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## Commentary

### A Chance To Keep Private Records Private

Two bills would require bank customers' consent before selling, releasing financial information

By Grayson Barber

**H**ow private should your personal financial records be? Many people consider their finances to be among the most sensitive records they have, ranking with health records and Social Security numbers.

On Feb. 5, the Appellate Division ruled that personal banking records enjoyed privacy protection under the New Jersey State Constitution. In *State v. McAllister*, the court said “banks, like telephones, are an extension of one’s desk or home office. ... The repose of confidence in a bank goes beyond entrustment of money, but extends to the expectation that financial affairs are confidential except as may be reasonable and necessary to conduct customary bank business.”

The same day, by coincidence, the New Jersey Senate Commerce Committee heard testimony on two legislative proposals that would require banks to obtain their customers’ consent before selling or giving away their financial information to marketers or others.

We all receive privacy notices from our banks, nowadays, thanks to the Financial Services Modernization Act of 1999, more popularly known as Gramm-Leach-Bliley. This federal

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statute permits banks and other financial institutions to sell, rent, lease or give away our personal financial information unless we take affirmative steps to stop them.

The first sentence of each privacy notice always says “Your privacy is very important to us.” But the reality is that you must “opt out,” taking it upon yourself to stop the bank from disclosing your financial information. Your silence signals implied consent.

GLB does not pre-empt state law in this area. Neither does the Fair Credit Reporting Act or the Fair and Accurate Credit Transactions Act of 2003 President Bush signed on Dec. 4. Here are examples of the kinds of information your bank could sell to anyone:

1. Your annual earnings.
2. The amount and frequency of your paycheck deposits.
3. Your average bank balance.
4. Your average credit card debt.
5. Your automatic withdrawals for mutual fund investments or car payments.
6. Your charitable contributions.
7. Every check you write.

If you don’t opt out, your financial institutions can sell, share, trade or give this information to anyone for any reason unless you contact them and tell them they can’t. If you forget or don’t do so in a timely manner, you’re out of luck and your confidential information is no longer confidential.

“Opt out” is contrary to the “opt-in”

approach preferred by most consumer and privacy advocates. Opt in would prohibit a financial institution from sharing or selling your data unless you give your affirmative consent. With opt out, you give your implied consent by failing to return the privacy notice sent to you by your financial company. Saying nothing means “yes, you can share my data.” The default for the opt-out approach is that your data is shared until and unless you notify the company otherwise.

Senate bills 362 and 493 would make “opt in” the standard for New Jersey. This is consistent with GLB, which expressly permits states to enact more privacy-protective legislation. It is also consistent with the laws of other states, such as California and Vermont. GLB permits individual states to reject the opt-out standard. States may enact stronger privacy laws, which will be deemed “not inconsistent” with federal law.

Am I trying to put the genie back in the bottle? Not if there’s a right to this kind of financial privacy under the New Jersey State Constitution. Article I §7 guarantees “the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.” This clause has been interpreted to give New Jersey citizens greater privacy than does the federal constitution.

The Appellate Division concluded that “bank records kept at home could

not be seized in the absence of a duly issued search warrant based upon probable cause and they should not be vulnerable to viewing, copying, seizure or retrieval simply because they are readily available at a bank.”

The Morris County prosecutor announced he would appeal *McAllister* to the New Jersey Supreme Court. The Attorney General’s Office, which appeared amicus, said it would seek a stay of the ruling pending appeal.

Maybe we have been assuming too long that our financial records are private. If we make this assumption because we actually want our financial records to be private, the time is right to speak up. ■