
Consumers' Right-To-Know: Maintaining Customers' Rights, Preventing Cyber Terrorism, and Preserving Banks as Part of Our Critical Infrastructure

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INTRODUCTION

Terrorists of yesterday used to calibrate their violence and harm they caused to just the right amount to get the government to sit down at the table and address their political grievances. The terrorists of today no longer calibrate their violence, nor do they aim merely to affect the government. Today, terrorists' goal is to kill and destroy as much as they can; the new political objective is to create a theocracy.¹ They bring the threat to our shores: our airports, our cities, and even our banks. They aim to disrupt and destroy all aspects of our critical infrastructure to reach this new political objective.

America today must face this new objective by protecting our critical infrastructure and preempting any damage that terrorist activities could toll against this country. This means evaluating each aspect of our critical infrastructure and securing it from vulnerabilities to terrorist activity. No doubt, such a daunting task will take years, and with the constantly rapid change of technological advances in cyber terrorism, the task may never truly be complete. Nonetheless, if America is to preserve its liberty and the liberty of its citizens, we must face the new terrorist objective aggressively.

One such aspect of our critical infrastructure is the banking industry. The proper functioning of banks is vital to the proper functioning of the country. America's banking industry is comprised of private institutions, heavily regulated by the government, and yet remains incredibly vulnerable to terrorist activity using cyberspace. This paper discusses those vulnerabilities and suggests methods for protecting banks against cyber terrorism without

¹ Susan Spaulding, Lecture at George Mason University School of Law, Cyberterrorism and National Security Class (February 25, 2003).

unnecessarily impinging upon the rights of citizens and institutions within the banking industry itself.

We first begin with a discussion of how banks use the Internet, and how that use results in banking customers' vulnerability to cyber attack. Second, is a discussion of who should be responsible for preventing cyber terrorism, and whether customers should have the right to know when a hacker or possible terrorist has exposed their information, which is held in a bank database. Third, this paper evaluates current right-to-know laws and determines that since banks are not a government agency, it would be unconstitutional to apply traditional right-to-know law to the banking industry. Thus fourth, the paper explores several alternative solutions toward securing bank databases; namely, the institution of a reporting requirement that would enable the public to obtain information on incidences of hacking through a request made under the Freedom of Information Act. Fifth, since any legal topic relating to the Internet is largely undeveloped, this paper compares and contrasts the privacy issues faced by banks and Internet service providers to provide incite on the scope of privacy protection on the Internet. Sixth and last, this paper briefly discusses another possible solution to poorly secured databases, which is to broaden the scope of existing liability rules already applied to banks for the protection of all customers' information.

BANKS, THE CRITICAL INFRASTRUCTURE, AND CYBER TERRORISM

The Critical Infrastructure Protection Act of 2001 states that the critical infrastructure is comprised of "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."² Banks fit squarely within this definition of critical infrastructure. The banking industry is a system, both physical and virtual, that if incapacitated or destroyed would debilitate the economic functions of this country and the countries with whom we transact; thus an attack would have a debilitating impact on our economic security.

Banks maintain an accounting of monies for everyone from individual citizens and publicly held corporations to government agencies. A crippling of the banking system would disrupt all aspects of commerce, from seemingly inconsequential transactions, like buying lunch, to larger transactions such as purchasing a home, completing a corporate merger, or developing new military airplanes for the nation's defense. Banks maintain this array of accounts by relying heavily on electronic transactions made possible only through cyberspace. Most of this information is proprietary, private, and highly sensitive to disruption—the transactions simply cease in the event of an effective attack. The country cannot afford to fall victim to such a debilitating attack; thus, someone must insulate the banking industry from cyber terrorism.

² Critical Infrastructure Protection Act, 42 USC 5195(c) (2001); See also, The Patriot Act of 2001 § 1016e.

THE BANKING INDUSTRIES' USE OF CYBER SPACE

"In the last decades of the 20th century, computer technology transformed the banking industry. The wide distribution of automated teller machines ("ATMs")...[and]...[o]nline banking through the Internet...allow for electronic payment of bills, money transfers, and loan applications without entering a bank branch."³ All of these transactions occur through the use of cyber space.⁴ This technology revolutionized the banking industry, increasing their capabilities as well as their efficiency; but it also made their records vulnerable to intrusion from hackers with all types of intentions. Before the terrorist attacks of September 11, 2001, concern surrounding banks' vulnerabilities from the use of cyber space appeared minimal, and emphasis remained on the incredible conveniences cyber space brought to the banking industry and its customers. Today, concerns continue to grow, but most consumers take the security of their banking information for granted while databases of the banking industry remain largely available for intrusion.

Concerns about the security of databases in the banking industry should grow. On February 19, 2003, the Washington Post reported one of the largest intrusions of this kind. Eight million credit accounts were exposed when a hacker broke into a computer database of a company that completes credit card transactions.⁵ The database contained account numbers and other financial information that could be used toward terrorist activity. More on point, the mere capability to hack into such a database is evidence of the increasing threat that cyber terrorism could successfully target and cripple American banks.

Such capability could cause debilitating chaos in America in at least three ways. First, in the event of a similar cyber attack, consumers' accounts would be frozen and they would have no means for conducting daily transactions, from acquiring food to eat, to making airline and hotel reservations. Second, consumers' private information would be in the hands of the hacker to use as [s]he sees fit. A hacker could use the information to track and terrorize individuals, steal identities and carry out terrorist activities in the consumer's name, or steal assets and use them to pay for terrorist activities. Armed with the conveniences of the Internet and millions of Americans' vital account information the possibilities for debilitation are great.

The third possibility for debilitating chaos is an event reminiscent of the historical run on the banks that resulted from the stock market crash of 1929. The cause for the 1929 incident was that consumer confidence was undermined when consumers suddenly gained knowledge that the bank did not hold enough cash for all account holders to withdraw all funds in their accounts, and there was a risk that others would withdraw funds, leaving someone who had "money in the bank" with no actual money.⁶

Banking, The Columbia Encyclopedia, 6th Ed. (2001), at <http://www.bartleby.com/65/ba/banking.html>.

Id.

Jonathan Krim, *8 Million Credit Accounts Exposed, FBI to Investigate Hacking of Database*, Washington Post, Feb. 19, 2003, at E1; See also, www.cnn.com, *Root of Massive Credit Card Theft Found*, Feb. 20, 2003.

Great Depression, The Columbia Encyclopedia, 6th Ed. (2001), at <http://www.bartleby.com/65/gr/GreatDep.html>;
Panic, The Columbia Encyclopedia, 6th Ed. (2001), at <http://www.bartleby.com/65/pa/panic.html>.

With the banking industry's failure to secure its databases while increasingly relying on the Internet, it faces the risk of a modern day recurrence of the 1929 run on the banks, because "[w]ithout data privacy protection, consumers may be reluctant to do business on the Internet."⁷ If consumer confidence is undermined by the vulnerability of bank databases to cyber terrorism, and the banking industry relies heavily on the Internet to conduct transactions, then consumers will be reluctant to trust banks with their money. Thus, the banking industry must secure its databases against hacker and terrorist intrusion or the public's confidence will be undermined and the banking industry, consumers, and the country will suffer.

Luckily, this time news of the February 2003 database hack came quietly, it did not implicate the name of the company whose database was exposed, and it went almost entirely unnoted by the general public. The lack of information here may have preserved public confidence in the banking industry for now, but we cannot build the security of our country and its citizens on hopes that information, which undermines public confidence, be suppressed. That approach will fail the banking industry in the long run. Eventually, information seeps into the public conscience and the sustainability of our banks, a substantial part of our critical infrastructure, must be built on foundations that inspire public confidence. The right-to-know is one such foundation.

Nevertheless, the question remains, should consumers have the right-to-know if a hacker has exposed their banking information, when the banks and not the consumers own the databases? With the surmounting concerns about privacy on the Internet as well as identity theft, surely we would expect the answer to be a resounding "yes!" However, currently there is no legal requirement that banks inform account holders when the hand of a hacker has exposed a customer's private information. Account holders affected by the February breach were not notified. Thus, the answer to this looming question appears to be, "no." To be sure, something must be done to ensure banks can prevent hackers—terrorist or otherwise—from exposing their customers' proprietary information. Since banks, like 80%-90% of the country's critical infrastructure, are owned and operated by private industry⁸, there is another issue that must be addressed before establishing whether consumers have this right-to-know. That issue is to determine *who* should secure the banking industry from cyber terrorism? The three obvious options are banks, consumers, or the government.

WHO SHALL PROTECT BANKS FROM CYBER TERRORISM?

Who shall protect banks from cyber terrorism—banks, the government, or you? As explained in the previous section, the government heavily regulates banks, and banks are a key part of the

⁷ McTigue, Deborah M., *Marginalizing Individual Privacy on the Internet*, 5 B.U.J. SCI. & Tech. L. 5, ¶ 41 (Spring 1999) (citing Peter Menyasz, U.S. Move to Privacy Legislation Seen as 'Inevitable' Over Long Term, 66 U.S.L.W. 2238, 2238 (Oct. 21, 1997), and quoting Professor Joel Reidenberg, *Frodham University Law School*; see also Ian Lloyd, *An Outline of the European Data Protection Directive*, J. Info. L. & Tech. 1996 (Jan 31, 2996) <<http://www.elj.warwick.ac.uk/elj/ji>>

⁸ John McCarthy, *Lecture at George Mason University School of Law, Cyberterrorism and National Security Class* (March 25, 2003).

country's critical infrastructure. Naturally, this means that the government has a strong interest in preserving the security of the banking industry. The government might see a need for monitoring banking transactions, or accessibility of bank databases containing customer information. Such close monitoring might be considered an unnecessary intrusion into private industry, as well as into the daily financial lives of private citizens.

Moreover, the fact that the banking industry is privately owned and operated indicates that the private sector also has a large interest in preserving the security of the banking industry. Banks must have specific concerns regarding the protection of customers' privacy against both the government and terrorists. If banks fail to maintain the security of their databases, they will lose customers and fail to operate profitably. At the same time, banks themselves have an interest in preserving the integrity of private banking information from excessive government intrusion to protect their privacy and the privacy of their customers. Since competing interests exist with regard to protection of the banking industry, it remains unclear whether the government or the banks themselves should be responsible for erecting the requisite shields against cyber terrorism.

CONSUMERS' RIGHT-TO-KNOW

Generally, right-to-know laws are applied against government agencies rather than private institutions. The purpose behind them is to protect consumers (or private citizens) by forging a path for the free flow of information, thereby creating some degree of transparency and accountability in the government's actions. Existing right-to-know laws are distinct from any that might exist in the context of the banking industry, because the right-to-know laws contemplated here would be applied to private institutions. Thus, traditional right-to-know laws may not be appropriate in this context.

We begin this section with an overview of basic laws governing banking, and then evaluate whether a right-to-know law should be imposed against private institutions in the banking industry, or if there is another, more appropriate path for establishing accountability in the industry. In short, the goal for sure is to establish banks' accountability to consumers (or customers) because that is the best way to ensure the security and integrity of these databases, which are currently alarmingly vulnerable to cyber terrorist attack.

LAWS GENERALLY GOVERNING BANKING

The basic laws governing banking were established and applied well before the advent of the Internet. Nevertheless, these laws establish the metes and bounds between bank and customer for most aspects of the banking relationship. Since no specific right-to-know laws exist with regard to the banking industry and its customers, this section briefly outlines the laws most relevant to whether customers have an implicit right-to-know if their information has been exposed by a hacker or terrorist.

These laws can be divided into two categories: (1) laws describing ownership; and (2) laws describing duties. The first set, laws describing ownership, state that the bank owns the deposits a customer makes to his account, while the customer owns the account itself. Since a bank account—separate from its deposits—is merely a compilation of data, the customer may also own the data currently vulnerable to attack. However, thus far neither case law nor statute speaks directly to this point.

The second set of banking laws relevant to whether customers have an implicit right-to-know if their information has been exposed are laws detailing the respective duties of the customer and the bank. Banks have a general duty of good faith and ordinary care to its customers.⁹ Surprisingly, that duty is limited in that “the fact that a bank is indebted to its account holders for the amount of funds deposited imposes no special duty of care for the safekeeping of funds on deposit.”¹⁰ The only time a special duty of care arises is in cases where the bank has established an advisory relationship with a customer.¹¹ For example, the bank establishes an advisory relationship with a customer when it makes a habit of notifying the customer that one of its bank supplied insurance policies is about to lapse.¹² Similarly, the customer has no duty to spot a bank’s accounting mistakes made with respect to his/her account, unless the bank regularly sends statements to the customer.¹³ Notably, the customer has the right to request information, but once a bank fulfills that request, the customer then has the duty to examine the information provided.¹⁴ In short, the duties between bank and customer are established by both parties’ actions during their course of dealing.

Additionally, banks owe the same general duties a bailee owes to a bailor when customers deposit valuables in a bank safety deposit box, and when customers deposit funds using automatic teller machines (“ATMs”).¹⁵ So, if a customer’s valuables or money is lost, the bank has a duty to replace the items or their equivalent value.¹⁶

Lastly, but perhaps most interesting and relevant to the discussion below, is the fact that most states require banks to “maintain the capacity to furnish legible copies of” account information requested by the customer. Banks are required to keep this information for at least seven years from the day they receive it. Since it is impractical to keep the information in any other form but electronic, states are essentially requiring banks to keep databases of customer account information. Furthermore, since the customer owns the account, and the bank owns the deposits, it may be that the customer has an ownership interest in the databases. In short, this rule of law is most interesting, because it may suggest that the databases vulnerable to cyber terrorism are owned, at least in part, by the banking customer; and thus, this law may give the customer a right-to-know if the database containing his/her account information has been exposed.

⁹ 10 Am. Jur. 2d Banks and Financial Institutions § 729 (2002); 11 Am. Jur. 2d Banks and Financial Institutions § 890 (2002).

¹⁰ 10 Am. Jur. Banks and Financial Institutions § 738 (2002) (This rule is consistent with the rule that a bank owns the deposits while the customer owns the account).

¹¹ *Id.*

¹² *Id.*

¹³ 10 Am. Jur. Banks and Financial Institutions §§ 743 & 747 (2002).

¹⁴ *Id.*

¹⁵ 11 Am. Jur. Banks and Financial Institutions § 1016 (2002).

¹⁶ 11 Am. Jur. Banks and Financial Institutions § 1021 (2002).

NO RIGHT-TO-KNOW: THE UNACCOUNTABILITY OF BANKS

Despite laws implying customer ownership of bank maintained databases, the customer has no established right-to-know if a hacker or terrorist has exposed his or her account information, and so banks are directly accountable to no one.¹⁷ This lack of clarity in the laws brings about a lack of accountability. Banks maintain databases comprised of private customer information, and if exposed by a hacker or terrorist it can have debilitating effects on the customer personally, as well as the country as a whole. Yet these databases remain vulnerable to cyber attack. The reason for this is that the customer has no established right-to-know if his or her information has been exposed; and thus, the banking industry is not accountable for its failure to secure consumers' account information, and the databases remain unsecured.

Perhaps consumers should have the right-to-know, because such a right makes banks accountable for security breaches. In other words, a consumer's right-to-know would give banks the incentive to secure their databases. Here, banks are the least cost avoider—they can secure their databases most cost effectively because they have the specialized knowledge about the databases that the government does not already have. On the other hand, establishing a customer's right-to-know might also serve to expose customers' private information—a result that benefits no one. Whether we need to establish a customers' right-to-know law against the banking industry will be discussed below. The paramount point is that the ultimate goal is to insulate databases from cyber terrorism, and a right-to-know law is merely one way we might accomplish this goal.

THE PROBLEM WITH THE RIGHT-TO-KNOW: A DELICATE BALANCE

The problem inherent in any right-to-know law is that the Constitutional rights of several parties must be balanced, and thus, some rights must be strengthened at the expense of other rights. In the context of the banking industry, these rights are particularly difficult to balance. First, the interests of the government to preserve the banking industry as part of our critical infrastructure must be weighed against banking institutions' right to conduct business. Second, the rights of consumers to maintain some degree of privacy in their financial information from the government must be weighed against the government's interest in protecting private individuals from terrorism.¹⁸ Third, customer's rights in keeping financial information private from fellow citizens must be balanced against the need for disclosure to protect national security.¹⁹ Balancing

¹⁷ They are only accountable indirectly when a customer's account is used, and then only if the customer can prove it, or the bank chooses to assume liability for it. See generally, 10 & 11 Am. Jur. Banks and Financial Institutions all sections (2002).

¹⁸ Also, The Gram-Leach-Bliley Act, was submitted with the primary purpose of protecting the privacy of individuals' financial information, especially when it is in electronic form. Gramm-Leach-Bliley Act of 1999, H.R. 106-434, 106th Cong. (1st Sess. 1999).

¹⁹ In fact, financial information has already been deemed as information that should be protected as private information. See, e.g., Public Information, Attorney General's Memorandum on the Public Information Section of the APA, Administrative Law Scope, (MB 2-7A 2003) (Stating that information concerning financial

all these interests at once is akin to balancing a single disk atop a pole; if one interest is given more weight, the disk will tilt away from all other parties. Indeed adequately balancing such interests that are so complexly related is a difficult task. Figure 1 is included below to help illustrate the delicate balance sought in maintaining customers' rights, preventing cyber terrorism, and protecting banks as part of our critical infrastructure.

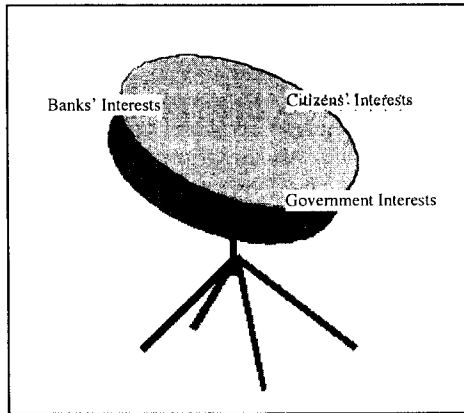


Figure 1: Illustration of the delicate balance between customer and bank rights and the need to protect the critical banking infrastructure.

The problem in its simplest terms is that the party—whether bank or government or individual citizen—forced to reveal information is also forced to surrender a large degree of its privacy. In other words, the right to know of one party necessarily impinges another party's right to keep information private. In the typical context where right to know laws are applied the party required to make a disclosure, and thus surrender its privacy, is usually the government. Other than its duty to preserve national security, the government has no right to privacy in particular.²⁰ Thus, when the government is the subject of a right-to-know law, individual privacy rights are less of an issue.

However, where the disclosing party is a private institution, such as a bank, issues of individual privacy loom large. In the banking context, information sought through forced disclosure is the financial information pertaining directly to banking customers, or individual citizens. For this reason, the right to privacy enumerated in the United States Constitution precludes a blanket right-to-know law applicable to banks, lest individual citizens' right to privacy be impinged.²¹ Since a right-to-know law as applied to the banking industry would be unconstitutional, we must seek another mechanism to achieve a higher standard of security in bank databases.

institutions is exempt from disclosure because it is important to "insure the security and integrity of financial institutions, for the sensitive details collected...if indiscriminately disclosed, [could] cause great harm.").

²⁰ The government only has a duty to keep information secret to preserve national security.

²¹ U.S. Const. Amend. I.

Indeed, the balance between right-to-know and right to keep private is always a delicate one. But when the disclosing party is a private institution, rather than a government agency, the balance becomes even more delicate, because the interests being balanced are inherently distinct. On the one hand, the balance of the government's right to keep secret and the individual's right to know is somewhat simple to keep, because on both sides of the equation the goal remains the same—to preserve liberty. On the other hand, the balance is much more difficult to strike when neither party is the government. Necessarily, one party's rights will be enjoyed at the expense of the others. For example, a right to know law would, by definition, require banks to open information about its daily activities to its customers. Banks' records of its daily activities are comprised of its customers' private financial information. Opening these records to other citizens, and possibly the government, would expose citizens' private information to the public as well as the government. This kind of exposure is a violation of individual privacy, but such a disclosure no doubt would allow the receiving party to enjoy its right-to-know. Since the balance between right to know and right to keep secret is more delicate in this context—where neither party is the government—we must consider alternative methods for preserving the right to know.

GIVING CONSUMERS KNOWLEDGE WITHOUT A RIGHT-TO-KNOW LAW

Since maintaining a Constitutional balance of rights appears impossible in the context of right-to-know laws against the banking industry, we must seek alternative methods for ensuring the security of bank databases. Toward that end, this section evaluates right-to-know laws as they exist in other contexts, as well as alternative methods by which consumers might obtain necessary information. Namely, this section first considers a tool already in place—The Freedom of Information Act (FOIA)—that could be used to increase the public's knowledge of the exposure rate of their private information, as well as banks' accountability for the security of the databases that contain such information. Second, we consider an analogy between Internet Service Providers (ISPs) and banks, whose problems with customer privacy are intriguingly similar. Third and last, this section evaluates the use of liability rules to provide banks the incentive to secure their databases against cyber terrorism.

EXISTING RIGHT-TO-KNOW LAWS

All states have right-to-know laws,²² and there are federal right-to-know laws governing federal agencies as well.²³ These laws include three basic elements: (1) presumption of a public right of access to government records; (2) enforceability of this public right in court; and (3) statutory

²² Richard A. Bumstead, *An Unfettered Press: The Right to Know* at <http://usinfo.state.gov/products/pubs/press/press03.htm>.

²³ See e.g., *The Freedom of Information Act* 5 USC 552 (2003).

exemptions to disclosure of certain information.²⁴ The government bears the burden of proof that something is exempt from disclosure.²⁵ As mentioned above, most right-to-know laws are enforced against governmental agencies. For example, any records created during the Food and Drug Administration's (FDA) normal course of business are subject to disclosure to any requesting member of the public. Thus, if there is a question regarding the FDA's approval of a genetically altered vegetable, the documents and transcripts relating to that approval can be reviewed by a reporter or any other member of the public.

Moreover, some agencies respond to right-to-know laws by voluntarily providing information. The Environmental Protection Agency (EPA), for example, voluntarily provides information on their web site about chemicals to which Americans might have been exposed.²⁶ The government does not require such information be offered, but the EPA voluntarily provides it "in the spirit of the right-to-know laws."²⁷ Hence these laws encourage transparency in the transactions of government agencies, and they also hold the responsible agency accountable for its own actions. Such transparency and accountability is something the banking industry needs if it is to avert any activity that attempts to disrupt its normal operation.

THE FREEDOM OF INFORMATION ACT (FOIA): AN UNTAPPED RESOURCE

In practice, when documents are available under the FOIA, any private, or sensitive information is redacted. This allows information to reach the public, while maintaining individual privacy rights, as well as protecting interests in national security. There are at least two conceivable ways to use the FOIA in the context of the banking industry. First, the industry could be treated as if it were a government agency; this would require almost all of its records to be subject to disclosure upon a FOIA request. Since this essentially amounts to a right-to-know law against the banking industry, and as discussed in the previous section, such a law is almost certainly unconstitutional, this use of the FOIA is not recommended.

The second conceivable way the FOIA might be useful in the context of the banking industry is recommended. That is, to impose a reporting requirement on all entities within the banking industry. If banks and the entities they use, such as companies that complete credit card transactions, are required by law to report any breach of the security of their databases containing customer information, the consumer's right-to-know would be properly balanced with the many rights of privacy at issue. In practice, the reporting requirement would work as shown in Figure 2).

The most likely requester of information under the FOIA would be a reporter, who in turn disseminates the information through the press. This solution seems the best overall method of

²⁴ Richard A. Bumstead, *An Unfettered Press: The Right to Know at* <http://usinfor.state.gov/products/pubs/press/press03.htm>.

²⁵ *Id.*

²⁶ *Where You Live, Right to Know*, at <http://www.epa.gov/epahome/r2k.htm>.

²⁷ *Id.*

disclosure, because it properly balances the interests of customers to know the rate of exposure of their financial information against the rights of privacy rights of institutions and other customers.

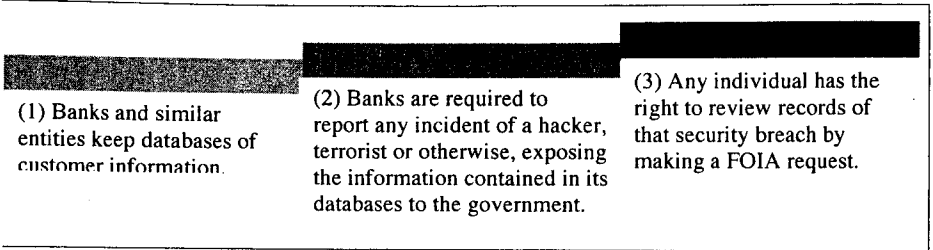


Figure 2: The reporting requirement for banks.

Most importantly, this solution does not require governmental monitoring of banks' activities, and consequently, it protects the privacy of customers' daily financial activities against the government and fellow citizens. At the same time, the reporting requirement helps to hold banks accountable for the security of the information they maintain. Since the overall goal is to protect banks from cyber terrorism, and to maintain confidence in this part of our critical infrastructure, a reporting requirement is the best solution thus far.

The reporting requirement would hold banks accountable for the security of the information they keep. In practical terms, if a bank's database is hacked and the customer information exposed, the report would also be required to include information such as the name of the bank whose database was hacked, the extent of information exposed, and any information obtained regarding the incident, such as whether this was known terrorist activity or just a 16 year old kid showing his intelligence in a mischievous manner. Since the institution's name must be included in the disclosure, consumer confidence in that institution would be a paramount concern for the bank. Thus the reporting requirement would provide a proper incentive to banks to secure their databases. In other words, the bank would have an incentive to prevent exposure of customer information lest it be forced to disclose the security breach and ultimately lose valuable customers to competitors.

INTERNET SERVICE PROVIDERS ("ISPS") AND BANKS: ANALOGOUS PARTIES

ISPs and Banks face similar problems when it comes to the issue of privacy on the Internet. Both parties provide a service to consumers. Both parties collect personal information from consumers so they can provide those services. Thus, both parties possess private consumer information that is transmitted across the Internet, and both parties' success is dependant upon keeping that information safe from exposure. To provide insight on how to balance privacy

interests against right-to-know interests in the banking industry, we now look to privacy issues that ISPs have already confronted.

Most recently, privacy concerns arose for ISPs in the scenario where a private individual requests an ISP to provide identifying information of one of its customers. In the past, a customer could conduct him or herself on the Internet and remain anonymous to all but the ISP who supplied the individual with access to the Internet. However, since the mid 1990's, the right to keeping ones identity on the Internet private has come under scrutiny.

In the United States District Court case, *McVeigh v. Cohen*, the court reviewed the United States Navy's decision to discharge plaintiff, Mr. McVeigh.²⁸ The Navy made the decision to discharge Mr. McVeigh under the statutory policy commonly known as "don't ask, don't tell," which allowed gays to remain in the military so long as they did not reveal their sexual preferences.²⁹ Mr. McVeigh's sexual preferences became apparent when a civilian Navy volunteer received an email message from an anonymous male who stated he was seeking males.³⁰ The Navy initiated a request to America Online ("AOL"), the ISP who provided Internet service to the plaintiff, to reveal the identity of the user who sent the email. AOL subsequently did reveal its customer's identity, which was Mr. McVeigh, a highly decorated 17-year veteran of the U.S. Navy. Upon receipt of this information from AOL, the Navy discharged Mr. McVeigh. Subsequently, the court overturned his dismissal.³¹ In this story, Mr. McVeigh suffered greatly at the hand of an ISP who failed to protect his privacy. Subsequently, AOL admitted the disclosure was made in violation of its Terms of Service Agreement, and provided a settlement award to Mr. McVeigh.³² Nevertheless, Mr. McVeigh's private information no doubt remained unnecessarily exposed.

In a similar case, also involving AOL, plaintiff-company issued a subpoena duces tecum against America Online requesting the identity of certain AOL customers who posted allegedly defamatory statements regarding plaintiff-company on a message board. This time, because of privacy concerns, AOL was resistant to reveal the identity of its users. Thus, AOL filed a motion to quash the discovery request. The ISP argued, "[I]t should not be required to reveal subscriber information because this would 'infringe on the well established First Amendment right to speak anonymously'."³³ In other words, AOL resisted complying with the subpoena in an attempt to protect its customer's privacy. The court, however, disagreed and denied the motion to quash because the interest of providing the plaintiff here with a means for discovery outweighed any privacy interests of AOL's customers. In short, the right to privacy on the Internet is not absolute, even in the absence of right to know laws; and thus, right to know laws are not the only means for obtaining private information.

²⁸ *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *McTigue, Deborah M., Marginalizing Individual Privacy on the Internet*, 5 B.U.J. SCI. & Tech. L. 5, ¶ 13 (Spring 1999).

³³ *America Online, Inc. v. Nam Tai Electronics, Inc.*, 264 Va. 583, 588 (2002); *See also*, 20 No. 1 *Computer & Internet Law*. 21 (Aspen Law & Business 2003).

The privacy issues facing the banking industry are similar to those facing ISPs, because both groups rely heavily on the Internet to provide services to their customers. Moreover, both groups' success depends on consumer confidence. For example, if an ISP willingly responds to subpoenas requesting the identity of its customers, then customers will likely seek a different ISP—one who protects individual privacy. Likewise, if a bank maintains databases of private customer information and fails to secure that information, when a hacker exposes customer financial data, and the incident is publicized, customer confidence is undermined, and customers seek another bank, or worse, they seek another place to secure their funds and personal information—such as a mattress. Since when customer privacy is not properly protected, banks and ISPs face similarly devastating consequences, and since those consequences weaken our critical infrastructure, banks, like ISPs, must be allowed to protect customers' privacy to a substantial degree.

After a comparison of privacy concerns in the banking industry and for ISPs, an imposition of a reporting requirement on those institutions within the banking industry, as suggested in the last section, remains the most balanced solution. Based on the understandings we have achieved through privacy concerns faced by ISPs, we know the need to protect privacy on the Internet is great. Additionally, based on the Washington Post report briefly described above, we know that banking institutions' databases are not secure, that they have in fact been hacked into, and that banking customer's financial information has in fact been exposed.³⁴ Further, since banks rely heavily on the Internet to transfer data and complete financial transactions, the security of that information in transit is vital to the preservation of the public's Constitutional right to privacy.

The current vulnerabilities of bank databases threatens individual privacy, because it is open to cyber terrorism attacks; at the same time, a right-to-know law, which might help preclude such attacks, would simultaneously serve to diminish individual Constitutional rights to privacy. Thus, the banking industry and regulators must look to developments in Internet law and privacy pertaining to ISPs. Thus far, it is apparent from the above two cases that there are times when information must be protected, like in the McVeigh case, and there are times when the interests of privacy is outweighed, and information must be disclosed, like in the case of AOL v. Nam Tai Electronics, Inc.

LIABILITY RULES

Another consideration for bank regulators is the liability rules for unnecessary exposure of banks' information to a hacker or cyber terrorist. Since this area of the law is largely undeveloped, it is not clear how existing rules of liability will be used in the context of banks' transmission of customer information on the Internet. Nevertheless, lawmakers must remain keenly aware that liability rules can be used to provide banks the proper incentive to secure customer information contained in bank databases.

³⁴ *Supra* n. 5.

For example, an effective way to prevent further occurrences of the incident reported by the *Washington Post*³⁵ might be to hold banks liable for any financial or reputational harm incurred by its customers as a result of exposure of the customer's information. Such a rule could prove too costly and run banks into financial turmoil; nevertheless, liability rules are a successful deterrent to haphazardly secured databases.

Evidence that some liability rules should exist lies in precedent. As discussed above in the section on laws governing banks generally, banks already have in place a "liability for breach of trust" that exists when a bank has taken an advisory role with the customer.³⁶ This rule holds banks to a higher fiduciary duty when they take an advisory role with the customer.³⁷ It is conceivable that the rule already applies to customers with whom the bank has taken an advisory role, and whose information is subsequently exposed through the hack of the banks unsecured database. This would only make sense. However, customers who merely keep an account with banks or whose information is merely transmitted through systems maintained by companies within the banking industry remain with neither remedy nor right-to-know if their information is exposed. Thus, liability rules in this context might need to be expanded to cover all customers whose information is exposed as a result of inadequately secured databases.

CONCLUSION

Yesterday, the thought of terrorists crippling the country with cyber warfare was inconceivable. Today, the thought haunts us, and we must begin to face the problem if we are to preserve the liberty of the Country and its individual citizens. Facing the problem begins with preserving our critical infrastructure against terrorist attacks.

Banks fit squarely within the definition of critical infrastructure, and thus are a substantial part of it. Because of the banking industry's heavy reliance on the Internet for the conduct of its business, and the ability of hackers to expose information, banks remain vulnerable to cyber terrorist attack. Their key to preservation is accountability.

By making banks accountable for the security of their databases they will find methods for preventing unauthorized access. One way to hold banks accountable is to provide bank customers with the right-to-know whether a hacker or terrorist has exposed their financial and personal information contained in bank databases. However, the benefits right-to-know laws confer on one party necessarily impinge another's right to keep the same information private. Because private institutions run the banking industry, a traditional right-to-know law applied to banks is almost certainly unconstitutional.

Therefore, other solutions, such as a reporting requirement or expanded liability rules, must be sought. In sum, protecting the rights of all parties is a delicate balancing act, but the goal remains the same—to preserve liberty against today's terrorists and their new political objective.

³⁵ *Supra* n. 5.

³⁶ 10 Am. Jur. § 720 (2002).

³⁷ See e.g., *Rush v. South Carolina Nat'l Bank*, 343 S.E.2d 667 (S.C. App. 1986).