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THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978: NEW PROTECTION FROM FEDERAL INTRUSION

GEORGE B. TRUBOW* & DENNIS L. HUDSON**

The Right to Financial Privacy Act of 1978 (FPA), enacted as Title XI of the Financial Institutions Regulatory Act,¹ became effective March 10, 1979.² The FPA is intended to provide bank customers with a measure of privacy regarding their financial records held by banks and related institutions.³ This article discusses the need for such protection and the adequacy of the FPA in meeting that need.

It will be helpful to clarify some terms. "Privacy" has been used to describe a broad range of notions such as the right to

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1. 12 U.S.C. § 3401 *et. seq.* (Supp. 1978). The Financial Regulatory and Interest Rate Control Act of 1978 is comprehensive legislation aimed at reforming and restructuring federal financial agencies regulating depository institutions. H.R. REP. NO. 1383, 95th Cong., 2nd Sess. 7, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9273 [hereinafter cited as HOUSE REPORT]. The need for this reform was brought to public attention by the Bert Lance affair in 1977. HOUSE REPORT at 9.

The origin of the Act's privacy title can be traced to the passage of the Bank Secrecy Act in 1970 (12 U.S.C. §§ 1829b, 1730d (Supp. 1978); 31 U.S.C. §§ 1051-1122 (Supp. 1978)). *See Note, Bank Recordkeeping and the Customer's Expectation of Confidentiality*, 26 CATH. U.L. REV. 89 (1976). Legislation similar to the current Title XI was introduced in Congress as early as 1971. *See id.* at 89, 93 n.21, 101 (1976) (listing examples of financial privacy legislation introduced in Congress prior to 1975).

For a summary of the legislative history of the privacy title since 1977, *see* HOUSE REPORT, *supra* note 1, at 3, 34.

2. 12 U.S.C. § 375b (Supp. 1978). As to the SEC, the Act does not take effect until November 10, 1980. 12 U.S.C. § 3422 (Supp. 1978). This two year exemption for the SEC is "in recognition of its rigorous internal procedures, and of the credible threat the agency's objections to the title would have posed if the exception had not been granted." HOUSE REPORT, *supra* note 1, at 247. The cost reimbursement provision does not go into effect until October 1, 1979. 12 U.S.C. § 3415 (Supp. 1978). This delay is due to the requirements of the Budget Act. HOUSE REPORT, *supra* note 1, at 229.

3. HOUSE REPORT, *supra* note 1, at 33.

use contraceptives⁴ or to have an abortion,⁵ the right to read pornographic literature,⁶ or the expectation that one's bank account will not be open to public scrutiny.⁷ In one popular sense, privacy is the right to be "let alone,"⁸ and thus it is a concept difficult to define or to limit.⁹ Privacy, with respect to information, raises questions as to what and how information about people is gathered. Confidentiality, on the other hand, deals with how information is used in terms of the circumstances in which one can have access to information about others. Confidentiality protects privacy by restricting access to personal information, which is any information that describes a specific individual or is indexed or maintained by reference to him.¹⁰

4. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the first, third, fourth, fifth and ninth amendments to the Constitution protect the privacy of marriage against state anti-contraceptive statute).

5. *Roe v. Wade*, 410 U.S. 113 (1973) (state anti-abortion statute violates woman's right of privacy).

6. *Stanley v. Georgia*, 394 U.S. 557 (1969) (the first and fourteenth amendments prohibit making the private possession of obscene material a crime).

7. Several legal theories have been advanced to support a bank's duty of secrecy to its customers. See, e.g., *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961) (agency relationship); *Brex v. Smith*, 104 N.J. Eq. 386, 146 A. 34 (1929) (property rights); *Sewall v. Catlin*, 3 Wend. 291 (Sup. Ct. N.Y. 1829) (tort invasion of privacy); *Sparks v. Union Trust*, 256 N.C. 478, 124 S.E.2d 365 (1962) (implied contract). For a detailed discussion of the "expectation of privacy" with respect to bank records, see Note, *United States v. Miller: Without A Right to Informational Privacy, Who Will Watch the Watchers?*, 10 J. MAR. J. 629 (1977).

8. The term right to be "let alone" was popularized in a now famous law review article by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In later years as a Supreme Court Justice, Brandeis continued his support of the concept:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

9. From a legal standpoint privacy is an elusive notion. Privacy represents a concept in constitutional law, *Griswold v. Connecticut*, 381 U.S. 479 (1965); tort law, *Prosser, Privacy*, 48 CALIF. L. REV. 383 (1960); and in the past decade has been recognized in various fashions by statute, see, e.g., 5 U.S.C. 552a (1977) (The Federal Privacy Act of 1974). For a further discussion of the concept of privacy, see generally *Gross, The Concept of Privacy*, 42 N.Y.U.L. REV. 34 (1967); *A. WESTIN, PRIVACY AND FREEDOM*, (1970); *A. MILLER, THE ASSAULT ON PRIVACY* (1971); *Freund, Privacy: One Concept or Many? PRIVACY* (Pennock and Chapman 1971).

10. For a more detailed discussion of the scope of privacy with respect

Conflicts between governmental inquiry and individual privacy are certainly not a new phenomenon in this country.¹¹ The Colonists were faced with governmental intrusion into their homes by "customs officials" who conducted virtually unrestricted house to house searches, ostensibly to enforce tax and tariff laws.¹² Government agents searched for literature or records which might disclose tax or tariff evasions or other anti-government activity, examining at will any personal papers they could find.¹³ The Bill of Rights was enacted to guard against these and other governmental transgressions.¹⁴ The fourth amendment specifically protects personal papers and the information contained therein,¹⁵ so long as records are in the individual's possession he can protect them from unwarranted government seizure.¹⁶ Countless records containing sensitive

to information, see Trubow, *Information Privacy and the Policy Foundations for Criminal Justice Information Management*, in PROCEEDINGS OF THE THIRD INTERNATIONAL SEARCH SYMPOSIUM ON CRIMINAL JUSTICE INFORMATION AND STATISTICS SYSTEMS 107 (1976).

11. See generally D. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* (1972). In discussing privacy in puritan New England, Flaherty states:

The state totally regulated the conduct of life. The well led personal life contributed to the essential corporate thrust of the community. Both would be judged by God under the covenant. Thus in a metaphysical sense personal privacy did not have a place among the dominant values of a Puritan government.

Id. at 165.

12. These searches were conducted under color of the "Writs of Assistance," which were broad grants of power easily obtainable by government agents. See N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 55 (1937); *Warden v. Hayden*, 387 U.S. 294, 301-11 (1967).

13. See generally J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 19-47 (1966).

14. See *id.* at 38. The Colonists' objection to the searches was deeply rooted in the English concept of property. See, e.g., *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765): "Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection" *Id.* at 1066.

15. U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (emphasis added).

16. In eighteenth century America, records were generally kept by the individual personally. Thus, the law only precluded the government from seizing records in the possession of the individual. See Comment, *Government Access to Bank Records*, 83 YALE L.J. 1439, 1457 (1974).

However, social, economic, and technological changes in modern society have de-emphasized the importance of the property concept in informational privacy. Most important of these changes was the development of the computer and its impact on information practices. See generally REPORT OF THE DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY, NATIONAL INFORMATION POLICY 3-9 (1976).

financial information about individuals are held by third parties such as banks and other financial institutions, but the protections of the fourth amendment have not been extended to such records.

In the case of *United States v. Miller*,¹⁷ the Supreme Court held that account records maintained by a bank are not the client's papers and thereby protected by the fourth amendment, but rather are business records of the bank.¹⁸ Indeed, the court said that the customer did not have standing even to object to access to these records by third parties.¹⁹ Thus, although such personal information could provide "a virtual biography,"²⁰ neither the Constitution nor the common law protected the individual from disclosure of financial records to government officials. Congress has responded to the *Miller* case with the FPA.²¹

BACKGROUND

The number of checks drawn in this country has grown from an estimated 24.5 billion in 1972, to more than 35 billion in 1977.²² For the average person, the use of a bank has become a practical necessity. Though one can choose whether or not to use bank services, "choice" is dictated by the realities of modern society. Of course, bank records are not limited to checking accounts, but include such information as loan applications, mortgage records, and trust and savings accounts.

The increase in banking activity has resulted in a corresponding increase in the information which banks maintain, frequently in response to government requirements. A prime example of legislation requiring the collection of additional in-

17. 425 U.S. 435 (1976). For a more detailed discussion of the *Miller* case see Note, *United States v. Miller: Without a Right to Informational Privacy, Who Will Watch the Watchers?* 10 J. MAR. J. 629 (1977); Note, *Government Access to Bank Records in the Aftermath of United States v. Miller and The Tax Reform Act of 1976*, 14 HOUS. L. REV. 636 (1977); Note, *Is There a Right of Privacy in Bank Records? Different Answers to the Same Question: California vs. Federal Law*, 10 LOY. L.A.L. REV. 378 (1977).

18. 425 U.S. 435, 442 (1976).

19. *Id.* at 446.

20. "[A] depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography." *Burrows v. Superior Court*, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974); See also *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting).

21. HOUSE REPORT, *supra* note 1, at 34.

22. *The Safe Banking Act of 1977: Hearings on H.R. 9086 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 1592 (1977) (statement of Morris F. Miller) [hereinafter cited as *Hearings on H.R. 9086*].

formation is the Bank Secrecy Act,²³ designed to discourage the use of foreign bank accounts for the purpose of avoiding American laws.²⁴ That Act requires banks to keep records of customer drafts in excess of \$100, extensions of credit for more than \$5,000 (except when secured by realty), and data to reconstruct the activity of any checking account.²⁵ The informational quantity and quality of bank records²⁶ makes them attractive to law enforcement agencies who seek the use of the records to help identify and prosecute organized crime figures, narcotic traffickers, securities thieves and manipulators and tax violators.²⁷ Banks are ordinarily careful with respect to non-law enforcement inquiries.²⁸

To what extent can bank officials, in the interest of clients, be expected to resist law enforcement inquiries? Compliance with a request saves time and money; a refusal invites the animosity of government authorities and perhaps even an expensive court battle.²⁹ Taking advantage of this pressure, government agents can often gain access to financial records informally or by questionable formal procedures. Informal access may be based on a friendly relationship between the agent and the bank.³⁰ Formal procedures pursuant to a government

23. 12 U.S.C. §§ 1829b, 1730d (Supp. 1978); 31 U.S.C. §§ 1051-1122 (Supp. 1978).

24. See Albrecht, *An Analysis of the Bank Secrecy Act* in BANK SECRECY ACT 9 (Practising Law Institute 1976).

25. The Act has provisions for both domestic and foreign recordkeeping: 31 U.S.C. §§ 1081-83 (domestic); 31 U.S.C. §§ 1101-05, 1121-22 (foreign).

26. Prior to the passage of the Bank Secrecy act in 1970, most banks only maintained a record of the amounts of the checks written by customers. There was no way of knowing to whom checks were paid. The bank was interested in these checks for accounting purposes only. Following the passage of the Bank Secrecy Act, banks began keeping microfilm copies of all checks written by customers. This made possible the compilation of profiles on customers. See *Hearings on H.R. 9086*, supra note 22, at 1461-62 (statement of Congressman Fortney H. Stark, Jr.); *Hearings on H.R. 9086*, supra note 22, at 1591 (statement of Morris F. Miller).

27. *Amend the Bank Secrecy Act: Hearings Before the Subcomm. on Financial Institutions of the Sen. Comm. on Banking, Housing and Urban Affairs*, 92nd Cong., 2d Sess. 82 (1972) (statement of Eugene T. Rossides).

28. Many banks assume that if legal process is presented, disclosure is required. See *id.* at 232 (testimony of Rex Morthland). This is not the case with respect to non-government inquiry. See *Depository and Lending Institutions: Hearings before the Privacy Protection Study Comm'n*, April 21, 1976 p. 5 (written statement of Continental Illinois National Bank and Trust Company of Chicago).

29. *Surveillance: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong. 1st Sess., pt. 1 at 494-5 (1975) (testimony of James E. Merritt, attorney for Crocker National Bank of California).

30. See *Hearings on H.R. 9086*, supra note 22, at 1622 (statement of John H. F. Shattuck). As support for this premise Mr. Shattuck cited the training manual for IRS agents:

agency's authorized subpoena power are often broad in scope and rarely challenged by a bank if the authorizing paper appears to be valid on its face.³¹ Both types of access threaten privacy by breaching the confidentiality of personal information, and the *Miller* decision renders the customer helpless to protect his interest.

Recommendations of the Privacy Protection Study Commission

The Privacy Protection Study Commission (Commission), created by the Privacy Act of 1974,³² was directed by Congress to make a "study of data banks, automatic data processing programs and information systems of governmental, regional, and private organizations, in order to determine standards and procedures in force for the protection of personal information."³³ Based on such studies, the Commission was to make legislative recommendations to the President and Congress with respect to what was deemed necessary "to protect the privacy of individuals while meeting the legitimate needs of government and society for information."³⁴ In response to this mandate, the Commission conducted sixty days of hearings and meetings, during which more than three hundred witnesses testified.³⁵ In July, 1977, the Commission released its final report, entitled *Personal Privacy in an Information Society*, which documents the need for more protection of informational privacy. The Commission examined the current relationship between the customer and records maintained about him by financial institutions, and made recommendations that would give the customer comprehensive rights with respect to such records.³⁶

Unlike the *Miller* court conclusion that a customer does not

The importance of bank records to Intelligence investigators and the rapid changes in banking procedures brought about by automation, make it highly desirable for management officials in the field to meet with and get to know banking officials personally. The objective of such action is to improve relationships with these officials and to open channels of communication beneficial to both parties. Int. Rev. Manual § 937(12), MT 9300-49 (2-19-75).

See also *Jabara v. Kelly*, 62 F.R.D. 424 (E.D. Mich. 1974) (FBI access to bank records during non-criminal investigation after oral request to the bank); *Kenyatta v. Kelly*, 375 F. Supp. 1175 (E.D. Pa. 1974) (depositor's bank records photocopied by FBI without formal legal process).

31. See note 28 *infra*.

32. PUB. L. NO. 93-579 § 5(c), 88 Stat. 1896 (1974).

33. THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY XV (1977) [hereinafter cited as PRIVACY STUDY].

34. *Id.*

35. *Id.* at XVI.

36. *Id.*

have an expectation of confidentiality regarding the records maintained by banks,³⁷ the Commission believed that such an expectation does exist.³⁸ Therefore, the Commission recommended that a duty of nondisclosure be imposed upon the recordkeeper and that remedies, including damages, injunctive relief and penalties, be provided for violation of prescribed access procedures.³⁹ If there is to be an enforceable expectation of confidentiality in bank records, however, the Commission observed that the customer must have an interest in the records themselves:

Without such a protectable interest in his records, an individual given notice, standing, and the right to challenge a government request for his records would have little basis for any real challenge, other than to snipe at the facial validity of a summons or subpoena and to question the government's adherence to the proper procedural path. A grant of such procedural defense does not really recognize the privacy interest of the individual; rather, it would create complexity, delay and expense for all parties while still leading almost inevitably to disclosure to the government.⁴⁰

Accordingly, the Commission recommended that Congress, by statute, empower the individual to challenge the relevance and scope of government access to his records, and that a showing of a reasonable relationship between the record sought and the government's investigation be required in order to overcome such a challenge.⁴¹

The Commission's report was officially released one month after the introduction of H.R. 8133,⁴² which became the basis for the Right to Financial Privacy Act of 1978. Though the Commission dissolved after its report was submitted, its recommendations have obviously influenced the Congress in shaping the FPA.⁴³

37. 425 U.S. 435, 441-43 (1976).

38. PRIVACY STUDY, *supra* note 33, at 101, 356-59. "Americans have long thought that the details of an individual's financial affairs are nobody's business but his own unless he chooses to reveal them." *Id.* at 101.

39. *Id.* at 357-58.

40. *Id.* at 352.

41. *Id.* at 362-63. The recommended standard is less than "probable cause." "[G]iven that an individual will have the right to challenge the summons before it can be enforced, a relativistic balancing test of government need and individual right will surely emerge, rather than a strict standard such as probable cause being placed on government." *Id.* at 363 n.60.

42. H.R. 8133, 95th Cong., 1st Sess. (1977); *House Report, supra* note 1, at 34.

43. Although Congress held hearings of its own, the importance of the Commission in shaping the FPA is well documented in the legislative history of the Act. *See, e.g., HOUSE REPORT, supra* note 1, at 34.

TITLE XI

The FPA is the first federal legislation to deal with a broad functional area of information since the Privacy Act of 1974, and it is also the first major restriction on government access to private sector information.⁴⁴ The stated purpose of the FPA is to "protect the customers of financial institutions from unwarranted intrusions into their records while at the same time permitting legitimate law enforcement activity."⁴⁵

The FPA applies to customer financial records held at any office of a banking-type institution located in the United States, as well as records held by consumer finance businesses and companies who insure credit cards.⁴⁶ A "customer" is defined as an individual or a partnership composed of five persons or less, and does not include corporations, large partnerships or other legal entities.⁴⁷ The "financial records" protected are those maintained in the customer's own name,⁴⁸ while information in the record of a third party is not included.⁴⁹ Only inquiries from federal agencies are covered by the Act's provisions.⁵⁰

As the Commission had recommended, the Act imposes on financial institutions the obligation to restrict federal access to protected records to the procedures outlined in the FPA.⁵¹ Likewise, federal agencies are prohibited from seeking access to financial records except pursuant to the FPA.⁵² Before any records may be obtained, the government must submit to the institution a certificate of compliance with all applicable proce-

44. See PRIVACY J., Vol. IV, No. 12, at 1 (1978).

45. HOUSE REPORT, *supra* note 1, at 33.

46. 12 U.S.C. § 3401(1) (Supp. 1978). Credit reporting agency records are not covered by the FPA since government access to these records is already covered by the Fair Credit Reporting Act (15 U.S.C. § 1681 *et. seq.* (1970)). HOUSE REPORT, *supra* note 1, at 35.

47. 12 U.S.C. § 3401(5) (Supp. 1978).

48. 12 U.S.C. § 3401(2) (Supp. 1978).

49. HOUSE REPORT, *supra* note 1, at 49. "The definitions of 'financial records' and 'customers,' taken together, are intended to preclude application of the bill to anyone other than the person to whose account information the government seeks access. They would exclude for example, the endorsers of checks and guarantors of loans." *Id.*

50. 12 U.S.C. § 3401(3) (Supp. 1978): "'Government authority' means any agency or department of the United States, or any officer, employee, or agent thereof." It is important to note that access by state or local government agencies or private individuals is not prohibited by the Act.

51. PRIVACY STUDY, *supra* note 33, at 357-59; 12 U.S.C. § 3403(a) (Supp. 1978).

52. 12 U.S.C. § 3402 (Supp. 1978). The records must be reasonably described by the government. Thus records must be described as specifically as possible; a request for "all records" is insufficient. HOUSE REPORT, *supra* note 1, at 50.

dures of the FPA.⁵³ If a bank reasonably relies on such a certificate, it is absolved from liability in case of impropriety by the government.⁵⁴

Access to Protected Records

The FPA prescribes five formal procedures for access to protected records. The first method is by voluntary authorization from the customer.⁵⁵ Such authorization, which is required to be in writing and for a period not to exceed three months, is revokable at any time. The authorization must identify the specific records and the purpose for which the disclosure is authorized.⁵⁶ A customer may not be forced to give an authorization as a condition of doing business with a financial institution,⁵⁷ and the banks must keep a record of the agencies to which the customer has authorized disclosure.⁵⁸

An administrative summons is the second method of access. Such a summons has long been used by many agencies to carry out investigative powers conferred by statute.⁵⁹ The Commission found that this process was subject to abuse. Both the discretion of the issuing agency and the scope of a summons are usually broad, and the courts have not restricted the process.⁶⁰ The FPA requires that there be statutory authority for the administrative summons, and that it be issued pursuant to agency regulations that specify the purpose of the summons and those officials authorized to issue it.⁶¹ In addition, the Act mandates that the customer be given notice of the summons and allowed at least ten days to file an objection.⁶²

The third means of access is the search warrant, issued pur-

53. 12 U.S.C. § 3403(b) (Supp. 1978). Thus, oral access is now prohibited.

54. 12 U.S.C. § 3417(c) (Supp. 1978). Such disclosures must be made in good faith. HOUSE REPORT, *supra* note 1, at 55.

55. 12 U.S.C. § 3404 (Supp. 1978).

56. 12 U.S.C. § 3404(a) (Supp. 1978).

57. 12 U.S.C. § 3404(b) (Supp. 1978).

58. 12 U.S.C. § 3404(c) (Supp. 1978).

59. An example of an agency with administrative summons power is the IRS (IRC § 7602 *et seq.*). Access by means of the administrative summons does not require probable cause. *United States v. DeGrosa*, 405 F.2d 926 (3rd Cir. 1973), *cert. denied*, 394 U.S. 973 (1973). *See generally* *United States v. Powell*, 379 U.S. 48 (1964); 1 AM. JUR. 2d *Administrative Law* §§ 86-91 (1962).

60. PRIVACY STUDY, *supra* note 33, at 367-73. In recent years a good deal of attention has been focused on the broad discretion of the IRS in issuing "pocket summons." *See, e.g., Right to Financial Privacy Act: Hearings Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2nd Sess. 38 (1976).

61. 12 U.S.C. § 3405 (Supp. 1978); HOUSE REPORT, *supra* note 1, at 219.

62. 12 U.S.C. § 3405 (Supp. 1978).

suant to the Federal Rules of Criminal Procedure.⁶³ Under this procedure, the government has the burden of showing probable cause to believe the desired records are relevant to a crime.⁶⁴ Although the customer is not informed at the time the warrant is issued, notice must be sent to him within ninety days after the records have been seized.⁶⁵

A fourth method of access is the judicial subpoena, issued by a court if such subpoena has been authorized by law and upon a showing of a legitimate law enforcement purpose.⁶⁶ This provision requires that a copy of the subpoena be served upon or mailed to the customer, and that the customer be allowed at least ten days to challenge the subpoena.⁶⁷

The formal written request, a procedure newly created by the Act, is the fifth access method, and allows agencies without administrative summons authority to request records in a formal manner.⁶⁸ Such a request may be used only if the agency lacks administrative summons power. Formal regulations must be promulgated by the agency to specify the officials authorized to issue the request and the circumstances in which the request may be used.⁶⁹ Here, too, prior notice to the customer is required.⁷⁰

The formal request creates a new access method which can be used by government agencies which previously had no such procedure available to them. It is excessive in scope inasmuch

63. 12 U.S.C. § 3406 (Supp. 1978). See *Stanford v. Texas*, 379 U.S. 476 (1965); *Kremen v. U.S.*, 353 U.S. 346 (1957).

64. See generally *Stanford v. Texas*, 379 U.S. 476 (1965); *Kremen v. United States*, 353 U.S. 346 (1957); 79 C.J.S. *Searches and Seizures* § 66(2) (1952).

65. 12 U.S.C. § 3406(b) (Supp. 1978). If the findings specified in § 3409(a) are met, a delay of up to 180 days may be granted. See note 76 and accompanying text, *infra*.

66. A judicial subpoena would include any type of subpoena issued by a federal court, including grand jury subpoenas, subpoenas for trial, orders to produce documents, etc. HOUSE REPORT, *supra* note 1, at 220. See also *In re Horowitz*, 482 F.2d 72 (2nd Cir. 1973), *cert. denied*, 414 U.S. 867 (1973); *Petition of Borden Co.*, 75 F. Supp. 857 (N.D. Ill. 1948).

67. 12 U.S.C. § 3407(3) (Supp. 1978).

68. 12 U.S.C. § 3408(1) (Supp. 1978). An example of agencies that would presumably use a formal written request are the FBI, all of the Justice Department's litigating and law enforcement divisions except the Antitrust Division and the Drug Enforcement Administration; the Secret Service, and a number of other Treasury Dept. agencies. HOUSE REPORT, *supra* note 1, at 221.

An agency that uses this form of access must meet the same standard that applies to the administrative summons or judicial subpoena: "reason to believe that the records sought are relevant to a legitimate law enforcement inquiry." 12 U.S.C. § 3408(3) (Supp. 1978).

69. 12 U.S.C. § 3408(2) (Supp. 1978). HOUSE REPORT, *supra* note 1, at 221.

70. 12 U.S.C. § 3408(4) (Supp. 1978).

as it applies to any agency without administrative summons authority. A more reasonable approach would have been to specify those agencies empowered to use the process, such as the Federal Bureau of Investigation. It is true that the request is not coercive. If a bank refuses to honor a request, the bank cannot be compelled to do so through any enforcement proceeding, even if the customer has been unsuccessful in blocking the process.⁷¹ It is unlikely, however, that a bank will refuse the request if the customer has been unable to enjoin it. This procedure could well have been left out of the FPA.

As indicated, all of the preceding forms of access except the search warrant require that the requesting agency notify the customer before the records may be obtained. The language of the notice is specifically set forth in the Act. The notice must describe the records sought, the purpose of the inquiry, and the steps to be taken by the customer to challenge the request.⁷² The Act also requires that the notice be accompanied by a blank motion and affidavit form suitable for filing in court.⁷³ The requesting agency must name the appropriate court where the papers may be filed, and the government official upon whom they must be served.⁷⁴ The customer is allowed ten days from the date that the notice is personally served upon him, or fourteen days if it is sent by mail, in which to file a challenge in court.⁷⁵

In situations where it is believed that notice to the customer would seriously endanger the investigation or the safety of others, the government may apply for a delay of up to ninety

71. HOUSE REPORT, *supra* note 1, at 221.

72. 12 U.S.C. §§ 3405(2), 3407(2) and 3408(4) (Supp. 1978).

73. 12 U.S.C. §§ 3405(2), 3407(2) and 3408(4) (Supp. 1978). An example of what should be included in the notice to the customer is specifically set out in the Act:

1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

2. File the motion and statement by mailing or delivering them to the clerk of the _____ Court.

3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to _____.

4. Be prepared to come to court and present your position in further detail.

5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

12 U.S.C. § 3407(2) (Supp. 1978).

74. 12 U.S.C. §§ 3405(2), 3407(2) and 3408(4) (Supp. 1978).

75. 12 U.S.C. §§ 3405(2), 3407(2) and 3408(4) (Supp. 1978).

days before notice is given.⁷⁶ To obtain a delay order, the agency must convince the court that the investigation is within the agency's jurisdiction, and that there is reason to believe that the notice will result in danger to the physical safety of any person, flight from prosecution, destruction of evidence, intimidation of a witness, or in some other manner seriously jeopardize the investigation.⁷⁷ Applications for additional delays in notice may also be granted upon the same showing, so that in some circumstances access notice to the customer may be postponed repeatedly.⁷⁸

By use of the delay provision, law enforcement agencies may gain access to records without giving the customer a chance to object, since the financial institution may not disclose that the records have been obtained or sought while an order of delay is in effect.⁷⁹ Upon expiration of the delay order, the customer must be notified as to the records obtained, the basis for the original investigation and the reason for delay of notice.⁸⁰ At such time the customer may consider his rights and remedies under the FPA. Although the Commission believed that post-notification was of little utility to the customer,⁸¹ this provision represents a compromise on behalf of law enforcement when a showing of sufficient urgency can be made. Abuse of this provision could develop if courts proceed to rubber-stamp routine government requests, and a burden of vigilance rests with the individual to seek careful scrutiny of instances of delayed notice.

A general notice provision raised a clamor from the financial industry, and was repealed before the Act became effective.⁸² As originally enacted, section 1104(d) provided that "all financial institutions shall promptly notify all of their customers of their rights under this title." Since "customer" is defined in the Act as "any person . . . *who utilized or is utilizing any serv-*

76. 12 U.S.C. § 3409 (Supp. 1978). An application for delay must be made with reasonable specificity.

77. 12 U.S.C. § 3409 (Supp. 1978). This section also provides that indefinite delay of notice may be obtained under the Trading with the Enemy Act, the International Emergency Economic Powers Act, or the United Nations Participation Act, if the court finds that there is reason to believe that notice may endanger the customer. *See id.* at § 3409(b)(1).

78. 12 U.S.C. 3409(b)(2) (Supp. 1978). The government must apply for each delay. HOUSE REPORT, *supra* note 1, at 222.

79. 12 U.S.C. § 3409(b)(1) (Supp. 1978).

80. 12 U.S.C. § 3409(b)(3) (Supp. 1978).

81. Privacy Study, *supra* note 33, at 348-353. Once the government agency has the information the individual's privacy has been violated. Post-notification cannot undue this harm. HOUSE REPORT, *supra* note 1, at 246.

82. PUB. L. NO. 95-630 § 1104(d) (1978). S. REP. NO. 96-5, 96th Cong., 1st Sess. 1-3 (1979).

ice of a financial institution . . . ,” the industry complained that it would be unreasonably costly and probably impossible to identify and notify all past customers (deceased, as well?).⁸³ Since anyone whose records will actually be sought will be specifically notified, the elimination of the general notice provision was probably reasonable.

With respect to the specific access notice provision of Title XI, a customer can protect himself only if he has knowledge of attempted access. This provision is generally fair and comprehensive. Since the government agency complies simply by mailing notice to the customer's last known address,⁸⁴ however, all that is required is constructive notice. Accordingly, an unscrupulous agent could conceivably frustrate the purpose of the Act by mailing notice when it is known that the customer will be away for an extended period, perhaps denying to the customer an opportunity to object. Since the burden to guarantee the delivery of actual notice would arguably have exceeded the added privacy enhancement, the Act's provisions are probably acceptable as a fair balance.

Challenges to Access

If a customer chooses to challenge government access, he must follow the procedures of the Act. A motion to quash the administrative summons or judicial subpoena, or an application to enjoin the government from pursuing a formal written request, must be filed within the period of time previously noted.⁸⁵ The challenge procedure, however, does place a significant, and possibly unfair, burden on the customer.

If the customer elects to challenge access, he must file a sworn statement with the court, stating that he is the person whose records are sought, and giving reasons why the law enforcement inquiry is not legitimate or the records are not relevant.⁸⁶ If the court is satisfied with the customer's showing,

83. 12 U.S.C. § 3401(s) (Supp. 1978) (emphasis added). New York's Citibank estimated that the notice would have to be sent to the holders of nearly one billion accounts at a cost of 922 million dollars. S. REP. NO. 96-5, 96th Cong., 1st Sess. 2 (1979).

84. The pertinent section reads “a copy of the subpoena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution together with the following notice” 12 U.S.C. §§ 3405(2), 3407(2), 3408(4) (Supp. 1978).

85. 12 U.S.C. § 3410 (Supp. 1978). The customer must file a motion to quash or an application to enjoin within ten days of service or within fourteen days of mailing of the notice.

86. The customer must support his statement with facts. HOUSE REPORT, *supra* note 1, at 223. The customer might allege that he has commit-

then the government must respond and establish a "demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant"⁸⁷ If the government meets this burden, then the customer's application or motion will be denied, and access permitted.⁸⁸

Since the facts concerning the inquiry and its relevance are probably within the possession of the government, it may be very difficult for the customer to satisfy the court — as when one seeks to prove a negative assertion. Further, there are no standards for what is relevant or legitimate, and a wide variance in judicial determinations can be anticipated. Though the legislative history supports an interpretation that the customer must simply go forward with the evidence while the government must maintain the burden of proof,⁸⁹ the customer's task is not an easy one. The Commission would have denied access to the government until it could establish a need paramount to individual privacy interests.⁹⁰ The FPA appears to give the advantage to the government, though perhaps this is not unreasonable in light of the previous absence of any protection whatsoever for the customer. Final judgment on this point must be deferred until the results of the Act in operation can be evaluated.

If the court is unable to make a decision based upon these initial filings by the customer and the government, additional proceedings may be ordered, though the matter must be determined within seven calendar days of the government's response.⁹¹ In the event that the customer's motion or application

ted no offense over which the agency has jurisdiction or that the investigation is for some reason not a legitimate one for the agency to conduct. The customer might also allege that the investigation is being conducted solely to harass or intimidate him, as by showing the existence of an "enemies list," or a political basis for the investigation, or frequent recent unsuccessful probes of his affairs. HOUSE REPORT, *supra* note 1, at 224.

87. 12 U.S.C. § 3410(c) (Supp. 1978). "Reason to believe" is not intended to mean any reason, no matter how theoretical or remote. HOUSE REPORT, *supra* note 1, at 51. Legitimate law enforcement purpose is a lower standard than probable cause. HOUSE REPORT, *supra* note 1, at 51.

88. 12 U.S.C. § 3410(c) (Supp. 1978).

89. House Report, *supra* note 1, at 53, 54. This section does not require a detailed evidentiary showing or that the the customer prove there is no legitimate law enforcement purpose for the government's attempt to obtain his records. However, it does require the customer to state facts to support his position. For example, he may state that to the best of his knowledge and belief he has no connection to the matters under investigation, he has not committed an offense related to the investigation, or that he is the subject of harassment as shown by prior unsuccessful attempts to obtain his records.

90. PRIVACY STUDY, *supra* note 33, at 363 n.60.

91. 12 U.S.C. § 3410(b)(Supp. 1978). The government may file its response *in camera* upon request if the court considers such a filing appro-

is denied, he may not appeal until after the conclusion of the proceedings against him in which the records were sought.⁹²

Bypassing Routine Access Provisions

The Act has special procedures whereby the regular access methods may be bypassed. Government agencies conducting foreign intelligence operations, or the Secret Service in connection with its protective functions, may gain access to financial records simply by providing the institution with a certificate of compliance.⁹³ The institution is not permitted to disclose to anyone the fact that a customer's record has been so obtained.⁹⁴ Agencies using this procedure are required to keep an annual tabulation of such access.⁹⁵

Further, any government agency can obtain immediate access to financial records if the agency determines that delay in access "would create imminent danger of physical injury to any person; serious property damage; or flight to avoid prosecution."⁹⁶ To utilize this procedure the inquiring agency must furnish to the financial institution a certificate of compliance,⁹⁷ and within five days of access must file a statement with the court explaining the grounds for the emergency access.⁹⁸ Notice to the customer is then required, and it must be served either personally or by certified or registered mail to the customer's last known address.⁹⁹ Here, too, the government may apply for delay of notice in accordance with the procedure previously dis-

priate. It has been argued that this provision places a considerable burden on the customer.

"The provision permitting the government agency to respond *in camera* to a successful showing by a bank customer that the subpoena is invalid . . . makes it impossible for the customer to learn the basis for denial of his claim." *Electronic Funds Transfer and Financial Privacy: Hearings Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing & Urban Affairs*, 95th Cong., 2nd Sess. 589 (1978) (statement of David F. Linowes).

92. 12 U.S.C. § 3410(d) (Supp. 1978).

93. 12 U.S.C. § 3414 (Supp. 1978). This exemption is to be used only for legitimate foreign intelligence investigations; investigations proceeding only under the rubric of "national security" do not qualify. The exception is available only to those U.S. government officials specifically authorized to investigate the intelligence operations of foreign governments. HOUSE REPORT, *supra* note 1, at 55. These agencies are not exempt from the reimbursement provisions of § 3415. *Id.*

94. 12 U.S.C. § 3414(a)(3) (Supp. 1978).

95. 12 U.S.C. § 3414(a)(4) (Supp. 1978).

96. 12 U.S.C. § 3414(b)(1) (Supp. 1978).

97. 12 U.S.C. § 3414(b)(2). The certificate in this case must be signed by a supervisory official. HOUSE REPORT, *supra* note 1, at 55.

98. 12 U.S.C. § 3414(b)(3) (Supp. 1978).

99. 12 U.S.C. § 3409(c) (Supp. 1978).

cussed.¹⁰⁰

Another provision places restrictions on secondary disclosure of information by a government agency.¹⁰¹ Privacy protection is incomplete if agencies can do indirectly that which they cannot do directly. Transfer to another agency of information obtained pursuant to the Act is not allowed unless the transferring agency "certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction" of the transferee.¹⁰² The customer does not receive notice prior to such a transfer and therefore has no opportunity to object.¹⁰³ He is entitled to notice fourteen days after the transfer, unless such notice has been delayed by procedures previously noted.¹⁰⁴

A procedure providing more protection for the customer would have required notice and permitted challenge before the transfer, as in the methods for direct access. The current provision, however, is better for the customer than the "routine use" concept in early drafts of the bill. Under that procedure, which was borrowed from the Privacy Act,¹⁰⁵ the original requesting agency would have been required to advise the customer, at the time of original access to his records, as to what agencies might have secondary access to the records. Specific notice of any subsequent transfer would not have been required.

Exemptions to the Act

There are a number of important exemptions to the Act. One is for the Internal Revenue Service, whose access procedures are governed by the Tax Reform Act of 1976.¹⁰⁶ The Tax

100. See notes 76-78 and accompanying text, *infra*.

101. 12 U.S.C. § 3412(a) (Supp. 1978).

102. *Id.* Nothing in the title prohibits any supervisory agency from exchanging examination reports or providing information to an enforcement agency concerning a possible violation of a regulation or statute administered by a supervisory agency. HOUSE REPORT, *supra* note 1, at 54.

103. 12 U.S.C. § 3412(a) (Supp. 1978).

104. 12 U.S.C. §§ 3412(b), (c) (Supp. 1978).

105. 5 U.S.C. § 552a(a)(7) (1977). Under the Privacy Act, " 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." The PPSC found difficulties with respect to the 'routine use' definition of the Privacy Act. See REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION, FEDERAL TAX RETURN CONFIDENTIALITY (1976).

106. 26 U.S.C. § 7609 (Supp. 1978). See also 12 U.S.C. § 3413(c), which provides that "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by the Internal Revenue Code."; HOUSE REPORT, *supra* note 1, at 226. The fact that the procedures under the Tax Reform Act and the FPA are not identical could cause compliance problems for small banks. *Hearings on H.R. 9086, supra* note 22, at 1471 (statement of Congressman Edward W. Pattison).

Reform Act provides the customer with only a procedural rather than a substantive interest in the records.¹⁰⁷ In addition, the customer has less protection against the widely used administrative summons. In most other respects, the Tax Reform Act provides adequate protection against excessive intrusion. If tighter control on IRS access is justified, it must be accomplished by amendment to the tax laws.

There are other exceptions to the Act in which privacy threats are considered minimal or law enforcement needs dominant.¹⁰⁸ Inquiries from financial institution supervisory agencies, or investigations in which the institution itself is the subject of the inquiry, are exempt, but the records obtained thereby may not be used for purposes relating directly to the customer.¹⁰⁹ There are other exemptions for disclosure by the institution, allowing for perfecting a security interest, conducting foreign transactions, or for other administrative reasons.¹¹⁰

One provision allows a financial institution to notify a Government authority that such institution has "information which may be relevant to a possible violation of any statute or regulation."¹¹¹ Once notice of information is given, the government must comply with the FPA in order to gain access to that information.¹¹² It is not clear, however, if the banker's tip itself provides the necessary relevance for government access, or whether the government must develop relevance from collateral sources. Privacy ought not to be a shield to hide fraud or illegality. A banker, as any citizen, should be encouraged to report suspected crimes to proper authorities. With that purpose in mind, notice from a financial institution should be sufficient to supply relevance for the ensuing government inquiry.

Although the grand jury subpoena, used to compel production of records and papers, is exempted from the Act, there are important limitations on its use.¹¹³ The Commission found the grand jury subpoena subject to great abuse.¹¹⁴ Often the docu-

107. PRIVACY STUDY, *supra* note 33, at 360-61.

108. 12 U.S.C. § 3413 (Supp. 1978).

109. 12 U.S.C. § 3413(b) (Supp. 1978).

110. 12 U.S.C. § 3403(d) (Supp. 1978).

111. 12 U.S.C. § 3403(c) (Supp. 1978).

112. HOUSE REPORT, *supra* note 1, at 218.

113. 12 U.S.C. §§ 3413(i); 3420 (Supp. 1978).

114. PRIVACY STUDY, *supra* note 33, at 373-79.

In essence, the Grand Jury subpoena *duces tecum* has become little more than an administrative tool, its connection with the traditional functions of the Grand Jury attenuated at best. One might characterize its current use as a device employed by investigators to circumvent the stringent requirements which must be met to obtain a search warrant.

ments seized by means of such a subpoena were never actually presented to the grand jury and were retained by law enforcement officials, perhaps for use in other matters unrelated to the cause at hand.¹¹⁵ In response to this problem, the Commission recommended that financial records surrendered be presented to the grand jury under whose authority the subpoena was issued, that the documents be used only for the purpose of prosecuting the crime for which the indictment was issued, and that unused documents be destroyed or returned without further disclosure.¹¹⁶ The FPA implements those recommendations by requiring that documents acquired under such subpoena must actually be presented to the grand jury, can be used only for indictment or prosecution, and must be returned or destroyed if no indictment is issued.¹¹⁷

Regulatory Provisions

The Act provides that financial institutions be reimbursed in most instances for the costs they incur in complying with government requests for records.¹¹⁸ This provision alone may serve to limit inquiries for records, because the costs to compile records can be considerable.¹¹⁹ The Federal Reserve Board is charged with the responsibility of establishing a reasonable fee schedule for the reimbursement of financial institutions.¹²⁰

The customer may recover from the government agency or financial institution a penalty of one hundred dollars for violations of the Act,¹²¹ actual damages sustained as a result of disclosure,¹²² and punitive damages if the violation was intentional.¹²³ In addition, court costs and reasonable attorney

Id. at 377.

115. *Id.* at 376-77.

116. PRIVACY STUDY, *supra* note 33, at 378-79.

117. 12 U.S.C. § 3420 (Supp. 1978).

118. 12 U.S.C. § 3415 (Supp. 1978).

119. A similar provision in the Tax Reform act of 1976 has had a positive effect on the summons procedure. The number of government requests decreased and the summonses were drafted more carefully. *Hearings on H.R. 9086, supra* note 22, at 1491-92 (testimony of L. Richard Fischer on behalf of Crocker National Bank).

"Not only does this [reimbursement] serve as a practicable deterrent to indiscriminate fishing expeditions; but since the Privacy Act of 1974 provides for reimbursement to the Federal Government for information supplied to private parties, simple equity dictates that the reverse apply as well." *Hearings on H.R. 9086, supra* note 22, at 1450 (statement of Congressman Fernard J. St. Germain).

120. 12 U.S.C. § 3415 (Supp. 1978).

121. 12 U.S.C. § 3417(a)(1) (Supp. 1978).

122. 12 U.S.C. § 3417(a)(2) (Supp. 1978).

123. 12 U.S.C. § 3417(a)(3) (Supp. 1978).

fees as set by the court can also be recovered.¹²⁴ Disciplinary proceedings against a government official for violation of the Act can only be instituted if the Civil Service Commission finds that the official's violation was intentional.¹²⁵ Disciplinary recommendations may include dismissal, and the employing agency must abide by the recommendations of the Civil Service Commission.¹²⁶

The Act provides that the Administrative Office of the U.S. Courts prepare an annual report detailing the number and disposal of applications for delays of notice and of customer challenges.¹²⁷ Government agencies utilizing the Act must report their activity annually to Congress.¹²⁸

IS PRIVACY PROTECTION ADEQUATE?

The FPA represents a compromise between the individual's interest in the confidentiality of records and the needs of federal law enforcement.¹²⁹ The Act does establish for the individual, in accordance with the recommendation of the Commission, a protectable interest in records maintained by financial institutions. Indeed, most of the Act is responsive to the Commission's findings and suggestions.

Corporations and large partnerships are without protection under the FPA.¹³⁰ The Act is consistent with the Privacy Act of 1974 in this respect, because that Act also protects only individuals.¹³¹ Since most business entities are otherwise subject to governmental regulation requiring substantial disclosure of information, it is appropriate that such entities not be included under privacy protection designed for individuals.

Financial institutions are not required to notify their customers that the government is seeking access to records; that obligation is on the government. The institution will release the records when the government supplies a certificate of compliance. The government may carelessly or intentionally fail to notify the customer but nevertheless gain access to the records. The penalties provided in the Act are specifically the only penalties and sanctions that may be imposed for violation.¹³² It is

124. 12 U.S.C. § 3417(a)(4) (Supp. 1978).

125. 12 U.S.C. § 3417(b) (Supp. 1978).

126. *Id.* Some banks follow this procedure if an employee improperly discloses customer information. *See, e.g., Hearings on H.R. 9086, supra* note 22, at 1462 (statement of Congressman Fortney H. Stark, Jr.).

127. 12 U.S.C. § 3421(a) (Supp. 1978).

128. 12 U.S.C. § 3421(b) (Supp. 1978).

129. HOUSE REPORT, *supra* note 1, at 33.

130. 12 U.S.C. § 3401(4) (Supp. 1978).

131. 5 U.S.C. 552a (1977).

132. 12 U.S.C. § 3417(d) (Supp. 1978).

therefore possible that the government could use wrongfully obtained financial information against a customer. To require that such information not be admissible into evidence would have been a further incentive for government agencies to strictly comply with the terms of the FPA.¹³³ In any case, banks may still choose to send notice to their customers. The courtesy would not be a costly or significant burden and, in some cases, could help avoid circumvention of the Act.

An important change from early drafts is that the FPA applies only against federal agencies.¹³⁴ As a result, customers must look to the states for protection with respect to state government or other third party inquiries. Several states have statutes which limit disclosure with respect to information held by financial institutions.¹³⁵ The range and kind of protection provided by these statutes varies.

Mississippi and Alaska have statutes prohibiting banks from disclosing certain customer information except pursuant to legal process.¹³⁶ A number of other states provide the same protection with respect to savings and loan associations.¹³⁷ None of these statutes, however, provide the customer with notice or the right to challenge access.

Illinois, Maine, Maryland and New Hampshire have virtually identical financial privacy acts. The acts of these states apply to "any person," and prohibit disclosure except "in response to a lawful subpoena, summons, warrant or court order."¹³⁸ These statutes also provide for notice, which can be waived upon a showing of good cause, and allow recovery of damages

133. The California Right to Financial Privacy act provides the customer with this protection CAL. GOV'T CODE §§ 7460-7490 (West Supp. 1977).

134. 12 U.S.C. § 3401(3) (Supp. 1978); HOUSE REPORT, *supra* note 1, at 247.

135. See generally THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION, APPENDIX 1: PRIVACY LAW IN THE STATES 11-13 (1977). Since the publication of the PRIVACY STUDY, *supra* note 33, a number of other states have considered privacy legislation similar to the FPA. For example, the following states had considered such legislation during the 1979 session (through April 16th): Connecticut (H. 5545); Iowa (H. 115); North Carolina (S. 301); Oklahoma (S. 217); South Carolina (H. 2194); Washington (S. 2992). COMPUTERS AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION, STATE LEGISLATION STATUS REPORT NUMBER 2 (1979).

136. ALASKA STAT. § 06.05.175a (1978); MISS. CODE ANN. § 81-5-55 (1972).

137. FLA. STAT. ANN. § 665.111(1) (West Supp. 1978); KY. REV. STAT. § 289.271 (1970); MINN. STAT. ANN. § 51A.11 (West 1970); MO. ANN. STAT. § 369.099 (Vernon Supp. 1978); OR. REV. STAT. § 722.118 (1975); PA. STAT. ANN. tit. 7, § 6020-92 (Purdon Supp. 1978); WIS. STAT. ANN. §§ 215.26(8) (West Supp. 1978).

138. ILL. REV. STAT. ch. 16-1/2, § 148.1 (1978); MD. ANN. CODE art. 11, § 224 *et. seq.* (Supp. 1978); ME. REV. STAT. tit. 9-B, § 161 *et. seq.* (West 1978); N.H. REV. STAT. ANN. § 359C (Supp. 1977).

for intentional violations.¹³⁹

The California financial privacy act is quite similar to the FPA and applies only to inquires from state and local agencies.¹⁴⁰ Disclosure is prohibited except pursuant to legal procedures which are described in detail. The act imposes a fine for violations, permits injunctive relief, allows for recovery of costs and attorney fees, and makes inadmissible evidence obtained in violation of the act.¹⁴¹

In general, state financial privacy legislation is not comprehensive in coverage, nor adequately specific with respect to customer rights and government access. Most states will have to enact or amend legislation in order to provide customers with protection similar to the FPA provisions.

CONCLUSION

The notion of a right to be let alone, to be free from unwarranted government intrusion, is especially meaningful against the backdrop of Orwell's "Big Brother" society of 1984.¹⁴² To characterize Orwell's predictions as purely science fiction may be somewhat naive in light of the Watergate episode. Experience has demonstrated that government is run by individuals, and not ideals, much as we would like to believe that we have a government of laws, and not men. Privacy, to a great extent, is the exercise of control over personal information, and the Right to Financial Privacy Act of 1978 seeks to give the individual some measure of control. The Act makes the process of government access to bank records more open so that it can be scrutinized, monitored, and limited as necessary.

The Act, whatever may be its shortcomings, represents an important step towards protecting the individual's interest in personal privacy. Though the interests of law enforcement are often given more weight than the individual's privacy interest, this legislation was made possible only by compromise. An in-

139. See note 138 *supra*. The statutes provide for recovery of \$1,000 in damages for intentional violations.

140. CAL. GOV'T CODE § 7460 *et. seq.* (West Supp. 1977).

141. *Id.* at §§ 7485-89.

142. See statement of Arthur Miller before the Senate Comm. on Government Operations, considering the Privacy Act of 1974:

I think if one read Orwell and Huxley carefully, one realizes that "1984" is a state of mind. In the past, dictatorships always have come with hobnailed boots and tanks and machineguns, but a dictatorship of dossiers, a dictatorship of data banks can be just as repressive, just as chilling and just as debilitating on our constitutional protections. I think it is this fear that represents the greatest challenge to Congress right now.

S. REP. NO. 93-1183, 93rd Cong., 2nd Sess. 6922 (1974).

sistence upon greater privacy protection, without room for compromise, might have foreclosed the enactment of any financial privacy legislation whatsoever. As it stands, there is little reason to lament the FPA. If experience under the Act indicates that significant abuses yet remain, that will be the time to consider corrective action.