

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

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NEAL J. ANTHONY and  
DENISE M. ANTHONY

*Debtor(s).*

Bankruptcy No. 97-00803S

Chapter 7

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LeMARS BANK AND TRUST CO.

*Plaintiff(s)*

Adversary No. 97-9135S

vs.

NEAL J. ANTHONY

*Defendant(s)*

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### ORDER RE: MOTION TO QUASH SUBPOENA and MOTION TO COMPEL

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On March 10, 1998, Plaintiff LeMars Bank and Trust Company served Valley Bank & Trust Company, Cherokee, Iowa, with a subpoena for its custodian of records to appear for a written deposition and to produce documents. (Doc. 27.) Valley Bank objects and moves to quash the subpoena. (Docs. 29, 30.) LeMars Bank moves to compel the custodian's appearance and production of documents. (Doc. 36.) These matters came before the court in Sioux city on March 24, 1998. Appearing were Ted Poulsen for LeMars Bank, Mark R. Cozine for Valley Bank, and Wil Forker for debtor-defendant Neal Anthony.

Valley Bank understands the subpoena to require it to produce its loan files on Neal Anthony and non-party Miles Peterson. Valley Bank objects on several grounds, including that the subpoena would require it to disclose privileged and confidential information.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...." Fed. R.Civ. P. 26(b) (1). The rules contemplate discovery from non-parties. Fed. R.Civ. P. 34(c), 45. LeMars Bank makes various claims against Anthony under 11 U.S.C. SS 523 and 727, including that Anthony misrepresented his financial condition to obtain a loan from LeMars Bank. (Doc. 32, Amended Complaint.) LeMars Bank believes that Anthony arranged a scheme to sell his equipment and lease it back from Miles Peterson. LeMars Bank seeks discovery of representations of asset values and of Anthony's financial condition, including representations connected with lending by Valley Bank to Miles Peterson. The court finds and concludes that the document requests of LeMars Bank are relevant to its claims against Anthony for purposes of Fed. R.Civ. P. 26(b) (1), and that the requests are sufficiently narrow so as not to constitute an undue burden. As further discussed below, the court concludes that Valley Bank has not shown it is entitled to quash or modify the subpoena on the ground that the requested documents are privileged or confidential. LeMars Bank's motion to compel should be granted.

Under Fed. R.Civ. P. 45(c) (3) (B), a person subject to subpoena may seek to protect a "trade secret or other confidential research, development, or commercial information." The protection of such material is not absolute. The court must weigh the party's need for the discovery against the potential financial harm to the person subpoenaed. Mycogen Plant Science v. Monsanto Co., 164 F.R.D. 623, 626 (E.D. Pa. 1996). "Confidential commercial information" has been defined as "information which, if disclosed, would cause substantial economic harm to the competitive position of the

entity from whom the information was obtained." Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691, 698 (D. Nev. 1994). Valley Bank has not claimed that the documents would reveal confidential commercial information within the meaning of this subsection.

The court must quash or modify a subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies." Fed. R.Civ. P. 45(c) (3) (A) (iii). Valley Bank has made several arguments that the documents requested are privileged or confidential.

### Right to Financial Privacy Act

The RFPA, 12 U.S.C. §§ 3401-3422, was enacted in response to United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619 (1976), in which the Court held that a bank depositor had no legitimate "expectation of privacy" in the contents of his bank records and that the discovery of such documents implicated no protected Fourth Amendment interest. Valley Bank concedes that the RFPA applies only to government access to bank records. It argues, however, that individuals should be similarly prevented from the infringement of a person's right to privacy of bank records.

The protection a bank customer receives under the RFPA is procedural. *See Nicewander, Financial Record Privacy--What Are and What Should Be the Rights of the Customer of a Depository Institution*, 16 St. Mary's L.J. 601, 612-15 (1985) (government must notify customer of document request; customer has opportunity to contest disclosure). Moreover, the RFPA is not applicable when the government does discovery under the Federal Rules of Civil Procedure in connection with litigation. 12 U.S.C. §3413(e); Sneirson v. Chemical Bank, 108 F.R.D. 159, 162 (D. Del. 1985). It "provides no justification for a bank's noncompliance with a subpoena issued in a civil action." Clayton Brokerage Co., Inc. of St. Louis v. Clement, 87 F.R.D. 569, 570 (D. Md. 1980). The enactment of the RFPA did not change the holding of United States that there is no constitutional right of privacy in bank records. Sneirson, 108 F.R.D. at 161; Clayton Brokerage, 87 F.R.D. at 571. In Sneirson and Clayton Brokerage, the courts concluded there is no federal public policy privilege against the discovery of bank records. Sneirson, 108 F.R.D. at 161-62; Clayton Brokerage, 87 F.R.D. at 571.

The legislative history of the RFPA shows a concern for the "sensitive nature" of bank records and a desire "to strike a balance between [bank] customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations." Sneirson, 108 F.R.D. at 162 (quoting 1978 U.S. Code Cong. & Ad. News 9273, 9305-06). One court has suggested that the "policies underlying" the RFPA should be considered in a motion to quash a subpoena to produce bank records. Chazin v. Lieberman, 129 F.R.D. 97, 98 (S.D.N.Y. 1990). In Chazin, the court found that a parties' "personal privacy rights" in bank records gave them standing to object to subpoenas served on banks. Those privacy interests did not, however, prevent discovery of bank records. The court instead limited the scope of material subject to subpoena. *Id. Cf. United States v. Miller*, 96 S.Ct. 1619, 1623 (records of depositor's accounts are business records of the bank).

### Iowa Constitution

Valley Bank argues that the right to privacy is guaranteed by Article I, § 8 of the Iowa Constitution. The court will assume for this discussion that rights provided under Iowa constitutional, statutory or common law are relevant in a federal court motion to quash. *Cf. Sneirson*, 108 F.R.D. at 162 (federal rule favoring discovery of relevant bank records prevails over assumed New Jersey privilege); O'Neil v. O.L.C.R.I., Inc., 750 F.Supp. 551, 557 (D. R.I. 1990) (same re Rhode Island law).

Section 8 is the prohibition against unreasonable searches and seizures. The Iowa Supreme Court has said that "the acquiring of evidence in the statutory manner to be used in a case is not a search and seizure within the meaning of the Constitution." Iowa Loan & Trust v. District Court of Polk County, 127 N.W. 1114, 1116 (Iowa 1910). The "constitutional provision prohibiting unreasonable searches and seizures has no application to an order requiring the production of books and papers to be used as evidence." *Id.* Although it appears that the court in Iowa Loan was referring to the federal constitution, the text of Iowa's § 8 is nearly identical to the federal Fourth Amendment. *See also United States v. Miller*, 96 S.Ct. at 1625 (assuming Fourth Amendment applies to subpoena for production of documents, requirement of no unreasonable search and seizure is satisfied if request is not too indefinite or overbroad, request is lawful and documents are relevant).

Iowa does recognize the right of privacy as a fundamental right. The right is implied in the right not to be deprived of liberty without due process of law. Iowa Const. Art. I § 9. This right, however, is narrowly construed as the freedom to make intimate decisions such as those relating to marriage, procreation, and child rearing. State v. Hartog, 440 N.W.2d 852, 854-55 (Iowa 1989), *cert. denied*, 110 S.Ct. 569 (1989).

### Work Product

Valley Bank argues that some of the documents in loan files are privileged as work product of bank officers. Counsel for Valley Bank identified these as notes and minutes of bank board meetings. The work product rule prevents the discovery of materials prepared by an attorney in anticipation of litigation. Black's Law Dictionary 1439-40 (5th ed. 1979); Diamond State Ins. Co. v. Rebel Oil Co., 157 F.R.D. 691, 698-99 (D. Nev. 1994). Valley Bank has not shown that the document requests would violate the work product rule.

### Bank Policy

Valley Bank states in its brief that it "has a confidentiality policy as to customers' financial information as suggested by Regulatory Compliance." Doc. 45, unnumbered page 5. The brief does not quote from the bank's policy statement, nor does it cite any statute or regulation regarding the confidentiality of bank records.

Valley Bank is probably under a duty of confidentiality. Customers' account information is not a matter of public record. The duty may arise in a number of ways. Iowa has codified the requirement of confidentiality in at least two instances. *See* Iowa Code § 527.1 ("electronic funds transfer systems should provide reliable service to the consumer with full protection of privacy of personal financial information"), and § 534.404(b) (limiting savings and loan association authority to release account and loan information of members). There may be a common law duty to keep customer information confidential. *Nicewander*, 16 St. Mary's L.J. at 623-27. A bank may be bound by a code of ethics or internal policy to do so. *Id.* at 627-28 & n.161. However, disclosure of information in compliance with legal process is an exception to any such duty of confidentiality.

The duty of confidentiality does not create a privilege that prevents the disclosure of bank documents. *See O'Neil v. O.L.C.R.I. Inc.*, 750 F.Supp. 551, 557 (D. R.I. 1990) (finding Rhode Island statute required confidentiality but did not create privilege). Federal courts do not recognize a "banker-customer privilege." *Id.* at 556; *see also Klatt v. First State Bank of Calmar*, 220 N.W. 318, 320 (Iowa 1928) (action to set aside transfers of stock to bank; neither existence of deposit account nor discussion of investments with banker created confidential relation between bank and depositor).

Courts that have recognized an implied contract to keep customer information confidential also recognize an exception when the bank has been served with a subpoena. *O'Neil*, 750 F.Supp. at 556; *see also Nicewander*, 16 St. Mary's L.J. at 624-26 (discussing Tournier v. National Provincial & Union Bank, 1 K.B. 461 (1924) (exception where disclosure is "under compulsion by law, as under subpoena"); Peterson v. Idaho First National Bank, 367 P.2d 284 (Idaho 1961) ("unless authorized by law"); and Milohnich v. First National Bank, 224 So.2d 759 (Fla. Dist. Ct. App. 1969) (qualified duty not to disclose without clear justification)).

## **ORDER**

IT IS ORDERED that Valley Bank's objection to deposition and subpoena is overruled, and its motion to quash is denied. The motion to compel filed by LeMars Bank is granted.

IT IS FURTHER ORDERED that LeMars Bank and Valley Bank shall have five days from the date of this order to advise the court as to whether they are able to agree on a date for the deposition and inspection of documents. If they are unable to agree, the court will choose a date.

IT IS FURTHER ORDERED that the deposition and inspection will take place at the offices of Valley Bank in Cherokee, Iowa, and that LeMars Bank will reimburse Valley Bank for photocopying expenses incurred in compliance with the subpoena.

SO ORDERED THIS 7 DAY OF APRIL 1998.

William L. Edmonds  
Chief Bankruptcy Judge