

NO. 42566-1

cm

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant,

v.

WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL,

Defendant/Respondent.

**BRIEF OF RESPONDENT
WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL**

ROBERT M. MCKENNA
Attorney General

Shannon E. Smith
Assistant Attorney General
WSBA No. 19077
800 5th Ave., Ste. 2000, TB-14
Seattle, WA 98104-3188
(206) 389-3996

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF ISSUES.....2

III. COUNTERSTATEMENT OF THE CASE3

 A. The Investigation of Ameriquest’s Lending Practices.....3

 B. The Public Records Request and Injunction Litigation.4

IV. ARGUMENT5

 A. Ameriquest Has the Burden of Proving That the Stated
 Income and Blackstone Email Messages Are Exempt
 from Public Disclosure.5

 B. The Trial Court Did Not Err in Ordering the Public
 Disclosure of the Stated Income and Blackstone Email
 Messages Because, As Redacted, the Email Messages Do
 Not Contain Nonpublic Personal Information About
 Consumers.....6

 1. The GLBA and the *Ameriquest* Decision Protect
 Nonpublic Personal Information About Consumers;
 They Do Not Protect Internal Financial Institution
 Communications Regarding Lending Practices.6

 2. Neither Federal Law Nor the *Ameriquest* Decision
 Preclude the AGO from Disclosing Information That
 Is Not Nonpublic Personal Information About
 Consumers.8

 3. The Supreme Court’s Decision Does Not Prohibit
 the AGO from Producing Certain Internal
 Ameriquest Records, Including Email
 Correspondence, Where All Nonpublic Personal
 Information Is Redacted.11

C.	The Trial Court Correctly Determined That the Stated Income and Blackstone Email Messages Are Not Exempt from Public Disclosure as Investigative Records Under RCW 42.56.240.	19
1.	Nondisclosure of the Stated Income and Blackstone Email Messages Is Not Necessary for Effective Law Enforcement.	20
2.	Disclosure of the Stated Income and Blackstone Email Messages Will Not Discourage Cooperation or Settlement With the AGO Pursuant to the Consumer Protection Act.	21
3.	Nondisclosure of the Stated Income and Blackstone Email Messages Is Not Essential to Protect Any Person’s Right to Privacy Under RCW 42.56.240.	29
D.	The Trial Court Did Not Err by Declining Ameriquest’s Request to Conduct Discovery on Whether the AGO’s Failure to Assert Exemptions for the Stated Income and Blackstone Email Messages Was Arbitrary and Capricious.	31
E.	The Trial Court Correctly Held That the Stated Income and Blackstone Email Messages Are Not Exempt as Civil Investigative Demand Responses.	35
1.	The Request for Information Was Not a CID.	36
2.	Ameriquest’s Voluntary Responses Are Not Exempt From Public Disclosure Pursuant to RCW 19.86.110(7).	39
3.	Federal Cases Interpreting the Federal Trade Commission Act Do Not Support Ameriquest’s Argument that Voluntarily Produced Documents Are Exempt from Public Disclosure Under RCW 19.86.110(7).	40

4. The States Did Not Assure Amerquest that the
Records Would Not Be Subject to Public Disclosure.43

V. CONCLUSION47

TABLE OF AUTHORITIES

Cases

<i>A. Michael's Piano, Inc. v. Federal Trade Comm'n</i> , 18 F.3d 138 (2d Cir. 1994)	42, 43
<i>Ameritrust v. Washington State Office of the Attorney General</i> , 170 Wn.2d 418, 214 P.3d 1245 (2010).....	passim
<i>Ames v. City of Fircrest</i> , 71 Wn. App. 284, P.2d 1083 (1993).....	5, 20
<i>Bainbridge Island Police Guild v. City of Puyallup</i> , 172 Wn.2d 398, P.2d 190 (2011).....	31
<i>Cowles Publishing Co. v. Spokane Police Dept.</i> , 139 Wn.2d 472, 987 P.2d 620 (1999).....	21, 46
<i>Critical Mass Energy Project v. Nuclear Regulatory Comm'n</i> , 975 F.2d 871 (D.C. Cir. 1992).....	25, 26
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, P.2d 246 (1978).....	39, 44
<i>M/A-Com Information Systems, Inc. v. United States Dep't of Health & Human Serv.</i> , 656 F. Supp. 691 (1986)	27
<i>Maccaferri Gabions, Inc. v. United States</i> , 938 F. Supp. 311 (D. Md. 1995).....	38, 39
<i>Newman v. King County</i> , 133 Wn.2d 565, 947 P.2d 712 (1997).....	20, 46
<i>Progressive Animal Welfare Soc'y v. University of Washington</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	5, 26, 27, 40
<i>Raphael v. Aetna Cas. & Sur. Co.</i> , 744 F. Supp 71 (S.D.N.Y 1990)	24

<i>Seattle Times Co. v. Serko</i> , 170 Wn.2d 581, 243 P.3d 919 (2010).....	6
<i>Soter v. Cowles Publ'g Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007).....	6
<i>Spokane Police Guild v. Washington State Liquor Control Bd.</i> , 112 Wn.2d 30, P.2d 283 (1989).....	44
<i>Steele v. State of Washington</i> , 85 Wn.2d 585 P.2d 782 (1975).....	38, 39
<i>United States v. Alex. Brown & Sons, Inc.</i> , 169 F.R.D. 532 (S.D.N.Y 1996).....	passim

Statutes

5 U.S.C. § 552(b)(3)	41
5 U.S.C. § 552(b)(4)	25
5 U.S.C. § 552(b)(7)	24
15 U.S.C. § 1312.....	24
15 U.S.C. § 1313(c).....	45
15 U.S.C. § 1313(c)(3).....	24
15 U.S.C. § 16.....	22
15 U.S.C. § 57b-1(i).....	42
15 U.S.C. § 57b-2(f)	41, 42, 43
15 U.S.C. § 6801(a)	6, 13
15 U.S.C. § 6802(a)	8
15 U.S.C. § 6802(c)	8

44 U.S.C § 3510(b)	24, 45
RCW 19.86	35
RCW 19.86.080	29
RCW 19.86.090	28
RCW 19.86.110	35, 38, 39
RCW 19.86.110(2)(a)	37
RCW 19.86.110(7).....	passim
RCW 19.86.110(8).....	35
RCW 19.86.110(9).....	35
RCW 19.86.130	28
RCW 19.108.010(4).....	27
RCW 42.56.030	40
RCW 42.56.050	30
RCW 42.56.070	35, 40
RCW 42.56.070(1).....	12
RCW 42.56.240	19, 29
RCW 42.56.240(1).....	passim
RCW 42.56.270	26, 46
RCW 42.56.540	5

Federal Regulations

16 C.F.R. § 313(o)(2)(ii)(B)	8
16 C.F.R. § 313.1(b)	7, 9
16 C.F.R. § 313.10	8
16 C.F.R. § 313.11	8
16 C.F.R. § 313.11(c).....	8
16 C.F.R. § 313.13	8
16 C.F.R. § 313.14	8
16 C.F.R. § 313.15	8
16 C.F.R. § 313.15(7)	8
16 C.F.R. § 313.3(n)(1).....	7
16 C.F.R. § 313.3(o)(1).....	7, 12
16 C.F.R. § 313.3(o)(2)(C)	8, 10
16 C.F.R. § 313.3(o)(2)(i)(C) and (D)	17
16 C.F.R. § 313.3(o)(2)(ii)(B))	11, 15
16 C.F.R. § 313.3(p)	9
17 CFR § 230.122	45
17 CFR § 240.0-4.....	45

I. INTRODUCTION

This appeal is a continuation of an action Ameriquest Mortgage Company (Ameriquest) filed in 2007 under the Public Records Act, RCW 42.56.540, to enjoin the public disclosure of records it provided to the Attorney General's Office (AGO) during an investigation into its mortgage lending practices. On remand from the Washington Supreme Court, the trial court concluded that the AGO may publicly disclose 49 pages containing internal Ameriquest email messages about income falsification and Blackstone Title Company. Following *in camera* review, the trial court ordered the AGO to produce the email messages and withhold from public disclosure, through redaction, all "nonpublic personal information" about consumers and all information that might identify a consumer as a customer of Ameriquest. "Nonpublic personal information" is a term defined in the federal Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (GLBA); the Act was recognized as an exemption under the Public Records Act in *Ameriquest v. Washington State Office of the Attorney General*, 170 Wn.2d 418, 440, 214 P.3d 1245 (2010).

In its order, the trial court properly held that public disclosure of the records, as redacted, would not violate the Gramm-Leach-Bliley Act or the Supreme Court's decision in *Ameriquest*. The trial court's order fully protects consumer privacy.

The trial court also properly held that the records do not fall within any exemption to public disclosure set forth in the Public Records Act, including the exemptions for investigative records, RCW 42.56.240(1), and responses to Civil Investigative Demands under RCW 19.86.110(7). Ameriquest has failed to sustain its burden of proof that the email messages are exempt from public disclosure.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the trial court properly ruled that neither the GLBA nor the Supreme Court's *Ameriquest* decision prohibit the public disclosure of internal Ameriquest records once the records are redacted to withhold all nonpublic personal information about consumers and all information that could identify consumers as Ameriquest customers.

2. Whether the trial court properly ruled that nondisclosure of internal Ameriquest documents that Ameriquest produced to the Attorney General's Office during an investigation pursuant to the Consumer Protection Act is not essential for effective law enforcement.

3. Whether the trial court properly ruled that nondisclosure of internal Ameriquest documents that Ameriquest produced to the Attorney General's Office during an investigation pursuant to the Consumer Protection Act is not essential to protect any person's right to privacy once

all nonpublic personal information about consumers is redacted from the records.

4. Whether the trial court properly ruled that Ameriquest is not entitled to discovery on whether the AGO's decision to produce redacted records is arbitrary and capricious?

5. Whether the trial court properly ruled that records voluntarily produced to the Attorney General's Office in lieu of a Civil Investigative Demand are not exempt from public disclosure pursuant to RCW 19.86.110(7).

III. COUNTERSTATEMENT OF THE CASE

A. The Investigation of Ameriquest's Lending Practices.

In 2004, the Washington AGO and the Attorneys General of several states (collectively, "States") commenced an investigation into Ameriquest's mortgage lending practices. During their investigation, the States asked Ameriquest to provide information, including copies of documents. Rather than issue a Civil Investigative Demand, the States asked Ameriquest to voluntarily cooperate and provide the information. CP at 179-180. In their request, the States made it plain that the request was made "in lieu of Civil Investigative Demands." *Id.* The States concluded the request for voluntary production with the following, "If Ameriquest would prefer a formal Civil Investigative Demand, please

contact us promptly and we will re-issue our demand under our formal investigative authority.” *Id.* Ameriquest voluntarily provided the information to the States without a Civil Investigative Demand.

At the conclusion of the investigation, the AGO and Ameriquest signed a Consent Decree that was filed in King County Superior Court. The Consent Decree contained a provision stating that records Ameriquest provided to the AGO may be subject to a public disclosure request and if a request is made, the AGO will comply with the Public Records Act:

If the State receives a request for documents provided by an Ameriquest Party . . . the State shall comply with applicable public disclosure laws and promptly provide notice to the Ameriquest Parties of the request that will afford the Ameriquest Parties the reasonable opportunity to assert that the documents subject to the request are exempt from disclosure.

Ameriquest, 170 Wn.2d at 427.

B. The Public Records Request and Injunction Litigation.

On February 5, 2007, Melissa Huelsman made a public records request to the AGO for “[a]ll records relating to [the] investigation of Ameriquest.” *Id.* (citation omitted). While initially very broad, this public records request was subsequently narrowed to “those documents related to allegations of falsification of income and those in which Blackstone Title Company was involved.” CP at 48. These are the “Stated Income” and “Blackstone” email messages that the trial court

reviewed *in camera* and ordered the AGO to produce to Ms. Huelsman as redacted. CP at 377-78; 402-56.¹

IV. ARGUMENT

A. **Ameriquest Has the Burden of Proving That the Stated Income and Blackstone Email Messages Are Exempt from Public Disclosure.**

As the party seeking to prevent public disclosure, Ameriquest bears the burden of proving that a specific exemption bars public disclosure of the Blackstone and Stated Income email messages. RCW 42.56.540; *Progressive Animal Welfare Soc'y v. University of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (*PAWS*); *see also Ames v. City of Fircrest*, 71 Wn. App. 284, 293, 857 P.2d 1083 (1993) (the party claiming an exemption to public disclosure has the burden to prove the exemption applies). To prevail, Ameriquest must prove that public disclosure “would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions.” RCW 42.56.540. *See Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 756-57, 174 P.3d 60

¹ The email messages are contained in the record at CP 401-56 and were filed with the Superior Court under seal. CP at 400-01. The information the trial court ordered the AGO to redact from the email messages is highlighted in yellow for the Court's review, and will be converted to black before the records are publicly disclosed.

Since the AGO originally identified the Stated Income and Blackstone email messages for public disclosure, Ameriquest notified the AGO that it considers five pages of the record, CP 405-09, protected by the attorney-client privilege. The AGO will not publicly disclose those pages.

(2007); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 591, 243 P.3d 919 (2010) (party opposing public records production has the burden to establish that disclosure clearly would not be in the public interest and would cause substantial and irreparable damage any person or vital government functions).

B. The Trial Court Did Not Err in Ordering the Public Disclosure of the Stated Income and Blackstone Email Messages Because, As Redacted, the Email Messages Do Not Contain Nonpublic Personal Information About Consumers.

In its Order, the trial court held that the Supreme Court's decision in *Ameriquest* protects from public disclosure nonpublic personal information about consumers regardless of whether the information is contained in email messages, such as the Stated Income or Blackstone email messages, or in the AGO's internal work product. CP at 377. The trial court also held that the Supreme Court did not categorically exempt from public disclosure all records that Ameriquest provided to the AGO, but only nonpublic personal information about consumers. *Id.*

1. The GLBA and the *Ameriquest* Decision Protect Nonpublic Personal Information About Consumers; They Do Not Protect Internal Financial Institution Communications Regarding Lending Practices.

The GLBA is a consumer privacy law that applies to financial institutions. 15 U.S.C. § 6801(a). It does not apply to all information held by financial institutions, but only to nonpublic personal information about

their customers. *Id.* The Federal Trade Commission (FTC) regulations implementing the GLBA's consumer privacy protections apply "only to nonpublic personal information about individuals who obtain financial products or services primarily for personal, family or household purposes" from financial institutions. 16 C.F.R. § 313.1(b).

In its implementing regulation, the FTC defines "nonpublic personal information" as:

- (i) Personally identifiable financial information; and
- (ii) Any list, description, or grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.

16 C.F.R. § 313.3(n)(1). The FTC defines "personally identifiable *financial* information" as any information:

- (i) A consumer provides to [a financial institution] to obtain a financial product or service from [the financial institution];
- (ii) About a consumer resulting from any transaction involving a financial product or service between [a financial institution] and a consumer; or
- (iii) [A financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer.

16 C.F.R. § 313.3(o)(1). "[P]ersonally identifiable financial information" includes the fact that an individual is or has been a financial institution's customer or has obtained a product or service from the financial

institution. 16 C.F.R. § 313.3(o)(2)(C). But information that does not identify a consumer is not “personally identifiable information.” 16 C.F.R. § 313(o)(2)(ii)(B).

The GLBA and the FTC prohibit a financial institution from disclosing nonpublic personal information unless permitted to do so under certain enumerated exemptions without providing consumers with notice and an opportunity to opt out of that disclosure. *See* 15 U.S.C. § 6802(c); 16 C.F.R. §§ 313.10; 313.11; 313.13; 313.14; 313.15. Ameriquest lawfully disclosed nonpublic personal information about its consumers to the AGO during the investigation. 15 U.S.C. § 6802(e)(8); 16 C.F.R. § 313.15(7). Under the GLBA and the FTC regulation, the AGO cannot disclose the nonpublic personal information to any other party unless the financial institution lawfully could make the disclosure. 15 U.S.C. § 6802(e)(8); 16 C.F.R. § 313.11(c).

2. Neither Federal Law Nor the *Ameriquest* Decision Preclude the AGO from Disclosing Information That Is Not Nonpublic Personal Information About Consumers.

Once the AGO received Ms. Huelsman’s public records request, it informed Ameriquest that it intended to produce consumer loan files and certain email messages² to Ms. Hulesman. *Ameriquest*, 170 Wn.2d at 427. In the proceedings reviewed by the Supreme Court, the AGO took the

² The email messages are the Stated Income and Blackstone email messages. CP at 402-56.

position that under the PRA the AGO lawfully could produce consumer loan files and the emails if it redacted certain personal information from the records prior to disclosure. *Ameriquest*, 170 Wn.2d at 430, 432. In accordance with exemptions to public disclosure set forth in the PRA, the AGO proposed to redact Social Security numbers, financial account numbers, and other sensitive financial information about consumers, but would produce the consumers' names, addresses, and other information about them because such information commonly was available from public sources. The AGO contended that it could redact certain "nonpublic" information about consumers and produce "public" information about consumers. *Id.*³

The Supreme Court disagreed. The Court rejected the AGO's argument that it could disclose consumer information that is a matter of public record. *Ameriquest*, 170 Wn.2d at 431-32. Instead, the Court held that the AGO was not permitted to disclose any information that would reveal the fact that the consumer is or was an Ameriquest customer. *Id.* "[T]he mere existence of the customer relationship is personally

³ The FTC distinguishes "nonpublic personal information" about consumers from "publicly available information" about consumers. "Publicly available information" is information that a financial institution has a reasonable basis to believe is lawfully made publicly available from government records, widely distributed media, or through lawfully required disclosures to the general public. 16 C.F.R. § 313.3(p). Information that is not about consumers is not protected by the GLBA. 16 C.F.R. § 313.1(b).

identifiable financial information.” *Id.* at 432 (citing 16 C.F.R. § 313(o)(2)(i)(C)).

Ameritrust misapprehends the trial court’s order when it characterizes the order as categorically permitting public disclosure of email messages and creating a “threshold requirement” relating to the quantity of nonpublic personal information that is withheld from a record. Ameritrust Br. at 19-21. Contrary to Ameritrust’s contention, the trial court held that the AGO is prohibited from disclosing nonpublic personal information, or personal identifiers, about consumers, regardless of whether the information is contained in emails or other records. CP at 377. This holding is consistent with the GLBA and *Ameritrust* and it is not error. Consistent with that order, with the GLBA, and with the *Ameritrust* decision, the AGO is not proposing to disclose a single “iota” of nonpublic personal information. *Cf.* Ameritrust Br. at 22.

The purpose of prohibiting the public disclosure of nonpersonal public information is to protect consumer privacy. In its *Ameritrust* decision, the Supreme Court recognized the federal policy requiring the protection of consumer privacy. *See* 170 Wn.2d at 424. The Court held that the GLBA and FTC nondisclosure rules are incorporated into the Public Records Act (PRA), RCW 42.56, as an exemption to public disclosure pursuant to RCW 42.56.070(1). *Id.* at 440. While the Supreme

Court held that the GLBA and the FTC regulation would prohibit the AGO from disclosing nonpublic personal information regardless of whether the information is contained in loan files, e-mails, or the AGO's internal work product, *id.* at 441, it also held that "the GLBA and the FTC prohibit specific information, not entire records" from public disclosure. *Id.* at 440. Information that does not identify a consumer is not subject to the GLBA or the FTC regulation. *Id.* at 435 (quoting 16 C.F.R. § 313.3(o)(2)(ii)(B)).

3. The Supreme Court's Decision Does Not Prohibit the AGO from Producing Certain Internal Ameriquest Records, Including Email Correspondence, Where All Nonpublic Personal Information Is Redacted.

None of the records that Ameriquest produced to the AGO were part of the record on appeal before the Supreme Court. *Ameriquest*, 170 Wn.2d at 426. The Court's attention, instead, was focused on an Ameriquest employee's description of the loan files that Ameriquest produced to the AGO. *See id.* at 426-27 (quoting from the declaration of an Ameriquest employee about the loan files). Not surprisingly, the loan files included significant amounts of nonpublic personal information, such as Social Security numbers, credit reports, tax records, and financial account information. *Id.* The Ameriquest employee also stated that the email correspondence included "confidential customer information." *Id.*

However, the content of the email messages was not before the Supreme Court. As explained below, the nonpublic personal information in the Stated Income and Blackstone emails is incidental to the substance of those emails and can be withheld in its entirety through redaction, providing absolute and complete protection of consumer privacy as required under the GLBA.

The GLBA is an “other statute” that exempts certain information or records from public disclosure. *Ameriquest*, at 440 (citing RCW 42.56.070(1)). “[T]he PRA makes room for an ‘other statute’ that expressly prohibits redactions or disclosures of entire records.” *Id.*; *see also id.* at 442 (“The nondisclosure rules of the GLBA and the FTC rule are incorporated as an exemption to the PRA through RCW 42.56.070(1).”). Thus, the AGO cannot redact consumer loan files and produce them for public disclosure because the files themselves are nonpublic personal information under 16 C.F.R. § 313(o)(1). However, where Ameriquest itself has “repackaged” nonpublic personal information, by referencing it in internal emails, no impermissible disclosure of nonpublic personal information occurs where all such information is redacted from the emails before they are publicly disclosed.

The purpose of the GLBA is to protect the security and confidentiality of consumers’ nonpublic personal information. 15 U.S.C.

§ 6801(a). Nothing in the GLBA suggests the Act was intended to allow a financial institution to extend a broad shroud of secrecy over its internal communications simply by inserting consumers' nonpublic personal information into those communications. The GLBA is intended to protect consumer privacy, not corporate secrecy.

Likewise, the Washington Supreme Court's decision in *Ameriquest* does not hold that Ameriquest's emails are exempt in their entirety simply because Ameriquest employees inserted a consumer's nonpublic personal information into the emails, or created email strings that incidentally happened to contain a consumer's nonpublic personal information in one of the emails. Ameriquest's argument to the contrary fails to acknowledge the Court's recognition that customer privacy—not corporate secrecy—animates the GLBA's privacy provisions. *Ameriquest*, 170 Wn.2d at 424.

The Supreme Court rejected the argument that AGO was permitted to redact nonpublic personal information about consumers (such as Social Security numbers and personal financial details) and produce for public inspection information that the AGO believed was publicly available information, such as consumer name, address, and mortgage interest rate. *Ameriquest*, 170 Wn.2d at 433-34. The Supreme Court held that under the GLBA and the FTC regulation the AGO cannot “newly redact or repackage the information in its possession to yield blind data, aggregate

information, and personal-identifier-free information that can be treated as public information.” *Id.* at 441. The public information the Court was addressing was public information about consumers. The Court was not addressing the public disclosure of documents where no nonpublic personal information at all is disclosed and no consumer identity is revealed.

The trial court reviewed the Stated Income and Blackstone email messages *in camera* and concluded that the AGO must produce the records to Ms. Huelsman after redacting all nonpublic personal information about consumers and all other information that can be used to identify a consumer. CP at 377-78. The trial court did not order the AGO to redact the email messages in order to release “identifier-free” nonpublic personal information about consumers; rather, the trial court ordered the AGO to withhold from public disclosure all information that identifies any person as an Ameriquest customer. *Id.* The order—by requiring the AGO to withhold all nonpublic personal information, including all information that may identify any person as an Ameriquest customer—complies with the GLBA’s mandate to protect the confidentiality of nonpublic personal information.⁴

⁴ The trial court’s order requires the AGO to withhold from public disclosure through redaction all nonpublic personal information that can be used to identify an individual as a customer of Ameriquest, including, but not limited to consumer names

For example, the trial court ordered the AGO to publicly disclose to Ms. Huelsman an email message relating to Blackstone Title Company in which nonpublic personal information about a consumer—the consumer’s last name—appears on the subject line. CP at 404. The consumer did not provide the text of the message to Ameriquest, and once the name has been redacted, there is no other information that identifies any consumer. The redacted email contains no information that identifies a consumer, and thus is not “personally identifiable financial information.” 16 C.F.R. § 313.3(o)(2)(ii)(B). As such, it is not “nonpublic personal information, 16 C.F.R. § 313.3(n)(1)(i), and therefore is not protected by the GLBA or the FTC regulation. *Ameriquest*, 170 Wn.2d at 435.

Similarly, four email messages dated October 17, 2003, comprise an email exchange between two colleagues that does not relate to any consumer. CP at 411-12. Rather, the colleagues “piggy backed” their communication on another email that identified a consumer’s name in the subject line. The only information in that email string that constitutes nonpublic personal information is the name of the consumer, and that is the only information in which the consumer has a cognizable privacy interest under the GLBA or the FTC regulation. Once the consumer’s

and residential addresses, mortgage property addresses, consumer loan numbers, consumer Social Security numbers, consumer telephone numbers, consumer email addresses, and consumer places of employment. CP at 377-78.

name is redacted—as it has been—the GLBA does not protect the email string from disclosure.

The record also contains two email messages between two Ameriquest employees that directly pertain to Ms. Huelsman’s request for records that relate to allegations of income falsification. CP at 430. The trial court ordered the AGO to produce the email messages after redacting the consumer’s first and last names and file number. Once the nonpublic personal information is redacted, remainder of the email correspondence is not protected by the GLBA. The privacy interests of consumers is fully protected, as required by the GLBA.

The trial court also ordered the AGO to produce two email messages that are communications directly between a consumer and an Ameriquest employee. The first is a message to a consumer from an Ameriquest employee that refers to Ameriquest’s stated income program. CP at 400.⁵ The second is a two-way correspondence in which the consumer asks a question about the loan process. CP at 402-04. In both instances, the emails are redacted to remove all information that may identify a consumer; the redacted emails therefore are not protected by the GLBA or the FTC regulation. *Ameriquest*, 170 Wn.2d at 435. Once all nonpublic personal information is redacted, the consumer has no federally

⁵ This email exchange also is found at CP 445-46.

protected privacy interest in how the Ameriquest employee represents the mortgage product or loan process to consumers.

The email messages the trial court ordered the AGO to produce, as redacted, do not do not contain any nonpublic personal information about consumers; rather, the email messages contain information about Ameriquest's stated income program and its relationship with Blackstone Title Company that is not protected by the GLBA. Consumers have no privacy interest in Ameriquest's email messages presenting or discussing its stated income practices or its dealings with Blackstone Title Company, and the GLBA does not protect those emails where all nonpublic personal information has been excised. The trial court's order therefore leaves the consumers' privacy intact and complies with the GLBA and the FTC regulations, and with the *Ameriquest* decision.⁶

It is plain from the Supreme Court's decision that it was concerned about the AGO disclosing records that would identify individuals who were Ameriquest's customers. *Ameriquest*, 170 Wn.2d at 431-32 (citing 16 C.F.R. § 313.3(o)(2)(i)(C) and (D)). Unlike the Supreme Court, this

⁶ Ameriquest contends that the AGO "improperly aggregated" the email messages by joining them together and adding descriptive terms. *Ameriquest* Br. at 24-25. The AGO did not add any content to the email messages. At the request of the investigating states, Ameriquest provided the email messages on DVDs and formatted them for accessibility using the Concordance litigation support software. The AGO extracted the messages from the Concordance program for public disclosure. Any changes in format or descriptive terms are the result of extracting the messages from Concordance and not changes to the messages themselves.

Court has the opportunity to inspect the records *in camera* to ensure that consumer privacy is protected and that no nonpublic personal information about consumers is produced for public inspection and copying. While there may be some email messages that Ameriquest provided during the investigation that the AGO would be required to withhold in their entirety under the GLBA and *Ameriquest*, the Stated Income and Blackstone email messages should be disclosed once all consumer nonpublic personal information is withheld through redaction.

Ameriquest argues that a single “bit” of nonpublic personal information in a document brings the entire document within the GLBA prohibition on disclosure. Ameriquest Br. at 13, 16. Ameriquest’s overly broad interpretation of *Ameriquest* creates a rule of law that would completely shield from public disclosure any record that a state agency received from a financial institution that contained any nonpublic personal information. Ameriquest’s rule potentially would even allow state regulatory agencies and financial institutions to insulate records from public disclosure simply by inserting nonpublic personal information about financial institution consumers. The Supreme Court did not intend to create such a broad exemption to public disclosure. It interpreted the GLBA and the FTC rule to protect specific information, not entire documents and entire email strings. *Ameriquest*, 170 Wn.2d at 440. This

Court should reject Ameriquest's overly broad reading of the *Ameriquest* decision and affirm the trial court's correct understanding, which fully protects consumer privacy.

C. The Trial Court Correctly Determined That the Stated Income and Blackstone Email Messages Are Not Exempt from Public Disclosure as Investigative Records Under RCW 42.56.240.

Ameriquest contends that the Stated Income and Blackstone email messages are exempt from public disclosure as "investigative records," *Ameriquest Br.* at 25-37, and that the trial court erred by not exempting the records from public disclosure pursuant to RCW 42.56.240. The trial court did not err.

The Public Records Act expressly exempts some investigative records from public disclosure:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, 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). The Stated Income and Blackstone email messages are investigative records. However, nondisclosure of the Stated Income

and Blackstone email messages is not essential to effective law enforcement or for protection of any person's right to privacy.

1. Nondisclosure of the Stated Income and Blackstone Email Messages Is Not Necessary for Effective Law Enforcement.

Rather than address each of the email messages on its merits, Ameriquest makes the policy argument that nondisclosure of the Stated Income and Blackstone email messages is essential for effective law enforcement to incentivize negotiated settlement and cooperation between the AGO and targets of its consumer protection investigations. Ameriquest Br. at 30. Ameriquest contends this policy should protect the records in their entirety. *Id.* at 29-30. Ameriquest's argument is not sufficient to meet its burden that the records are essential to effective law enforcement. *See Ames*, 71 Wn. App. at 293 (burden is on the party claiming an exemption to public disclosure to prove the exemption applies).

When a law enforcement investigation is open and ongoing, disclosure of investigative records under the PRA would compromise effective law enforcement. *See Newman v. King County*, 133 Wn.2d 565, 572-75, 947 P.2d 712 (1997). However, this blanket exemption ends when an investigation is completed and enforcement action is concluded. *Cowles Publishing Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 477-78,

987 P.2d 620 (1999). Here, the AGO's investigation into Ameriquest is closed and the records are not categorically exempt under the investigative records exemption. Where the exemption is asserted in cases such as this case, the trial court should conduct an *in camera* review of the records and make a case-by-case determination of whether nondisclosure is necessary for effective law enforcement. *Id.* at 479-80. The trial court conducted an *in camera* inspection of the records and properly concluded that their nondisclosure is not essential to effective law enforcement. CP at 393.

2. Disclosure of the Stated Income and Blackstone Email Messages Will Not Discourage Cooperation or Settlement With the AGO Pursuant to the Consumer Protection Act.

Ameriquest contends that the Stated Income and Blackstone email messages are exempt from public disclosure because disclosure would discourage parties from cooperating and settling with the AGO. Ameriquest's argument boils down to this: If targets of, or witnesses to, AGO consumer protection investigations knew that information they voluntarily provided to the AGO would be subject to public disclosure, they would not cooperate or settle with the AGO, the AGO would not be able to effectively enforce the Consumer Protection Act, and Washington citizens would no longer benefit from settlements such as the Ameriquest

Consent Decree. Ameriquest Br. at 33-34. The trial court properly rejected this policy argument.

The general policy statements set forth in the federal cases Ameriquest cites in support of its arguments fall short of meeting Ameriquest's burden that the records are exempt. All of the cases can be distinguished from this case and none provide any reason why this Court should determine that the records are exempt from public disclosure.

Ameriquest contends that this Court should rely on *United States v. Alex. Brown & Sons, Inc.*, 169 F.R.D. 532 (S.D.N.Y 1996), to hold that the nondisclosure of the Stated Income and Blackstone email messages is essential for effective law enforcement. Ameriquest Brief at 7. The *Alex. Brown* case is not persuasive.

At issue in *Alex. Brown* was a settlement memorandum that the United States Department of Justice (DOJ) had prepared during a Sherman antitrust investigation of numerous securities firms. 169 F.R.D. at 536. As part of its investigation, the DOJ gave the defendants the settlement memorandum, which summarized the evidence it had gathered in the investigation; the purpose of the memorandum was to demonstrate to the defendants the strength of DOJ's case. *Id.* The DOJ and the defendants entered into a consent decree. Pursuant to the Tunney Act, 15 U.S.C. § 16 (also called the Antitrust Procedures and Penalties Act), when the DOJ

enters into a consent decree under the Sherman Act, it must submit materials to the Court that summarize the evidence supporting the allegations in the complaint and describe the resolution set forth in the consent decree. The purpose of the Tunney Act is to expose federal antitrust consent decrees to varying degrees of public scrutiny to enhance the likelihood that the consent decrees will serve the public interest in eliminating anticompetitive behavior. 169 F.R.D. at 536-37. As required by the Tunney Act, the DOJ submitted some materials along with the consent decree, but not the settlement memorandum. *Id.* at 536.

The *Alex. Brown* plaintiffs requested a copy of the settlement memorandum under the Tunney Act. *Id.* at 540. Accordingly, the court analyzed whether the plaintiff was entitled to the settlement memorandum under the Tunney Act, 15 U.S.C. § 16. *Id.* at 540-43. The court concluded that the settlement memorandum was not subject to disclosure pursuant to the Tunney Act. *Id.* at 540-42. There is no Washington law analogous to the Tunney Act.

The *Alex. Brown* court did not analyze whether the settlement memorandum was exempt from public disclosure under the federal counterpart to Washington's investigative records exemption, 5 U.S.C. §

552(b)(7).⁷ The court noted that the settlement memorandum “may” be protected by the law enforcement investigative privilege, but did not go further. *Id.* at 544.⁸

In passing, *Alex. Brown* the court offered an observation that public disclosure may chill settlements. However, the court did not determine that the settlement memorandum was exempt from public disclosure simply because future defendants may be deterred from entering into settlement negotiations with the DOJ. The court rested its holding on applicable federal statutes to determine whether the DOJ’s settlement memorandum was subject to public disclosure. Ameriquest’s reliance on the court’s policy observation that public disclosure may chill settlements is not persuasive. The trial court here did not err by declining

⁷ The federal investigative records exemption is known as Exemption 7 to the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7). Unlike the state investigative records exemption, the FIOA provision exempts investigative records from public disclosure while an investigation is pending *and* for a “reasonable” time thereafter. *Alex. Brown*, 169 F.R.D. at 544 (citing *Raphael v. Aetna Cas. & Sur. Co.*, 744 F. Supp 71, 74 (S.D.N.Y 1990)).

⁸ The *Alex. Brown* court found other reasons not to order public disclosure of the settlement memorandum. The memorandum summarized selected evidence the DOJ had compiled during its investigation, including civil investigative demand (CID) responses. *Id.* Like the AGO, the DOJ may issue CIDs, 15 U.S.C. § 1312, and responses to the CIDs are exempt from public disclosure under federal law. 15 U.S.C. § 1313(c)(3). The DOJ had obtained limited waivers from those who had responded to CIDs that would allow the DOJ to disclose evidence provided in response to a CID “only to Defendants and potential defendants and only for the purpose of settlement negotiations with these Defendants and potential defendants.” 169 F.R.D. at 536. In addition, the DOJ had reviewed numerous transcripts of depositions taken by the Securities and Exchange Commission (SEC), which was pursuing a concurrent investigation into securities markets. *Id.* at 535. Information the DOJ received from the SEC was exempt from public disclosure pursuant to other federal statues. *Id.* at 543 (citing 44 U.S.C § 3510(b), 17 C.F.R. § 230.122, and 17 C.F.R. § 240.0-4).

Ameriquet's invitation to make a federal district court's broad policy observation the rule in applying Washington's investigative records exemption.

Ameriquet also relies on *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) to support its argument that the Stated Income and Blackstone email messages should be exempt from public disclosure because release of the records may impact the willingness of other entities to provide information to the AGO voluntarily. In *Critical Mass*, the court was interpreting Exemption 4 of the federal ¶ (FOIA). 975 F.2d at 872-73. FOIA Exemption 4 exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The issue was whether the federal "trade secret" exemption protected from public disclosure information that was voluntarily provided to a federal agency and which was considered confidential by the provider. *Critical Mass*, 975 F.2d at 878-79.

Critical Mass is distinguishable from this case. First, in *Critical Mass*, the court did not address either FOIA's investigative records exemption or the effective law enforcement prong of that exemption, and therefore has no bearing on this case. *See* 975 F.2d at 872-73. Second, the court's reasoning in *Critical Mass* is contrary to Washington cases

interpreting the PRA because it allows an entity providing records to a government agency to determine whether the records are exempt from public disclosure. Under the Washington PRA, records are exempt from public disclosure only if they fall within a specific exemption. *See PAWS*, 125 Wn.2d at 258 (a court may enjoin the disclosure of public records only if they fall within a specific exemption of the PRA).

The *Critical Mass* court analyzed whether records provided to a government agency were exempt from public disclosure under FOIA Exemption 4, which protects from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 975 F.2d at 872 (quoting 5 U.S.C. § 552(b)(4)). The PRA also protects from public disclosure certain financial, commercial, and proprietary information, RCW 42.56.270, and trade secrets. *PAWS*, 125 Wn.2d at 262 (Uniform Trade Secrets Act, RCW 19.108, is an “other statute” that exempts public records from disclosure). However, the PRA makes no distinction on whether the agency obtains the information voluntarily or through compelled process. Under Washington law, a record (or a portion of a record) is exempt from public disclosure if it contains information that (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who

can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *Id.* (citing RCW 19.108.010(4)). Again, it does not matter if the agency obtained the trade secret voluntarily or through compelled process, trade secrets, as defined by state law, are exempt from public disclosure.

Ameriquest's reliance on *M/A-Com Information Systems, Inc. v. United States Dep't of Health & Human Serv.*, 656 F. Supp. 691, 692 (1986) is unpersuasive for the same reasons. Neither case provides any basis to exempt the email messages from public disclosure.

Our Legislature decided to protect trade secrets from public disclosure to prevent unfair competition. *PAWS*, 125 Wn.2d at 262-63 (citing Laws of 1994, ch. 42, § 1, p. 130). In essence, Ameriquest asks this Court to give all voluntarily produced information the same protected status as trade secrets simply because Ameriquest believes the disclosure of voluntarily produced information may discourage others from cooperating with the AGO in consumer protection investigations. The trial court did not err in refusing to adopt such a broad exemption to public disclosure.

The enforcement structure of the CPA provides good reason to reject Ameriquest's policy argument that an exemption of voluntarily produced information is necessary for robust enforcement of the CPA.

Targets of the AGO's consumer protection investigations routinely settle with the AGO to avoid the risks of litigation. CP at 304. One risk avoided by settlement is that a settlement ordinarily does not include a finding by the court that the defendant's conduct violated the Consumer Protection Act. This is significant because a final judgment or decree in any Consumer Protection action brought by the AGO is prima facie evidence against the defendant in any private Consumer Protection Act action brought by another party, except where the final judgment or decree is a consent decree or consent judgment where the court makes no finding of illegality. RCW 19.86.130. CP at 304. Rather than face treble damages by consumers (which could be extraordinary depending on the scope of the illegal practices), defendants have a strong incentive to settle with the AGO with a consent judgment or decree.⁹

As with all litigation, defendants in CPA actions brought by the AGO have an incentive to control the outcome of the case through negotiation, rather than take the risk that a judge could order more restrictive injunctions or greater civil penalties against a defendant. In

⁹ Any person who is injured by a CPA violation may bring an action to enjoin further violations of the CPA and recover damages, along with recovery of attorney's fees. RCW 19.86.090. The trial court may award treble damages to any person, up to \$25,000. If a court finds that a business violated the CPA in an action brought by the AGO, and the number of consumers who were injured was in the hundreds or thousands, the resulting damages awards could be very significant. For example, if a business practice injured 1000 consumers, the defendant could be exposed to potential damage awards of up to \$25 million.

addition, prolonged litigation would expose a defendant to a greater legal defense cost and the possibility of a greater award of attorney fees to the AGO.¹⁰ CP at 304.

The trial court properly rejected Ameriquest's policy arguments as a basis for applying the investigative records exemption in RCW 42.56.240(1).

3. Nondisclosure of the Stated Income and Blackstone Email Messages Is Not Essential to Protect Any Person's Right to Privacy Under RCW 42.56.240.

Alternatively, investigative records are exempt from public disclosure if nondisclosure is essential to protect any person's right to privacy. RCW 42.56.240(1). Ameriquest contends that the records are exempt from public disclosure under RCW 42.56.240 because they contain some GLBA-protected information about consumers. Ameriquest Br. at 28-29.

As explained above, the trial court ordered the AGO to redact all nonpublic personal information from the emails at issue, including any information that could be used to identify a consumer. Once all information that can be used to identify a consumer is redacted, the Stated

¹⁰ The AGO also faces litigation risk when it brings CPA actions. Under RCW 19.86.080, the court may award attorney's fees to the prevailing party, which may not be the AGO. The AGO mitigates this risk by assuring itself of the strength of its case before filing a CPA action.

Income and Blackstone email messages do not contain private information about any consumer.

Under the PRA, a person's right to privacy is violated only if disclosure (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. RCW 42.56.050. Ameriquest has not identified any non-redacted information contained in the email messages the disclosure of which would be considered highly offensive to a reasonable person. Ameriquest appears to concede there is no such information contained in the Stated Income and Blackstone email messages, but informs the Court that there may be some private information contained in other records it provided to the AGO that are not part of this public records request. Ameriquest Br. at 29. If the AGO identifies other records for public disclosure, Ameriquest will bear the burden of proving the disclosure of that information would violate a person's right to privacy.

Because Ameriquest has not identified any information contained in the Stated Income and Blackstone email messages, as redacted, that falls within the "highly offensive" prong of RCW 42.56.050, there is no

need to address whether disclosure of the email messages would not be of legitimate concern to the public.¹¹

This Court should affirm the trial court's decision that the Stated Income and Blackstone email messages, as redacted, are not exempt from public disclosure under RCW 42.56.240(1). Complete withholding of the records is not essential for effective law enforcement or to protect any person's right to privacy.

D. The Trial Court Did Not Err by Declining Ameriquest's Request to Conduct Discovery on Whether the AGO's Failure to Assert Exemptions for the Stated Income and Blackstone Email Messages Was Arbitrary and Capricious.

Ameriquest assigns error to the trial court's decision to permit it to conduct discovery into why the AGO decided not to assert the investigative records exemption for the Stated Income and Blackstone Email messages. Before the trial court, Ameriquest contended that the AGO's refusal to withhold disclosure the Stated Income and Blackstone email messages was arbitrary and capricious because Ameriquest believes in other circumstances the AGO withheld production of voluntarily

¹¹ A recent decision by the Washington Supreme Court suggests the public has an interest in how state agencies conduct investigations. The court held that while the public does not have a legitimate interest in the identity of a police officer who was the subject of an unsubstantiated allegation of sexual misconduct, the public nevertheless has a legitimate interest in how a police department responds to and investigates allegations of sexual misconduct against officers. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 416, 259 P.2d 190 (2011).

produced records of a similar nature and is now treating Ameriquest unfairly.¹² VPR (Sept. 2, 2012) 6:2-12.

On appeal, Ameriquest's argument has changed. It now contends that it must be afforded the opportunity to probe the AGO's conclusion that public disclosure of the Stated Income and Blackstone email messages is not essential for effective law enforcement. Ameriquest believes that conclusion is wrong in light of Ameriquest's policy argument that nondisclosure is essential to obtain cooperation from defendants, and it wants to inquire whether that conclusion may be inconsistent with other settlement agreements. Ameriquest Br. at 35. Ameriquest's contentions are without merit.

As an initial matter, Ameriquest concedes that there is nothing about the content of the Stated Income or Blackstone email messages themselves that is essential for effective law enforcement. Rather, Ameriquest relies solely on its legal policy argument that public disclosure of the email messages would have a chilling effect on voluntary cooperation in consumer protection investigations such that complete

¹² The AGO's decision to produce the Stated Income and Blackstone email messages, as redacted, is not arbitrary and capricious. In any event, it is unclear what the remedy would be if the Court were to rule that the AGO's failure to assert a particular exemption was arbitrary and capricious. The PRA does not provide an exemption for "arbitrary and capricious" production of public records. If the Court finds that the records are not subject to a specified PRA exemption, then the AGO's arbitrary and capricious decision cannot exempt the records from public disclosure.

withholding of the email messages is essential for effective law enforcement. *Id.*

Ameriquest takes aim at the declaration of Senior Assistant Attorney General Douglas Walsh, the Division Chief of the AGO's Consumer Protection Division, and argues that it must have the ability to probe his conclusions that there would be no chilling effect on the AGO's ability to obtain compliance from future targets of consumer protection investigations. Ameriquest Br. at 35. In his declaration, Mr. Walsh offered compelling reasons why Ameriquest's policy argument is not persuasive. CP 303-05. In essence, Ameriquest wants to engage in discovery to determine why the AGO is not persuaded by the line of cases it has cited in support of its policy argument. Discovery is not necessary because, as argued above, the holdings in those cases provide no rule of law that would compel the nondisclosure of the Stated Income and Blackstone email messages. The trial court did not err by refusing to allow discovery on a matter of law.

Ameriquest also wants to engage in discovery to determine whether the AGO has taken inconsistent positions in other cases. Ameriquest notes two settlements the AGO entered into with other financial institutions. Ameriquest Br. at 36 n.11. Apparently, Ameriquest has construed these settlements as containing confidentiality provisions

that would trump public disclosure. *Id.* However, neither of these settlements raises any inconsistency with the AGO's position with respect to the records Ameriquest provided.

In 2010, the AGO entered into an Assurance of Discontinuance with Wells Fargo. As in the Consent Decree with Ameriquest, the AGO agreed to keep confidential information confidential, "except to the extent required by law, regulation, or court order (and in any of these circumstances, only upon prior written notice to Wells Fargo)." CP at 198. Like the AGO's settlement with Ameriquest, the confidentiality provision of the Wells Fargo settlement recognizes that the AGO's ability to keep the information confidential is limited by law or court order, which necessarily includes the Public Records Act.

Similarly, the AGO's 2009 settlement with Countrywide Financial Corporation does not supersede the Public Records Act. In the Consent Judgment, the AGO agreed to keep confidential information confidential, "except to the extent required by law, regulation, or court order (and in such case, only upon prior written notice to the disclosing party)." CP at 202-03. This agreement cannot override the AGO's obligation to comply with Public Records Act.

The trial court's decision to deny Ameriquest's discovery motion was not error. This Court should affirm the trial court.

E. The Trial Court Correctly Held That the Stated Income and Blackstone Email Messages Are Not Exempt as Civil Investigative Demand Responses.

In enforcing the Consumer Protection Act, RCW 19.86, the Attorney General may compel anyone (not just the target of an investigation) to answer interrogatories, produce documents, or give testimony under oath before filing a complaint in court by issuing a civil investigative demand (CID). RCW 19.86.110.¹³ A CID is compulsory process; if a recipient of a CID refuses to respond, the AGO may bring an action in superior court to enforce the CID and the court may award sanctions for failure to comply with a properly issued CID. RCW 19.86.110(9). The recipient of a CID may move the court for an order that sets aside, modifies, or extends the deadline for responding to a CID. RCW 19.86.110(8).

Responses to CIDs are not subject to public disclosure, unless the person who provided the responses consents to the disclosure or a court orders disclosure upon good cause. RCW 19.86.110(7). Like the GLBA, RCW 19.86.110(7) is an “other statute” that would exempt public records from disclosure under the Public Records Act. RCW 42.56.070. The

¹³ The text of RCW 19.86.110 is attached in Appendix A to this brief. Most states have a version of Washington’s Consumer Protection Act that authorizes the state attorney general to engage in pre-filing discovery during a consumer protection investigation.

AGO does not dispute that CID responses generally are exempt from public disclosure; the issue here is whether records Ameriquest voluntarily provided to the AGO fall within the exemption for CID responses. Because the AGO did not obtain the records pursuant to its authority to compel information (nor did any other state participating in the investigation), the records are not CID responses and therefore are not exempt from public disclosure pursuant to RCW 19.86.110(7).

1. The Request for Information Was Not a CID.

In the May 13, 2004, letter asking Ameriquest to voluntarily provide documents to the states, the Assistant Attorney General made plain that the request was not compelled process pursuant to any state's authority to issue civil investigative demands:

This letter is a request for information regarding the operations of Ameriquest Mortgage Corporation in the States of Iowa, Minnesota, Montana, New Hampshire, New Mexico, Texas, and Washington. This multistate investigation is being conducted jointly by the Attorney General's Offices of Iowa, Minnesota, Montana, New Hampshire, New Mexico, Texas, and Washington and by state financial regulators in Montana, New Hampshire and Washington. 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 mechanisms for compelling pre-Complaint discovery.*

CP at 179 (emphasis added). By its own terms, the request was not a CID—it was a request in lieu of a CID.¹⁴ To further clarify that point, the AAG concluded the letter by informing Ameriquest that if the company would prefer compelled process, the states would formalize the information request: “If Ameriquest would prefer a formal Civil Investigative Demand, please contact us promptly and we will re-issue our demand under our formal investigative authority.” *Id.*

Ameriquest nevertheless attempts to convince this Court that the information request should be considered a CID because it contained many elements that are required for a CID. Ameriquest Br. at 40-44. In its attempt, however, Ameriquest ignores the crucial and dispositive distinction: a CID is compelled process, a request for voluntary information is not. The CPA and RCW 19.86.110 do not address voluntary production and therefore provide no blanket exemption for the disclosure of voluntarily provided information. Only those responses that are obtained through compelled process are exempt from public disclosure pursuant to RCW 19.86.110(7).

¹⁴ The May 13, 2004, letter from Minnesota Assistant Attorney General Prentiss Cox requesting Ameriquest to voluntarily produce information does not list the state statutes the AGO and other states alleged Ameriquest violated, nor does it state the general subject matter of the investigation as required by RCW 19.86.110(2)(a). While it could be presumed that the attorneys general (but not the financial regulators) were investigating potential violations of their respective consumer protection laws, the letter contains no citation of authority for the information request. CP at 179.

Ameriquest's reliance on *Steele v. State of Washington*, 85 Wn.2d 585, 537 P.2d 782 (1975) is misplaced. Unlike this case, *Steele* involved a CID issued pursuant to RCW 19.86.110. In *Steele*, the owners of an employment agency had moved to set aside a CID by contending that employment agencies are exempt from the Consumer Protection Act and that the CID at issue constituted an unconstitutional search and seizure because it imprecisely described the nature of the AGO's inquiry. *Id.* at 586-87. The *Steele* court did not involve non-compulsory requests for information.

The fact that the states described the nature of their inquiry as involving Ameriquest's lending practices does not change the voluntary request into compelled process. Nor does it matter that the states numbered their requests as interrogatories and document requests and asked Ameriquest to provide responses to designated individuals within 30 days. There is nothing in *Steele* that supports Ameriquest's argument that a voluntary request for information has the same legal status as compelled process issued pursuant to RCW 19.86.110—particularly where, as here, the request unequivocally states that it is **voluntary** and **in lieu of** a CID or other compelled process. CP at 179.

Ameriquest similarly misapprehends *Maccaferri Gabions, Inc. v. United States*, 938 F. Supp. 311 (D. Md. 1995). The court in *Maccaferri*

was asked to modify or set aside a CID issued by the Antitrust Division of the United States Department of Justice for various alleged defects. *Id.* at 313. The court rejected the arguments and held, among other things, that the degree of specificity describing the nature of the conduct being investigated was sufficient and that requiring too much sufficiency would defeat the purpose of the Antitrust Civil Process Act. *Id.* at 313-14. Like the *Steele* case, the *Maccaferri Gabions* case involved the propriety of CIDs and did not address voluntary requests for information.

Ameriquet contends that this is a simple matter of form over substance and failing to treat the states' voluntary request for information just like compelled process would render RCW 19.86.110 meaningless. Ameriquet Br. at 43-44. Ameriquet has it backward—the rights, requirements, and obligations set forth in RCW 19.86.110 will be rendered meaningless if the AGO could seek judicial enforcement, including sanctions, against a person for failing to respond to a voluntary request for information, regardless of the form of the request.

2. Ameriquet's Voluntary Responses Are Not Exempt From Public Disclosure Pursuant to RCW 19.86.110(7).

The PRA “is a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Courts are to liberally construe the Public Records Act's

disclosure requirements and narrowly construe its exemptions. RCW 42.56.030. This is equally true when deciding whether records are exempt from disclosure pursuant to a state statute outside of the PRA. *See* RCW 42.56.070. The exemptions contained in other state statutes must be explicit; courts are not to imply exemptions from other statutes. *PAWS*, 125 Wn.2d at 262.

Responses to CIDs are exempt from public disclosure unless the person who provided the responses consents to the disclosure. RCW 19.86.110(7). Records the AGO obtains in consumer protection investigations by means other than CIDs are not exempt from public disclosure under RCW 19.86.110(7). There may be other exemptions that apply to those records (*e.g.* trade secrets or proprietary information), but unless the records are received in response to a CID, they are not exempt pursuant to RCW 19.86.110(7).

3. Federal Cases Interpreting the Federal Trade Commission Act Do Not Support Ameriquest's Argument that Voluntarily Produced Documents Are Exempt from Public Disclosure Under RCW 19.86.110(7).

Ameriquest also contends that federal court decisions regarding public disclosure of records obtained by the FTC dictate that the records Ameriquest voluntarily provided to the AGO are exempt from public disclosure. Ameriquest Br. at 44. Ameriquest is wrong.

Unlike records voluntarily provided to the AGO, records voluntarily provided to the FTC in an investigation are exempt from public disclosure under the federal Freedom of Information Act:

Any material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under this subchapter *or which is provided voluntarily in place of such compulsory process* shall not be required to be disclosed under section 552 of title 5 or any other provision of law, except as provided in paragraph (2)(B) of this section.

15 U.S.C. § 57b-2(f) (emphasis added).¹⁵ This statute differs considerably from RCW 19.86.110(7), which provides in relevant part:

No documentary material, answers to written 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 or 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) (emphasis added). The federal exemption includes voluntarily produced records, the state Consumer Protection Act does not.

¹⁵ Exemption 3 of FOIA allows a federal agency to withhold from public disclosure information that is specifically exempt from disclosure by another statute. 5 U.S.C. § 552(b)(3). The FTC's confidentiality statute, 15 U.S.C. § 57b-2(f), is an "other statute" that exempts records from disclosure.

Given the express inclusion of voluntarily produced records in the federal statute, it is not surprising that federal courts have held that records acquired by the FTC during investigations are exempt from disclosure regardless of whether the records were provided voluntarily or pursuant to a CID or other compulsory process. Therefore, contrary to Ameriquest's argument, *A. Michael's Piano, Inc. v. Federal Trade Comm'n*, 18 F.3d 138 (2d Cir. 1994), does not support an interpretation of RCW 19.86.110(7) that would exempt from public disclosure the records Ameriquest voluntarily provided to the AGO. Ameriquest Br. at 45-47.

A. Michael's Piano involved a request for public records under 15 U.S.C. § 57b-2(f). 18 F.3d at 144-46. The requester had argued that the records were not exempt from public disclosure under 15 U.S.C. § 57b-2(f) because the records were requested by a regional FTC office and its staff who did not have authority to issue CIDs or compulsory process, which in turn meant that the request could not have been made "in place of" compulsory process.¹⁶ The Second Circuit rejected this argument as unworkable; and also rejected an overly broad interpretation of 15 U.S.C. § 57b-2(f) that would exempt from public disclosure all voluntarily

¹⁶ In FTC investigations, subpoenas or CIDs must be signed by an FTC Commissioner acting pursuant to an FTC resolution, and this authority cannot be delegated. 15 U.S.C. § 57b-1(i). Attorneys on the FTC staff cannot issue compulsory process, but can request that material be provided voluntarily, in place of compulsory process. This process differs from AGO investigations in which individual Assistant Attorneys General are authorized to issue CIDs on behalf of the Attorney General.

submitted documents. Rather, the court ruled that records provided voluntarily to the FTC are exempt under 15 U.S.C. § 57b-2(f) only if the FTC (1) 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 Second Circuit's ruling was a limitation on the scope of the exemption for voluntarily produced records. The ruling has no application with respect to RCW 19.86.110(7), which does not address voluntarily provided records.

4. The States Did Not Assure Ameriquest that the Records Would Not Be Subject to Public Disclosure.

In their May 13, 2004, letter requesting Ameriquest to voluntarily provide records to the states, the states did not assure or promise Ameriquest that the records would be kept confidential. CP at 179. Likewise, in no communication to Ameriquest did the Washington AGO promise or assure that the records would be exempt from public disclosure. To the contrary, in the Consent Decree, Ameriquest and the AGO expressly acknowledged that documents Ameriquest provided to the AGO are subject to public disclosure and required the AGO to give Ameriquest notice before producing the records: "If the State receives a request for documents provided by an Ameriquest Party . . . the State shall

comply with applicable public disclosure laws and promptly provide notice to Ameriquest Parties of the request that will afford the Ameriquest Parties the reasonable opportunity to assert that the documents subject to the request are exempt from disclosure.” *Ameriquest*, 170 Wn. 2d at 427.

Ameriquest may have informed the states that it considered the records to be confidential. *See* CP at 176. Ameriquest believes that the AGO’s failure to expressly contradict Ameriquest’s understanding amounts to an assurance or promise that the records are not subject to public disclosure. *See* CP at 177. Ameriquest is incorrect. Washington law does not permit agencies to override the Public Disclosure Act with promises of confidentiality. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 137, 580 P.2d 246 (1978); *see also Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989). What the AGO could not do explicitly, it could not do by Ameriquest’s implication.

Despite the fact that the AGO did not promise or assure Ameriquest that the records would be kept confidential and exempt from public disclosure, and that any such promise could not override the Public Records Act, Ameriquest nevertheless contends that an agency’s promise alone is sufficient to exempt public records from disclosure. *See Ameriquest Br.* at 48-49 (citing *United States v. Alex. Brown & Sons, Inc.*, 169 F.R.D. 532 (S.D.N.Y. 1996)). The *Alex. Brown* decision is not

helpful to Ameriquest because (1) the request for the settlement record was not made pursuant to FOIA, and (2) the record at issue in that case—the settlement memorandum prepared by the Department of Justice in an antitrust case—was exempt from public disclosure under a number of federal statutory, contractual, and common law confidentiality provisions. 169 F.R.D. 543.¹⁷ The Court did not hold that the record was exempt from public disclosure simply because the Department of Justice promised or assured it would be. Indeed, even if DOJ had made such a promise, and it were held to be enforceable by federal law under the facts of that case, *Alex. Brown* would not be persuasive authority in this case. The AGO did not promise or assure Ameriquest that the records would be exempt from public disclosure, and even if it had, that promise could not override the Public Records Act. To the contrary, the AGO knew the records would be subject to the Public Records Act and agreed in the Consent Decree that it

¹⁷ The settlement memorandum in that case contained CID responses that are exempt from disclosure pursuant to the Antitrust Civil Process Act, 15 U.S.C. § 1313(c), *Alex. Brown*, 169 FRD at 343; data the DOJ received from the Securities and Exchange Commission was exempt from public disclosure under 44 U.S.C § 3510(b), 17 CFR § 230.122, and 17 CFR § 240.0-4, *id.*; the memorandum fell within the Government's deliberative process privilege, *id.*; and the memorandum may be exempt from disclosure by the law enforcement investigative privilege, *id.* at 544. The court also noted that the requestors were plaintiffs in a related lawsuit and wanted the memorandum to avoid duplicating the DOJ's investigation through civil discovery, and that the memorandum could be confidential as a settlement communication, *id.* at 542, 544. Further, the "assurances" the DOJ made were to individuals who had provided deposition testimony pursuant to a CID and the DOJ assured those individuals that its disclosure of the material they provided in response to a CID during the settlement negotiations would remain confidential.

would give Ameriquest notice if a public records request was made. *Ameriquest*, 170 Wn.2d at 427.

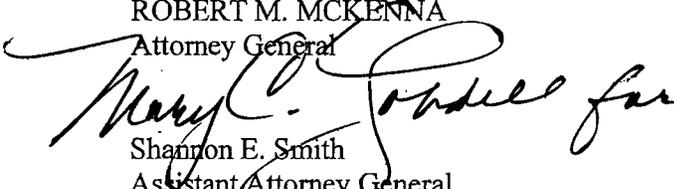
Further, any statement by Ameriquest conveying its understanding that the AGO would keep the records confidential as provided by law would fit within the limits of specific exemptions to public disclosure. For example, the records would be exempt from public disclosure while the investigation was pending. RCW 42.56.240(1); *Newman*, 133 Wn.2d at 572-75; *Cowles*, 139 Wn.2d at 477-78. In addition, some of the records Ameriquest provided to the AGO may be exempt from public disclosure because they contain proprietary or trade secret information, RCW 42.56.270. Ameriquest has the opportunity to assert (and the burden of proof if it does so) that individual records are exempt from public disclosure pursuant to specific exemptions. However, the records are not exempt in their entirety under any blanket “promise” or “assurance” of confidentiality by the AGO because no promise or assurance was given. Because Ameriquest’s argument fails as a matter of law and fact, the trial court’s decision that the records are responses to a CID is not error. This Court should affirm the trial court.

V. CONCLUSION

The trial court's order is consistent with the GLBA and the *Ameriquest* decision because it fully protects consumer privacy by withholding through redaction all nonpublic personal information about consumers, including all information that can be used to identify a consumer as a customer of Ameriquest. The court also properly declined to hold that the Stated Income and Blackstone email messages are exempt from public disclosure as investigative records or responses to a CID. Therefore, this Court should affirm the trial court its order to publicly disclose the Stated Income and Blackstone email messages, as redacted.

RESPECTFULLY SUBMITTED this ²⁷th day of February 2012.

ROBERT M. MCKENNA
Attorney General



Shannon E. Smith
Assistant Attorney General
WSBA No. 19077

800 5th Ave., Ste. 2000, TB-14
Seattle, WA 98104-3188
(206) 389-3996

NO. 42566-1-II

**COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II**

AMERIQUEST MORTGAGE
COMPANY,

Plaintiff/Appellant,

v.

OFFICE OF ATTORNEY
GENERAL OF WASHINGTON

Defendant/Respondent.

DECLARATION OF
SERVICE

em

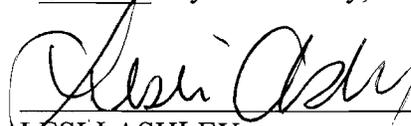
I, LESLI ASHLEY, certify that on February 27, 2012, I cause to be filed with the Court of Appeals, Division II, the BRIEF OF RESPONDENT, and caused to be delivered, via US Mail, true and accurate copies to:

Melissa Huelsman
Law Office of Melissa Huelsman
705 Second Avenue, Suite 1050
Seattle, WA 98104-1741

Erik Price
Laura Morse
Lane Powell PC
111 Market Street NE, Suite 360
Olympia, WA 98501

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

Executed in Tacoma, WA, this 27th day of February, 2012.



LESLI ASHLEY