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Financial Record Privacy - What Are and What Should Be the Rights of the Customer of a Depository Institution.

Dan L. Nicewander

FINANCIAL RECORD PRIVACY—WHAT ARE AND WHAT SHOULD BE THE RIGHTS OF THE CUSTOMER OF A DEPOSITORY INSTITUTION

DAN L. NICEWANDER*

* Partner, Gardere & Wynne, Dallas, Texas; B.A., The University of Texas, 1963; L.L.B., Columbia University, 1966. Special thanks are in order to George E. Henderson of Fulbright & Jaworski, in Austin, Texas, who was kind enough to read and comment on this article. As chairman of the Corporation, Banking and Business Law Section of the State Bar of Texas, George attended the legislative hearings on amended article 342-705 and helped obtain passage of the amendments.

I. INTRODUCTION

Effective September 1, 1983, article 342-705 of the Texas Banking Code was amended to limit the required disclosure by a Texas bank of "the amount deposited by any depositor or records of accounts or other bank records" to certain specific situations.[1] In addition, two new sections were added to establish a procedure whereby any party attempting to obtain an order, subpoena, or request for "the disclosure, examination, or production of records of deposits or accounts and other bank records" must give notice to the customer of the bank.[2] This notice is to be accompanied by a certification to the bank

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1. *See* TEX. REV. CIV. STAT. ANN. art. 342-705, § 1 (Vernon Supp. 1984). Section 1 of article 342-705 was amended to read as follows:

> Section 1. No bank shall be required to recognize the claim of any third party to any deposit, or withhold payment of any deposit to the depositor or to his order, unless and until the bank is served with citation or other appropriate process issuing out of a court of competent jurisdiction in connection with a suit instituted by such third party for the purpose of recovering or establishing an interest in such deposit; neither shall any bank be required to disclose or produce to third parties, or permit third parties to examine the amount deposited by any depositor or records of accounts or other bank records except (i) where the depositor or owner of such deposit or other bank customer as to whom records of accounts or other bank records are to be disclosed is a proper or necessary party to a proceeding in a court of competent jurisdiction in which event the records pertaining to the deposits, accounts, or other bank transactions of such depositor, owner, or customer shall be subject to disclose or (ii) where the bank itself is a proper or necessary party to a proceeding in a court of competent jurisdiction or (iii) in response to a subpoena issued by a legislative investigating committee of the Legislature of Texas, or (iv) in response to a request for examination of its records by the Attorney General of Texas pursuant to Article 1302-5.01 et. seq. of the Texas Miscellaneous Corporation Laws Act.

Id.

2. *See id.* §§ 2, 3. Sections 2 and 3, added in 1983, read as follows:

> Sec. 2. Unless ordered otherwise by a court of competent jurisdiction, before disclosure, production, or examination may be required under Section 1 of the article, the agency, body, or party issuing or obtaining the order, subpoena, or request for the disclosure, examination, or production of records of deposits or accounts and other bank records shall (1) give notice of such order, subpoena, or request to the depositor or bank customer by personally serving the depositor or customer with a copy thereof or by mailing a copy thereof to the depositor or customer by certified mail, return receipt requested, at least 10 days preceding the date when compliance with the order, subpoena, or request is required, and (2) certify to the bank (at the time the order, subpoena, or request is served or delivered to the bank) that the depositor or bank customer has been served with or has been mailed a copy of the order, subpoena, or request as required herein. A bank shall be entitled to recover reasonable costs of reproduction which it incurs in complying with orders, subpoenas, and requests for the disclosure, examination, or production of records of deposits or accounts and other bank records. The bank may notify its customers or

that such notice has been given at least ten days preceding the date when compliance with the order, subpoena, or request is required.[3]

The limitations on required disclosures by Texas banks in amended article 342-705 were intended to give Texas banks a protected area in which to operate. It does not, however, restrict a bank from making "voluntary" disclosures of bank information regarding the customer. Because of its failure to deal with the limits of voluntary disclosure, amended article 342-705 not only leaves unresolved the question of what are the present rights of the bank customer as to financial record privacy, but also what should be the reasonable expectations of the customer of any depository institution with regard to financial record privacy, be it a bank, savings and loan association, or credit union. In other words, when should the customer be able to prevent a third party from obtaining his financial records from his depository institution, whether or not the depository institution wants to disclose the contents of the records?[4]

This article will first analyze amended article 342-705 and will then attempt to fit it into the larger context of recurring financial privacy issues, which may be grouped roughly into four broad issues: (1) what rights does the customer have to prevent disclosure in the course of an investigation or prosecution of a criminal offense?, (2) what statutory limitations exist regarding disclosure?, (3) what common law rights to confidentiality can the customer assert?, and (4) what self policing by depository institutions exists in regard to giving out finan-

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depositor (unless ordered otherwise by a court of competent jurisdiction) of its receipt of any subpoena, order, or request for production.

Sec. 3. Each customer or depositor to whom notice of an order, subpoena, or request for disclosure, examination, or production of records of deposits or accounts or other bank records may, prior to the date specified therein for disclosure, examination, or production, file in an appropriate district court of the State of Texas a motion to quash the order, subpoena, or request or for protective order and shall make personal service of such motion on the party, agency, or body issuing or obtaining such order, subpoena, or request and on the bank prior to the date for disclosure, examination, or production. Any motion to quash or for protection shall be verified. Failure to file and serve such motion to quash or for protection shall constitute consent for all purposes to disclosure, production, or examination made pursuant to this article.

Id.

3. *See id.* § 2.

4. The limitations of amended article 342-705 do not extend to disclosure in the course of investigation or prosecution of criminal offenses. *See id.* amendatory act § 3. Article 342-705, prior to its amendment in 1983, was held to be preempted by federal statutes, such as the Right to Financial Privacy Act of 1978 and the I.R.C., where applicable. *See* Jacobson v. Citizen State Bank, 587 S.W.2d 480, 482 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

cial records? Next, this article will attempt to set forth some arguments as to how far the customer's privacy rights in his financial records should extend. Such examination will explore the differences, if any, which should be made between accounts records, financial statements, and loan records. Finally, this article will attempt to place the financial privacy question in the larger context of general privacy issues presented by our increasingly technological and complex society. In so doing, it will summarize the current status of privacy protection laws both within the United States and abroad and the movements for and against more regulation.

II. AMENDED ARTICLE 342-705

The 1983 amendment to article 342-705 was intended to establish the procedural rights and duties of various parties when any information is requested from a bank about its customer.[5] The prior version of article 342-705 was much more limited in several respects.[6] First, it only applied to the situation where a third party was claiming an interest in a deposit and/or was attempting to obtain information regarding the amount deposited with the bank.[7] The amended version of article 342-705 clearly applies on its face to all "other bank records," which presumably would include loan records and financial

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5. At least this was the intent of the Banking Law Committee of the State Bar, which drafted amended article 342-705. The author was chairman of this committee; however, most of the credit for drafting and revising the amendment should go to Scott J. Sheehan of Houston, Professor Bob Wood of Lubbock, Gene Huff of Amarillo, and George E. Henderson of Austin.

6. Prior to its amendment in 1983, article 342-705 had read as follows:

> No bank shall be required to recognize the claim of any third party to any deposit, or withhold payment of any deposit to the depositor or to his order, unless and until the bank is served with citation or other appropriate process issuing out of a court of competent jurisdiction in connection with a suit instituted by such third party for the purpose of recovering or establishing an interest in such deposit; neither shall any bank be required to disclose the amount deposited by any depositor to third parties except where (i) the depositor or owner of such deposit is a proper or necessary party to a proceeding in a court of competent jurisdiction in which event the records pertaining to the deposit of such depositor or owner shall be subject to disclosure or (ii) the bank itself is a proper or necessary party to a proceeding in a court of competent jurisdiction or (iii) in response to a subpoena issued by a legislative investigating committee of the Legislature of Texas, or (iv) in response to a request for examination of its records by the Attorney General of Texas pursuant to Article 1302-5.01 et. seq. of the Texas Miscellaneous Corporation Laws Act.

Act of June 10, 1963, ch. 440, 1963 Tex. Gen. Laws 1135, 1135-36, *amended by* TEX. REV. CIV. STAT. ANN. art. 342-705 (Vernon Supp. 1984).

7. *See id.*

statements, as well as account records.[8] Secondly, amended article 342-705 requires the person seeking production of records to give prior notice to the customer and to certify to the bank that it has given such notice.[9] This procedure is modeled after the procedure found in several federal statutes, such as the Right to Financial Privacy Act of 1978 discussed later in this article. Thirdly, section 2 added to amended article 342-705 now allows the bank to recover reasonable reproduction costs which are incurred in complying with "orders, subpoenas, and requests for the disclosure, examination, or production of records of deposits or accounts and other bank records."[10] Finally, section 3 added to amended article 342-705 specifically gives the customer the right to file a motion to quash the order, subpoena, or request, and if he fails to do so, he is deemed to have consented to the disclosure, production, or examination of his bank records.[11]

As noted above, amended article 342-705 does allow the bank to recover the reasonable reproduction costs incurred. This is an important feature from the bank's standpoint, largely because it should limit unreasonable requests. It is presumed that the bank would have to apply to a court to compel payment of such costs if the party seeking the records fails to voluntarily pay them. At that point, the court would determine the reasonableness of the costs if such issues were raised.

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8. *See* TEX. REV. CIV. STAT. ANN. art. 342-705, § 1 (Vernon Supp. 1984).

9. *See id.* § 2.

10. *See id.* § 2.

11. *See id.* § 3. By way of background, it is interesting to note that the amendment to article 342-705 was introduced as part of the State Bar Legislative Program for 1983. The legislation was drafted by the Banking Law Committee (now the Financial Institutions Committee) of the Corporation, Banking and Business Law Section of the State Bar of Texas. It was introduced as part of Senate bill 429, which also amended article 342-701 of the Texas Banking Code relating to the definition of depository contracts. *See* Act of June 19, 1983, ch. 525, Tex. Gen. Laws 3056, 3056-60 (codified at TEX. REV. CIV. STAT. ANN. arts. 342-701 & 342-705 (Vernon Supp. 1984)). It is appropriate that such amendment would be proposed by the State Bar of Texas, and not by the banking industry, inasmuch as it is largely a procedural proposal which merely attempts to set up an orderly procedure for banks to comply with requests for information about the bank's customer. There is little, if anything, in the amendment to article 342-705 which attempts to regulate the substantive rights of either the bank or its customer in regard to what financial records may be disclosed. That this is largely a neutral procedural proposal which also assists the customer is attested by the fact that consumer lobbyists were aware of the amendment and did not oppose it. The hearings on this amendment were attended by Jim Broyle, a consumer lobbyist from Austin, and Consumer Credit Commissioner Sam Kelley, among others.

While amended article 342-705 does not actually address the substantive issues of disclosure, the 1983 Amendatory Act (S.B. 429) provides that a bank is not restricted in its use or disclosure of information under section 3.[12] Such disclosure, however, must be made (1) in good faith in the usual course of the bank's financial business; (2) in the course of litigation affecting the bank's interest; or (3) with the express or implied consent of the customer.[13] It is common practice to attempt to discover bank records in relation to many lawsuits, such as divorce actions or business disputes, and, as a result, the requirement of giving at least ten days notice before discovery of bank records has caught more than one Texas trial lawyer by surprise since September 1, 1983. One saving grace for the trial attorney caught unaware of the time limitation is that section 2 of amended article 342-705 allows a court of competent jurisdiction to shorten this period if necessary.[14] Of course, the better practice is to start discovery far enough before a trial setting so that the ten day notice period presents no problem, rather than rely on the mercy of a trial judge at the last minute.

Amended article 342-705 is merely a procedural statute and does not address substantive issues regarding financial privacy.[15] It is modeled after federal statutory limitations on disclosure of bank records to governmental agencies or authorities, which are also

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12. *See* TEX. REV. CIV. STAT. ANN. art. 342-705, amendatory act § 3 (Vernon Supp. 1984).

13. *See id.* Sections 3 and 4 of the 1983 amendatory act provide as follows:

> Sec. 3. This Act shall not restrict or apply to amendment of depository contracts, addition of new terms or provisions to depository contracts, or disclosure or production of deposits or of records of accounts and other banks records where such amendment, addition, or disclosure is made under or in substantial compliance with applicable federal laws or regulations. This Act shall not restrict or apply to the use or disclosure by a bank of information or records pertaining to deposits, accounts, or bank transactions where such use or disclosure is made in good faith in the usual course of the financial business of the bank, is made by the bank in the course of the litigation affecting its interests, or is made with express or implied consent of the depositor or customer. The provisions of this act shall not apply to the investigation or prosecution of criminal offenses.
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> Sec. 4. Failure of the depositor or bank customer to receive any notice given under this Act respecting a depository contract or any copy of a subpoena, request, or other order shall not render the same ineffective where such was mailed or served as provided herein.

Id. §§ 3, 4.

14. *See id.* § 2.

15. *See id.* § 3 (customer may file motion to quash; failure to file shall constitute consent for disclosure).

largely procedural.[16] Before analyzing such federal statutes, however, it is necessary to first sketch out the overall framework of financial privacy issues as they have developed to date.

III. Disclosure of Bank Records in the Criminal Area

One of the most litigated areas regarding financial records lies in the criminal realm.[17] Such records can be of vital importance in many criminal trials. It does not take much imagination for a defense criminal attorney to contend that the customer of the bank has protection against "search and seizure" of his bank records under the fourth amendment of the United States Constitution.

In the leading case of *United States v. Miller,*[18] Miller, the defendant, was convicted of operating an unregistered, unbonded still in Georgia. Miller had the bad luck of having a fire break out in a warehouse he had rented. In the course of putting out the fire, the firemen discovered a 7500 gallon distillery along with 175 gallons of non-taxed whiskey and related whiskey-making equipment. Miller sought to suppress evidence, including bank records, of his relationship with several Georgia banks. Although Treasury agents obtained a subpoena which was defectively issued, the Georgia banks permitted the Treasury agents to examine microfilmed records and obtain copies. As is often done, this was permitted by the banks without notification to the defendant.[19] The records involved were not only account records and loan records but also Miller's financial statements.[20] The government contended, before the United States Supreme Court, that

16. *See* I.R.C. §§ 7609, 7610 (CCH 1984); Freedom of Information Act, 5 U.S.C.A. §§ 552-552b (West 1977 & Supp. 1984); Right to Financial Privacy Act, 12 U.S.C.A. §§ 3401-3422 (West 1980 & Supp. 1984); Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601-1667c (West 1982 & Supp. 1984); Electronic Fund Transfer Act, 15 U.S.C.A. §§ 1693-1693r (West 1982 & Supp. 1984); 12 C.F.R. §§ 4.16-.19 (1984). Due to the fact that several statutes cited in this article have been amended subsequent to the most recent U.S.C. supplement, all citations will be made to the U.S.C.A.

17. *See, e.g.,* United States v. Miller, 425 U.S. 435, 435 (1976) (respondent charged with several federal criminal offenses made motion to suppress records relating to bank accounts); California Bankers Ass'n v. Shultz, 416 U.S. 21, 41 (1974) (issuance of subpoena to obtain bank records in criminal prosecution); United States v. First Nat'l Bank, 295 F. 142, 143 (S.D. Ala. 1924) (I.R.S. summons directed to third-party bank), *aff'd*, 267 U.S. 576 (1925).

18. 425 U.S. 435 (1976).

19. *See id.* at 436-38. This was probably done because the bank officers were told that they would not need to appear at the scheduled time before the grand jury if they allowed the Treasury Agents to make their examination of the records. *See id.* at 438.

20. *See id.* at 438.

Miller had no fourth amendment interest permitting him to challenge the validity of the subpoena.[21] The Supreme Court upheld the government's position and stated:

> Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy. He relies on this Court's statement in *Katz v. United States,* 389 U.S. 347, 353 . . . that a 'search and seizure' become[s] unreasonable when the Government's activities violate 'the privacy upon which [a person] justifiably relie[s].' But in *Katz* the Court also stressed that '[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.' [W]e perceive no legitimate 'expectation of privacy' in [the contents of] checks and deposits. *The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks* and exposed to their employees in the ordinary course of business.[22]

Although the *Miller* decision raised a furor in the United States Congress, it was not surprising in light of the earlier Supreme Court case of *California Bankers Association v. Schultz.* In *California Bankers Association,*[23] the United States Supreme Court upheld the validity of the Bank Secrecy Act under a fourth amendment challenge.[24] In doing so, the Court stated:

> Since we hold that the mere maintenance of the records by the banks under the compulsion of the regulations invaded no Fourth Amendment right of any depositor, plaintiff's attack on the record keeping requirements under that Amendment fails. That the bank in making the records required by the Secrecy acts under the compulsion of the regu-

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21. *See id.* at 439. In addition, the government claimed that the court of appeals erred in finding defects in the subpoena and in holding that the appropriate remedy was suppression of the evidence. *See id.* at 439.

22. *See id.* at 442 (emphasis added).

23. 416 U.S. 21 (1974).

24. *See id.* at 54. The Bank Secrecy Act, despite its title, is not a "privacy" enhancing law. Rather, the Act, passed in 1970, requires financial institutions and other persons involved in financial transactions to maintain copies of checks and other records and to report financial transactions to the Secretary of the Treasury. *See* 12 U.S.C.A. §§ 1730d, 1829b, 1951-1959 (West 1980); 18 U.S.C.A. § 6002 (West Supp. 1984); 31 U.S.C.A. §§ 321, 5311-5314, 5316-5322 (West 1983).

> lation is clear, but it is equally clear that in doing so it neither searches nor seizes records in which the depositor has a Fourth Amendment right.[25]

This is not to say that the federal courts would not apply the first and/or fifth amendments of the United States Constitution to block disclosure of bank records in extreme circumstances, such as where the government seeks bank records to determine political or religious affiliations.[26] However, the absence of a general federal constitutional right of confidentiality or privacy in banking records, as held by the United States Supreme Court, resulted in the enactment of several major federal statutes that either directly or indirectly affect financial privacy.[27] Texas' amended article 342-705 and other state statutes are modeled after these federal statutes in part, and an examination of them in some detail is necessary to properly fit amended article 342-705 into the overall context of financial record privacy.

IV. FEDERAL STATUTES

Two major federal statutes addressing the issue of access by federal agencies to confidential bank records were passed in direct response to the *Miller* decision.[28] These were the Tax Reform Act of 1976[29] (sections 7609 and 7610) and the Right to Financial Privacy Act of 1978.[30] These two acts will be analyzed in some detail. The Federal Fair Credit Reporting Act,[31] affecting personal financial privacy, had

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25. California Bankers Ass'n v. Shultz, 416 U.S. 21, 54 (1974).

26. *See* Pollard v. Roberts, 283 F. Supp. 248, 257 (E.D. Ark.), *aff'd per curiam,* 393 U.S. 14 (1968). In this case, the court enjoined the enforcement of subpoenas issued by a prosecutor for checking account records of the State Republican Party. The court based its decision on the first amendment. *See id.* at 256-57. The fifth amendment privilege against self-incrimination, however, will not usually protect a person from the disclosure of records held by a third party recordkeeper. *See* Fisher v. United States, 425 U.S. 391, 397 (1976).

27. *See* I.R.C. §§ 7609, 7610 (CCH 1984) (1976 Tax Reform Act); 12 U.S.C.A. §§ 3401-3422 (West 1980 & Supp. 1984) (Financial Privacy Act); *see also* H.R. REP. NO. 95-1383, 95th Cong., 2d Sess. 34, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 9273, 9306 (Financial Privacy Act passed in response to *Miller)*; R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 3, at 2-3 (1983) (sections 7609 and 7610 of Tax Reform Act stem from *Miller).*

28. *See* H.R. REP. NO. 95-1383, 95th Cong., 2d Sess. 34, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 9273, 9306 (Financial Privacy Act passed in response to *Miller);* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 3, at 2-3 (1983) (sections 7609 and 7610 of Tax Reform Act stem from *Miller).* This book is an excellent detailed analysis of all the provisions of the various financial privacy statutes, both federal and state.

29. I.R.C. §§ 7609, 7610 (CCH 1984).

30. 12 U.S.C.A. §§ 3401-3422 (West 1980 & Supp. 1984).

31. 15 U.S.C.A. §§ 1601-1667c (West 1982 & Supp. 1984).

already been passed in 1970 in the wave of consumer legislation which followed the passage of the Federal Truth in Lending Act in 1968.[32] A complete analysis of all the provisions of this complex statute is beyond the scope of this article; however, its impact on financial record privacy will additionally be discussed. Also, several other federal statutes which indirectly affect financial privacy, such as the Electronic Funds Transfer Act,[33] the Freedom of Information Act,[34] and the laws and regulations affecting the disclosure of bank examination reports,[35] will be discussed.

A. *The Tax Reform Act of 1976*

Sections 7609 and 7610 of the Internal Revenue Code were added by the Tax Reform Act of 1976.[36] This was the first major federal statute to address the issue of access by federal agencies to confidential bank records and was passed in direct response to the *Miller* decision.[37] As will be discussed, the tax privacy provisions of the I.R.C. are generally similar to those now found in the Financial Privacy Act.[38] The tax privacy provisions protect the records of individuals and virtually all legal entities.[39] The basic statutory scheme requires that the federal government provide the taxpayer with notice of a summons which orders a third party to disclose information on the taxpayer.[40] There is then a waiting period during which the taxpayer may prevent disclosure.[41] These provisions do contain certain exceptions to the general rule of notice, including provisions for John Doe

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32. *See* 15 U.S.C.A. §§ 1601-1614, 1631-1646, 1661-1665a, 1666-1666j, 1667-1667e (West 1982 & Supp. 1984) (Truth in Lending Act).

33. *Id.* §§ 1693-1693r (West 1982 & Supp. 1984).

34. 5 U.S.C.A. §§ 552-552b (West 1977 & Supp. 1984).

35. *See* 12 C.F.R. §§ 4.16-.19 (1984).

36. *See* Pub. L. No. 94-455, § 1205, 90 Stat. 1525, 1699-1703 (1976) (codified as amended at I.R.C. §§ 7609-7610 (CCH 1984)).

37. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 3, at 2 (1983).

38. *See id.* at 3.

39. Any "person" whose records are held by a third-party recordkeeper is protected by the tax privacy provisions. *See* I.R.C. § 7609(a)(1)(A), (B) (CCH 1984). The word "person" is broadly defined in the I.R.C. to include "an individual, a trust, estate, partnership, association, company or corporation." *See id.* § 7701(a)(1).

40. *See id.* § 7609(a)(1). Such notice must be given to the taxpayer within three days of the summons or 23 days before the records are to be produced, whichever is less. *See id.* § 7609(a)(1).

41. *See id.* § 7609(b)(2)(A). The taxpayer has a right to begin a proceeding to quash the summons within 20 days after he receives the notice from the government. *See id.* § 7609(b)(2)(A).

summonses in specified exigencies,[42] but they do not contain the numerous and complex exceptions found in the Financial Privacy Act.

If a depository institution concludes that a summons is not governed by the I.R.C. tax privacy provisions and that other privacy laws are not relevant, then the depository institution may comply with the summons according to its own policies.[43] In practice, however, many times the depository institution is uncertain of the application of the tax privacy provisions. In these cases it may want to take more precautions. The depository institution could notify the customer of the subpoena or summons and the stated compliance date.[44] In addition, the depository institution could ask the I.R.S. agent to confirm in writing that the bank or the particular summons is not bound by the tax privacy provisions of the I.R.C.[45] The problem with this alternative, however, is that the I.R.S. agent will probably be reluctant to do so.[46] Finally, the depository institution could provide the records requested by the I.R.S. in a sealed envelope with a form cover letter instructing the I.R.S. not to open the sealed envelope until it has determined that the tax privacy provisions are inapplicable or that an exemption applies.[47]

One of the major innovations of the tax privacy provisions added to the I.R.C. was the amendment to section 7610, which allowed persons with third party summonses to recover certain costs of complying with such summonses.[48] The I.R.C. specifically provides "reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced by summons."[49] As noted earlier, this is the model followed by amended

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42. *See id.* § 7609(g). Other examples of summonses which the tax privacy provisions do not cover are those issued solely to determine the identity of a person with a numbered account, *see id.* § 7609(c)(2)(A), those served on a taxpayer whose tax liability is at issue, *see id.* § 7609(a)(4)(A), those issued to collect the tax liability of a taxpayer determined by assessment or judgment to owe an amount, *see id.* § 7609(c)(2)(B)(i), and those issued in exigent circumstances following ex parte judicial proceedings, *see id.* § 7609(g).

43. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 3, at 14 (1983).

44. *See id.* at 14.

45. *See id.* at 14.

46. *See id.* at 14.

47. *See id.* at 15.

48. *See* I.R.C. § 7610 (CCH 1984).

49. *Id.* § 7610(a)(2).

article 342-705.[50]

On some occasions, the depository institution may wish to contest compliance with a subpoena for reasons of its own, whether or not the customer also has objections. The principal reasons why the bank might object are insufficient description of the record sought, insufficient description of the customer, and overbreath.[51] The depository institution must weigh the probable cost of the enforcement proceeding against the probable cost of compliance, less the reimbursement expected under the I.R.C. in determining whether to raise an "undue burden" defense. Furthermore, the depository institution is very unlikely to recover any attorney's fees incurred in raising an "undue burden" defense.[52]

B. *The Right to Financial Privacy Act*

The second major federal statute passed in reaction to the *Miller* decision was the Financial Privacy Act, which regulates the divulgence of financial records to agencies and departments of the United States government.[53] Basically, financial institutions are prohibited from providing access to the financial records of any customer of the financial institution to a federal authority, except in accordance with the provisions of the Act.[54] The federal authority seeking the records must give a written certification to the financial institution that it complied with the applicable provisions of the Act.[55] As opposed to the broader coverage of the Tax Reform Act, a "customer" covered by the Financial Privacy Act "means an individual or partnership of five or fewer individuals."[56] Financial record "means an original of, a copy of, or information known to have been derived from, any record

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50. *Compare id.* § 7610(a)(2) (reimbursement for reasonable cost of reproducing records) *with* TEX. REV. CIV. STAT. ANN. art. 342-705, § 2 (Vernon Supp. 1984) (stating "[a] bank shall be entitled to recover reasonable costs of reproduction which it incurs in complying with orders, subpoenas, and requests for the disclosure, examination, or production of records of deposits or accounts and other bank records").

51. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 3, at 50 (1983).

52. *See id.* at 52.

53. *See* 12 U.S.C.A. §§ 3401-3422 (West 1980 & Supp. 1984).

54. *See id.* § 3402 (West 1980).

55. *See id.* §§ 3402, 3404-3408.

56. *See id.* § 3401(4), (5). Actually, this is the definition of a "person". *See id.* § 3401(4). Subsection 5, however, defines "customer" as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name." *Id.* § 3401(5). *Compare id.* § 3401(4), (5) (person is "individual or partner-

held by a financial institution pertaining to a customer's relationship with [it] . . . ."[57] There are at least eleven exceptions to the general procedures of the Financial Privacy Act.[58]

Three requirements under the Financial Privacy Act must be satisfied for the government authority to obtain financial records pursuant to an administrative subpoena or summons. First, the subpoena or summons must be authorized by law; second, the records sought must be relevant to a legitimate law enforcement inquiry; and third, the government must follow a specified procedure when obtaining the

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ship of five or fewer individuals") *with* I.R.C. § 7701(a)(1) (CCH 1984) (broad definition of person as "an individual, a trust, estate, partnership, association, company or corporation").

57. *See* 12 U.S.C.A. §§ 3410 (2) (West 1980).

58. The exceptions are as follows: 1. Notifying a federal authority that a financial institution or its officers, employees or agents has information that "may be relevant to a possible violation of any statute or regulation." *See id.* § 3403(c). This exception, however, does not appear to permit giving the information itself until the federal authority complies with the Act. 2. "Providing copies of any financial record to any court or federal authority as an incident to perfecting a security interest, proving a claim in bankruptcy, or otherwise collecting on a debt [owed] either to the financial institution itself or in its role as a fiduciary." *Id.* § 3403(d)(1). 3. Providing any financial record necessary to permit the authority to carry out its responsibilities incident to processing an application for assistance to a customer in the form of a federal loan, loan guaranty, or loan insurance agreement, or as an incident to processing a default on, or administering, a federal guaranteed or insured loan. *See id.* § 3403(d)(2). 4. Disclosing financial records that are not "identified with or identifiable as being derived from the financial records of a particular customer." *See id.* § 3413(a). 5. "Examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution." *Id.* § 3413(b). The term supervisory agencies includes "any of the following that have statutory authority to examine the financial condition or business operations of the [financial] institution:" § 3401(6) the Federal Deposit Insurance Corporation; the Federal Savings and Loan Insurance Corporation; the Federal Home Loan Bank Board; the National Credit Union Administration; the Board of Governors of the Federal Reserve System; the Comptroller of the Currency; the Securities and Exchange Commission; the Secretary of the Treasury with respect to the Bank Secrecy Act and the Currency and Foreign Transactions Reporting Act; and any state banking or securities department or agency. *See id.* § 3401(6). 6. "Disclosure of financial records in accordance with procedures authorized by the Internal Revenue Code." *Id.* § 3413(c). 7. "Providing financial records or information required to be reported in accordance with any federal statute or rule promulgated thereunder." *Id.* § 3413(d). 8. "Financial records sought by a federal authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and customer are parties." *Id.* § 3413(e). 9. Financial records sought by a federal authority "pursuant to an administrative subpoena issued by an administrative law judge in an adjudicatory proceeding subject to" 5 U.S.C. § 544 and to which the federal authority and the customer are parties. *See id.* § 3413(f). 10. "Any subpoena or court order issued in connection with proceedings before a grand jury." *Id.* § 3413(i). 11. "Financial records sought by the General Accounting Office pursuant to an authorized proceeding, investigation, examination or audit directed at a government authority." *Id.* § 3413(j).

records.[59] This procedure involves the now familiar pattern of customer notification, a waiting period, and an opportunity for the customer to contest disclosure before it occurs.

The Financial Privacy Act also permits customer authorization for disclosures of financial records and allows the government authority to obtain customer financial records by the use of a search warrant.[60] A government authority may also obtain customer records under the Act through the use of a judicial subpoena.[61] The legislative history of the Act makes it clear that financial institutions may ignore formal written requests for customer information with impunity unless they are enforced by some other formal legal process.[62] A government authority, however, may use a formal written request technique if it does not reasonably appear to have available to it some other administrative summons or subpoena authority to obtain financial records for the purposes for which they are sought.[63] Such formal written request must be authorized by regulations promulgated by the agency seeking the records.[64] In response to this requirement, several federal departments and agencies have proposed a promulgated formal regulation providing for a formal written request. These agencies include the Department of Defense,[65] the Inspection Service Authority of the Postal Service,[66] the Department of Justice,[67] and the Department of the Treasury.[68]

The most important provision of the Financial Privacy Act for financial institutions is section 3403(b). This section prohibits financial institutions from releasing customer records until the government authority seeking the records provides written certification to the financial institution that it has complied with the appropriate provisions of the Act.[69] The most important provision of the Act for customers is section 3410, which prescribes a procedure whereby a customer may

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59. *See id.* § 3405.
60. *See id.* §§ 3404, 3406.
61. *See id.* § 3407.
62. *See* Right to Financial Privacy Act, Pub. L. No. 95-630, 1978 U.S. CODE CONG. & AD. NEWS (92 Stat. 3641) 9273, 9322.
63. *See* 12 U.S.C.A. § 3408(1) (West 1980).
64. *See id.* § 3408(2).
65. *See* 32 C.F.R. § 294.9(b) (1984).
66. *See* 39 C.F.R. § 233.5(c) (1984).
67. *See* 28 C.F.R. § 47.4 (1984).
68. *See* 31 C.F.R. § 14.3 (1984).
69. *See* 12 U.S.C.A. § 3403(b) (West 1980).

challenge a government order or request for records.[70] This procedure is the only judicial remedy available to a customer to prevent disclosure of the customer's financial records under the Act.[71]

There are several limitations to the Financial Privacy Act. The Act does not apply to requests for orders for information by state and local government agencies[72] and does not affect an I.R.S. summons.[73] In addition, it has been held that the Act does not preclude discovery of the bank customer's transactions in a civil suit.[74]

Following the model of the Tax Reform Act, section 3415 of the Financial Privacy Act provides for reimbursement by the federal government of certain costs of compliance.[75] In accordance with this statutory authority, the Federal Reserve Board has promulgated Regulation S, prescribing the rates and conditions for reimbursement.[76] The policy behind this reimbursement of costs is to promote prompt and efficient compliance by financial institutions with federal requests for information.

C. *The Fair Credit Reporting Act*

The Fair Credit Reporting Act[77] was passed in the wave of consumer legislation that followed the enactment of the Truth in Lending Act in 1968.[78] It constitutes a "privacy" act in the sense that it restricts the dissemination of "written, oral or other communication of any information . . . bearing on a consumer's credit worthiness . . . for (1) credit or insurance to be used primarily for personal, family, or

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70. *See id.* § 3410.

71. *See id.* § 3410(e); R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 2, at 39 (1983).

72. *See* 12 U.S.C.A. § 3402 (West 1980).

73. *See id.* § 3413(c); United States v. MacKay, 608 F.2d 830, 834 (10th Cir. 1979); McTaggart v. United States, 570 F. Supp. 547, 550 (E.D. Mich. 1983).

74. *See* Clayton Brokerage Co. v. Clement, 87 F.R.D. 569, 570-71 (D. Md. 1980) (Financial Privacy Act provides no justification for bank's noncompliance with subpoena issued in civil action).

75. *See* § 12 U.S.C.A. § 3415 (West 1980). According to this section, the government shall pay the financial institution "assembling or providing financial records pertaining to a customer . . . a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required or requested to be produced." *See id.*

76. *See id.;* 12 C.F.R. § 219.1-.7 (1984).

77. *See* Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, § 601, 84 Stat. 1127, 1127-36 (codified as amended at 15 U.S.C.A. §§ 1681-1681t) (West 1982 & Supp. 1984)).

78. *See* 15 U.S.C.A. §§ 1601-1614, 1631-1646, 1661-1665a, 1666-1666j, 1667-1667e (West 1982 & Supp. 1984) (Truth in Lending Act).

household purposes, [in a 'consumer report' by a consumer reporting agency]. . . ."[79] The Fair Credit Reporting Act is aimed at credit bureaus and similar institutions and is intended to force them to adopt reasonable procedures for meeting with the commercial need for information in a manner that is fair and equitable to the consumer.[80] In effect, the Act provides minimum standards for the collection and maintenance of credit data and gives consumers the right to have access to correct their files.[81] The consumer is also given the right to have summaries of any disputes with the credit reporting agencies and certain updated information delivered to the depository institution.[82]

Section 1681a(d) excludes from "consumer report[s]" those reports of "information solely as to transactions" with the consumer.[83] A depository institution can generally avoid being classified as a "consumer reporting agency" by limiting the information it furnishes to others to that reflecting only its direct experience with the customers. The depository institution, however, can very easily become an inadvertent consumer reporting agency. This occurs if the depository institution provides consumer reports it obtains from credit bureaus to other financial institutions dealing with the same customer, even if this is done at the request of, or to accommodate, its customer.[84] A holding company subsidiary bank may be deemed to be a consumer reporting agency if it regularly transfers credit applications, or information in them, to a separate bank subsidiary of the same holding company.[85] The "joint user" exception does allow a creditor, without becoming a consumer reporting agency, to transmit non-experience[86] information to a "joint user" of the information.[87]

The main effect on depository institutions of the Fair Credit Reporting Act is that a depository institution may be held liable for ob-

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79. *See* 15 U.S.C.A. § 1681a(d) (West 1982).

80. *See* Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, 1970 U.S. CODE CONG. & AD. NEWS (Stat.) 4394, 4395.

81. *See* 15 U.S.C.A. § 1681i (West 1982).

82. *See id.*

83. *See id.* § 1681a(d).

84. *See* 5 CONSUMER CRED. GUIDE ¶ 11,203, q. 19 (CCH 1971).

85. *See id.* q. 17.

86. *See* 15 U.S.C.A. § 1681(a)(d).

87. *See* 5 CONSUMER CRED. GUIDE ¶ 11,307, q. 4 (CCH 1971). As used in this exception, a "joint user" is another party involved in the same transaction. *See id.* q. 4.

taining consumer reports improperly.[88] The basic coverage of the Fair Credit Reporting Act allows a consumer reporting agency to prepare a consumer report (1) in reply to the order of a court with jurisdiction to issue such an order, (2) in accordance with the consumer's written instructions, and (3) for one or more of five specified "permissible purposes."[89]

The depository institution often accesses the credit reporting agency's credit files directly through use of a computer terminal located on the institution's own premises. Often the depository institution will only make a general representation to the credit reporting agency at the start of their relationship that it will only obtain consumer reports for "permissible purposes." Since the credit reporting agency does not actually review or question the purposes to which each consumer report is being obtained, the depository institution may end up being liable for obtaining consumer reports improperly.[90]

The principal duty of a user of a consumer report or other non-experience information is to notify the consumer of adverse action taken on the basis of that information.[91] Although the notification

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88. *See* 15 U.S.C.A. §§ 1681n, 1681o (West 1982). Section 1681n pertains to civil liability for willful noncompliance and states that "[a]ny consumer reporting agency or user of information which willfully fails to comply with any requirement . . . with respect to any consumer is liable to that consumer" for any actual damages, any punitive damages which may be allowed by the court, and any court costs and attorney's fees. *See id.* § 1681n. Section 1681o pertains to civil liability for negligent noncompliance and is similar to § 1681n except that no punitive damages are recoverable. *See id.* § 1681o.

89. *See id.* § 1681b. If the person requesting the consumer report meets one of the following requirements, then the report will be issued:

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extention of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

See id. § 1681b (3).

90. *See id.* § 1681n.

91. *See id.* § 1681m. This section makes a distinction in the requirements for adverse action taken based on reports of consumer reporting agencies and adverse action based on reports of persons other than consumer reporting agencies. In the former situation, the consumer must be notified of the adverse action and be given the name and address of the agency

requirements of the Fair Credit Reporting Act overlap the similar requirements of the Equal Credit Opportunity Act[92] and Regulation B,[93] the two sets of requirements are not identical.[94] The Equal Credit Opportunity Act and Regulation B apply to certain forms of business credit,[95] while the Fair Credit Reporting Act notifications and requirements apply only to consumer credit.[96] In addition, the definition of "adverse action" for notification purposes under Regulation B is both more precise and broader than the concept of adverse action in the Fair Credit Reporting Act.[97]

It is obvious by its name that the Fair Credit Reporting Act deals mainly with loan or credit information rather than account information. The definition of a "consumer report," however, is broad enough to include account information if it bears on a "consumer's credit worthiness" and may give the depository institution some protection in giving out account information that is unnecessary and which the depository institution would not otherwise have.

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making the report. *See id.* § 1681n(a). In the latter situation, the consumer must make a written request for the information after being so informed of this right. *See id.* § 1681n(b).

92. *Id.* §§ 1691-1691f (West 1982 & Supp. 1984).

93. 12 C.F.R. § 202.1, pt. 202, app. A (1984). Regulation B is authorized by the Equal Credit Opportunity Act. *See id.*

94. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 1, at 47 (1983).

95. *See* 12 C.F.R. § 202.3(a)(4) (1984); R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 1, at 47 (1983).

96. *See* 15 U.S.C.A. § 1681a(d) (West 1982) (defines "consumer report"); Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252, 255 (N.D. Ga. 1973) (Fair Credit Reporting Act does not protect consumers in acquiring commercial credit); R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 1, at 47 (1983).

97. *See* 12 C.F.R. § 202.2(c) (1984). Adverse action under Regulation B is defined as:

> (i) A refusal to grant credit in substantially the amount or on substantially the terms requested by an applicant unless the creditor offers to grant credit other than in substantially the amount or on substantially the terms requested by the applicant and the applicant uses or expressly accepts the credit offered; or
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> (ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or a substantial portion of a classification of a creditor's accounts; or
>
> (iii) A refusal to increase the amount of credit available to an applicant when the applicant requests an increase in accordance with procedures established by the creditor for the type of credit involved.

Id.; see also 15 U.S.C.A. § 1681m (1982). The FCRA defines "adverse action" to be "[w]henever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency. . . ." *Id.* A more detailed analysis of either the Fair Credit Reporting Act or the Equal Credit Opportunity Act is not relevant to the discussion at hand.

D. *The Electronic Fund Transfer Act*

The Electronic Fund Transfer Act[98] was passed in 1978 to provide some measure of regulation for electronic systems established to transfer funds.[99] On March 28, 1979, the Federal Reserve Board promulgated a detailed regulation for this purpose, known as Regulation E.[100] The provisions of the Electronic Fund Transfer Act and Regulation E are comprehensive and detailed and beyond the scope of this article. There is, however, the noteworthy requirement in each that there be advance disclosure of the financial institution's privacy policies.[101] The disclosure provisions of Regulation E appear to require the financial institution to disclose, in general terms, the situation in which, and the persons and entities to whom, it ordinarily will disclose information concerning the customer's account.[102]

E. *The Freedom of Information Act*

Federal regulatory agencies compile vast quantities of information submitted by financial institutions, most of which relates to individual customers of such institutions. The Freedom of Information Act[103] was passed in 1966 and requires federal agencies to disclose information held in federal agency files upon request, unless that information falls within one of nine specifically exempted categories.[104] Under the

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98. 15 U.S.C.A. §§ 1693-1693r (West 1982 & Supp. 1984).

99. *See* Electronic Fund Transfer Act, Pub. L. No. 95-630, 92 Stat. 3728 (1978).

100. 12 C.F.R. §§ 205.1-.14 (1984).

101. *See* 15 U.S.C.A. § 1693c(a) (West 1982) (Electronic Fund Transfer Act); 12 C.F.R. § 205.7 (1984) (Regulation E).

102. *See* 12 C.F.R. § 205.7(a) (1984). At least four situations warrant disclosure of financial information. *See id.*, pt. 205, app. A, § A (7). Appendix A lists the following:

> (1) Where it is necessary for completing transfers, or (2) In order to verify the existence and condition of your account for a third party, such as a credit bureau or merchant, or (3) In order to comply with government agency or court orders, or (4) If you give us your written permission.

Id.

103. 5 U.S.C.A. §§ 552-552b (West 1977 & Supp. 1984).

104. *See id.* § 552(a)(3) (West 1977). The nine exempted categories are: (1) matters that are "established by an Executive order to be kept secret in the interest of national defense or foreign policy"; (2) matters that are solely related to the internal personnel procedures of an agency; (3) matters exempted from disclosure by statutes; (4) trade secrets and privileged financial information; (5) inter- or intra-agency "memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; (6) personnel and medical files; (7) investigation records compiled for law enforcement purposes, if the disclosure of such would interfere with enforcement activities or a fair trial; (8) matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of,

Freedom of Information Act there is a presumption in favor of disclosure,[105] and, as a general rule, the nine exceptions are construed narrowly.[106]

F. *The Bank Examination Report*

The policy of protecting the confidentiality of national bank examination reports dates back more than a century to the establishment of the national banking examination system in 1864.[107] Courts have consistently upheld this confidentiality.[108] The Comptroller of the Currency has regulations which apply to requests for access to examination reports.[109] These regulations deal with the specific request procedure applicable to all types of documents pursuant to the provisions of the Freedom of Information Act.[110] Any lawyer attempting to discover national bank examination reports should carefully review these regulations. As a practical matter, it is extremely difficult to compel discovery of examination reports.[111]

Article 342-210 of the Texas Banking Code establishes an absolute privilege against the disclosure of the confidential section of state bank examination reports.[112] The Texas Savings and Loan Act also

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or for the use of an agency responsible for the regulation or supervision of financial institutions"; or (9) any geophysical or geological information, including maps, pertaining to wells. *See id.* § 552(b).

105. *See* Moorefield v. United States Secret Serv., 611 F.2d 1021, 1023 (5th Cir.) (presumption of disclosure in FOIA suit), *cert. denied,* 449 U.S. 909 (1980); Niemier v. Watergate Special Prosecution Force, 565 F.2d 967, 973 (7th Cir. 1977) (presumption of disclosure under FOIA which is rebuttable by government).

106. *See* Conoco, Inc. v. United States Dep't of Justice, 687 F.2d 724, 726 (3rd Cir. 1982) (nine exemptions under FOIA are to be exclusive and narrowly construed); Chamberlain v. Alexander, 419 F. Supp. 235, 238 (S.D. Ala. 1976) (FOIA exceptions, to be "narrowly construed"), *affirmed in part, reversed in part on other grounds,* 589 F.2d 827, 838-39 (5th Cir.), *cert. denied,* 444 U.S. 842 (1979).

107. *See* National Bank Act, ch. 106, 13 Stat. 99, 99-118 (1864) (codified as amended at 12 U.S.C.A. §§ 21-200 (West 1945 & Supp. 1984).

108. *See, e.g.,* City Nat'l Bank v. St. Paul Fire & Marine Ins. Co., 408 F.2d 371, 372 (5th Cir. 1969) (recognizing privilege of nondisclosure of bank examination reports); Overly v. United States Fidelity & Guar. Co., 224 F.2d 158, 163 (5th Cir. 1955) (privilege not waived by wrongful disclosure of bank examination reports by bank directors); Bank of America Nat'l Trust & Sav. Ass'n v. Douglas, 105 F.2d 100, 103 (D.C. Cir. 1939) (bank examination reports are to be treated as confidential).

109. *See* 12 C.F.R. §§ 4.16-.19 (1984).

110. *See id.*

111. *See* Shockey, *Discovery of Examination Reports of the Comptroller of the Currency,* 11 FORUM 1241, 1247-51 (1976) (discussion of regulations and their administration).

112. *See* Stewart v. McCain, 575 S.W.2d 509, 510 (Tex. 1978) (article 342-210 creates

contains a similar provision.[113] Neither the Texas Banking Commission nor the Texas Savings and Loan Commission have detailed regulations similar to those issued by the Comptroller of the Currency relating to the procedure for "discovering" examination reports in civil lawsuits.

V. STATE CONSTITUTIONS AND STATUTES

Unlike the United States Constitution, a few states specifically guarantee a right to personal privacy in their constitutions.[114] One such state is California.[115] Relying on the California constitutional provision, the California Supreme Court held that a depositor could challenge a bank's unauthorized disclosure of his bank records as an illegal search and seizure, when legal process was not given.[116] In another case, the California Supreme Court construed the California constitutional guarantee to require a bank not to disclose the customer's records to an unrelated third party pursuant to discovery in civil litigation without first taking "reasonable steps to notify its cus-

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absolute privilege against disclosure of confidential information); *see also* TEX. REV. CIV. STAT. ANN. art. 342-210 (Vernon Supp. 1984). Information in the Department of Banking's bank examination reports is excepted from required public disclosure under the Open Records Act (art. 6252-17a) by § 3(a)(1) of the Act, as information deemed confidential by art. 342-210, and by § 3(a)(12) of the Open Records Act, as information contained in an examination report prepared by an agency responsible for the supervision of financial institutions. *See* Tex. Att'y Gen. ORD-147 (1976). Article 342-210 provides in part:

> [A]ll information obtained by the Banking Department relative to the financial condition of state banks other than call reports and profit and loss statements, whether obtained through examination or otherwise, except published statements, and all files and records of said Department relative thereto shall be confidential, and shall not be disclosed by the Commissioner or any officer or employee of said Department. Further provided that no such information shall be divulged to any member of the Finance Commission, nor shall any member of the Finance Commission be given access to such files and records of the Banking Department. . . .

Id.

113. *See id.* art. 852a, § 11.18 (Vernon Supp. 1984).

114. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 5, at 5-7 (1983). Those states are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New York, South Carolina, and Washington. *See id.* at 5. It is beyond the scope of this article to analyze the constitutional provisions of these eleven states. The provision contained within the constitution of Hawaii is typical: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." HAWAII CONST. art. I, § 6 (Supp. 1983).

115. *See* CAL. CONST. art. I, § 1 (Deering 1981).

116. *See* Burrows v. Superior Court, 529 P.2d 590, 594-96, 118 Cal. Rptr. 166, 170-72 (1974).

tomer of the pendency and nature of the proceedings and afford the customer a fair opportunity to assert his interests."[117] Apparently, a depository institution could be liable for damages if it improperly violates its customer's reasonable expectations of privacy under the California Constitution.[118]

Texas is not the first state to pass a more detailed statute affecting financial privacy;[119] many states have specific statutes governing this area.[120] The statutes of four states are similar to each other and to the federal Financial Privacy Act.[121] The protection afforded by most state statutes is limited to procedural safeguards only.[122] Only California explicitly requires a depository institution to balance the government's need for the information with the depositor's right of privacy.[123] Although some state statutes, such as Texas' amended article 342-705, do create a notice and challenge procedure,[124] none give

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117. *See* Valley Bank v. Superior Court, 542 P.2d 977, 980, 125 Cal. Rptr. 553, 556 (1975).

118. *Cf. id.* at 980, 125 Cal. Rptr. at 556 (bank must notify customer and allow customer opportunity to object before disclosing confidential information).

119. *See, e.g.*, CAL. GOV'T CODE §§ 7460-7493 (Deering 1982 & Supp. 1985) (act passed in 1976); ME. REV. STAT. ANN. tit. 9-B, §§ 161-164 (1980) (act passed in 1977); OR. REV. STAT. §§ 192.550-.595 (1983) (act passed in 1977). The prior version of article 342-705, passed in 1963, was too limited to be considered a financial privacy statute. It affected only "deposits" and the "amount deposited." *See* Act of June 10, 1963, ch. 440, 1963 Tex. Gen. Laws 1135-36, *amended by* TEX. REV. CIV. STAT. ANN. art. 342-705 (Vernon Supp. 1984).

120. *See, e.g.*, LA. REV. STAT. ANN. § 9:3571 (West 1983) (disclosure of personal credit information); ME. REV. STAT. ANN. tit. 9-B, §§ 161-164 (1980) (confidential financial records); OKLA. STAT. ANN. tit. 6, §§ 2201-2206 (West 1984) (financial privacy act); *see also* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 5, at 21-23 (1983). It is beyond the scope of this article to analyze all of the various state statutes. They vary greatly as to the financial institutions and customers covered, as well as with regard to the sanctions for violations. *See generally id.* at 23-30.

121. *See* CAL. GOV'T CODE §§ 7460-7493 (Deering 1982 & Supp. 1985); NEV. REV. STAT. § 239A (1983); N.H. REV. STAT. ANN. § 359-c (1981 Supp.); OR. REV. STAT. §§ 192.550-.595 (1983). These statutes all govern particular financial institutions as to the disclosure of customer information to local and state government.

122. *See, e.g.*, LA. REV. STAT. ANN. § 9:3571A (West 1983) (customer required to be notified by bank before disclosure); OKLA. STAT. ANN. tit. 6, § 2204 (West 1984) (customer has 14 days after subpoena served to file motion to quash); TEX. REV. CIV. STAT. ANN. art. 342-705, § 2 (Vernon Supp. 1984) (financial institution required to give notice to customer prior to disclosure).

123. *See* CAL. GOV'T CODE § 7461(c) (Deering 1982).

124. *See, e.g.*, OKLA. STAT. ANN. tit. 6, § 2204 (West 1984) (notice of subpoena must be given to customer on day served; customer then has 14 days to file motion to quash); OR. REV. STAT. § 192.565 (1983) (customer must be given notice of subpoena; after notice received customer has 10 days to move to quash); TEX. REV. CIV. STAT. ANN. art. 342-705, §§ 2, 3

the depositor a legally enforceable privacy right which can be asserted in a challenge hearing. In other words, informal government access to bank records is merely replaced by a formalized legal process.

VI. COMMON-LAW DUTIES OF CONFIDENTIALITY

For a number of years, banks have been sued for giving out information about customers, sometimes even regardless of whether such information is inaccurate or misleading.[125] The next part of this article traces the historical development of the common-law theories used as a basis for these lawsuits.

A. *Invasion of Privacy*

One of the first common-law theories developed to provide some protection of financial privacy arose as a general privacy right under tort law.[126] This tort common law was sparked by a famous law review article published by Samuel Warren and Louis Brandeis in 1890.[127] By 1960, Dean William Prosser had subdivided this tort into four categories. "1. [i]ntrusion upon a [person's] seclusion or solitude, or into his private affairs[;] 2. [p]ublic disclosure or embarrassing private facts about the [person;] 3. [p]ublicity which places the [person] in a false light in the public eye[; and] 4. [a]ppropriation, for the defendant's advantage, of the [person's] name or likeness."[128]

Texas cases have also adopted the general privacy right under tort law.[129] The heart of the privacy theory lies in the protection not merely of false or embarrassing information, but of all information

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(Vernon Supp. 1984) (after customer receives notice he may move to quash up until 10 days before compliance is required).

125. *See, e.g.*, Tournier v. National Provincial & Union Bank, [1924] 1 K.B. 461, 462; Milochnich v. First Nat'l Bank, 224 So. 2d 759, 760 (Fla. Cir. Ct. 1969); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 286 (Idaho 1961).

126. *See generally* Warren & Brandies, *The Right To Privacy*, 4 HARV. L. REV. 193, 193-220 (1890) (famous article arguing for "right to be left alone").

127. *See id.* at 193.

128. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

129. *See, e.g.*, Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973) (action may be maintained for invasion of right to privacy); National Bonding Agency v. Demenson, 648 S.W.2d 748, 749 (Tex. App.—Dallas 1983, no writ) (invasion of privacy actionable tort in Texas); Milner v. Red River Valley Publishing Co., 249 S.W.2d 227, 229 (Tex. Civ. App.—Dallas 1952, no writ) (Texas courts apply right to privacy).

that the person desires to be kept confidential for any reason.[130] The current impact, if any, of the doctrine of invasion of privacy probably affects the procedure by which depository institutions collect information. In other words, a depository institution could be liable if it collects information on a customer in an unreasonably intrusive manner.[131] The doctrine of invasion of privacy, however, has been replaced in the financial privacy area by a number of the statutes discussed earlier, such as the Fair Credit Reporting Act. Today, the doctrine of invasion of privacy is little more than a last resort or a separate source of relief for those who can obtain no help from applicable statutes.[132]

B. *Implied Contract*

A second common-law theory still in use today is the theory of implied contract. Under this theory, a depository institution has an implied agreement with its customer that the depository institution will keep the financial affairs of the customer confidential.[133] This implied contract doctrine was raised in England as far back as the 1850's and later affirmed in the leading English case of *Tournier v. National Provincial and Union Bank,* decided in 1924.[134] Tournier was a customer of National Provincial and Union Bank of England, and received a check from another customer of that bank, which he endorsed to a bookie. An employee of the bank noticed the endorsement and reported it to Tournier's employer. When Tournier's employment contract expired, it was not renewed. Tournier sued the bank, claiming that it breached a duty to him not to disclose to any third person any information it had acquired about him.[135] The jury found for the bank, but the court of appeals reversed, holding that the obligation of secrecy was an implied term of the contract between the

130. *See* Milner v. Red River Valley Publishing Co., 249 S.W.2d 227, 229 (Tex. Civ. App.—Dallas 1952, no writ) (right of privacy defined as person's "right to be let alone").

131. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 5, at 8 (1983). The circumstances determine what is reasonable, but most courts are reluctant to find an invasion of privacy within the parameters of the ordinary course of business. *See id.* at 8.

132. *See id.* at 9.

133. *See* Milohnich v. First Nat'l Bank, 224 So. 2d 759, 762 (Fla. Cir. Ct. 1969); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 290 (Idaho 1961); Suburban Trust Co. v. Waller, 408 A.2d 758, 764 (Md. App. 1979).

134. *See* Tournier v. National Provincial & Union Bank, [1924] 1 K.B. 461.

135. *See id.* at 461-62.

bank and the depositor.[136]

The English court qualified its general statement of legal duty with four broad exceptions:

1. "Where disclosure under compulsion by law," as under subpoena;

2. "[W]here there is a duty to the public to disclose;"

3. "[W]here the interests of the bank require disclosure;" and

4. "[W]here the disclosure is made by the express or implied consent of the customer."[137]

In America, the doctrine was first accepted in the case of *Peterson v. Idaho First National Bank.*[138] Peterson was a local manager for a finance company. His management of his personal business was less than ideal; he wrote hot checks on his account at Idaho First National Bank. A banker at Idaho First wrote a letter to Peterson's boss in Denver, telling the boss that Peterson's personal finances were a mess, that they were the subject of unfavorable criticism in the community, and that the bank had returned a large number of checks NSF.[139] We are left to assume that Peterson lost his job as a result of such disclosures. Peterson sued Idaho First for breach of implied contract.[140]

The Supreme Court of Idaho, taking its law indirectly from the Tournier case, stated in favor of the implied contract doctrine:

> It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors. . . .
>
> It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by customer or depositor, the bank must be held liable for breach of the implied contract. The claimed discretionary power assumed by the bank manager did not dispense with the necessity

136. *See id.* at 472-73.

137. *See id.* at 473.

138. 367 P.2d 284 (Idaho 1961).

139. *See id.* at 286.

140. *Cf. id.* at 288. Actually, the plaintiff brought an action for the invasion of a depositor's right to privacy. *See id.* at 286. The court held that the plaintiff failed to state a cause of action under this claim. *See id.* at 288. The court then held, however, that the plaintiff's claim did state a cause of action under an implied contract theory. *See id.* 289.

of assent by the customer or depositor.[141]

A few years later, in *Milohnich v. First National Bank,*[142] Milohnich sued the First National Bank of Miami Springs.[143] Milohnich's complaint was that the bank had given out information about an account in which he had an interest, with the result that third parties to whom the information was given sued Milohnich and others on three separate occasions. The third parties were able to freeze the defendants' bank accounts pending the outcome of the suit.[144] The case is not clear as to the procedure followed, but it may be similar to garnishment proceedings in Texas. The Florida court cited the *Tournier* and *Peterson* cases and agreed that there is a "qualified duty of non-disclosure."[145] In addition, the Florida court cited other authorities, including the opinion of counsel for the American Bankers Association, who stated that: "A bank should, as a general policy, consider information concerning its customers as confidential, which it should not disclose to others without clear justification."[146] The court limits its opinion to the facts before it, but there is little question that it clearly recognized a duty of the type referred to in the *Tournier* and *Peterson* cases.[147]

The *Tournier* case, with its holding that there is an implied contract that a bank will not divulge any information about its customers' business except with the customer's consent or in any other very restricted circumstances, stalks the land. To date there is no Texas case specifically on this point. But at least one judge of the federal appellate court which hears cases arising in Texas, the Fifth Circuit, has cited both *Milohnich* and *Peterson* favorably in the case of *Price v. Wirtz,*[148] a case not involving bank disclosure.[149]

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141. *Id.* at 290.

142. 224 So. 2d 759 (Fla. Cir. Ct. 1969).

143. *See id.* at 759-60.

144. *See id.* at 760.

145. *See id.* at 760-61.

146. *See id.* at 761.

147. *See id.* at 760-62.

148. 412 F.2d 647 (5th Cir. 1969). Both *Milohnich* and *Peterson* were cited by Judge Dyer in the dissenting opinion. *See id.* at 654 (7-5 decision) (Dyer, J., dissenting).

149. *Price* is a labor relations case discussing an issue arising under the Labor-Management Reporting and Disclosure Act. *See id.* at 647-48.

C. *Defamation*

The common-law doctrine of defamation protects individuals and businesses against the publication of false information about them.[150] The law of defamation has at least two major limitations in protecting financial privacy. The first is that proof of the truth of any alleged defamatory matter is a complete defense to a defamation suit.[151] Secondly, the law of defamation protects a customer only against the dissemination of false information and not against dissemination of information that the customer only wishes to be kept confidential.[152] In addition, under the first amendment to the United States Constitution, courts require defamation plaintiffs who are "public figures" to prove that defamatory information was disseminated with reckless indifference to its truthfulness or falsity.[153]

VII. SELF-POLICING OF FINANCIAL DISCLOSURE BY DEPOSITORY INSTITUTIONS

The Robert Morris Associates, founded in 1914, is a national association of bank commercial loan and credit officers.[154] In 1980, 2100

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150. *See* W. PROSSER & P. KEETON, PROSSER AND KEETON ON TORTS § 111, at 771 (5th ed. 1984); *see, e.g.,* Wolfson v. Kirk, 273 So. 2d 774, 776 (Fla. Dist. Ct. App.) (defamation defined as unprivileged communication of false statements that result in harm to another), *cert. denied,* 279 So. 2d 32 (Fla. 1973); McGowen v. Prentice, 341 So. 2d 55, 57 (La. Ct. App. 1976) (statement which exposes person to hatred, obloquy, ridicule, or contempt is defamation); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex.) (individual may recover damage from publisher of defamatory falsehood upon showing that publisher knew or should have known statement was false), *cert. denied,* 429 U.S. 1123 (1976).

151. *See, e.g.,* Brueggemeyer v. Associated Press, 609 F.2d 825, 826 (5th Cir. 1980) (accurate accounts of reporter's conversation could not be defamatory); Bell v. Gayle, 384 F. Supp. 1022, 1027 (N.D. Tex. 1974) (newspaper article stated truth so no defamation of character); Hoxsey v. Fishbein, 83 F. Supp. 282, 282 (N.D. Tex. 1949) (Texas statute allows defense of truthfulness of accusations).

152. *See* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex.) (proof of defamation requires false statement), *cert. denied,* 429 U.S. 1123 (1976); A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71, 79 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (false statement essential element of defamation).

153. *See* U.S. CONST. amend. I; New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1963); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 815 (Tex.), *cert. denied,* 429 U.S. 1123 (1976).

154. *See* ROBERT MORRIS ASSOCIATES, CODE OF ETHICS FOR THE EXCHANGE OF COMMERCIAL CREDIT INFORMATION BETWEEN BANKS 1 (Apr. 1980). The code of ethics is published in pamphlet form by Robert Morris Associates and can be ordered from: Robert Morris Associates National Office, 1616 Philadelphia National Bank Building, Philadelphia, PA 19107.

banks were represented in the association by over 8200 commercial loan and credit officers from fifty states, Puerto Rico, Canada, and Panama.[155] The association was organized to facilitate the flow and interchange of credit information.[156] Since 1916, the association has maintained a code of ethics for the exchange of commerical credit information between banks.[157] The latest revised code of ethics was published in October 1976 and mailed to every member of the association, as well as to the chief executive officer of every commercial bank in the United States.[158]

While the code of ethics is admirable, it has several drawbacks. First, it basically applies only to the exchange of commercial credit information and is aimed more at the lending rather than the depositing function of banks.[159] Secondly, the only sanction for violation of the code of ethics by member banks is that their membership in the association may be terminated pursuant to the association's bylaws.[160] Third, membership does not include credit unions and savings and loan personnel.[161]

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155. *See id.* at 1

156. *See id.* at 1.

157. *See id.* at 2.

158. *See id.* at 1.

159. *See id.* at 1.

160. *See id.* at 4.

161. *See id.* at 1. Many banks also have detailed internal policy statements regarding the release of customer information. Such policy statements may include elements of the code of ethics. For example, Chemical New York Corp. has an elaborate policy manual which was described in a speech delivered by Duncan C. Smith, Deputy General Counsel, Chemical Bank, New York, New York, to the American Bar Ass'n, in Chicago, on August 7, 1984. This speech was entitled *Privacy and Transborder Data Flow Issues In A Large Financial Institution.* The part of the Chemical Manual relevant to this dicussion reads as follows:

> Staff members must not divulge any material non-public information regarding the Corporation to any outsider. Staff members must maintain the confidential relationship between the Corporation and each of its customers. Confidentiality is a fundamental principle of the financial business. Confidential information, such as account balances, financial information obtained from a customer, or anticipated changes in the management or financial condition of a customer, must never be discussed outside the normal and necessary course of the Corporation's business.
>
> This prohibition against discussing customer information applies especially to passing of such information to other entities or divisions of the Corporation, such as World Banking Group to Trust and Investment Division, or vice versa. The Corporation's written policy requires that a "trust" wall must be constantly maintained between the commercial and the trust sides of the Corporation. The primary purpose is to prevent Trust and Investment officers from making investment decisions based upon confidential information received from the commercial side of the Bank.

VIII. THE PRESENT RIGHTS OF THE CUSTOMER OF A DEPOSITORY INSTITUTION TO FINANCIAL RECORD PRIVACY

As can be seen from the foregoing discussion, all of the statutory and common-law rights given to the customer relating to financial privacy have some drawbacks. By and large, the federal statutes and amended article 342-705 are procedural in nature only. Even though a customer of a depository institution may not have a privacy right in his bank records, at least these statutes give the customer a procedural opportunity to find out that he does not have such rights.

In addition, the statutes suffer from other limitations. For example, the Financial Privacy Act has limited coverage, in that its restrictions apply only to federal agencies, not to state and local authorities or to private individuals and organizations.[162] The Act also protects only individuals and partnerships of five or fewer members, excluding larger partnerships, corporations, trusts, or other legal entities.[163] The greatest drawback of all, however, is that the Act does not create a legally enforceable right of privacy in bank records.[164] Without this right, the customer's position is limited to the assertion of procedural safeguards or relevancy issues in compliance with the Act. The result is that, in most cases, the customer has an inability to prevent disclosure.

In addition, each of the common-law theories which has been used to claim a right of confidentiality in bank records has some drawback. The implied contract theory, discussed in part, has been followed by several American cases.[165] However, the difficulty is that a great deal of discretion is given to the bank to determine what is in the public or its own interest. As a result, the court in *Suburban Trust Company v. Waller*[166] was able to reject the *Tournier* standards in preference for a more restrictive standard of disclosure, limited only to disclosure

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See Speech by Duncan C. Smith to the American Bar Ass'n, *Privacy and Transborder Data Flow Issues In A Large Financial Institution,* 175, in Chicago (Aug. 7, 1984).

162. *See* 12 U.S.C.A. §§ 3401(3), 3402 (West 1980).

163. *See id.* § 3401(4).

164. *See id.* § 3410.

165. *See* Milohnich v. First Nat'l Bank, 224 So. 2d 759, 762 (Fla. Cir. Ct. 1969); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 290 (Idaho 1961); Suburban Trust Co. v. Waller, 408 A.2d 758, 764 (Md. App. 1979).

166. 408 A.2d 758 (Md. App. 1979).

compelled by law or consented to by the depositor.[167] A tort theory based on invasion of the depositor's right of privacy has been advanced, but with little practical success.[168] Defamation requires publication beyond one person in order to recover for public disclosure of a private fact.[169] The action must also meet an "outrageous conduct" or embarrassment standard.[170] This is rarely the case in banking record disclosures. Although many states, including Texas, now recognize a common-law right to privacy, this right might not extend to financial institution records. In addition, a tort cause of action does not include the possibility of recovering punitive damages.

A final theory of common-law confidentiality which has been asserted is an evidentiary privilege similar to the well established attorney-client or husband-wife privilege. This theory has been repeatedly rejected in the federal courts.[171] The concept of a banker-depositor privilege has fared little better under state law.[172] No state has codified such a privilege, and the courts have been reluctant to judicially adopt new ones.[173]

Of course, the depositor could insist that the depository institution contract in the deposit agreement not to disclose information about the depositor's account. The American Civil Liberties Union has proposed a bank deposit agreement for this express purpose.[174] The usefulness of such a contract right would be limited, however, to instances where it did not conflict with legal compulsion to disclose. Such a conflict arose in *Jacobson v. Citizens State Bank,*[175] in which the depositor sued its bank for disclosing account records contrary to

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167. *See id.* at 765.

168. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 5, at 9 (1983) (doctrine used as last resort).

169. *See* McGuire v. Adkins, 226 So. 2d 659, 661 (Ala. 1969); Louka v. Park Entertainments, 1 N.E.2d 41, 43 (Mass. 1936).

170. *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 111, at 774 (5th ed. 1984).

171. *See* United States v. Prevatt, 526 F.2d 400, 402 (5th Cir. 1976) (banker-depositor privilege does not exist in federal courts); United States v. Grand Jury Investigation, 417 F. Supp. 389, 391-92 (E.D. Pa. 1976) (federal courts do not recognize banker-depositor privilege).

172. *See* Valley Bank v. Superior Court, 542 P.2d 977, 979-80, 125 Cal. Rptr. 553, 556 (1975) (refusing to adopt banker-depositor privilege).

173. *See id.* at 980, 125 Cal. Rptr. at 556 (since legislature has not enacted banker-depositor privilege, court refuses to judicially adopt such privilege).

174. Zimmerman, *ACLU Drafts Model Bank-Customer Contract Aimed at Protecting Privacy of Accounts,* Am. Banker, July 27, 1972.

175. 587 S.W.2d 480 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

his prior oral and written instructions to keep the account confidential.[176] Such instructions had been recorded on the signature card. When the I.R.S. served a summons for the customer's record on the bank, the customer requested that they be withheld unless a court order was obtained. The bank complied with the summons, however, over the objections of its customer. The court found no liability, holding that the customer's right of privacy was subordinate to the bank's duty to comply with section 7602 of the I.R.C.[177]

IX. SHOULD THE CUSTOMER HAVE MORE RIGHTS TO FINANCIAL RECORD PRIVACY?

As discussed above, diversity characterizes not only the sources, but also the type of protection offered by laws affecting the right to financial record privacy in the United States. This diversity of content is also true in privacy law in general. The diversity of content reflects the complexity of the modern idea of privacy and the pragmatic approach generally applied by lawmakers in the United States.

Very little distinction has been made in the statutes between account information and loan information. It is easy to argue that there should be a distinction between these two types of information. After all, when the customer approaches a creditor for a loan, it is only natural to assume that the customer has impliedly authorized the creditor to check with other creditors regarding the potential customer in order to protect itself. There is, however, surprisingly little statutory authority on this point. Regulation B, issued by the Federal Reserve Board under the Equal Credit Opportunity Act, contains model credit application forms which contain a statement above the customer's signature as follows: "You are authorized to check my credit and employment history and to answer questions about your credit experience with me."[178] Inclusion of this sentence in the model form may have simply been intended as a reminder to the customer of the preexisting right of the creditor. This is evidenced by the Fair Credit Reporting Act for consumers and some case law for other borrowers.[179] On the other hand, the drafters of Regulation B may have

176. *See id.* at 481.

177. *See id.* at 481-82.

178. 12 C.F.R., pt. 202, app. 50 (1984).

179. *See* Graney Dev. Corp. v. Taksen, 400 N.Y.S.2d 717, 720 (Sup. Ct. 1978), *aff'd* 411

felt that it was necessary to confer such right upon the lender. It is more likely that the former is the case.

The situation in the United States is very different from that in Europe. In the United States, with a largely mobile population, it is very common for one person to deal with numerous creditors at one time. Significantly, the average person deals with literally hundreds of creditors throughout his lifetime. Thus, in a very mobile society, such as the United States, it is necessary for "Macy's to talk to Gimbel's" to protect itself. On the other hand, in Europe, it has been traditional for one person to deal with a single creditor for most of his life. As a result, in Switzerland there are very strict bank secrecy laws.[180]

Perhaps a better argument can be made for more right to financial record privacy in regard to the account relationship. Before one can propose legislation regarding the substantive rights to financial record privacy in the account relationship, however, it is necessary to analyze the current philosophical arguments raging in the privacy area in general. After all, financial record privacy is only part of a bigger public policy issue currently being discussed throughout the world. This issue involves the argument as to how much privacy is necessary in a technologically complex world in order to maintain basic human rights.

X. PRIVACY AND HUMAN RIGHTS

Privacy was clearly identified as a human rights issue a decade ago by a United Nations conference.[181] Many advocates of privacy allege that it is endangered by automation.[182] The differences between the reaction to this alleged threat in the European countries and in the United States is drastic. Several European countries have enacted

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N.Y.S.2d 756 (App. Div. 1978) (borrower would not normally expect loan information to be kept confidential).

180. It is interesting to note that Swiss bankers are being called upon to defend their famous numbered accounts more and more. However, the voters in Switzerland recently rejected a proposal to change the bank secrecy laws by a 70% margin. *See* Anders & Studer, *Switzerland's Banking Gnomes Aren't the Magnet They Once Were for International Cash Hoards,* WALL ST. J., Jan. 31, 1985, at 28; Parry, *In Defense of Famed Secrecy, Swiss Bankers Attach 'Myths',* AM. BANKER, Jan. 4, 1985, at 2; Parry, *Swiss Bankers Criticize Effort To Revive Anti-Secrecy Plan,* AM. BANKER, Dec. 5, 1984, at 2; *Swiss Secrets Are Put to a Vote,* TIME, May 28, 1984, at 69.

181. *See* Coombe, Jr. & Kirk, *Privacy, Data Protection, and Transborder Data Flow: A Corporate Response to International Expectations,* 39 BUS. LAW. 33, 37 (1983).

182. *See id.* at 37.

broad privacy laws to protect personal data.[183] The European Economic Community and the Counsel of Europe have debated the issue.[184] In September 1980, the Organization for Economic Cooperation and Development (OECD) adopted guidelines governing the protection of privacy and transborder flow of personal data.[185] The guidelines, applicable to both governmental and private records systems,[186] recommend that signatory countries adhere to eight principles in connection with the collection, use, and disclosure of personal data.[187] These eight principles are described as "minimum standards," which are capable of being supplemented by additional measures for the protection of privacy and the individual liberties.[188] Paragraph 19 of the guidelines recommends that in implementing the principles of privacy protection, "member countries should establish legal, administrative or other procedures or institutions for the protection of privacy and individual liberties in respect of personal data."[189]

This article discussed the legal aspects of privacy protection in the United States as they apply to financial records. In addition, there are numerous other statutes, regulations, and constitutional mandates which affect privacy in other areas.[190] Many of these relate to actions

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183. *See id.* at 37.

184. *See id.* at 37.

185. *See Recommendations of the Council Governing the Protection of Privacy and Transborder Flows of Personal Data,* OECD Doc. c(80) 58 (Oct. 1, 1980), *reprinted in* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 6, at 32 (1983). An early consideration of the guidelines is found in 22 HARV. INT'L L.J. 241, 241-47 (1981). The recommendations were adopted at the Council's 523d meeting in Paris, on Sept. 23, 1980. *See id.* at 241 n.1.

186. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 6, at 46 (1983) (explanation of paragraph 2 of guidelines); *see also* Recent Development, *Transborder Data Flows: Personal Data,* 22 HARV. INT'L L.J. 241, 241 (1981).

187. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 6, at 29-30 (1983) (part two of guideline's annex); *see also* Recent Development, *Transborder Data Flows: Personal Data,* 22 HARV. INT'L L.J. 241, 242 (1981).

188. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 6, at 29 (1983) (guidelines state they are minimum standards); *see also* Recent Development, *Transborder Data Flows: Personal Data,* 22 HARV. INT'L L.J. 241, 242 (1981) (eight principles are minimum standards).

189. *See* R. FISCHER, THE LAW OF FINANCIAL PRIVACY ch. 6, at 31 (1983) (paragraph 19 reprinted).

190. *See, e.g.*, 2 U.S.C.A. § 603(c) (West 1985) (invasion of privacy exception to public access of Congressional Budget Office data); 18 U.S.C.A. § 5038 (West Supp. Pamph. 1984) (records of juvenile delinquency proceedings safeguarded from disclosure); 20 U.S.C.A. § 1232g (West 1978 & Supp. 1984) (privacy rights of parents and students regarding inspection of education records).

by government agencies.[191] For example, violations of constitutional safeguards, such as those secured by the first, fourth, and fifth amendments, may subject the government agency official to a suit for injunctive or declaratory relief and/or money damages.[192] The Privacy Act requires agencies of the federal government to assure that records used to make a "determination" about an individual are accurate, relevant, timely, and complete "as is reasonably necessary to assure fairness to the individual."[193] Agencies are required to publish a detailed annual notice in the Federal Register that describes each record system, the kind of information maintained, its source, the policies governing management of the system, and the procedures for obtaining access to records about oneself.[194] Finally, the Financial Privacy Act requires agencies, on request, to provide individuals access to records and an opportunity to correct or challenge the contents of the record.[195]

Many other specific privacy laws in the United States could be discussed. For example, enforcement of the Family Education and Privacy Rights Act is achieved primarily through the right of students and their parents to inspect and challenge education records.[196] Additionally, administrative enforcement of the Act is vested in the Department of Education, and the Act provides for termination of federal funds if an institution violates its terms and compliance cannot be secured voluntarily.[197]

None of the privacy statutes in the United States, however, are comparable with the unitary schemes of regulations adopted by many

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191. *See, e.g.*, 20 U.S.C.A. § 1232g (West Supp. 1984) (privacy rights of individuals regarding inspection of education records); 12 C.F.R. pt. 505a (1984) (privacy rights of individuals regarding records maintained by Federal Home Loan Bank Board); 29 C.F.R. pt. 70(a)(1984) (privacy rights of individuals regarding records maintained by Secretary of Labor).

192. *See, e.g.*, Katy v. United States, 389 U.S. 347, 350 (1967) (fourth amendment protects individual privacy against certain kinds of governmental intrusions); Tehan v. Shott, 382 U.S. 406, 416 (fifth amendment reflects Constitution's concern for right of individuals "to a private enclave where he may lead a private life"); NAACP v. Alabama, 377 U.S. 288, 307 (1964) (governmental purpose to prevent activities may not be achieved by broad means which invade privacy rights under first amendment).

193. *See* 5 U.S.C.A. § 552a(e)(5) (West 1977).

194. *See id.* § 552a(e)(4)(A)-(I) (West 1977 & Supp. 1984).

195. *See id.* § 552a(d) (West 1977).

196. *See* 20 U.S.C.A. § 1232g (West 1978 & Supp. 1984).

197. *See id.*

countries of continental Europe.[198] The question arises as to what further legislative steps, if any, are required in the personal privacy area in the United States. The difference in attitudes appears to turn on how one reacts to the new information technologies. In a speech given by Senator Patrick Leahy of Vermont to the American Bar Association at Chicago, Senator Leahy said:

> As we march into the era of the information society, we must update our laws to protect our rights to privacy. But we should never do so in a way which compromises our right to free speech, our right to a free press, our right to assemble, or our right to know.
>
> We cannot allow the loss of personal privacy to serve as an excuse for the creation of greater government secrecy.
>
> Right now, the National Security Council, with the help of the Defense Department and the National Security Agency, is undertaking a major review of ways to strengthen the security and privacy of the nation's telecommunications and automated information systems. My foregoing remarks must make it clear that I think that the topic of the review is one worthy of study. But given the players who are conducting the review, I am hardly sanguine that personal privacy will top the list of concerns being addressed by the study.
>
> In changing policies and changing laws, we should not worry excessively about making the United States an information society. That will happen for us, no matter what we do—just as it will in Japan, in Europe, and even in the Soviet Union. What we must worry about, and worry about excessively, is how we create an information democracy. The first step towards that information democracy is to reverse the current trend of making government information less accessible to citizens, and information about citizens more accessible to government and businesses.[199]

On the other hand, in an article that appeared in the Washington Monthly, in May 1984, Mr. Philip Keisling stated:

> A centralized 'dossier' system that could be instantly accessible to anyone with the right computer access code is a disquieting thought. But there's an important distinction that privacy advocates usually overlook when they argue, in effect, that an inefficient government is necessary for the preservation of basic freedoms. Basically, civil liber-

198. *See* Coombe, Jr. & Kirk, *Privacy, Data Protection, and Transborder Data Flow: A Corporate Response to International Expectations*, 39 BUS. LAW. 33, 38 (1983).

199. *See* Speech by Senator Patrick Leahy to the American Bar Assn., *Privacy 1984,* at 4, in Chicago (Aug. 7, 1984).

> tarians imply that a major difference between a democracy and police state is whether information can be retrieved at the touch of one button, or whether it takes two days to assemble by rummaging through several dozen different files. But the real difference lies in what the information consists of, and what it is then used for.[200]

XI. CONCLUSION

Procedural safeguards are of course important. It is important that a customer of a depository institution be aware of when and to whom his financial records are being released. For this reason, amended article 342-705 should be extended to apply to credit unions and savings and loan associations as well as to banks. The easiest way to accomplish this might be for Texas to simply pass a law similar to the Financial Privacy Act which applies to state agencies, as well as to parties seeking private information.

As to substantive rights to prevent such information release, it is arguable that the customer should have less rights regarding loan experience information disclosed to other creditors than he would have in more confidential information, such as account balances, financial information he has supplied the bank about himself, or anticipated changes in his management or financial condition. Any legislative attempts to address the area of what should be confidential is very complex and difficult to draft. Legislation would have to balance the need of government and industry for information with the depositor's right of privacy. Perhaps we in this country should adopt more comprehensive privacy statutes, as has been done in Europe. Until then, the best protection for the customer regarding financial privacy is to deal with a depository institution which has a well thought out written manual and code of ethics applying to the disclosure of both account and loan information. Unfortunately, the customer's real sanction if the depository institution violates such policy or code of ethics is to take his business elsewhere.

It is difficult to predict which course financial privacy will take in the United States. Federal law enforcement officials have announced an interagency agreement among the Justice Department, the F.B.I., the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Federal Home Loan

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200. Keisling, *The Case Against Privacy,* WASH. MONTHLY, May 1984, at 25.

Bank Board to make criminal referrals to other law enforcement agencies without notice to customers.[201] This is sure to cause debate regarding the proper balance between the need for the government to prevent and combat crime and the right to privacy.

201. *See* Rosenstein, *Federal Lawmen Trying to Pierce Veil Shielding Bank Records of Individuals,* AM. BANKER, Apr. 3, 1985, at 16.