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OPEN RECORDS DIVISION

Opinion Committee

CREDIT UNION DEPARTMENT

Harold E. Feeney
Commissioner

Lynette Pool-Harris
Deputy Commissioner

RQ-0109-JC

September 9, 1999

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The Honorable John Cornyn
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Opinion Committee

FILE # MW-40982-99
I.D. # 40982

Dear Attorney General Cornyn:

As the Texas Credit Union Commissioner, I am asking for your opinion with respect to various issues that are of concern to this office and the credit union industry in Texas. Specifically, the issues revolve around the question of whether a credit union is entitled to be compensated for its costs of producing documents in response to a grand jury subpoena. A background explanation is appropriate.

In a typical situation, a credit union is served with a subpoena in connection with an ongoing criminal investigation, seeking production of a substantial quantity of documents such as membership agreements, account signature cards, account statements, loan documents, canceled checks, copies of deposit items, and the like. In many cases, it is not unusual for the investigating authority to seek records covering a period of several years. Some types of records, such as account cards and loan documents, are relatively easy to retrieve and copy. Others, such as account statements, deposit tickets, and deposited items, require substantial amounts of research time. By way of example, copies of particular deposited items are not normally maintained as part of a member's account records. To identify such items, it is necessary first to review the account statements to determine the exact date of each deposit, and then examine the microfilm copies of all items deposited on that date to locate the ones matching the information reflected in the member's account statement. When the subpoena covers a large period of time, credit union personnel can easily spend considerable time in completing the task.

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It is also customary for credit unions not to retain copies of canceled checks, but rather to use a third party processor. The servicing agreement between the credit union and the processor usually requires the credit union to pay a fixed fee for each reproduction.

Normally, the investigating authority maintains that it has no obligation to compensate the responding credit union either for its research time or for actual expenses in obtaining copies. Similarly, the investigating authority asserts that the credit union has the responsibility to obtain copies of the checks from the processor, even though the credit union does not actually maintain copies in its possession. With respect to many subpoenas, the investigating authority has taken the position that the credit union is not entitled to its expenses because the investigation of criminal offenses is specifically excluded by Section 30.007, Civil Practice & Remedies Code.

The last session of the Texas Legislature amended Section 30.007, Civil Practice & Remedies Code, effective September 1, 1999. It now provides that civil discovery of a customer record maintained by a financial institution is governed by Section 59.006, Finance Code. There is no indication of what law applies to criminal discovery of similar records. Since Section 59.006 is the exclusive method for civil discovery, there is an exclusion for criminal investigations.

Section 125.402, Finance Code, provides that a credit union is not required to disclose or produce to a third party records pertaining to the affairs of a credit union member, with a response to a subpoena or other court order being one of the exceptions. Obviously, a credit union has a duty to respond to a proper subpoena by producing the documents. However, Section 125.403, Finance Code, provides that a credit union is entitled to recover from a third party the reasonable costs actually incurred in producing records "under this subtitle or other applicable law" (emphasis added). The only exception is for costs incurred in connection with an examination or audit by a government agency authorized by law to examine credit unions. Since the Legislature did not see fit to repeal or amend Section 125.402, it appears that it must still apply to some form of compelled discovery as Section 59.006 now controls civil discovery involving customers of financial institutions.

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From a plain reading of this statute, it would appear that a credit union is allowed to recover its reasonable costs in producing records in response to a grand jury subpoena or other similar process involving a criminal investigation. Without offering any authority, the investigating agencies have historically disagreed and have typically responded with a threat of contempt sanctions should the credit union not comply.

Accordingly, I seek your opinion on the following issues:

1. In responding to a grand jury subpoena or similar process issued in connection with an ongoing criminal investigation, is a credit union entitled to recover from the investigating agency the reasonable costs actually incurred in disclosing or producing the records?
2. If so, what elements are included within the costs that can be recovered – i.e., does the “cost of reproduction” include the cost of research and investigation time?
3. If a credit union does not maintain copies of its members’ canceled checks but copies are retained by a third party processor, are those records within the credit union’s “possession” within the meaning of Article 24.02, Code of Criminal Procedure?
4. If so, are the fees paid to the processor for obtaining copies a recoverable cost under Section 125.403, Finance Code, for criminal discovery procedures?

Your response to these questions would be appreciated.

Respectfully submitted,



Harold E. Feeney
Credit Union Commissioner

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