. Util. and Transp. Comm’n*, 141 Wn. App. 98, 168 P.3d 443 (2007). *Northwest Gas* addressed and then remanded the question of whether federal law preempted the requested disclosure of information about natural gas pipelines. 141 Wn. App. at 126. Like *PAWS II*, *Northwest Gas* did not address the possible application of the “other statute” exemption to a federal statute. Unlike *PAWS II*, *Northwest Gas* never cites RCW 42.56.070. But at the end of the discussion of preemption, *Northwest Gas* states “[b]ecause the facts here differ significantly from those in *PAWS*, *PAWS* is not a case on point except to the extent it acknowledges the ‘other statutes’ exemption.” 141 Wn. App. at 127. It is unclear what the Court of Appeals meant by that remark, and it is useless to speculate.

It is not necessary for this Court to overrule *PAWS II*, which correctly states the applicable analysis for federal preemption. At most, clarification is needed. This Court should hold that a federal statute, such as the GLBA, may be an “other statute” for purposes of RCW 42.56.070.

2. **There are important differences between (i) an “other statute that exempts or prohibits disclosure of specific information or records,” and (ii) a statute that preempts the PRA.**

Ameriquest makes an important observation in a footnote toward the end of its supplemental brief:

The AGO has not made any argument of how the GLBA’s application is the least bit affected in any substantive sense by whether it applies via preemption or via the “other statutes” provision.

*Ameriquest Supp. Br.* at 16 n.11. While this criticism of the AGO’s briefs may be valid, Ameriquest’s point equally applies to Ameriquest’s own briefing. Ameriquest has never explained why the difference between (i) the “other statute” exemption (RCW 42.56.070) and (ii) a preemption analysis matters to Ameriquest. Yet Ameriquest continues to insist that the GLBA preempts the PRA, and that the “other statute” exemption is not applicable.

There are important differences between (i) an “other statute that exempts or prohibits disclosure of specific information or records,” and (ii) a statute that preempts the PRA. Before considering Ameriquest’s

argument that the GLBA preempts the PRA, the Court needs to understand what those differences are.

The PRA is not merely a requirement that agencies disclose public records followed by a list of exemptions from that requirement. The PRA creates an entire framework for access to public records. In addition to establishing the basic rule that records must be disclosed unless a specific exemption applies, RCW 42.56.070, the PRA imposes a number of other duties on agencies. These include duties to establish PRA procedures, to acknowledge requests for records, to respond promptly to requests, to provide inspection and/or copying, to provide fullest assistance to requesters and the most timely possible action on requests, to not distinguish among requesters, to explain withholding and redaction of records in writing, and to provide exemption logs when records are withheld. RCW 42.56.070, -.080, -.090, -.100, -.210, -.520; *PAWS II*, 125 Wn.2d at 271. The PRA also establishes procedures for judicial review of agency responses, including provisions for the burden of proof, *de novo* review, *in camera* review, third-party notice and injunctions, venue, limitations on actions, and judicial review of the reasonableness of an agency's estimate of the time required to respond to a request. RCW 42.56.540, -.550. Finally, the PRA provides remedies for violations of the

PRA, including statutory penalties and awards of attorney's fees. RCW 42.56.550.

If the GLBA is merely an "other statute that exempts or prohibits disclosure of specific information or records," then the procedures, rights and remedies created by the PRA remain in place even if the GLBA requires the AGO to withhold or redact certain information or records. But to suggest that the GLBA, or any other statute, *preempts* the PRA calls the entire PRA framework into question. While Ameriquest insists that the GLBA preempts the PRA, Ameriquest never considers the broad consequences of that assertion.

Is Ameriquest suggesting that the GLBA preempts the requirement in RCW 42.56.210(3) that agencies explain exemptions in writing such that an agency may withhold records under the GLBA without explanation? Is Ameriquest suggesting that the GLBA preempts the requirement in RCW 42.56.520 that agencies promptly respond to requests for records such that a request for records affected by the GLBA may be ignored? Or is Ameriquest suggesting that the GLBA preempts the third-party injunction remedy created by RCW 42.56.540 despite the fact that Ameriquest specifically invoked that statute as the legal basis for filing this case in the first place? CP 24.

Contrary to Ameriquest's superficial understanding of the PRA, the distinction between the GLBA operating as an "other statute" under RCW 42.56.070 and the GLBA preempting the entire PRA is not a matter of "form over substance." *Ameriquest Supp. Br.* at 16. The Court should hold that a federal statute, such as the GLBA, may be an "other statute" for purposes of RCW 42.56.070.

**B. The GLBA does not preempt the PRA.**

As set forth in *PAWS II*, there are three ways that a federal statute may preempt state law:

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.

*PAWS II*, 125 Wn.2d at 265 (quoting *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 326, 858 P.2d 1054 (1993)). The GLBA does not preempt the PRA in any of these ways.

**1. The GLBA does not expressly preempt the PRA.**

The Court of Appeals agreed with Ameriquest that the GLBA expressly preempts the PRA. *Ameriquest*, 148 Wn. App. at 159. This conclusion was apparently based on 15 USC § 6807, which provides:

(a) In general

This subchapter and the amendments made to this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.

(b) Greater protection under State law

For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter and the amendments made by this subchapter, as determined by the Federal Trade Commission, after consultation with the agency or authority with jurisdiction under section 6805(a) of this title of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

15 USC § 6807. These provisions are the antithesis of an express preemption provision. Rather than indicating any intent to preempt state disclosure laws in their entirety, subsection (a) provides that the GLBA supersedes a state law only to the extent of an inconsistency. In other words, the GLBA creates, at most, conflict preemption. *See* subsection (3) (below). By allowing state laws to provide **greater** protection for personal information, subsection (b) clearly disavows any express preemption. Ameritrust seems to have forgotten that express preemption means that state laws do not apply at all.

Ameritrust's arguments regarding express preemption are incoherent, and based on Ameritrust's own incorrect understanding of the structure of the PRA. While the issue is whether 15 USC § 6807 expressly preempts the entire PRA, Ameritrust immediately falls back on an argument that the GLBA "inherently conflict[s]" with some unspecified portion of the PRA. *Ameritrust Supp. Br.* at 12. Ameritrust's assertion that the PRA conflicts with the GLBA is based on the erroneous assumption that the GLBA is not an "other statute" under RCW 42.56.07. The procedural and remedial provisions of the PRA do not provide less protection than the GLBA, and Ameritrust does not argue otherwise.<sup>5</sup>

This Court should hold that the GLBA does not expressly preempt the PRA.

**2. There is no issue of field preemption in this case.**

The second type of federal preemption — field preemption — is not applicable in this case. The Court of Appeals did not conclude that the GLBA amounts to field preemption. Ameritrust does not argue otherwise.

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<sup>5</sup> Ameritrust argues that the GBLA requires the AGO to provide notice to Ameritrust customers whose personal information might be disclosed. *Answer to Petition for Review* at 16. This provision does not conflict with the PRA. RCW 42.56.540 expressly recognizes that another law, outside the PRA, might require an agency to provide notice to affected parties.

### 3. The GLBA does not conflict with the PRA.

Finally, there is no conflict preemption in this case because there is no actual conflict between the GLBA and the PRA.<sup>6</sup> Despite having briefed this issue several times, Ameriquest has never identified an actual conflict between the GLBA and the PRA. WCOG pointed this out in its earlier *Memorandum of Amicus Curiae*, and it is still true.

In response to WCOG's earlier observation that Ameriquest had "never explained how the PRA conflicts with the GLBA," Ameriquest asserted that the Court of Appeals "spent six pages of its Opinion ... engaging in an in-depth analysis of how the PRA was inconsistent with, and less protective than, the GBLA." *Answer to Memorandum of Amicus Curiae* at 3. But that is incorrect; the Court of Appeals never identified a specific conflict with the PRA. The Court of Appeals' conflict analysis consists of a single conclusory statement that "[t]his federal provision prohibiting disclosure of information directly conflicts with Washington's PRA..." *Ameriquest*, 148 Wn. App. at 162. That statement is based on the erroneous assumption, caused in large part by Ameriquest's poor briefing, that the GLBA is not merely an "other statute" under the PRA.

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<sup>6</sup> The PRA contains a separate conflict provision that provides "In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." RCW 42.56.030. That language, which was part of the original 1972 act, is not at issue in this case.

In its supplemental brief, Ameriquest continues to rely on its own erroneous assumption that the PRA requires the disclosure of the records governed by the GLBA notwithstanding the “other statute” exemption in RCW 42.56.070. Ameriquest variously asserts that “[t]he GLBA directly conflicts with the PRA in fundamental purpose and in substance,” that “one statute mandates disclosure of the documents while the other statute prohibits disclosure,” and that “the PRA’s disclosure mandate conflicts with the GLBA’s directive not to disclose.” *Ameriquest Supp. Br.* at 1, 9, 10. But the PRA does *not* mandate the disclosure of all public records. On the contrary, the PRA requires disclosure unless records are exempt pursuant to the PRA “or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070.

If, as Ameriquest argues, the GLBA restricts the release of records by the AGO, then the GLBA is an “other statute” within the PRA framework. There is no actual conflict between the GLBA and the PRA where — as here — the GLBA’s nondisclosure provisions are incorporated into the PRA as an exemption contained in an “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). There can be no conflict, and hence no conflict preemption, where the allegedly conflicting statute is simply incorporated into the PRA as an additional exemption from disclosure.

Finally, Ameriquest argues that “selective redaction is not an option,” suggesting that the GLBA requires the nondisclosure of entire records. *Ameriquest Supp. Br.* at 12-14. WCOG expresses no opinion on whether Ameriquest’s interpretation of the GLBA is correct.

But even if Ameriquest is correct, there is still no actual conflict with the PRA. Although the PRA generally requires redaction of records, *see* RCW 42.56.210(1), the “other statute” exemption incorporates statutes that prohibit disclosure of “specific information *or records*.” (Emphasis added). RCW 42.56.070.

In sum, the preemption analysis in the Court of Appeals Opinion is both unnecessary and erroneous. The GLBA does not expressly preempt the PRA or conflict with the PRA. If, as Ameriquest argues, the GLBA restricts disclosure of certain records then it is merely an “other statute” within the PRA framework.

**C. The Court should decline to address the AGO’s arguments regarding trial court procedure on remand.**

In its supplemental brief, the AGO argues that the “remand should be limited” in this case. The AGO asserts, **without any citation to authority whatsoever**, that

Except in extraordinary cases, the pertinent record for judicial review consists only of the public records request, the agency’s response(s) to that request, any other relevant communications between the requester and the agency, and

the records themselves. In a motion for an injunction under RCW 42.56.540, as here, briefing and affidavits by affected third parties appropriately may be considered.

*AGO Supp. Br.* at 18. The AGO further asserts that the Court of Appeals

has bypassed the summary procedure provided in the Public Records Act... In doing so, and by inviting discovery and additional fact-finding regarding [the arbitrary and capricious action] claim, the court of appeals erects a procedure that could substantially delay and frustrate public disclosure in the future

*AGO Supp. Br.* at 19. These unsupported arguments are completely irrelevant to the question of preemption.

This Court should decline to address the AGO's new arguments for several reasons. First, the AGO did not raise this issue in either its brief at the Court of Appeals or in the *Petition for Review*. Second, this Court's *Order* dated July 7, 2009, expressly states that the *Petition for Review* was granted "only on the issue of whether federal law preempts or precludes disclosure of information in the loan files held by the Attorney General." Third, there is no PRA requester actually opposing the AGO on these new arguments. The Court should avoid addressing any issue that is not presented in a genuinely adversarial manner. *See Everett v. Van Dyke*, 18 Wn. App. 704, 705-06, 571 P.2d 952 (1977).

The confines of civil litigation under the PRA is an unsettled and hotly contested issue. Agencies, like the AGO, have frequently sought to curtail the rights of requesters by suggesting various procedural

restrictions on PRA litigation. For example, in *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104-06, 117 P.3d 1117 (2005), this Court confirmed that an action under the PRA is an ordinary civil action, and rejected arguments that (i) a show cause order is mandatory, and (ii) that summary judgment is unavailable under the PRA.

The AGO's new arguments are a thinly-veiled attempt by a state agency to weaken the PRA by restricting the procedural tools available to requesters. It is particularly disingenuous for the AGO to attempt to sneak these new arguments into a case where the public interest is not represented, and to suggest that the AGO's arguments are intended to promote public disclosure. The Court should wait for a case in which these new issues are squarely presented by adversarial litigants, and in which the public interest is adequately represented.

## V. CONCLUSION

The court should hold that a federal statute, such as the GLBA, may be an "other statute" for purposes of RCW 42.56.070, and that the GLBA does not preempt the PRA. The Court should decline to address the AGO's arguments regarding trial court procedure on remand.

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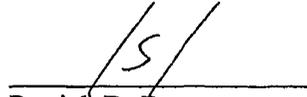
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RESPECTFULLY SUBMITTED this 12th day of April, 2010.



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