
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 3229 **Hearing Date:** June 12, 2018
Author: Burke
Version: March 19, 2018
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *California Right to Financial Privacy Act*

HISTORY

Source: Department of Justice

Prior Legislation: AB 618 (Cogdill), Chapter 705, Statutes of 2006
AB 2249 (Niello), Chapter 234, Statutes of 2008
AB 976 (Papan), Chapter 757, Statutes of 1998

Support: Unknown

Opposition: None known

Assembly Floor Vote: 73 - 0

PURPOSE

The purpose of this bill is to add the Department of Justice (DOJ) to the list of agencies that may receive financial records from a financial institution, provided that a crime report involving fraud has been filed.

Existing law declares that procedures and policies governing the relationship between financial institutions and government agencies have in some cases developed without due regard to citizens' constitutional rights and that the confidential relationships between financial institutions and their customers are built on trust and must be preserved and protected. (Government Code, § 7461.)

Existing law states the legislative purpose of protecting the confidential relationship between financial institutions and their customers and balancing a citizen's right of privacy with the governmental interest in obtaining information for specific purposes and procedures. (Government Code, § 7461.)

Existing law allows the dissemination of financial information that is not identifiable with the financial records of a particular customer. (Government Code, § 7480 (b).)

Existing law prohibits financial institutions from providing any financial records or the information contained therein, if the institution knows or has reasonable cause to believe that the financial records or information are being requested in connection with a civil or criminal

investigation of the customer, whether or not an investigation is being conducted pursuant to formal judicial or administrative proceedings. (Government Code, § 7471.)

Existing law provides that any police, sheriff, district attorney, when investigating fraud, and any county adult protective services office or a long-term care ombudsman, when investigating the financial abuse of an elder or dependent adult, may request, with the consent of the account holder, a bank, credit union, or savings association to furnish information about a customer account. (Government Code § 7480 (c).)

Existing law specifies that a financial institution, upon request of a police, sheriff, district attorney, county adult protective services office, or a long-term care ombudsman, may furnish information about a customer account, with the consent of the account holder. (Gov. Code, § 7480 (c).)

Existing law authorizes a financial institution, in its discretion, to initiate contact with, and thereafter disclose customer financial records to state or local agencies concerning suspected violation of any law. (Government Code § 7471(c).)

Existing law provides that any police, sheriff, and district attorney, may request a bank, credit union, or savings association to furnish information about a customer account. (Gov. Code, § 7480 (b).)

Existing law requires the requesting police, sheriff, or district attorney to provide, in writing, that a crime report has been filed that alleges fraudulent use of drafts, check, access cards, or other orders drawn upon a bank, credit union, or savings association in the state. (Gov. Code, § 7480 (b).)

Existing law provides that a county adult protective services office, or a long-term care ombudsman, when investigating the financial abuse of an elder or dependent adult, may request a bank, credit union, or savings association to furnish information about a customer account. (Gov. Code § 7480 (b).)

Existing law requires the financial institution, upon request of a police, sheriff, district attorney, county adult protective services office, or a long-term care ombudsman to furnish a statement setting forth specified information about a customer account for a period of 30 days before and 30 days following, the date of the alleged illegal act. (Government Code § 7480 (b).)

Existing law states that the Attorney General, and other specified state agencies, may ask an office or branch of a financial institution whether a person has an account or accounts at that office or branch, and if so, the agency may request the account numbers. (Government Code, § 7480 (e)(1).)

Existing law allows the dissemination of financial information and records pursuant to an order by a judge, upon a written ex parte application by a police officer, for the investigation of money laundering, fraud, or embezzlement, pursuant to the Penal Code. (Government Code § 7480 (n)(3).)

Existing law permits the disclosure of application forms for a credit card by an unauthorized person to a peace officer, if a police report alleging identity theft has been obtained. (Govt. Code, § 7840 subd. (o).)

This bill adds the Department of Justice (DOJ) to the list of agencies that may receive financial records from a financial institution, provided that a crime report involving fraud has been filed.

COMMENTS

1. Need for This Bill

According to the author:

Currently, the DOJ does not have statutory access to bank account information relating to an alleged case of fraud. However, other law enforcement agencies, namely sheriffs, police and district attorneys, are entitled to this information pursuant to Government Code Section 7480. This places a substantial impediment to the DOJ's investigations of intercounty fraud cases. Especially impacted by this discrepancy is the Bureau of Gambling Control, as it is common for check fraudsters to pass counterfeit checks at tribal casinos and cardrooms, statewide.

2. The California Right to Financial Privacy Act

Financial records are viewed by the law as confidential because they reveal private matters such as income, assets, debts, credit card and ATM use, transaction history, credit rating, spending habits, and the names of a person's associates. As the California Supreme Court points out, a person's financial records "may reveal his habits, his opinions, his tastes, and political views, as well as his movements and financial affairs." (*People v. Blair* (1979) 25 Cal.3d 640, 652.)

In *Burrows v. Superior Court*, the Supreme Court held that, pursuant to article I, section 1 of the California Constitution, an individual in California has a reasonable expectation that the information she divulges to her bank in connection with her banking activities is confidential. (*Burrows v. Superior Court* (1974) 13 Cal. 3d 238.) As such, the police cannot lawfully acquire or use the information without authorization from the individual, or through the legal process, i.e., a warrant, subpoena, or summons. However, the *Burrows* case created an exception to this general rule. (*Id.*) A bank can divulge private information to law enforcement if it finds itself a victim of wrongdoing allegedly attributable to the individual customer. (*Id.*) The "bank as a victim exception" applies if "the bank is not neutral, as for example where it is itself a victim of the defendant's suspected wrongdoing, the [customer's] right of privacy will not prevail." (*Id.*; see also *People v. Blair* (1979) 25 Cal.3d 640; *People v. Muchmore* (1979) 92 Cal.App.3d 32.) Thus, if a person attempts to deposit a bad check, the bank is a "victim of the crime" regardless of whether it has suffered financial loss, and can divulge its customer's account information to a law enforcement officer. (*People v. Hole*, 139 Cal. App. 3d 431, 438.)

In response to *Burrows* decision, the Legislature enacted the California Right to Financial Privacy Act (CalRFPFA). CalRFPFA was enacted to protect the privacy of customers by limiting the access that state and local government agencies have to their financial information. Generally, CalRFPFA restricts governmental access to an individual's banking records, absent the account holder's consent, subpoena, or search warrant. (Govt. Code, §7460 et seq.)

However, the *Burrows*' "bank as victim exception," created uncertainty as to whether officers could lawfully initiate contact with the bank and request an individual's financial records, or whether they must wait for the bank to initiate an investigation. Thus, CalRFPFA clarified that financial institutions are authorized to divulge customer account information upon the request of

police, sheriffs, and district attorneys, if a crime report alleging fraud has been filed, or with the consent of the account holder. (Govt. Code, section 7840 subd. (b)-(c).) Section 7840 specifically permits police, sheriffs, and district attorneys to access information including the number of items dishonored, the number of items paid that created overdrafts, the dollar value of these items, the dates and amounts of deposits and debts on the account, a copy of the signature card and address, the date the account opened and closed, and surveillance photographs and video recordings of persons accessing the financial account via an ATM or from the financial institution. (*Id.*) Subsequently, the Legislature added county adult protective offices and long-term care ombudsmen to the list of agencies authorized to request customer account information, if they have the account holder's consent, or are investigating financial elder abuse. (*Id.*) This is the broadest exception to CalRFPA's general prohibition on the disclosure of financial records.

CalRFPA's other exceptions are narrow and only authorize *limited* release of a customer's account information for specific purposes. (66 Ops. Cal. Atty. Gen. 128, 129.) One such exception allows certain enumerated agencies, including the Attorney General, to ask a branch whether an individual has an account at the branch, and the branch is permitted to disclose the account number. (Gov. Code, § 7480 subds. (d)(1)-(5), (e), (f)(1)-(2) and (f)(9).) Another exception to the rule prohibiting disclosure allows a financial institution to release specified customer information to a peace officer. (Govt. Code, § 7840 subd. (o).) However, the information is significantly limited to application forms for a credit card by an unauthorized person, if a police report alleging identity theft has been obtained. (*Id.*; see also Pen. Code, § 830.1, defining a peace officer as a sheriff, undersheriff, or deputy sheriff, chief of police, director or chief executive officer of a consolidated municipal public safety, a police officer, director or chief executive of a public safety agency of a city, a chief of police or police officer of a district, a marshal or deputy marshal of a superior court, a port warden or port police officer, and an inspector or investigator employed in the office of a district attorney.) In *Stafford v. Realty Bond Service Corp.*, the court explained that, as to these particular exceptions, "[t]he governmental intrusion is minimal. The institutions need furnish only names and account numbers. Any financial information must then be obtained by legal process. It must be assumed that the Legislature had knowledge of and considered the constitutional right to privacy when it allowed this access" and that "[t]he concern of the *Burrows* case focused only on the release of such financial information which placed the customer's private life on display." (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.)

When enacting CalRFPA, the Legislature authorized specific agencies, including the Attorney General, and peace officers, to have limited access to an individual's financial account information. Contrastingly, the Legislature authorized financial institutions to divulge more private details about their customers, only to police, sheriffs, and district attorneys (and later to county adult protective offices and long-term care ombudsmen) investigating fraud, without a warrant, subpoena, summons, or the customer's consent.

This bill would require a financial institution to also divulge their customers' private information to a special agent with the DOJ, if the special agent certifies in writing that a crime report has been filed that involves fraudulent use of drafts, checks, access cards, or other orders drawn upon a bank, or if the special agent has the consent of the account holder.