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OPINION	:	No. 81-802
of	:	JANUARY 7, 1982
GEORGE DEUKMEJIAN Attorney General	:	
JOHN T. MURPHY Deputy Attorney General	:	

THE HONORABLE JOHN H. DARLINGTON, District Attorney of Nevada County, has requested an opinion on the following question:

Does a customer of a California financial institution, as defined in Government Code section 7465(a), have a constitutional right to privacy which would prohibit the institution from releasing the customer's name and account number to a district attorney without a search warrant or other legal process?

CONCLUSION

The constitutional right of privacy of a customer of a California financial institution, as defined in Government Code section 7465(a), does not prohibit the institution from releasing the customer's name and account number to a district attorney without a search warrant or other legal process.

ANALYSIS

Government Code sections 7460-7493, inclusive, constitute the "California Right to Financial Privacy Act" which was enacted in 1976. (Stats. 1976, c. 1320, p. 5911 et seq., § 5.)[1] Generally, a governmental agency seeking from a financial institution the records of a customer must receive authorization from the customer, or obtain an administrative subpoena, a search warrant or a judicial subpoena. (Gov. Code § 7470(a)(1)-(4).)[2] However, several exceptions to these requirements are delineated in section 7480, among them being subdivision (c) which provides, in part, that nothing in the Act prohibits

> "a police or sheriff's department or district attorney from requesting of an office or branch of a financial institution, and the office or branch from responding to such a request, as to whether a person has an account or accounts at the office or branch and, if so, any identifying numbers of such account or accounts."

Accordingly, neither the district attorney nor the financial institution would be subject to the penalties for violating the Act (Gov. Code § 7485) if information limited to the names and account numbers of customers were requested and disclosed without legal process.[3] Obviously, in many criminal prosecutions and investigations the district attorney may be unable to obtain a search warrant or a subpoena for financial information without some verification of the customer's identity or some identification of the account. The exception of this kind of information from the strictures of the Act is unambiguous.

We are asked to determine if a financial institution, in complying with a request from a district attorney as to whether a person has an account and, if so, the identifying number of the account, would violate the customer's constitutional right to privacy notwithstanding section 7480(c).[4]

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[1] A summary and comment on the Act is contained in *Review of Selected 1976 California Legislation*, 8 Pac.L.J. 251-257 (1977).

[2] All further statutory references will be to the Government Code, unless otherwise indicated.

[3] The parallel federal statute (Title 12, U.S.C. § 3413(g)) allows release of a customer's name, address, account number and type of account upon a "legitimate law enforcement inquiry. . . ."

[4] We are assuming that the financial institution is a neutral party in this matter. In *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 245, the court held: "[I]f the bank is not neutral, as for example where it is itself a victim of the defendant's suspected wrongdoing, the depositor's right of privacy will not prevail." (See also *People* v. *Muchmore* (1979) 92 Cal.App.3d 32, 36-37.)

In November 1972 the voters of California amended article 1, section 1 of the California Constitution to include among the various "inalienable" rights the right of "privacy." As reworded by constitutional amendment in November, 1974, article I, section 1, now provides as follows:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

On December 27, 1974, the California Supreme Court decided *Burrows* v. *Superior Court*, *supra*, 13 Cal.3d 238, 245. The court held that the defendant-bank depositor, had a reasonable expectation that his bank would maintain the confidentiality of records which originated with him, and that the bank's surrender of the records to the prosecuting authorities without the benefit of legal process constituted an illegal search and seizure. A police detective had contacted several banks in which the defendant maintained accounts and requested copies of defendant's bank statements and at least one bank furnished the officer with photocopies of the statements. The officer was aware of the existence of the account since check stubs had been found during an earlier search of defendant s office. The court's concern was addressed to the disclosure of financial information. The court stated, 13 Cal.3d at 243:

> "It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable."

In *Valley Bank of Nevada* v. *Superior Court* (1975) 15 Cal.3d 652, 656-657, the court determined that a bank customer's right of privacy under article 1, section 1, was entitled to protection in civil discovery proceedings involving the bank and other persons.

People v. *Blair* (1979) 25 Cal.3d 640, extended the right of privacy to credit card records. In the course of a murder investigation, the police determined that the defendant had been issued credit cards by Diner's Club, American Express and Carte Blanche and then obtained records from the companies without the legal process required in *Burrows*. Diner's Club gave the prosecutor documents which included the record of charges made by defendant with the card. Defendant appealed on the ground that the trial court should have suppressed the records. The California Supreme Court stated, 25 Cal.3d at 652:

> "The rationale of *Burrows* applies in a comparable manner to information regarding charges made by a credit card holder. As with bank statements, a person who uses a credit card may reveal his habits, his opinions, his tastes, and political views, as well as his movements and financial affairs. No less than a bank statement, the charges made on a credit card may provide 'a virtual current biography' of an individual. (*Burrows*, 13 Cal.3d at p. 247.)"

The court did not decide whether the cardholder had an expectation of privacy in information less revealing of his personal conduct. The court observed, 25 Cal.3d at 650, fn. 8:

> "While the motion to suppress covered the information obtained from American Express and Carte Blanche as well, the only matters disclosed to the police by these companies without legal process were a copy of a credit card application, Bartee's [defendant's] address, and the amount he owed. The effect of this information upon the case against defendant is so peripheral that we do not discuss the propriety of providing this data to the police without legal process."

Using the *Burrows* test, it must be determined "whether a person has exhibited a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable governmental intrusion." (13 Cal.3d at 243.) Accordingly, we will examine what, if any, expectation of privacy a customer has that his name and account number will be kept confidential by a financial institution[5] and what, if any, is the extent of governmental intrusion caused by section 7480(c) in allowing the release of name and account number to a district attorney.

Account holders must be posited with knowledge that they do not have "secret" accounts. Under various provisions of the Revenue and Taxation Code the State Controller, the Franchise Tax Board, the Board of Equalization, Alcoholic Beverage Control Board and other tax authorities have general or limited access to information in taxpayers' accounts. (See Rev. and Tax Code §§ 14811-14814 (Inheritance Tax); § 19254 (Income Tax); § 7054-7056 (Sales Tax); § 32453 (Alcoholic Beverage Tax).) Provisions of the Financial Code afford the Department of Banking and the Department of Savings and Loan broad authority to examine records and accounts. (See Financial Code §§ 1900-1912, 8750-8806.) Moreover, it is common knowledge that financial institutions, pursuant

[5] The term "financial institution" includes state and national banks, state and federal savings and loan associations, trust companies, industrial loan companies, and state and federal credit unions. (Gov. Code § 7465(a).)

to section 6049 of the Internal Revenue Code (Title 26, U.S.C. § 6049), report to the Internal Revenue Service all payment of interest to customers aggregating ten dollars or more, and that this report contains the name and address of the customer.

The California Right to Financial Privacy Act was designed to implement the *Burrows* decision and the decision in *Valley Bank* v. *Superior Court*, *supra*, 15 Cal.3d 652, 656. (See Privacy: *To Be or Not to Be, That is the Question*, Peter H. Behr (1979) 10 Pac.L.J. 663, 669-670.) A strong presumption favors the Legislature's interpretation by subsequent statutory enactment of a constitutional provision. (*Methodist Hosp. of Sacramento* v. *Saylor* (1971) 5 Cal.3d 685, 692; *Delaney* v. *Lowrey* (1944) 25 Cal.2d 561, 569; *Board of Supervisors* v. *Lonergan* (1980) 100 Cal.App.3d 848.) A statute should not be annulled as unconstitutional unless it can be said to be "positively and certainly opposed to the constitution." (*Kaiser* v. *Hopkins* (1936) 6 Cal.2d 537, 540; 63 Ops.Cal.Atty.Gen. 397, 399 (1980); 63 Ops.Cal.Atty.Gen.336, 340 (1980).)

In *Valley Bank of Nevada* v. *Superior Court*, *supra*, 15 Cal.3d 652, 657, the court observed that existing statutes had failed to strike a balance between the customer's right of privacy and conflicting rights. The California Right to Financial Privacy Act achieves such a balance.

In subdivisions (d)(1)-(5), (e), (f)(1)-(2) and (9) of section 7480 many agencies are given special access to a customer's financial information. It must be assumed that the Legislature had knowledge of and considered the constitutional right to privacy when it allowed this access. (*Stafford* v. *Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.)

The governmental intrusion is minimal. The institutions need furnish only names and account numbers. Any financial information must then be obtained by legal process. The concern of the Burrows case focused only on the release of such financial information which placed the customer's private life on display.

In *Lehman* v. *City and County of San Francisco* (1978) 80 Cal.App.3d 309, the jury commissioner informed litigants of plaintiff s identity as a prospective juror in their trial, as required by provisions of the Government Code. The plaintiff sued and alleged, *inter alia*, an invasion of his right to privacy. The Court of Appeal, in reviewing the dismissal of his lawsuit following the sustaining of a demurrer, stated at page 313:

> "The cases recognizing the presence of the California constitutional right of privacy involve the gathering or disclosure of sensitive or personal information. [Footnote omitted.] (See, e.g., *White* v. *Davis* (1975) 13 Cal.3d 757 [university student's political views]; *Porten* v. *University of San*

Francisco (1976) 64 Cal.App.3d 825 [student's academic record]; *Valley Bank of Nevada* v. *Superior Court* (1975) 15 Cal.3d 652 [individual's bank records].) In the present case, the only information disclosed by respondent about appellant was his status as a prospective juror This information was not of personal nature as was that involved in White, Porten or Valley Bank. Appellant's appearance on the list of prospective jurors was not voluntary and revealed nothing about him since selection for jury duty is random. (Code Civ. Proc., §§ 204e, 205.) Finally, the release of appellant's identity as a prospective juror is no more violative of his privacy than the release of his identity as an actual juror, which is inevitable once a trial begins The only alleged private or sensitive information involved in the present case was gathered by others after respondent's disclosure."

The release of the customer's name does not invade his constitutional right to privacy The Act, for example, was designed to protect "financial records" from unjustified prying by government agencies. In section 7465 the term "financial record" means "any original or any copy of any record or document held by a financial institution pertaining to a customer of the financial institution." In common understanding, the customer's name is not a "financial record" since it is not evidence of a monetary transaction.

Turning to account numbers, the case of *People* v. *McKunes* (1975) 51 Cal.App.3d 487 must be examined. In *McKunes* a district attorney's investigator, pursuing a theft investigation, obtained from the telephone company without subpoena or court order the record of a suspect's telephone calls. This record was used at trial. The Court of Appeal reversed, stating at page 492:

". . . . It is true that the relationship between a subscriber and a telephone company does not involve the same fiduciary status as does the relationship between a bank and its depositors. But that is not material The question is not one of a breach of a fiduciary duty, but of a violation of a reasonable expectation of privacy. As with bank records, a subscriber has a reasonable expectation that records of his calls will be utilized only for the accounting functions of the telephone company in determining his bills. He has no reason to expect that his personal life, as disclosed by the calls he makes and receives, and the day and time of those calls, will be disclosed to outsiders without some prior judicial inquiry into the need for such invasion and its extent. . . ."

McKunes, however, is not without limitation. In *People* v. *Elder* (1976) 63 Cal.App.3d 731, an undercover operative investigating bookmaking, posing as a person

seeking to make a bet, obtained from "Al" a piece of paper bearing the name "Sam" and a telephone number. Through this number several bets were placed. A district attorney's investigator then obtained from the telephone company, without legal process, the name and address of the subscriber to that telephone number. A subsequent police raid on that address led to defendant's arrest and subsequent conviction. On appeal, the Court of Appeal found no invasion of the right to privacy stating, at pages 737-738:

> "Name and address relate to identification rather than disclosure of private, personal affairs. It is virtually impossible to live in our current society without repeated disclosure of name and address, both privately and to the government. While a myriad of reasons motivate some to reduce the degree of their identity before the public eye which includes, for example, subscribing to an unlisted phone number, this quest for anonymity does not compel the conclusion that a reasonable expectation of privacy existed on the facts before us.
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> "We think the answer to the contention raised is simply this: There is no reasonable expectation of privacy in name, address, or telephone number as found in the records of the telephone company nor any reasonable expectation of privacy in the address of the subscriber of gas company services from disclosure to law enforcement, without the benefit of a warrant, as a part of its normal and legitimate investigative procedures. We think it unreasonable to conclude that the information of identity here obtained would be reasonably contemplated by the subscriber to be within the constitutional privacy protection. If the police go further, as demonstrated by *Burrows* and *McKunes*, the nature of the information obtained changes the result."

We see no substantial difference between a telephone company or other utility disclosing an account number and a financial institution revealing an account number. In *People* v. *Suite* (1980) 101 Cal.App.3d 680, police searching for the person using a telephone to make bomb threats to a university instructed the telephone company to "trap" the university's telephone line. This procedure involved identifying the source of the incoming call only. The company's computer intercepted a subsequent threatening call and the printout indicated that the call came from the defendant's telephone. Finding *People* v. *Blair*, *supra*, and *People* v. *McKunes*, *supra*, inapplicable, the Court of Appeal held that the defendant had no reasonable expectancy that his telephone number was private.

Accordingly, we conclude that the constitutional right of privacy does not protect a financial institution's customer's account number from disclosure to a district attorney without legal process.

The California constitutional rule, as proclaimed in *Burrows*, should be contrasted with the federal constitutional rule, as set out in *United States* v. *Miller* (1976) 425 U.S. 435. In *Miller*, two banks in compliance with subpoenaes duces tecum turned a customer's financial statements over to treasury agents. The Court found that the customer had no expectation of privacy, stating at pages 442-443:

> "Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate 'expectation of privacy' in their contents. 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. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they 'have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings.' 12 U. S. C. § 1829b(a)(1). Cf. *Couch* v. *United States*, *supra*, at 335.
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> "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. *United States* v. *White*, 401 U. S. 745, 751-752 (1971). This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."

Indeed, the United States Supreme Court concerns for privacy in financial records have focused on situations which might involve disclosure of associational activities. (See *Buckley* v. *Valeo* (1975) 424 U.S. 1, 64-84 (campaign contributions and expenditures); *Eastland* v. *United States Servicemen's Fund* (1975) 421 U.S. 491, 507-511 (bank records of anti-war organization); *California Bankers Assn.* v. *Shultz* (1974) 416 U.S. 21, 55-57 (membership lists from bank records).)

We conclude that a person who opens and maintains an account at a California financial institution has no reasonable expectation that his name and account number will be a confidential matter. Thus, the financial institution does not violate that person's constitutional right to privacy by revealing name and account number to a district attorney without a search warrant or other legal process.

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