News From the Bench: Police Access to Customer’s Bank Records Limited

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Long before the federal banking agencies finalized regulations protecting the confidentiality of “nonpublic personal information” following the enactment of the Gramm-Leach-Bliley Act in 1999, the Illinois Banking Act included a Section protecting the confidentiality of customer records (Section 48.1).

In fact, Section 48.1 provides broader protection than the federal regs in at least two ways: first, Section 48.1 applies to all customers (i.e., commercial as well as consumer), while the federal regs only protect consumers; second, the federal regs require disclosure of the bank’s privacy policy and then offer the customer an “opt out” option, whereas Section 48.1 makes Illinois an “opt in” state because it prohibits disclosure by the bank without an authorization by the customer.

The federal regs and Section 48.1 each contain numerous exceptions that permit disclosure under specified circumstances regardless of the customer’s decision to opt out or opt in. For the purposes of this News From the Bench article, the only relevant exception is found in Section 48.1(b)(7) of the Illinois Banking Act, which permits a bank to disclose a customer’s otherwise confidential bank records to law enforcement in a situation where “the bank reasonably believes that it has been the victim of a crime.” If none of the exceptions apply and the customer has not consented to disclosure, then the records can generally only be obtained by subpoena, warrant or court order.

Let’s get this out of the way:

“This article and the judicial opinion summarized herein are only for news/informational purposes and are not a substitute for the legal research, analysis and advice that you need from your bank’s own attorney in the event that your bank is involved in litigation or is in a situation where litigation is reasonably foreseeable. If you or your bank’s attorney would like a copy of any court opinion referenced in this article, please contact CBAI General Counsel Jerry Cavanaugh [jerryc@cbai.com] or CBAI Paralegal Levette Shade [levettes@cbai.com].”

In the case of State of Illinois vs. Nesbitt, a bank employee was charged with stealing $40,000 from the bank at which she worked. Before trial, her attorney filed a Motion to suppress 250 pages of bank records that law enforcement had requested and received from the bank. [SPOILER ALERT: the cop collected the records relating to the suspect’s bank account by making a generalized request without any showing that the investigation pertained to a crime against the bank.] The trial court judge granted the defense attorney’s motion to suppress the records. In its November, 2010 decision, Illinois Court of Appeals upheld the trial court’s judgment by finding that the Illinois Constitution goes beyond the U.S. Constitution’s protection against “searches and seizure” because the Illinois Constitution also protects against “invasions of privacy.” of the person as well as his or her “houses, papers, and other possessions....”

Ultimately, the Appellate Court concluded that the defendant’s bank records were entitled to Constitutional privacy protection and so strict compliance with Section 48.1 was necessary before obtaining the defendant’s bank records. Because the Defendant had clearly not authorized disclosure and because no subpoena or search warrant was served on the bank, the records were suppressed. But what about that Section 48(b)(7) exception authorizing disclosure during investigations where the bank believes that it had been the victim of a crime? Why did that exception not apply in this case where the bank employee had stolen $40,000 from her employer-bank? The unfortunate truth is that the exception would have applied, if only the cop or the bank had expressed that as the reason for the cop’s request for the records; but because the law enforcement request was just an informal, generalized request that did not mention anything close to the Section 48(b)(7) exception, that avenue to the records was unavailable. The Court was not willing to authorize access to a citizen’s private bank records based on a sloppy, casual request from law enforcement that failed to cite any statutory authority for the access.