

A Financial Institutions Legal Update

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Washington Supreme Court Holds Federal Privacy Rights Can Prevail Over State Public Records Act Disclosures

On November 4, the Washington Supreme Court issued a decision holding that federal banking privacy rules will apply to prevent release of documents otherwise disclosable under the Washington Public Records Act ("PRA"). In *Ameriquest Mortgage Company vs. Washington State Office of the Attorney General*, a unanimous Court, for the first time, addressed the circumstances of when a federal banking privacy statute might overcome the state PRA's presumption of disclosure. The result is a broadening of the potential avenues for protecting information and documents from disclosure.

The case involved a 2007 public records request to the Washington State Attorney General's Office ("AGO") for Ameriquest's customer-related documents that the AGO had collected during its investigation into Ameriquest's lending practices. Ameriquest, represented by Lane Powell, filed suit to prevent the disclosure of the documents arguing, in part, that the federal Gramm-Leach-Bliley Act ("GLBA") protects all customer-related financial information from disclosure to third parties. Following vigorous litigation at the trial court level, Ameriquest prevailed at the state Court of Appeals on most issues in early 2009. Subsequently, the AGO appealed to the state Supreme Court the portion of the case involving the GLBA, arguing that federal law did not prevent disclosure or, at least, did not prevent redactions under the state PRA. Notwithstanding the privacy protections in the GLBA for customers' "nonpublic personal information," the AGO argued that the PRA's presumption in favor of disclosure required the AGO to release the Ameriquest customer information in its possession (at least in redacted form), in part, because much of the information could be in the public domain.

The Supreme Court's 9-0 decision not only rejected the AGO's position and agreed with Ameriquest on the operation of the GLBA, but it also went further than any previously reported decision in explaining the GLBA's protection of banking customers' "nonpublic personal information" when in the hands of third parties. Unlike financial institutions that have a "business incentive to respect its customers and be careful with their privacy," the Court said that third parties should not be given any incentive to "rummage through" the customers' information to determine what is nonpublic and what may be publicly available. Accordingly, the Court ruled that third parties may not disclose, redact, or repackage the customer information even if the information may be in the public domain and, in the case of the AGO, even in response to a public records request.

The *Ameriquest* decision is also notable for how it construed the substantive and procedural interactions between federal privacy rights, such as under GLBA and the PRA. The Court held, for the first time, that federal law can serve to augment the PRA by providing additional exceptions to the PRA's otherwise broad mandate for disclosure of information held by government agencies.

Because of the detailed analysis the Court engaged in, as well as the unanimity of its opinion, the case is likely to have application to GLBA cases nationwide, as well as state PRA cases outside the narrow confines of the GLBA.

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