

PROTECT AGAINST GOVERNMENT SNOOPING:

Your Banking Is Your Business

By Trudy Hayden

The average person writing a check or making a deposit in his bank account simply assumes that these day-to-day transactions are no one's business but his own. Unfortunately, the assumption is wrong. It is quite possible that those checks you write to support your favorite candidates and causes and to pay for your magazine subscriptions and organizational memberships are being scrutinized and recorded by the government.

During the last year the ACLU has had to deal with a growing number of cases in which banks, acting far beyond their legal obligations, have allowed police, FBI agents and congressional investigators to examine the records of individual and organizational accounts, without the permission or even the knowledge of the depositors. The reason for our concern, of course, is that if the government can determine how a person spends his money—to which publications he subscribes, to which politically active individuals and organizations he makes donations—it has learned most of what there is to know about his political sympathies and affiliations.

This snooping is taking place against a background of increasing FBI, Army and police surveillance of politically active citizens: peace groups and their members, students, civil rights leaders, black militants, radical Rightists and Leftists, and the proponents—including a number of congressmen, senators and presidential candidates—of a wide variety of causes from welfare rights to ecology.

Litigation

ACLU has one suit challenging an FBI search of the account records of the Fifth Avenue Peace Parade Committee. The FBI wanted to know who had bought tickets to the 1969 Viet Nam Moratorium demonstration in Washington. Another suit is based on evidence from the "Media papers." It shows that FBI agents had scrutinized a black economic development group's account records. We are also fighting House Internal Security Committee subpoenas of the bank records of several "radical" parties. The government has shown an interest in religious societies and publishers as well. Last winter FBI agents searched all records of the Unitarian-Universalist Association in a Boston bank for evidence that Beacon Press, the Association's publishing arm, had been involved in the release of the Pentagon Papers.

How do the banks feel about the issue? Not as many civil libertarians would expect.

Last spring, we decided to find out what the policies and practices of the banks actually are—and to try to persuade them to adhere to strict rules of confidentiality. The ACLU wrote to the presidents of the 100 largest banks in the United States. Our letter outlined the constitutional principles and legal precedents which forbid governmental inquiry into the personal beliefs and associations of individuals: the First Amendment's guarantee of the freedom of belief, speech and association and the Fifth Amendment's guarantee of the right not to disclose one's beliefs and associations to the state. We illustrated the destructive effects of these forays into First Amendment territory: how, for example, an organization whose bank records were subpoenaed by the House Internal Security Committee had suffered a drop of 50 per cent in contributions—even though the records demanded by HISC were never actually produced. (Many regular contributors who had specifically requested anonymity, including one annual donor of \$10,000, discontinued their support when HISC announced its intent to publicize the organization's membership rolls.)

We urged the banks to make a public pledge to their customers. First, we asked them to forbid their staffs from giving the government information from customers' bank records, except in response to a subpoena. Second, when a subpoena is issued, we asked the banks not to comply before sending a copy to the customer. The custo-



Drawing by Sandy Huffaker

Let it be known that it is in the interest of sound banking policy, bank-customer relations, and the maintenance of customer privacy that any and all banking transactions and contacts, in any way concerning the customer, be carried on by the Bank in strict confidentiality, and therefore that:

1. The Bank recognizes a responsibility to safeguard the privacy of all information and records relating to the financial transactions of any customer, and adopts and promotes a general policy of non-disclosure of identifiable records to all third parties;

2. In furtherance thereof, the Bank pledges specifically that none of its employees, at any level, will on a mere demand or request unsupported by legal process of the written consent of the customer, provide any government, or private investigator with access to any identifiable records or information concerning the customer;

3. The Bank further pledges that before complying with any formal subpoena, court order, or statutory duty to disclose such information it shall make a reasonable effort to communicate such demand for disclosure to the customer within two days of its receipt by the Bank. Within the legal limits, the Bank shall not comply with such demand until the customer to whom communication has been sent has had an adequate opportunity to take responsive action (14 days after notice). A reasonable effort to communicate shall be the mailing of a copy of the subpoena or court order, or notice of the statutory duty, to the customer via the fastest possible regular delivery mail.

4. The Bank and customer agree to the above declaration, and will uphold it to the fullest extent possible.

5. The foregoing has no application to the examination and audit of the business and affairs of the bank in accordance with applicable state and federal banking laws, provided that no auditing or examining agency shall use the records or information for any purpose other than regulatory or statistical purposes. Nor should any auditing and examining agency publish or disclose to third parties the particular customer records or information furnished by the bank in a form in which the identity of any customer or his account can be recognized by anyone other than the customer or the bank furnishing them.

(Depositor's Signature)

(Date)

(Bank)

mer can then sue to quash an unconstitutional subpoena before any information is divulged.

Bank Responses

Twenty banks replied to our letter. Certainly the most striking characteristic of the responses was their diversity. It was immediately apparent, even from this rather small sampling, that the banking profession has not dealt systematically with questions of privacy, and in particular with the problem of political surveillance.

Apart from that however, we were most impressed by the length and detail of many of the responses, and their receptive tone. Bankers appear to be sincerely interested in our arguments and suggestions. Several banks agreed wholeheartedly with our position and said they were complying with it. A few promised to re-evaluate their proce-

dures and devise a system to protect their customers' privacy. Several took issue with some of our suggestions, but apparently not so much because of a philosophical disagreement as because of a reluctance to obstruct what they understood to be proper law enforcement procedures.

What, in fact, are the banks' practices? Some banks said they divulge information only in response to a subpoena, but do not notify the customer first. Others notify the customer only "if time permits." Some banks require a subpoena before disclosure only "within the bounds of reason," or subject to exceptions "as in [the bank's] sole judgment may be warranted by the circumstances."

Some banks feel bound to honor the demand of a grand jury that its subpoena of a customer's records not be revealed to the customer. Others stated merely that they honor their legally established obliga-

tions (which are minimal) to protect privacy; still others assured us that they respect privacy, but they did not describe their procedures.

However, even the banks that expressed total agreement with our position present some problems. For instance, one bank replied with an enthusiastic endorsement of our views—but it so happens that unauthorized disclosures from the records of that very bank are at issue in a current ACLU suit. We concluded that although a bank may officially adopt policies of confidentiality, the officers and lower-echelon employees at the bank's local branches may not be made aware of these policies or of the importance of faithfully adhering to them.

Press

The public release of our letter led to extensive coverage in *American Banker*, the main daily banking paper. *American Banker* printed our entire letter and ran two very detailed, front-page articles describing the ACLU position and the banks' responses.

Additionally, both the financial and the general press have had numerous articles about the lawsuits by the ACLU in a Washington, D.C. court and the Northern California affiliate and the California Bankers Association in a California court, challenging U.S. Treasury Department regulations under the Bank Secrecy Act of 1970. The regulations can be interpreted to authorize any government agency to require full disclosure of all transactions in any account.

In June, Sen. John Tunney of California addressed the Senate on the issue of bank privacy, citing the ACLU letter and the banks' responses. In August, Senator Tunney conducted hearings in the Subcommittee on Financial Institutions of the Committee on Banking, then introduced legislation embracing many of the safeguards ACLU has supported.

Meanwhile, the dialogue with the bankers continues. We reply to each letter individually, meeting each objection, doubt and exception; urging that loopholes be closed and vaguenesses eliminated. We have explained that the grand jury "secret subpoena" is, at the very least, constitutionally questionable. And above all, we have argued that the customer must always be given the opportunity to vindicate his constitutional rights in a court before the damage is done.

Some ACLU affiliates have been developing contacts with their own banking communities. The Minnesota, Virginia, Kentucky, Vermont, Tennessee, Maine, Indiana, Massachusetts and Utah Civil Liberties Unions have all written to the major banks in their states and have begun to receive some answers.

Government

The citizen's ultimate quarrel with the issue of privacy is not with the banks, but with the government. ACLU's initial contacts with the banking community have convinced us that the bankers are not hostile to our efforts, that in fact they would welcome a clear solution to a very unsettled problem.

Part of the answer lies in the pending legislation and litigation. But perhaps the most promising means of bringing about change is the power of the millions of individual bank customers to bring pressure on their own banks to guarantee their own right of privacy. ACLU has prepared a model "contract" that individuals can present to their banks, by which the banks will agree to release information to outside parties only upon the presentation of a subpoena, and only after notifying the customer.

The model agreement is printed here. We suggest that you make two copies of it, sign them, and send them to the managing officer of your own bank, with the request that he countersign them and return one copy to you. Your bank may very well decide to enter into this agreement; but even if it does not, it will be placed on notice that its depositors are aware of their constitutional rights and determined to see them honored.

Trudy Hayden is staff officer of the ACLU's Free Speech and Equality Committees.