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I. SUMMARY INTRODUCTION

This appeal arises from a request pursuant to Washington's Public Records Act ("PRA"), Chapter 42.56 RCW, that seeks disclosure of documents Appellant Ameriquest Mortgage Company ("Ameriquest") provided to the Washington State Attorney General ("AGO") in the course of an inquiry into Ameriquest's lending practices. This PRA request has been the subject of a prior appeal that was previously heard by this Court and our Supreme Court, resulting in the decision, *Ameriquest Mortgage Co. v. Washington State Office of the Att'y Gen.*, 170 Wn.2d 418, 241 P.3d 1245 (2010) (the "*Ameriquest* Decision").

The PRA request at issue, submitted by Intervenor Melissa Huelsman ("Intervenor"), initially sought over one million pages of documents that Ameriquest provided to the AGO in response to a document demand related to the lending-practice inquiry. Ameriquest objected to this PRA request on multiple grounds, one of the primary bases being the federal financial privacy law, the Gramm-Leach-Bliley Act ("GLBA"), as well as PRA exemptions.

When our Supreme Court decided the issues, it expanded on this Court's analysis of how the GLBA operated to protect the information Ameriquest provided to the AGO. The Supreme Court undertook a detailed analysis of why the GLBA and related regulations and FTC rules protected

all customer information, regardless of the medium -- including e-mails. Notably, our Supreme Court considered these GLBA restrictions in the context of the PRA. The Supreme Court remanded the case to the trial court with the direction that certain documents could not be disclosed.

After remand, the AGO informed Ameriquest that it would be disclosing to the Intervenor a small subset of the documents produced by Ameriquest, the "Blackstone" and "Stated Income" e-mails.¹ The AGO proposed producing these documents to the Intervenor with the so-called "protections" of redaction ——— contrary to the *Ameriquest* Decision.

Ameriquest objected and moved that the disclosure should be prohibited. The grounds for Ameriquest's motions and the trial court's ruling were: (1) the GLBA protections, as clearly set forth in the *Ameriquest* Decision, prohibit disclosure, even with the proposed aggregation, redaction and repackaging; (2) the documents are shielded from production by the PRA's investigative records exemption; and (3) there is a blanket prohibition on release of records produced in response to a civil investigative demand ("CID"). The trial court, with virtually no citation to or discussion of the applicable federal law, regulations, rules or state statutes, denied all three motions. This appeal follows.

¹ The sampling of e-mails at issue here are just a very small portion (>.01%) of the documents produced.

Ameriquest respectfully requests that this Court follow the tenets of the *Ameriquest* Decision, the GLBA and governing FTC rules and federal regulations, as well as the PRA, and remand this case to the trial court with instructions that the e-mails at issue cannot be produced.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Ameriquest's motion that the GLBA prohibits disclosure of the documents at issue.

2. The trial court erred when it denied Ameriquest's motion that the PRA's Investigative Records Exemption applied to the documents.

3. The trial court erred when it denied Ameriquest's motion that the documents produced deserved the blanket protections of Washington's civil investigative demand provisions.

III. STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Whether the trial court erred when it ruled that the GLBA, as dictated by the *Ameriquest* Decision, permitted the aggregation, redaction, and repackaging of documents Ameriquest provided to the AGO. (Assignment of Error No. 1.)

2. Whether the trial court erred when it ruled that the GLBA does not apply to documents Ameriquest provided to the AGO based on the

quantity or nature of the “personal information” in the documents.
(Assignment of Error No. 1.)

3. Whether the trial court erred when it denied Ameriquest’s motion that the Ameriquest production is protected from disclosure under the “investigative records” exemption to the PRA because the documents with GLBA-protected information are protected under the “investigative records” privacy provision. (Assignment of Error No. 2.)

4. Whether the trial court erred when it denied Ameriquest’s motion that the Ameriquest production is protected from disclosure under the “investigative records” exemption to the PRA because the nondisclosure of all of the Ameriquest documents is essential to effective law enforcement. (Assignment of Error No. 2.)

5. Whether the trial court erred when it relied on a declaration from the AGO regarding the AGO’s practice of keeping similarly obtained records confidential, without permitting Ameriquest the opportunity to conduct discovery challenging those assertions (especially given independent evidence to the contrary). (Assignment of Error No. 2.)

6. Whether the trial court erred , given the applicable facts and circumstances, by ruling that the documents at issue were not governed by the protections of the civil investigative demand provisions of Chapter 19.86 RCW. (Assignment of Error No. 3.)

IV. STATEMENT OF THE CASE

A. The Documents Provided by Ameriquest to the AGO.

1. The AGO, Through a Multi-State Investigation of Ameriquest's Lending Practices, Requests Compliance With Formal Interrogatories and Requests for Production. The Multi-State, a group of state agencies that included the Washington AGO, initiated an examination of Ameriquest's lending practices. Clerk's Papers (CP) at 172, ¶ 2 (Tiberend 7/28/11 Decl.). The Multi-State sent an investigative demand to Ameriquest for information regarding the operations and business practices of Ameriquest. CP at 172, ¶ 3. Given prior communications and the demand itself, Ameriquest knew that its lending practices were being investigated under each member state's applicable Consumer Protection statute. *Id.* Similarly, Ameriquest knew that pre-lawsuit discovery was authorized and enforceable pursuant to those same statutes. CP at 172-73, ¶ 3.

The Multi-State's demand included formal discovery requests, specifically 23 interrogatories and 24 document requests that sought confidential and proprietary information, including confidential information regarding Ameriquest's employees and customers (collectively the "Discovery Requests"). CP at 172, ¶ 3; CP at 178-93 Ex. 1 (Multi-State Discovery Requests *redacted*). Ameriquest was given thirty (30) days within which to respond to the Discovery Requests. *Id.*

2. Ameriquest Complied With the Multi-State's Demand and Provided the AGO With Confidential Customer Information and Trade Secret and Proprietary Information With the Understanding that the Information Would Be Maintained as Confidential. In response to the Multi-State's demand, Ameriquest gathered and provided over one million pages of documents, including loan files, employee e-mails, and proprietary company documents. CP at 117, ¶¶ 2-5 (Tiberend 4/3/07 Decl.); CP at 284, ¶¶ 4-5 (Tiberend 8/18/11 Decl.).

Included in this comprehensive production were over one million pages of Ameriquest employee e-mail correspondence with attachments. CP at 284, ¶ 4 (Tiberend 8/18/11 Decl.). As would be expected, these internal e-mails contain confidential customer information. For example, as part of the loan process, Ameriquest employees would communicate with customers by e-mail and request information and documents to process the loan to completion. CP at 95, ¶ 4 (Tiberend 7/21/11 Decl.). Ameriquest's employees would also communicate **about** the customers by e-mail with closing agents, real estate appraisers, and title companies to obtain property appraisals, title commitments, and coordinate loan closings.

Among the e-mails provided by Ameriquest, many include highly confidential customer information such as social security numbers, birth dates, maiden names, account numbers, driver's license information, and

loan terms. CP at 284, ¶ 4 (Tiberend 8/18/11 Decl.). Not every e-mail contains each item listed above, and some contain more detail than others, but there is no question that within the Ameriquest production, there are many e-mails containing GLBA-protected information.²

Ameriquest consistently made clear that the entire production was confidential. Many of the documents produced by Ameriquest included legends identifying the materials as “Confidential” and “Proprietary” and the internal employee e-mails produced by Ameriquest specifically set forth at the top of each e-mail “CONFIDENTIAL TREATMENT REQUESTED.” CP at 173-74, ¶ 5 (Tiberend 7/28/11 Decl.).

The communications between Ameriquest and the Multi-State speak for themselves; Ameriquest underscored to the Multi-State that it had an expectation of confidentiality for the production. CP at 173-74, ¶¶ 4-10. Not only did the Multi-State not refute or contradict Ameriquest’s expectation of confidentiality, even though there were multiple opportunities to do so, but Ameriquest confirmed in March and April 2005 that the Multi-State had agreed that the documents would be kept confidential. CP at 175-76, ¶¶ 9-10. Had Ameriquest known that the AGO did not intend to honor the agreement to keep the documents confidential, and that the records produced to the Multi-

² In addition to the consumer-specific information, Ameriquest produced over 20,000 pages of confidential and proprietary documents including internal policies and procedures, training materials, and other confidential documents. CP at 284, ¶ 5 (Tiberend 8/18/11 Decl.). These documents relate to the loan transactions at issue with the Multi-State.

State would not be maintained confidentially, Ameriquest would not have complied with the investigation in the same manner. CP at 176, ¶ 11. Consistent with this pattern of cooperation, Ameriquest and the AGO ultimately entered into a negotiated settlement.

3. The AGO Announces It Is Going to Disclose Confidential Ameriquest Loan Files and E-mails in Response to a PRA Request. In February 2007, the AGO received a PRA request from the Intervenor asking for “all records relating to the investigation of Ameriquest.” CP at 38, ¶ 2 (Joint Statement of Issues). The AGO notified Ameriquest that it intended to release the records, including loan files and certain e-mails to the Intervenor. *Id.* Ameriquest objected to this disclosure on numerous grounds, including violation of the confidentiality of the documents based on federal consumer financial privacy law and the PRA’s own exemptions.

B. The Ameriquest Decision and Remand to the Trial Court.

In a long and complicated course of events, the parties litigated various aspects of this PRA request by Intervenor at the trial court, this Court of Appeals, and, ultimately, the Washington Supreme Court. By the time the case reached the Supreme Court, the principal issue that was litigated was the application of the GLBA to the Ameriquest documents.

In November 2010, the Washington Supreme Court issued a detailed opinion that analyzed the GLBA in the context of the PRA request

and provided explicit direction to the trial court upon remand. Specifically, our Supreme Court's instruction with respect to the scope of the GLBA's privacy protections and disclosure prohibitions were as follows:

- The GLBA mandates that financial institutions “respect the privacy of its customers” and “protect the security and confidentiality of those customers’ nonpublic personal information.” *Ameriquest*, 170 Wn.2d at 424. These federal restrictions apply to the AGO. *Id.* at 426.
- GLBA-protected information (e.g. customer names, addresses, phone numbers, etc.), may not be disclosed by the AGO in response to a PRA request, regardless of the vessel of the information (e.g. document or an *e-mail*). *Id.* at 431-32.
- GLBA-protected information may not be redacted or repackaged for the purpose of public disclosure as the GLBA requires the AGO to “leave the [nonpublic personal information]—and the consumer’s privacy—undisturbed” regardless of whether the information appears in loan files, *e-mails*, or the AGO’s internal work product. *Id.* at 435-36 and 441. This prohibition also applies to any aggregation of data (grouping of consumers) that the AGO may have created. *Id.* at 435. And
- The only documents that the AGO may disclose, without violating the privacy provisions of the GLBA are documents which, *when provided by Ameriquest to the AGO*, contained blind data or identifier-free information. *Id.* at 436. In other words, the AGO cannot itself make data blind or identifier-free information, it had to receive the data in that form directly from Ameriquest.

With these instructions, the case was remanded to the trial court.

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

Following remand from the Supreme Court, the AGO acknowledged to Ameriquest that, in light of the *Ameriquest* Decision, it was prohibited from disclosing the Ameriquest customer loan files to Intervenor; however, the AGO advised that it still intended to disclose a subset of the e-mails known as the “Blackstone” and “Stated Income” e-mails. This collection of e-mails is a

tiny subset of the full body of e-mails Ameriquest provided to the AGO, but the e-mails still hold a myriad of GLBA-protected confidential customer information: names, loan numbers, employer name, loan amount, risk rating, debt to income ratio, loan to value ratio, loan product type, telephone numbers, e-mail address, *etc.* CP at 101 (Ameriquest's GLBA Motion); 112-14, Ex. A (Chart Describing GLBA Information in Blackstone and Stated Income E-mails). Moreover, many of the e-mails have been aggregated and do not contain all of the information of the original e-mails. In addition, what appear to be descriptive terms have been added by the AGO. CP at 95-96, ¶ 5 (Tiberend 7/21/11 Decl.).

Rather than withhold the Blackstone and Stated Income e-mails, the AGO informed Ameriquest that it would merely redact what the AGO decided was the GLBA-protected information from the documents. Ameriquest objected to the redaction, and subsequent production, of these documents as being inconsistent with the *Ameriquest* Decision.

D. The Trial Court Rejects *Ameriquest* Decision's Protection of E-mails With GLBA Information and Authorizes Disclosure of the Disputed Documents after Redactions.

Accordingly, Ameriquest moved the trial court for protection, asserting that the AGO's intended disclosure of the Blackstone and Stated Income e-mails with its proposed redaction was a violation of the holding of the *Ameriquest* Decision. Ameriquest also moved on two additional

issues described below that have broad application to the administration of this case going forward and would apply to **all documents**, not merely documents containing GLBA-protected information. All three motions were denied by the trial court.

In greatly summarized form, the three motions were as follows:

1. Amerquest Motion re: GLBA Protections. Asserting that the GLBA prohibited any redaction or repackaging and disclosure of the Blackstone and Stated Income e-mails as proposed by the AGO. CP at 98-166 (Motion); 94-97 (Tiberend 7/12/11 Decl.); and 272-79 (Reply). The trial court denied the motion, ruling that the *Amerquest* Decision's prohibition on redactions or repackaging of GLBA-protected information did not apply to e-mails and the e-mails could be disclosed in redacted form. CP at 376-77, ¶ 1 -6; 378, ¶ 1 (Trial Court 9/2/11 Order).

2. Amerquest Motion re: PRA's Investigative Records Exemption. Amerquest explained that the Investigative Records Exemption of the PRA exempts the Amerquest documents from disclosure because of the privacy concerns and impact on effective law enforcement. CP at 278-301 (Motion); 283-86 (Tiberend 8/18/11 Decl.); and 320-64 (Reply). The trial court denied the motion based solely on the statements of the AGO, concluding that the protection of the Amerquest documents was

not necessary for effective law enforcement. CP at 393, ¶¶ 1-2 (Trial Court 9/30/11 Order).

3. Ameriquest Motion re: Civil Investigative Demand.

Ameriquest also argued that the Washington Consumer Protection Act's provision for CIDs prohibits disclosure of the Ameriquest documents without Ameriquest's consent. CP 195-218 (Motion); 171-94 (Tiberend 7/28/11 Decl.); and 261-68 (Reply). Again, the trial court denied the motion, ruling that the Multi-State's demand for information did not constitute a CID under the Consumer Protection Act and, therefore, the disclosure is allowed. CP at 378, ¶¶ 7-9, and 2 (Trial Court 9/2/11 Order).

Ameriquest timely appealed the trial court's orders to this Court. On November 2, 2011, Ameriquest's appeal on all three issues were consolidated into this single appeal.

V. STANDARD OF REVIEW

The PRA mandates that "[j]udicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3); *Ameriquest Mortgage Co. v. The Att'y. Gen. of Washington*, 148 Wn. App. 145, 154, 199 P.3d 468 (2009).

VI. ARGUMENT

As noted above, this appeal is based on the proposed disclosure of the relatively small number of Blackstone and Stated Income e-mails, but

the three different issues raised by this appeal will have global application to the rest of the Ameriquest production, especially in light of the fact that the AGO expects Intervenor will request additional records. CP at 52 (AGO Brief Re: E-mails). The three issues will be addressed in turn.

A. **Issue No. 1: The Trial Court Erred by Permitting Redaction, Repackaging and Disclosure of E-Mails That Contain GLBA-Protected Information.**

The first issue discussed is the trial court's error with respect to the direct application of the GLBA to e-mails containing GLBA-protected information. The three key points from the *Ameriquest* Decision that govern this issue are:

(1) The Supreme Court's decision prohibiting disclosure of GLBA-protected information applies equally to e-mails. *Ameriquest*, 170 Wn.2d at 432 (providing that GLBA protections apply "*regardless of whether the information appears in loan files, e-mails, or the AGO's internal work product.*" (emphasis added)).

(2) There is no required minimum amount of GLBA information to trigger protection. GLBA protections extend to all documents that contain any "bit" of GLBA-protected information. *Id.* at 431 (finding that "bits" of information are protected from disclosure under the GLBA).

(3) The AGO may not redact or repackage the e-mails to permit public disclosure. *Id.* at 436 (requiring the AGO “to leave the information—and the consumer’s privacy—undisturbed”).

Our Supreme Court’s directive, grounded in the applicable statute, regulations, and FTC rule, seemed simple enough. However, after the *Ameriquest* Decision (and remand to the trial court), the issues laid to rest by the *Ameriquest* Decision were resurrected when the AGO gave notice that it intended to disclose e-mails in redacted form which contain GLBA-protected information as well as e-mails that had been improperly aggregated – the Blackstone and Stated Income e-mails. Despite our Supreme Court’s prohibition on such disclosure, the trial court inexplicably ruled directly to the contrary, permitting the redaction and disclosure of the e-mails. This was in error.

In its oral ruling, the trial court applied a strained reading of the *Ameriquest* Decision:

[I]n the body of the decision the Supreme Court indicated that the review was on the issue of whether federal law preempts or precludes discovery of information in loan files held by the Attorney General. I do realize in its decision the Supreme Court’s language was somewhat broader than addressing only loan files, but the discussion of the Supreme Court in its analysis seemed most concerned about the protection of consumer information that was submitted to obtain loans.

...

The Supreme Court used the word “e-mail” saying that the personal information that is contained in e-mails or the Attorney General’s internal work product is also subject to protection. So obviously, those personal identifiers in e-mails or other work product of the Attorney General could not be disclosed. *But it is not clear in the*

opinion that the e-mails themselves cannot be disclosed. It is clear in the opinion I think that there's about nothing in the individual consumer's loan application or loan file that could be disclosed; however, *I think the Supreme Court opinion falls short of saying there is nothing in the e-mails or other information in the possession of the Attorney General that could not be disclosed if the personal identifiers were eliminated.*

... I will say that it is inconceivable to me that if the Supreme Court had the e-mail examples and redactions that I reviewed that they would intend to extend their decision to prohibit disclosure of the e-mails themselves with redaction. ... In each e-mail there's *very little personal information.* ... [W]ith those redactions of the nonpublic personal information, it seems to me that it is exactly that sort of information that is contemplated by the Public Records Act of Washington that would mandate disclosure. *Accordingly, I am going to determine that the e-mails are not protected. They may be redacted and produced.*

VRP (Aug. 12, 2011) 29:23-24; 30:1-7; 30:11-24; 31:1-17; (emphasis added). The trial court's decision provides little explanation of why, in its view, the rules and holdings in the *Ameriquest* Decision do not apply to e-mail documents and it made no attempt to independently analyze the statutory language, federal rules, or case law discussed by our Supreme Court. Rather, the trial court merely commented that the opinion "falls short" of prohibiting the disclosure of redacted e-mails.

Perhaps most puzzling about the trial court's ruling is that our Supreme Court was neither vague nor conclusory in its *Ameriquest* Decision. Indeed, our Supreme Court painstakingly analyzed the statutory language, federal law, federal rules, and federal agency guidance on this complicated subject and

issued a decision that is not limited merely to loan documents.³ Simply put, *any* document that contains GLBA-protected information, regardless of its form, cannot be aggregated, repackaged, redacted, or manipulated in any way – and must be withheld from disclosure in its entirety. Through application of the Supreme Court holdings in the *Ameriquest* Decision, it is clear that the Blackstone and Stated Income e-mails contain data, even if just bits, which qualify as GLBA-protected information, that these e-mails are subject to the same protections as customer loan files, and that the e-mails cannot be redacted and disclosed.

1. The Supreme Court Confirms That the Definition of GLBA-Protected Information Is Extremely Broad; That Broad Definition Covers the Data in the E-mails Here. The *Ameriquest* Decision is solidly grounded in, and speaks the language of, a relatively complicated federal law, distinctly different from standard PRA jurisprudence. The key to proper application of the *Ameriquest* Decision is an understanding of the scope of GLBA-protected information which the GLBA defines as “personally identifiable financial information.”

The term “personally identifiable financial information” is construed very broadly and includes *any* information requested or obtained by a financial

³ The fact that the trial court found that the protection of GLBA information in these e-mails was “inconceivable” only underscores the trial court’s wholesale failure to understand the scope of GLBA-protected information and appreciate the application of binding federal authorities to these documents.

institution when providing a financial product or service or relates to a consumer's transaction. *Id.* at 431. The FTC recognized that having such a broad definition would protect from disclosure *even information that ordinarily might not be considered financial*. "Any information" qualifies if (1) the consumer merely gives the information to the financial institution; *or* (2) it is about the consumer's transaction; *or* (3) the financial institution obtains the information about the customer. 16 C.F.R. § 313.3(o)(1) and 15 U.S.C. § 6809(4)(A)(i)-(iii)); *see, also, Ameriquest*, 170 Wn.2d at 431.

An understanding of this definition is critical to this appeal. It may be counter-intuitive to think of "financial information" as any information created or obtained by Ameriquest in connection with a consumer's financial transaction; however, the GLBA, as explained above, protects all information provided to a financial institution, regardless of whether it appears to be "financial" or not.

For the GLBA, context is everything; if the information is given to, or obtained by, the financial institution in the financial context, it wears the shroud of GLBA protections. One of the best explanations of these comprehensive protections is found in *Individual Reference Servs. Group, Inc. v. Fed. Trade Comm'n*, 145 F. Supp. 2d 6 (D.C. Cir. 2001), the seminal case interpreting the GLBA's restrictions. Ameriquest relied significantly upon *Individual* when presenting its case to the Supreme Court, and the

Ameriquist Decision mirrors the reasoning in *Individual*. Thus, that reasoning and background bears repeating here.

In its explanation of why certain information may not, at first blush, seem like information that should be protected by a financial privacy law, the *Individual* court highlighted the importance of context.

Congress recognized that the status of particular types of information may vary according to the context in which it is used. ***Information used in or derived from a financial context is nonpublic personal information under § 6809(4)(C)(i)***; the same information in another context, however, may not be [nonpublic personal information]. ***Thus, it is the context in which information is disclosed—rather than the intrinsic nature of the information itself—that determines whether information falls within the GLB Act.***

Id. at 27 (emphasis added). Our Supreme Court echoed this sentiment, framing its analysis of “personally identifiable financial information” in “the *context* of the provision of a financial product or service.” *Ameriquist*, 170 Wn.2d at 431 (emphasis added).

Our Supreme Court went on to explain that GLBA-protected information includes customer names, addresses, phone numbers, account numbers, and any information provided to *Ameriquist* by the customer, information about a consumer’s transaction, and even the mere identity of an individual as a customer of *Ameriquist*. *Id.* at 431-32. This is true even if the information may not be considered private or confidential if disclosed in a non-financial context. This information **may not** be disclosed by the

AGO in response to a PRA request, **regardless of the vessel of the information** (e.g., document or an e-mail). *Id.*

2. The Trial Court Erred in Three Significant Ways in Considering the E-mails in Light of the *Ameriquist* Decision. The trial court's decision denying Ameriquest's motion was error for at least three reasons. First, the trial court incorrectly concluded that our Supreme Court did not intend that e-mails, *as a category of documents*, enjoy GLBA protection. VRP (Aug. 12, 2011) 30:17-24. Second, the trial court erred by finding that, in any event, e-mails with "very little personal information" *are not* protected by the GLBA. *Id.* at 31:8-9; 31:15-17. Third, the trial court erred by determining that the e-mails "may be redacted and produced." *Id.* at 31:17. Again, these rulings fly in the face of the *Ameriquist* Decision.

a. The Supreme Court Specifically and Repeatedly Confirmed that E-mails – Not Just the Loan Files – Are Protected. The format of the document within which GLBA-protected information is stored, like e-mails, has no bearing on the application of the GLBA protections to that document. Further, GLBA-protected information not only includes information that Ameriquest receives from the consumer but also includes information generated about a consumer as a result of the transaction and information the company obtains about a consumer. *Ameriquist*, 170 Wn.2d at 431, citing 16 C.F.R. § 131.3(o)(1). The GLBA allows Ameriquest to use

this information for numerous purposes including purely “internal use” necessary to process the financial product or service requested by the customer. 15 U.S.C. § 6801(e)(1)(A). For any financial institution offering mortgage loans, GLBA-protected information will be used and stored in all sorts of different forms, including e-mails, reports, loan processing data, etc. The information is protected by the GLBA in all such vessels. Indeed, the Supreme Court expressly included e-mails in the category of protected documents:

Notably, the definition of “[p]ersonally identifiable financial information” relates to “information,” and not to the vessel of the information (for example, a document or an e-mail). 16 C.F.R. § 313.3(o)(1). Therefore, any information meeting the definition of “[p]ersonally identifiable financial information” is subject to the GLBA and the FTC rule, regardless of whether the information appears in loan files, e-mails, or the AGO’s internal work product.

Ameriquest, 170 Wn.2d at 432 (alterations and italics in original, bold added). In concluding its opinion, our Supreme Court again confirmed:

Any information meeting the definition of “personally identifiable financial information” is nonpublic personal information that may not be disclosed, regardless of whether the information appears in loan files, e-mails, or the AGO’s internal work product.

Id. at 441 (emphasis added). Consequently, the trial court’s blanket exclusion of e-mails from the GLBA’s broad prohibition on disclosure of entire documents which contain GLBA-protected information was clearly erroneous in light of the *Ameriquest* Decision.

b. The Trial Court’s Assertion That E-mails With “Very Little” Personal Information Are Not Protected by the GLBA’s Prohibition on

Redaction and Repackaging Is Flat Wrong. The trial court's second error was in applying a threshold requirement for GLBA-protected information. In reaching its conclusion that certain e-mails are not subject to GLBA protection, the trial court applied an artificial standard that e-mails which, in the trial court's judgment, contain "very little personal information" are not protected by the GLBA. VRP (Aug. 12, 2011) 31:8-9; 31:15-17. There is no basis in either the *Ameritrust* Decision itself, or the governing federal law upon which it relies, to support such a standard. To be sure, not every e-mail contains the full array of protected information. Indeed, some of these e-mails contain only a limited amount of identifying information. Some documents contain full names and loan numbers, but others have a single last name. Yet, nowhere in the *Ameritrust* Decision is the suggestion that customer identifiers need to rise to a particular level before they enjoy the protections of the GLBA.

To the contrary, our Supreme Court recognized that even "bits" of information are protected and cannot be disclosed. *Ameritrust*, 170 Wn.2d at 431. This, again, affirms the rationale from *Individual* that there should not be subjective or case-by-case judgment of the type of information protected: "Information *used in or derived from a financial context* is nonpublic personal information" and cannot be disclosed under the GLBA. *Individual*, 145 F. Supp. 2d at 27 (emphasis added).

If a document contains *one iota* of GLBA-protected information, the document cannot be disclosed because the GLBA's overriding concern is the protection of consumer privacy. Moreover, the fact that records containing GLBA-protected information may also contain derivative or substantive information about Ameriquest is not relevant to the inquiry as to whether these records can be produced in response to a PRA request. It is undisputed that these documents contain GLBA-protected information, and they cannot be released regardless of other types of information contained therein.

c. The Trial Court's Ruling Permitting Redaction, Repackaging, and Disclosure Is Patently Contrary to the *Ameriquest* Decision.

The trial court's third error was its acceptance of the AGO's request to redact the e-mails. Like the previous two errors, the *Ameriquest* Decision illustrates just how far the trial court strayed from the law. After its careful analysis of the question of what is personally identifiable financial information, our Supreme Court turned to a fundamental question suggested by the customary tool of the PRA: could the AGO disclose Ameriquest documents as long as GLBA-protected information was redacted? The *Ameriquest* Decision answers that question with a resounding "no."

In its opinion, the Supreme Court posed this specific question: "Does the GLBA or the FTC rule prohibit redactions or repackaging to yield solely public information?" *Ameriquest*, 170 Wn.2d at 435. In

answering this question, the Supreme Court held that the GLBA prohibits the AGO from redacting or repackaging information for public disclosure. *Id.* at 436-36. “The FTC tightly restricts what a non-affiliated third party [like the AGO] may do with the protected information that it receives” from a financial institution [like Ameriquest]. *Id.*⁴

The Supreme Court acknowledged that the only possible scenario in which the AGO might be able to disclose this information was pursuant to the AGO’s argument that it could “disclose and use” the information in the ordinary course of its investigation. *Id.* at 435. But our Supreme Court rejected that possibility and found that “[p]ublic disclosures are not an ordinary part of an investigation.” *Id.* at 436. Consequently, it concluded:

[T]he AGO is not permitted to use any nonpublic personal information for purposes of public disclosure. *We think “use” includes redactions and repackaging of information because the AGO is required to leave the information—and the consumer’s privacy—undisturbed* unless the AGO needs to use it in the ordinary course of business to carry out the investigation.

Id. (emphasis added).

The Supreme Court also relied on the reuse restrictions of 16 CFR § 313.11, which bar any attempt to strip the identifying information from the e-mails. The FTC’s “reuse” restrictions prohibit disclosure – of even “de-identified” information. Thus, any attempt to redact or “de-identify”

⁴ The AGO is a non-affiliated third party as defined by the GLBA, and this point is not at issue on this appeal. *Id.* at 429.

GLBA-protected information would be a direct violation of these prohibitions. The regulation is clear:

Sec. 313.11 Limits on *redisclosure and reuse* of information.

(a)(1) Information you receive under an exception. If you receive nonpublic personal information from a nonaffiliated financial institution under an exception in Sec. 313.14 or 313.15 of this part, your disclosure and use of that information is limited as follows:

...

(ii) *You may disclose the information to your affiliates, but your affiliates may, in turn, disclose and use the information only to the extent that you may disclose and use the information;*

16 C.F.R. § 313.11 (emphasis added.) As our Supreme Court clarified, “‘use’ *includes redactions.*” *Ameriquest*, 170 Wn.2d at 436 (emphasis added).

With this extreme level of protection imposed by the GLBA, if there is any GLBA-protected information, whatever the amount, it cannot be *touched* by the AGO and released pursuant to a PRA request. The trial court’s order to disclose the e-mails violates these principles.

Further, the AGO has improperly aggregated the e-mails which also violates these “use” restrictions. When *Ameriquest* produced the e-mails it did so as stand-alone documents and, at the top of each e-mail, *Ameriquest* inserted “CONFIDENTIAL TREATMENT REQUESTED” as demonstrated by Bates No. PDR 10338303-002268. CP at 95, ¶ 3 (Tiberend 7/21/11 Decl.). Here, the AGO has created a grouping of e-mails by joining unrelated e-mails into a single document and adding descriptive terms that did not exist on the original documents. *Id.* at ¶ 5. Even a

cursory review of the submitted e-mails show that the AGO has taken this data from its original format and repackaged it. Again, this is expressly prohibited by the *Ameriquest* Decision. 170 Wn.2d at 436. The Court correctly concluded: “the GLBA and the FTC **do not permit the AGO to newly redact or repackage the information in its possession** to yield the blind data, aggregate information, and personal-identifier-free information that can be treated as public information.” *Id.* at 441.

In short, our Supreme Court has held that (1) e-mails are not different from loan files in the eyes of the GLBA; (2) that small “bits” of GLBA information do not deserve any less protection; and (3) that redactions are not appropriate to remove GLBA-protected information. Nonetheless, the trial court determined that “the Blackstone and Stated Income E-mails are not protected” and “may be redacted and produced.” CP at 377 (Trial Court 9/2/11 Order). This is simply wrong. The trial court’s ruling should be reversed with a direction that Blackstone and Stated Income e-mails which contain GLBA-protected information and/or have been aggregated may not be disclosed at all.

B. Issue No. 2: The Trial Court Erred by Failing to Protect the Entire Ameriquest Production Because the Production Satisfies the “Investigative Records” Exemption to the PRA.

Unlike the first issue on appeal which is limited to documents that contain GLBA-protected information, the second issue of this appeal has

global application to all documents in the Ameriquest production – the “investigative records” exemption to the PRA.⁵ This exemption provides:

Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person’s right to privacy.

RCW 42.56.240(1).

This exemption applies to the Ameriquest production in two distinct ways: (1) to protect important privacy rights (protecting GLBA documents from disclosure); and (2) because non-disclosure is essential to effective law enforcement (globally protecting all documents in the production). Ameriquest argued both of these reasons to the trial court, and explained their distinct applications. In anticipation of the AGO’s response regarding “effective law enforcement,” Ameriquest also specifically requested discovery in the event the AGO tried to submit testimony claiming its law enforcement function would not be adversely affected by disclosure. As predicted, the AGO defended against Ameriquest’s motion with such a declaration. CP at 302-06 (Walsh 9/24/11 Decl.).

In its ruling, the trial court completely ignored Ameriquest’s privacy argument and made no mention of it. As for “effective law enforcement,” the

⁵ This Court of Appeals has ruled that Ameriquest has standing to challenge the AGO’s failure to invoke applicable exemptions. *Ameriquest v. Attorney General of Washington*, 148 Wn. App. 145, 166-67, 199 P.3d 468 (2009).

trial court simply adopted the AGO's position without making any provision for discovery for Ameriquest. The trial court stated in its oral ruling:

The Attorney General's Office, which is the law enforcement agency that gathered the records which were voluntarily submitted and which was in the process of an investigation which has since been completed, has indicated that there is not a need from their point of view for withholding these records for disclosure for purposes of carrying out their law enforcement function or for purposes of gaining cooperation in future investigations. This is enough for me to conclude that there is no law enforcement or investigative function to be protected to keep these records confidential. These records shall be disclosed.

VRP (Sept. 2, 2011) 12:5-17.

The trial court's decision is contradicted by both the facts of this case and persuasive federal case law deciding similar issues under the federal Freedom of Information Act. Accordingly, it was error for the trial court to (1) ignore Ameriquest's privacy arguments; and (2) wholly adopt the AGO's position on "effective law enforcement" while turning a deaf ear to Ameriquest's request for discovery on the very same issue.

1. The Ameriquest Documents Qualify as "Investigative Records." Three elements must be met in order for the "investigative records" exemption to apply:

(1) The disputed documents must be specific investigatory records or contain specific intelligence information; (2) they must have been compiled by an investigative law enforcement or penology, [and qualified state agencies]; and (3) nondisclosure must be essential to either (a) effective law enforcement or (b) the protection of any person's right to privacy.

City of Tacoma v. Tacoma News, Inc., 65 Wn. App. 140, 144, 827 P.2d 1094 (1992) (citation omitted). The third element has two alternative prongs – “effective law enforcement” *or* privacy rights. All of these elements are met here for the Ameriquest production. At the trial court, the AGO conceded the first two elements, agreeing that the records are “investigative records” and that the AGO was a qualified law enforcement agency. CP at 309 (AGO Response Brief). As shown below, with respect to the two alternate prongs of the last step (essential to *either* (a) effective law enforcement *or* (b) the protection of any person’s right to privacy), both are also met.

2. Disclosure of GLBA-Protected Information Would Violate the Privacy Prong of the Investigative Records Exemption. Taking the “privacy” alternative prong first, this aspect of the investigative exemption is easily met, given the foregoing GLBA discussion and the directives of the *Ameriquest* Decision. Our Supreme Court was clear, GLBA information must be protected from disclosure because of the important privacy interests. These same privacy interests compel non-disclosure under the privacy prong of the investigative records exemption. Once the exemption is triggered, as it is here, documents containing private information must be withheld. Assessing what must be withheld is straightforward – the Supreme Court has instructed that all GLBA-protected information is private. Thus, for the same compelling reasons discussed above, the AGO must not disclose *any*

document in the Ameriquest production, including any Blackstone or Stated Income e-mails, that contains any GLBA-protected information by the operation of the additional mechanism of the PRA's investigative records exemption. (Other privacy considerations may also apply to Ameriquest documents that the AGO has yet to earmark for disclosure.)

The trial court's failure to grant this aspect of Ameriquest's motion was likely driven by its initial error on the GLBA's direct application to the e-mails (discussed in the foregoing section). Nevertheless, as noted above, the trial court compounded its mistake by failing to address at all this privacy aspect of the investigative records exemption. Such silence was error and should be reversed.

3. Non-disclosure of the Ameriquest Production Is Essential for Effective Law Enforcement. The alternate prong of the investigative records exemption ("effective law enforcement") is also met in this case. This prong, however, applies differently than the privacy prong, because it globally protects the entire production, not just those documents that contain GLBA-protected information. Like the CID issue discussed in the following section of this brief, satisfaction of this prong practically resolves this case because no documents in the production could be disclosed.

In contrast to Ameriquest's privacy arguments, upon which it was silent, the trial court expressly ruled on this prong of the investigative

records exemption. As noted above, the trial court merely adopted the AGO's blanket denial that the release of this information would impact its law enforcement activities, and failed to permit Ameriquest the opportunity to explore the justifications for the AGO's position.

The trial court's order was wrong. Simply put, non-disclosure of these documents *is essential* to effective law enforcement because of the strong policy, supported by case law, of incentivizing efficient law enforcement through negotiated settlement and compliance, notwithstanding the arguments to the contrary by the AGO.

This matter is one of first impression.⁶ There is no Washington case that addresses this particular situation – where an agency obtained over 1.2 million pages of documents through demand and compliance, then (efficiently) settled with the target of the investigation with promises of confidentiality. Fortunately, federal decisions provide guidance.⁷

⁶ Much of the Washington case law on this particular exemption deals with police and prosecutor records. *See, e.g., Newman v. King County*, 133 Wn.2d 565, 568, 947 P.2d 712 (1997) (seeking police records of murder investigation); *City of Tacoma*, 65 Wn. App. at 142 (requesting policy incident report regarding allegation of abuse of a minor); *Koenig v. Thurston County*, 155 Wn. App. 398, 404, 229 P.3d 910 (2010) (analyzing request for disclosure of victim impact statements obtained by the prosecutor). These cases are distinguishable from this case because the bulk of their discussion analyzes the details of whether the release of information about certain individuals, such as informants, would jeopardize law enforcement efforts to work with such individuals – facts that are entirely dissimilar to this case.

⁷ When analyzing this issue, Washington Courts have looked to the federal Freedom of Information Act (FOIA), which has a similar exemption, and has followed approaches used by the federal courts. *Newman*, 133 Wn.2d at 572; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978) (finding that “judicial interpretations of [FOIA] are particularly helpful in construing [the PRA]”).

a. Federal Decisions Recognize Essential Value to Encouraging Cooperation and Compliance by Targets of Investigations. With carefully reasoned decisions, federal courts have held that maintaining the confidentiality of documents, such as the Ameriquest disclosure, is *essential* to effective law enforcement. One such case, *United States v. Alex. Brown & Sons, Inc.*, 169 F.R.D. 532 (S.D.N.Y. 1996), involved materials compiled by the Department of Justice (DOJ) during its investigation into the trading activities of securities dealers. *Alex. Brown*, 169 F.R.D. at 534-35. The DOJ sought to settle the case with a proposed consent decree. The plaintiffs argued that both a settlement memorandum prepared for settlement negotiations and the underlying evidence obtained by the agency should be disclosed so that they could evaluate the appropriateness of the resulting consent decree. *Id.*

As part of its decision, the *Alex. Brown* court found that public disclosure of information provided in connection with negotiated settlements would likely deter future defendants “from cooperating in investigations that are likely to lead to such negotiations.” *Id.* at 544. The court was concerned about the ensuing harm to the agency if such disclosure were allowed:

The cost to antitrust enforcement, particularly in an era of declining government resources, could be substantial. Most of the Government’s civil antitrust cases are now settled rather than tried. **If more cases are required to be litigated because the substance**

of the settlement negotiations are discoverable, fewer of them can be brought.

Id. (emphasis added). Rejecting the plaintiffs' argument of needing disclosure to evaluate the appropriateness of the consent decree, the court stated that "[s]uch conjecture does not constitute an adequate basis for granting Plaintiffs broad access to the Government's files." *Id.* at 544-45.

Applying similar rationale, the court in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) called it "common sense" that information provided to a government agency under circumstances similar to this case would have a devastating effect on law enforcement:

It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release.

Critical Mass, 975 F.2d at 879. Although *Critical Mass* was not an "investigative records" case *per se*, its concurrence with the fears raised by *Alex. Brown* of the grave impact on law enforcement speaks to the seriousness of this issue.

In another similar case, settlement document drafts exchanged between a government agency and an investigation target were not disclosed when the drafts included reference (albeit slight) to the target's commercial information and when the information was provided with

explicit promises of confidentiality from the government. *M/A-Com Information Systems, Inc. v. U.S. Dept. of Health & Human Services*, 656 F. Supp. 691, 692 (1986). The court reasoned that “it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of [the government] to carry out its governmental duties if disclosure of this kind under FOIA were required.” *Id.*

Read together, these federal cases demonstrate that disclosure of the Ameriquest production, given the circumstances of the AGO’s acquisition of it, would gravely impact the law enforcement efforts of agencies like the AGO going forward. As reasoned in *Alex. Brown*, *Critical Mass*, and *M/A Com*, the impact on *future* investigations drives the analysis of whether disclosure would harm effective law enforcement.⁸ This is especially true where, as here, the Multi-State (including the AGO), agreed that the information provided to it by Ameriquest would remain confidential. *See* CP at 173-76, ¶¶ 4-9 (Tiberend 7/28/11 Decl.). Had Ameriquest known that its information would be disclosed, it would not have responded in the same manner. *Id.* at ¶ 11.

Moreover, given the high profile of this case, disclosure would surely impact future law enforcement to a degree well beyond the average run-of-the-mill governmental investigation. To be sure, the release of this information

⁸ *See, e.g., Ames v. City of Fircrest*, 71 Wn. App. 284, 295, 857 P.2d 1083 (1993) (finding after reviewing extensive facts presented through summary judgment that nondisclosure is required where disclosure would prevent use of established techniques in the future or prevent witnesses or complainants from coming forward in the future).

will not go unnoticed. Having been alerted to the massive disclosure of private documents provided in good faith with the expectation of confidentiality, future private parties will simply refuse to participate in these types of investigations. As noted by the *Alex. Brown* court, the effect on law enforcement would be “substantial,” with “fewer cases” brought by law enforcement. The AGO’s refusal to protect the documents in this case will have certain negative effects in the future, and the cost will be borne by the citizens of the state, many of whom were able to benefit from the settlement with Ameriquest in this case. How many other settlements will never be reached because of the sea change of business behavior, from the cooperative to the litigious, that will surely result from this type of disclosure? These concerns cannot be dismissed as speculative. A close review of the offered case law shows that these potential future consequences drive the analysis taken by the courts, and that calling this a Pandora’s Box is not an exaggeration.

4. The Trial Court’s Decision to Deny Discovery was Additional Error. As noted above, the AGO’s response to this compelling federal case law was simple denial. With the submission of the conclusory Declaration of Douglas Walsh (“Walsh Decl.”), the AGO claimed that barring disclosure of the Ameriquest documents *is not* essential for effective law enforcement. CP at 302-06 (Walsh 8/24/11 Decl.).

Ameritrust countered with a request for discovery to probe the declaration's conclusory statements, including the apparent inconsistencies with publicly available settlement agreements, as well as exploring why the AGO seems to find so little value in the strong policies expressed by the foregoing cases. Yet, the trial court ignored the case law and Ameritrust's pleas for discovery, and simply adopted the unsupported conclusions contained in Mr. Walsh's declaration. Mr. Walsh's declaration, however, should not be dispositive or even persuasive – at least not without more development of the facts.⁹

It is *common sense* that the AGO's decision to release information that was cooperatively provided with the expectation of privacy will have a chilling effect on the AGO's ability to obtain compliance from future targets. The fact that Mr. Walsh does not seem to recognize the essential importance of the AGO's ability to efficiently investigate targets does not mean it is not true. Indeed, his position flies in the face of the cited line of cases addressing similar situations and defies logic. Only through discovery will Ameritrust have an opportunity to develop the facts through discovery to explore the reasons behind, and consistency of, the AGO's blanket denial that disclosure here would not harm law enforcement.

⁹ This issue of whether nondisclosure is essential to effective law enforcement is an issue of fact, not of law. *Ames*, 71 Wn. App. at 295 (acknowledging that the Ames court considered "extensive evidence of the operations and techniques of the internal investigation division and of the agencies involved and the trial court's detailed findings").

Ameritrust's request for discovery should not be dismissed as merely a fishing expedition. The targeted areas for this discovery are raised by the Walsh declaration itself. For example, Mr. Walsh claims that the AGO "primarily relies on evidence it obtained through Civil Investigative Demands" and "rarely obtains pre-filing discovery . . . on a voluntary basis." CP at 303, ¶ 5 (Walsh 8/24/11 Decl.).¹⁰ Through discovery, Ameritrust would be able to determine whether or not Mr. Walsh's conclusory statements have any merit.

Furthermore, Mr. Walsh claims that he has "not been exposed to a situation where a defendant agreed to enter into settlement negotiations on the condition that records it provided would be confidential or exempt from disclosure." *Id.* at ¶ 15. However, two recent settlements entered into between the AGO and other financial institutions appear to have included confidentiality provisions.¹¹ These two settlements *appear* to be inconsistent with Mr. Walsh's statement. Whether they *actually* are inconsistent is something that Ameritrust does not know. But it certainly underscores the need to probe the conclusory statements of Mr. Walsh.

¹⁰ Mr. Walsh's claim that the AGO rarely seeks voluntary production bolsters Ameritrust's argument that it was responding to a demand as defined under RCW 19.86 (See Issue No 3 – Civil Investigative Demand, *supra*).

¹¹ See, *In the Matter of Wells Fargo, N.A., Assurance of Discontinuance*, at p. 24. <http://www.atg.wa.gov/pressrelease.aspx?id=26544> (last visited Aug. 29, 2011), CP at 357-59 (Assurance of Discontinuance); *State of Washington v. Countrywide Financial Corp., et al.*, Consent Judgment at p. 32-33. <http://www.atg.wa.gov/countrywide.aspx> (last visited Aug. 29, 2011), CP at 361-64 (Consent Judgment).

Mr. Walsh also claims that the Consumer Protection Division is told to not promise or assure that records are confidential, but there is no evidence he was involved with the Ameriquest investigation. CP at 305, ¶ 16 (Walsh 8/24/11 Decl.). In fact, his statement directly conflicts with Diane Tiberend's July 28, 2011, Declaration, and her statement that Ameriquest was promised that its records would remain confidential. CP at 173-75, ¶¶ 4-9 (Tiberend 7/28/11 Decl.).

Only through discovery can this conflicting evidence be sorted out. Ameriquest should not be required to defend against the AGO's factually-devoid statements without any opportunity to develop its own evidence. Of course, the development of this evidence without discovery is impossible because it resides completely within the possession of the AGO.

Ameriquest should prevail outright on its argument that disclosure should be prevented under the investigative records exemption. But if not, then certainly it is an affront to fundamental fairness to deny Ameriquest access to this evidence through discovery, while, at the same time, forcing it to carry the burden of proof on this exemption. The trial court's errors on these matters require reversal – by either granting Ameriquest's motion, or at the very least, remand to permit discovery.

C. **Issue No. 3: The Trial Court Erred by Failing to Protect the Entire Ameriquest Production Because the Production Resulted From a Civil Investigative Demand.**

The third issue of this appeal (and a second “global” justification for barring the release of the Ameriquest production *in toto*) is the issue of the “civil investigative demand” or “CID.” This third issue can be summarized as follows: because the entire production resulted from compliance with a CID, as defined by Washington’s Consumer Protection Act (“CPA”), 19.86 RCW, the entire production should be withheld from disclosure.

As noted above in the factual background, the investigating member states, including Washington, (the “Multi-State”), demanded that Ameriquest provide over one million pages of documents under the authority of their Consumer Protection Acts. The demand included formal discovery requests, specifically 23 interrogatories and 24 document requests that sought confidential and proprietary information regarding the operations and business practices of Ameriquest, as well as confidential information regarding Ameriquest’s employees and customers (collectively the “Discovery Requests”). CP at 172-73, ¶¶ 2-4 (Tiberend 7/28/11 Decl.); CP at 177-94, Ex. 1 (Discovery Requests *redacted*). Ameriquest agreed to comply with this demand and provide the requested information and documents only with the agreement that the requested documents would be kept confidential. CP at 173, ¶ 4.

This document demand constituted a CID under the CPA. Under this statute, the AGO has the power to investigate possible unfair or deceptive practices before filing a civil action. See RCW 19.86.110(1), *Steele v. State of Washington*, 85 Wn.2d. 585, 590, 537 P.2d 782 (1975) (finding that the AGO did not need to first file a civil action before serving a CID). To further its investigation, the CPA authorizes the AGO to:

[E]xecute in writing and cause to be upon such a person, a civil investigative demand requiring such person to produce such documentary material and permit inspection and copying, to answer in writing written interrogatories, to give oral testimony, or any combination of such demands pertaining to such documentary material...

RCW 19.86.110(1).

However, if information is sought this way, all documents disclosed to the AGO by a target of an investigation are kept confidential and cannot be disclosed without the target's consent. The CPA provides:

No documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a superior court for good cause shown, be produced for inspection, copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the attorney general, without the consent of the person who produced such material, answered written interrogatories, or gave oral testimony, except as otherwise provided in this section...

RCW 19.86.110(7).

Based on the characteristics of the 2004 demand by the Multi-State and the operation of this statute, Ameriquest moved the trial court for "global" protection of all of the Ameriquest production documents.

The trial court denied the motion, holding that the Multi-State's demand for Ameriquest's documents fell short of being a "civil investigative demand." CP at 378, ¶¶ 7-9; and 2 (Trial Court 8/12/11 Order). As explained more fully below, this decision is error.

1. The Discovery Requests Satisfied the Criteria of a CID, The Ameriquest Documents Are Confidential and May Not Be Disclosed Without Its Consent. The CPA does not specify any "magic language" that must be used to issue a CID. Rather, if a demand includes the requisite components, it becomes a CID – even if it is not labeled so.

To constitute a CID, the CPA provides that the demand shall (a) identify the alleged violation under investigation and the general subject matter of the investigation; (b) specify the material demanded with reasonable specificity; (c) prescribe a return date for the document production and answers to written interrogatories, and (d) identify the staff member to whom the information should be given. RCW 19.86.110(2)(a)-(d). The written demand that Ameriquest received from the Multi-State satisfied all of these criteria.

(a) Identification of violation. The Multi-State sent Ameriquest a written demand stating that Ameriquest's operations were the target of a multi-state investigation. Although brief, the description satisfies the first prong of the CPA's requirements – identification of violation.

This prong does not require that the written demand describe with specificity the activity or transaction that prompted the investigation. *Steele*, 85 Wn.2d at 594. Rather, the test is whether the investigation was within the agency's authority, the written demand was not too indefinite, and the information sought was relevant to the investigation. *Id.* The test set forth in *Steele* is clearly satisfied here as the AGO was provided authority under the CPA to investigate unfair practices, the requests were extremely specific (formal interrogatories and requests for production), and the information sought was relevant to Ameriquest lending practices which was the subject of the investigation.¹²

(b) Specify information requested. The second prong of the CPA is the demand must specify the information being requested. Here, the Multi-State's written demand included requests for documents and information in the form of formal discovery requests – 23 Interrogatories

¹² Moreover, consistent with *Steele*, other courts have focused on substance over form in analyzing whether a demand qualifies as a "civil investigative demand." See *MacCaferrri Gabions, Inc. v. United States*, 938 F. Supp. 311 (D. Md. 1995). The *MacCaferrri* court found that, where adequate detail of the offense was provided in meetings and communications between counsel for the target and the government agency, the statutory requirements were satisfied. *Id.* at 314-15. A short and terse statement is adequate because the requisite detail can be provided informally other than through the information request. *Id.* at 314.

MacCaferrri has application here. Ameriquest had been in communication with the members of the Multi-State, including the AGO, prior to receipt of the written demand, so it was well aware that the investigation was proceeding under the applicable consumer protection statute for the respective States and that the Multi-State's written demand was in furtherance of this investigation. CP at 172-73, ¶ 3 (Tiberend 7/28/11 Decl.).

and 24 Document Requests – that were written with sufficient specificity to more than meet this prong. *Id.*

(c) Provide a return date: The CPA’s third prong, the requirement of a “return date” is readily met here because the Multi-State’s demand required compliance within 30 days. *Id.*

(d) Identify a staff member: The fourth prong is simply that a staff member for the response must be identified. Here, again, this prong is met because the Multi-State’s demand identified the AGO’s D. Huey, Assistant Attorney General, as a party to whom Ameriquest was to produce its responses to the Discovery Requests. *Id.*

Once the demand qualifies as a CID under the statute, then all documents received in response thereto must be kept confidential and cannot be disclosed without the consent of Ameriquest. RCW 19.86.110(7). This prohibition on disclosure includes responding to PRA requests. RCW 42.56.070(1); *see also Ameriquest*, 170 Wn.2d at 440 (finding that disclosure may be exempted or prohibited by another statute). Thus, the trial court’s decision to permit disclosure of any documents is error.

2. The Demand’s Representation That It Is Not a “Formal” CID Is Not Dispositive. Notwithstanding the law set forth above, the trial court found that the Multi-State’s demand fell short of being a “CID.” In addition to the features discussed above, the demand also states that “[in]

anticipation of Ameriquest's voluntary cooperation in our multistate investigation, we are sending this request in lieu of Civil Investigative Demands or other similar methods for compelling pre-Complaint discovery." CP at 172-73, ¶ 3 (Tiberend 7/28/11 Decl.). No doubt focusing on this language, the trial court stated:

The request in this case was for voluntary cooperation. The form of the request, the deadlines for the request were in the nature of what would be included in a civil investigative demand, but the letter itself was clear that this was not a civil investigative demand.

CP at 378, ¶ 7 (Trial Court 8/12/11 Order).

Notwithstanding this "in lieu of" language used in the demand, the trial court erred because it ignored the substantive requirements of the law, favoring "form over substance" instead. The Multi-State's demand was a CID because it contained all of the required elements for such a demand under Washington law, and was treated as such by Ameriquest. Each time Ameriquest forwarded documents, it did so expressing the unequivocal understanding that the documents would be treated as confidential by the Multi-State. CP at 173-76, ¶¶ 5-11 (Tiberend 7/28/11 Decl.). Ameriquest also memorialized the Multi-State's "express agreement" that all of the documents, information, and communications exchanged between the parties were "privileged and confidential." CP at 176-76, ¶¶ 9-11.

The statute does not require that a CID be entitled "CID" or "formal Civil Investigative Demand"; it only requires the demand meet the statutory

requirements. Nor does the statute provide that a government agency can strip a CID of its substance simply by saying “this was not a formal CID.” The statute lists certain elements and the case law fills in the gaps. Under the law, the request at issue is a CID and the information Ameriquest provided enjoys the protections of RCW 19.86.110. Indeed, under these circumstances, to *not* apply the confidentiality provision of RCW 19.86.110(7) to these documents would render the statute meaningless. *De Grief v. Seattle*, 50 Wn.2d 1, 10-11, 297 P.2d 940 (1956) (holding that “[i]t is a rule of statutory construction almost universal that it is the duty of the courts to give such construction to the language of a statute as will make it purposeful and effective, rather than futile and meaningless.”); *see also Steele*, 85 Wn.2d. at 590. Courts, such as *MacCafferri* cited above, have wisely held that substance, not form, matters in these cases. The trial court’s failure to focus on the substance of this demand was error.

3. Federal Jurisprudence Dictates That Regardless of the Form of the Written Demand to Ameriquest, the Information It Provided to the Multi-State Is Exempt From Disclosure. The trial court also ignored persuasive federal cases supporting Ameriquest’s position that regardless of the form of the Multi-State’s written demand, the documents Ameriquest produced to the AGO during the course of the multi-state investigation should be afforded the confidentiality protections of RCW 19.86.110(7).

Indeed, federal courts have addressed this issue under similar federal antitrust statutes, and have held that the target of an investigation should be afforded the same confidentiality protections regardless of whether the documents were voluntarily produced or were produced after a formalized CID had been issued. *A. Michael's Piano*, 18 F.3d at 141-42; *Carter, Fullerton & Hayes, LLC v. FTC*, 637 F. Supp. 2d 1, 11 (D.D.C. 2009).¹³

In one such case, *A. Michael's Piano, Inc. v. F.T.C.*, the Federal Trade Commission ("FTC") commenced an investigation of a piano manufacturer (the "Target") for possible violations of the FTC Act. 18 F.3d 38, 141-42 (2d Cir. 1994). During the investigation, the FTC made written requests to the Target for documents and information. *Id.* at 142. Following the close of the investigation, the plaintiff made a FOIA request seeking copies of the documents produced by the Target to the FTC in its investigation. *Id.* The FTC Act provided that information and documents produced in furtherance of

¹³ Because the CPA is modeled after federal antitrust statutes, the Washington legislature expressly provided that the courts should be "guided by" federal law when interpreting the CPA:

... It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters . . .

RCW 19.86.920 (emphasis added); *see also Blewett v. Abbot Laboratories*, 86 Wn. App. 782, 783, 938 P.2d 842 (1997) (finding that "[t]he state Consumer Protection Act directs us to be guided by federal precedent in our interpretation of the Act."). The Legislature's "guided by" federal law directive demonstrates an intention by the Legislature to "minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct." *Blewett*, 86 Wn. App. at 788. Therefore, any departure from federal law must not be rooted in general policy arguments but in our statutes or case law. *Id.*

a pending investigation could not be disclosed. *Id.* The Second Circuit recognized that, in amending the FTC rule to allow for a broader exemption to disclosure, the FTC was concerned with the difficulties it had in “obtaining information from businesses because of fears that confidential information would be publicly disclosed.” *Id.* at 145 (citation omitted). However, in order to avoid a blanket exemption for any document the FTC voluntarily receives, the Second Circuit established the following three-part test that must be met before documents voluntarily produced in connection with an official investigation will remain confidential:

(1) [FTC] had requested documents that were (2) relevant to an ongoing investigation within its jurisdiction and (3) the documents could have been subpoenaed had the party refused to comply with the FTC’s requests.

Id. at 145-46. The court concluded that the FTC had satisfied the test and that the documents were exempt from disclosure. *Id.*; see also *Carter, Fullerton & Hayes, LLC v. FTC*, 637 F. Supp. 2d 1, 11 (D.D.C. 2009) (adopting the three-part test in *A. Michael's Piano* and finding that FOIA Exemption 3 was properly invoked).

The rationale of *A. Michael's Piano* can be applied equally to this case. Here, it is undisputed that there was an official investigation of Ameriquest at the time the documents were demanded and produced. It is further undisputed that the documents were relevant to the AGO’s investigation into potential unfair and deceptive practices related to

Ameriquet's lending practices. Moreover, had Ameriquet not complied, the AGO would most certainly have judicially enforced the document production. The fact that Ameriquet's compliance obviated the need for such action does not mean that production would not have been compelled.

The trial court characterized the request as merely voluntary. But this, in effect, punishes Ameriquet for compliance – such result would undermine the process and “only breed litigation and encourage everyone investigated to challenge (sic) the sufficiency of the notice.” *A. Michael's Piano*, 938 F. Supp. at 314 (alteration in original). There would be an utter disincentive for Ameriquet to comply, which, in turn, would have unnecessarily created an adversarial relationship with the Multi-State. *See generally, FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, (D.D.C. 2010) *aff'd*, -- F.3d -- (D.C.C. Dec. 13, 2011)(2011 U.S. App. LEXIS 24587) (warning of consequences of non-cooperation with government investigation).¹⁴

¹⁴ In its decision below, the trial court dismissed the relevance of this federal case law because of the statutory differences between Washington's CPA and federal antitrust law. Ameriquet recognizes that the federal antitrust law was amended to expressly clarify that its confidentiality provisions applied to information voluntarily provided. The trial court apparently found that dispositive of the issue:

I'm also satisfied that where the voluntary production was entitled to exemption from disclosure, it was because of a statute that specifically protected the voluntary production from disclosure, and Washington does not have that kind of statute.

VRP (Aug. 12, 2011) 32:14-18.

However, the statutory differences do not change the compelling policy considerations expressed by the federal court decision. These policies, coupled with the CPA's express purpose of avoiding conflict with federal law, support this Court's adoption of the confidentiality protections afforded to voluntary productions.

4. The Multi-State's Promises of Confidentiality Further Underscores the Policy of Enforcing this "CID." Adopting the policy holdings of these cases is made even more persuasive when one considers the promises of confidentiality made by the Multi-State. *See Alex. Brown*, 169 F.R.D. 532. As explained in the factual background section above, the Multi-State provided assurances that the materials provided by Ameriquest would be confidential as shown in the March 2005 communication from Mr. Ron Stevens. CP at 175-76, ¶¶ 9-11 (Tiberend 7/28/11 Decl.).

These types of promises, according to the *Alex. Brown* court, cannot be ignored. In *Alex. Brown*, intervenors sought to have the Department of Justice (DOJ) disclose information that the DOJ had shared with certain target co-defendants during settlement negotiations. The intervenors argued that any privilege that may have attached at one time was waived by the disclosure to co-defendants. In refusing to disclose the documents, the court noted that the only reason the targets agreed to the sharing of their information with co-defendants is because the DOJ expressly agreed that the privileges and confidentiality of the documents would be preserved. *Id.* at 544. If information the DOJ promised would remain confidential was routinely disclosed, according to the court, future targets of investigations would likely be dissuaded from entering into settlement negotiations and even from cooperating with investigations. *Id.*; *see also Critical Mass Energy Project v.*

Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (C.A.D.C. 1992) (finding it to be a matter of “common sense” that disclosure of information voluntarily provided to the Government, in confidence, both jeopardizes the Government’s ability to get cooperation from sources and harms the producing party’s interest in preventing release).

The court in *Alex. Brown* also found a sound policy rationale for allowing the DOJ to agree to the confidentiality of documents:

The cost to antitrust enforcement, particularly in an era of declining government resources, could be substantial. Most of the Government’s civil antitrust cases are now settled rather than tried. *If more cases are required to be litigated because the substance of settlement negotiations are discoverable, few of them can be brought.*

Alex. Brown, 169 F.R.D. at 544 (emphasis added).¹⁵

Here, if the AGO is permitted to release these documents in the face of its assurances that the documents would remain confidential, the same chilling effect would occur. The Multi-State agreed with Ameritrust that all of the documents Ameritrust had provided would remain privileged and confidential. CP at 175-76, ¶¶ 9 -11 (Tiberend 7/28/11 Decl.). In reliance on these promises, Ameritrust provided materials and engaged in good faith settlement negotiations with the Multi-State that ultimately resulted in settlement without the requirement of a trial. Ameritrust would not have provided the documents to the Multi-State if it knew that the confidence of

¹⁵ The rationale in *Alex. Brown* underscores that nondisclosure is also essential for effective law enforcement discussed in the previous section (Issue No. 2).

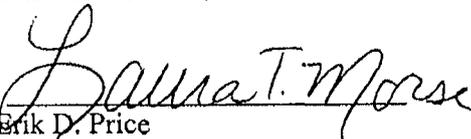
the materials would not be maintained. CP at 176, ¶ 11. Under these circumstances, if the AGO is forced to abide by its promises of confidentiality because its demand constituted a CID, the policy purposes behind the exemption under Washington's CPA will be further served.

VII. CONCLUSION

For the above-stated reasons, the trial court erred when it denied Ameriquest's requested relief. Ameriquest respectfully requests that this Court vacate the trial court's orders and direct the trial court that the documents at issue not be disclosed, consistent with the arguments presented herein.

RESPECTFULLY SUBMITTED this 25th day of January, 2012.

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DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Defendants/Respondents

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Paula Casey)

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I hereby certify under penalty of perjury that on January 25, 2012, I electronically filed **Appellant's Opening Brief** together with this Certificate of Service and served the same on the following persons at the addresses and in the manners listed:

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