

VOLUME NO. 41

OPINION NO. 66

BANKS AND BANKING - Authority to compel disclosure by financial institution of financial information under Electronic Funds Transfer Act;
COUNTY ATTORNEYS - Authority to obtain investigative subpoena to compel disclosure by financial institution of customer information under Electronic Funds Transfer Act;
CRIMINAL LAW AND PROCEDURE - Authority to compel disclosure by financial institution of customer information under Electronic Funds Transfer Act;
CRIMINAL LAW AND PROCEDURE - Use of investigative subpoena for legitimate criminal investigation;
MONTANA CODE ANNOTATED - Sections 32-6-105(1), 46-4-301, 46-4-304(2), 46-11-317;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 82 (1980);
UNITED STATES CODE - 12 U.S.C. § 3407, 15 U.S.C. § 1693.

HELD: Section 32-6-105(1), MCA, does not preclude the county attorney from compelling disclosure

of customer information by a financial institution pursuant to an investigative subpoena.

4 June 1986

Harold F. Hanser
Yellowstone County Attorney
Yellowstone County Courthouse
Billings MT 59101

Dear Mr. Hanser:

You have requested an opinion concerning:

Whether section 32-6-105(1), MCA, precludes a county attorney from obtaining an investigative subpoena compelling disclosure of a customer's financial records by a financial institution, under the Electronic Funds Transfer Act.

Section 32-6-105(1), MCA, states:

(1) No information relating to any transaction by electronic funds transfer, or application therefor, between a financial institution and its customer or prospective customer may be disclosed by the financial institution to any person or government entity without consent of the customer or, if the customer refuses to so consent, under subpoena issued by a court of record.

Subsection (2) contains exceptions which do not apply here. The language of the statute is clear. Since an investigative subpoena is issued by a court of record (§ 46-4-301, MCA), this section permits issuance of an investigative subpoena regarding the release of electronic funds transfer information.

The section contains no language which limits issuance of subpoenas based on privacy considerations. When this section is read with other pertinent statutory provisions, it is clear that the Legislature intended financial information under the Electronic Funds Transfer Act to be subject to disclosure under investigative and other court subpoenas.

Section 46-4-301, MCA, authorizes the issuance of investigative subpoenas whenever the Attorney General or the county attorney has a duty to investigate alleged criminal activity and when necessary for the administration of justice. There are no other limitations. Moreover, since the investigative subpoena is the principal tool in Montana for investigation of alleged crime, interpreting section 32-6-105(1), MCA, to be an absolute privilege against disclosure would in effect insulate criminal offenders from any prosecution based upon an illicit financial transaction. No other financial information in this state is beyond the reach of legitimate criminal investigation. There is no basis for finding legislative intent to create this distinction for transactions under the Electronic Funds Transfer Act. The language of the act must therefore be interpreted to allow access to such information through subpoena issued by a court of record.

There is, of course, a degree of privacy accorded to examination and testimony obtained pursuant to investigative subpoenas. They are subject to the secrecy and disclosure provisions for grand juries. §§ 46-4-304(2), 46-11-317, MCA.

Confidential information is generally subject to disclosure pursuant to investigative subpoenas or other court orders. For example, in 38 Op. Att'y Gen. No. 82 (1980) I held that a county attorney may, in the course of a criminal investigation, use an investigative subpoena to compel a health care provider to release confidential health care information.

Gaining access to electronic funds transfer customer information by issuing an investigative subpoena to the bank does not offend the customer's various constitutional rights. The customer's Fifth Amendment protection against compulsory self-incrimination is not in jeopardy. See In re Grand Jury Proceedings, 601 F.2d 162, 167 (5th Cir. 1979). There the Court held that because the privilege against self-incrimination protects only individuals, records maintained by a corporation, partnership, or collective group are not protected from compelled disclosure.

The customer does not have a legitimate expectation of privacy from legitimate governmental inspection of those

records under the Fourth Amendment guarantee against unreasonable searches and seizures.

In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court recognized that a bank's records of, and relating to, a customer's accounts are not the customer's private papers, but are the business records of the bank. Id. at 440. In rejecting any Fourth Amendment implications, the Court stated that the Fourth Amendment does not prohibit the bank from conveying information it receives to a government authority, because, in revealing his affairs to the bank, the customer takes the risk that the information will be conveyed to the government for legitimate purposes. Id. at 443.

In any event, the subpoena is valid within the Fourth Amendment context so long as it is reasonably definite in its request and relevant to the legitimate inquiry for which it is issued. See United States v. (Under Seal), 745 F.2d 834, 837 (4th Cir. 1984), cert. granted, U.S. v. Doe, 105 S. Ct. 954, vacated, 105 S. Ct. 1861, on remand, 763 F.2d 662 (1985).

Montana's constitutional right to privacy does not preclude use of an investigative subpoena. The county attorney's legitimate investigation of criminal activity and the use of investigative subpoenas, when necessary to the investigation, are essential to the enforcement of the criminal laws and thus to the preservation of a free, safe, and orderly society. Such subpoenas issue only when it appears upon affidavit of the county attorney or the Attorney General that the administration of justice requires issuance. § 46-4-301, MCA. The above constitutes a compelling state interest which is a legitimate basis for invasion of whatever privacy interest a person may have in his financial records. § 46-4-301, MCA; see State v. Coleman, ___ Mont. ___, 616 P.2d 1090, 1096 (1980). In Coleman, the Montana Supreme Court held that a compelling state interest exists when the state must enforce its criminal laws for the benefit and protection of other fundamental rights to its citizens.

In summary, while section 32-6-105, MCA, creates a privacy protection for a customer, it does not do so to the exclusion of an investigative subpoena.

My conclusion is consistent with federal law as well. 15 U.S.C. § 1693 contains the federal Electronic Funds Transfer Act, which is substantively similar to the Montana Act. 12 U.S.C. § 3407 authorizes the government to obtain financial records, including those under the Electronic Funds Transfer Act, by judicial subpoena for legitimate law enforcement inquiry.

THEREFORE, IT IS MY OPINION:

Section 32-6-105(1), MCA, does not preclude the county attorney from compelling disclosure of customer information by a financial institution pursuant to an investigative subpoena.

Very truly yours,

MIKE GREELY
Attorney General