

An Unrestricted Invitation to Injure, Steal and Conceal

California State Senator Steve Peace's
"The Personal Privacy Act of 1999"
(Introduced in the California Senate)
SB 129

Rep. James A. Leach, R-Iowa.
"The Financial Information Privacy Act of 1999"
(Introduced in the U.S. House of Representatives)
HR 30, now HR 10

Sen. Paul S. Sarbanes, D-Md.
"Financial Information Privacy Act of 1999"
(Introduced in the U.S. Senate)
S.187

Sen. Phil Gramm, R-Tx
The Financial Modernization Act of 1999
(Introduced in Committee and signed into law by President Clinton November 12, 1999)
S.900

Legislation introduced by California State Senator Steve Peace as SB 129 states that whatever you need to know, whoever it is that you need to know it about, regardless of a legitimate legal need to know the information, you will not be allowed to learn the required information about them through public records without the subjects written consent.

Legislation introduced by Representative James A. Leach, R-Iowa, as HR 10 changed to HR 30, as well as S.187 by the same title was introduced into the Senate by Senator Paul S. Sarbanes, D-Md., was recently passed as S. 900, authored by Sen. Phil Gramm, R-Tx has been signed into law by President Clinton on November 12, 1999. It is now a federal felony to obtain financial information by "pretext" regardless of the suspected or known fraud without the specific written authority of the suspect individual or entity involved.

It is referred to as the "Financial Modernization Act of 1999". And provides for chilling sanctions for the release and the obtaining of financial information from a financial institution. The purpose of the legislation is noble but short sighted. The stated goals are admirable to be sure, introduced for what, at initial consideration, seem like very sound reasons motivated in part by paranoid, alarmist, overly hyped, partially accurate, inflammatory media reports--usually during ratings season.

In effect, this law provides a cocoon of absolute protection and sanctuary for the person(s) or entities known to be committing frauds and swindles simply because they happen to have a bank account in any of the contiguous United States of America. Heretofore, the swindler had to immediately wire transfer his ill gotten gains to an off shore account usually through the Isle of man for a few moments then with the click of a computer mouse to the Caribbean or some other location off shore that was receptive to the receipt of funds obtained by fraud, or obvious illegal means, potentially including those funds laundered by the drug cartels.

There will no longer be a need for the wrongdoer to make a modicum of effort to secret his ill gotten gains since the law now provides a shield against discovery simply because they have a bank account. After all, why should the swindler, fraudster or drug lord incur the extra expense or expand the time or effort and be bothered by the necessary details of maintaining an off shore account when the Federal government has created a mechanism to provide the same, if not better protections within the United States.

Asset profiles can still be determined by inference at substantial time and expense without fear of reprisal under this legislation. However, by the time that you have determined with reasonable certainty the location of a wrongdoers funds, those funds will be removed to yet another location or financial institution, again by the click

of a computer mouse. You then start the process and incur the expenses of locating those same funds anew.

The sanctions for a yet to be explained reason are substantially more severe if the information is acquired by “pretext.” The sanctions apply to only those individuals and entities that obtain the information in this fashion and does not provide for sanctions for those in the chain of acquisition and release. Thus an attorney or other entity who request the acquisition of the information are exempt from the sanctions. The sanctions only apply to those that obtain the information through “pretext.”

As a practical matter, the legislation is wrong-headed and has not been clearly thought through as to the realities of accomplishing its stated intent. The bill creates a cocoon of protection and absolute financial privacy for those of our society willing to plunder, injure, steal and defraud their fellow citizens. It allows the crooks and wrongdoers of our society to be unaccountable...with the assistance of the federal government, in effect providing a safe harbor. A black market for the information obtained through pretext will flourish. Prohibitions against legitimate legal activity never works but always encourages those engaged in such activity to go underground and discretely sell their services to the highest bidder.

James Madison and Alexander Hamilton correctly stated when referring to the enactment of legislation as having to meet a minimum of three prerequisites before serious consideration, acceptance and being signed into law: “Reason, consequence and the facts of the situation giving rise to the legislation. And cautioning if this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature as well as on the people, the people will be prepared to tolerate anything but...liberty. (The New York Packet, Feb. 19, 1788.)

Each piece of legislation, as currently worded ignores Madison and Alexander’s well thought out caution and has an exemption for the needs of governance and law enforcement.” Governance and Law enforcement is not obligated to make themselves subject to the same restrictions as they would have the ordinary “people” adhere.

One need not stretch the thought processes to conclude that the well connected--ergo, the heavy financial contributors to state or federal legislators promulgating these laws, will be (defacto) exempt as well when they or those near to them are adversely impacted by a fraud or catastrophically damaged in some way. Those entities with a deep financial pocket will as a practical matter also be exempt and will have the ability to locate someone willing to provide the information for the right price. It is naive to think otherwise.

There is a far easier, less complicated way to insure privacy, confidentiality and protect consumers presuming that is the true intent of the legislation and there is no underlying hidden agenda.

A “Special Master” with the authority to issue an ex parte “Writ of Assistance” is but one of many possible answers to this mythical need for absolute personal privacy. I will comment on this theory in more depth later.

It is not uncommon for corporations to attempt to change historical information of their executives actions and decision-making. This scenario occurs most often when there is a perceived need to hinder, defraud or delay the consumers and other aggrieved parties in their pursuit of appropriate redress.

A classic example of this effort by corporations is clearly depicted in the recent film “The Insider” about what has become known as the tobacco wars. This legislation provides corporations and executives a firewall against personal accountability because of perceived intrusive scrutiny when they have broken the law or conspired to hide evidence and assets.

It is not fiction the use of computers makes it easier to assimilate public information on any given person or entity. Basic data processing also known as data mining, does nothing more than rapidly collate potentially related information and sort out patterns of activity. This rapid process is actually a desirable system since related rele-

vant and accurate up to date, current material and information can be efficiently compiled, as opposed to the daunting task it was before the personal computer and the Internet or accessible on-line commercial databases.

Naturally, if it is your desire to obfuscate, mislead, commit fraud or otherwise steal or injure others and escape personal accountability for egregious or illegal activity, then the more time consuming, financially costly it is to assimilate and collate materials, the better. King George III of Great Britain, in reference to his tyranny, was criticized on this very issue on April 20, 1777 in Kingston New York, when this initial but primary complaint was considered of sufficient importance by the framers of the Constitution to make specific reference thereto as follows:

“He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, (emphasis added) for the sole purpose of fatiguing them into compliance with his measures.”

However if you have done nothing which could be viewed as against the public interest, you have the strength of character, the resolve and willingness to stand personally accountable for any real or imagined wrongs committed, then your support of the above legislation is misguided and should be given serious reconsideration. It has been noted that the world’s best privacy policy (even those in the European Community) are absolutely worthless...if not followed. (David Brin, page 64 “The Transparent Society”)

The bills’ titles--“Personal Privacy Protection Act of 1999” and “The Financial Modernization Act of 1999”, should be renamed the “1999 Act to Legalize Unrestricted, theft, swindling and Injuring.” Further, enactment of these bills have provided for lifetime income and employment of illegal rogue information brokers, private investigators, insurance adjusters and attorneys, fraudsters, swindlers, thieves, child molesters, defendants, plaintiffs and others of like mind.

They encourage people to engage in illegal activities and creates the ability to hide assets from a potential judgment, financial recovery for the swindled, the wronged or the opportunity to assist in the collection enforcement of unpaid child support payments. And others involved in litigation from independent legal verification of sworn affidavits, answers to interrogatories garnered in the discovery phase of the legal process will necessarily be relied on even less since there will be no means of independent verification.

The four bills will encourage fraudsters, swindlers, deadbeats to continue their activity while insulating and encouraging executives to increase despicable efforts to damage, steal and injure the consumer without fear of corporate or personal accountability as well. At the same time, the bills create an equally hideous need by defendants, plaintiffs as well as others similarly situated to obtain information illegally thus the creation of a black market for the necessary information to bring the foregoing to justice. It will also leave little option for those that are currently acting legally to cease doing so, forcing them to participate in the black market or to find other legal employment.

The proposed legislation will provide justification for those so inclined to go to whatever lengths to obtain any information sought for any whim, regardless of the existing law...(if, as always is the case) and will continue to be the case...if the price is right. It is naive to think this does not already happen and will continue to happen, but fortunately because most information needed in litigation and criminal defense is currently public and reasonably available under clearly defined circumstance, the “black market” type of effort is somewhat curtailed and limited.

SB 129 is a meaningless fuzzy piece of “feel good,” vote-generating legislation that fails to accomplish what needs to be accomplished. It fails to do what has been requested to be accomplished by every legal investigator, adjuster, attorney that I have known in my 20 plus years of practice. I do not know a legitimate information bro-

ker or allied para or professional that does not support much of the noble and lofty goals intended in these bills. It is the absolute closure to any access by any source for any reason (other than governance or law enforcement) that is adverse to the public interest.

Many corporations are merging (especially in the financial world) not necessarily for only the monetary assets, but for the databases of information maintained by the acquired organization which will be cross referenced or mined for related strings of data about specific individuals, corporations, and competitors. Additional laws are being introduced to preclude information from migrating for the use of or to the databases of the acquiring conglomerates. The only way this prohibition will be enforced will be post incident. The collection of such evidence will be all but impossible without the use of "pretext" extraction, a disgruntled current insider, former employee or the use of public records.

Once it is necessary to obtain personal or financial information for any reason, these bills, in part, require the following hurdles to be overcome by compliance. (compliance which is all but insurmountable in view of the first requirement) All other requirements are for the most part already adhered to by the very nature of the business of an information broker or legal investigator:

1. That an individual be provided the opportunity to choose whether, (a signed authorization is required) and the manner in which, a third party may use or obtain the information within public records.
2. That the third party provide the same level of privacy protection as the information gatherer.
3. That reasonable measures be taken to ensure the reliability of personal information for its intended use.
4. That reasonable precautions be taken to protect personal information from either loss, misuse, or unauthorized access, disclosure, alteration or destruction.
5. That individuals be provided reasonable access to information about themselves, together with the ability to correct or amend inaccurate information.

In addition, SB 129 will establish two requirements that would be applicable to both the collection and maintenance of personal information:

1. That it be relevant for the purposes for which it was gathered.
2. That the data be accurate, complete and current.

A more detailed legal analysis has been provided, which I have borrowed from Terry Francke, Esq., legislative advocate of the California First Amendment Coalition, soon to be published in the Los Angeles Daily Journal which demonstrates the level of absolute total control the individual will have over public information about themselves. And I quote:

1. "Unless specifically authorized by law," bar any "organization" governmental, commercial or nonprofit from collecting "personal information" about an individual, for any purpose, without his or her informed consent.
2. Require the organization to inform the individuals concerned as to the type of information it collects, how it does so, its purposes in doing so, the organizations to which the information will be disclosed, and the choices available to individuals to limit the use and disclosure of the information.
3. Require the organization to give individuals the opportunity to choose whether and how personal information

they provide is used, including control over whether and how the information may be used by organizations to which it is transferred (assuming transfer is approved).

4. Require third-party possessors of the information (presumably meaning those organizations that acquire it by transfer from the original collectors) provide at least as much privacy protection as the collectors.

5. Require organizations to keep personal information "accurate, complete and current," and prohibit the collection and maintenance of personal data not "relevant for the purposes for which it has been gathered."

6. Require organizations to provide individuals with "reasonable access to information about themselves" and to allow them to "correct or amend" inaccuracies.

7. Require organizations "creating, maintaining, using or disseminating records of personal information" to take "reasonable measures to ensure its reliability for intended use" and to take "reasonable precautions to protect it from loss, misuse, unauthorized access or disclosure, alteration, or destruction."

Violations would be misdemeanors punishable by a fine of up to \$5,000, or a civil penalty in the same range. Civil remedies for the aggrieved individual would include injunctive relief and damages, plus attorney's fees and costs.

Rep. Leach, Sen. Sarbanes, and Sen. Gramm's enacted Financial Modernization Act 1999 provides for many of the same or similar prohibitions (albeit worded differently) with far more costly sanctions directed specifically to the financial and investigational services community.

In the real world, most of the preceding requirements are already being complied with and have been complied with to the best of my recall for the past few hundred years. The free market requires it. This is a requirement to do what is already being done, and seems unnecessary and redundant. I can just imagine going to a suspected fraudster, swindler, deadbeat, and saying, Hey, I have reason to believe you have committed a fraud, or stolen from the public at large...Here won't you please, please sign this authorization so I can obtain access to the information which will at best make you honestly accountable, at worst, send you directly to jail without passing goal.

I am equally sure the subject of such a request will fall all over him or herself to sign such an authorization! Oh, by the way, sign this authorization without consulting with your attorney as well. Yeah, right!

Don Ray, author of "Public Records Primer and Investigators Handbook, the California Edition," as well as several other similarly related texts, points out over 100 actions an individual must take to maintain anonymity from bonafide research. This shows the futility of the suggested legislation as currently structured. Further, it suggests the information that must be redacted when someone enters a state or federal witness protection program. I will mention but one or two, suggesting a visit to his home page along with a close careful review of www.donray.com/donray, or in the alternative for his 104 tips on how to remain absolutely private go to www.privacyrights.org/donray.htm.

A simple matter such as a telephone number must never have been obtained. If you have ever, had a telephone, you can be identified! The application contains additional personal information as well such as where you are employed, your income and who to contact if you are not available in an emergency. The calls that you have made outside your primary area code can be determined and by extension, anyone or entity you have contacted, including your bank(s) and stock brokers, following which information about your financial standing can be obtained.

If a telephone number is unlisted, then all records and access thereto must be "passphrase" protected by a sen-

ior executive of the telephone company in order for it to remain private. The telephone companies themselves are already and have been selling for sometime the “unlisted numbers” to telemarketers. All communication must be either scrambled or encrypted. Certainly, all bills must be paid in cash, however, with the FDIC program of “Know your Customer,” (now defeated and withdrawn, but again being promoted behind the scenes in the halls of congress) your banker would have been required to complete a “Customer activity Report” (CAR) on any transaction in excess of \$100, or a “Suspicious Activity Report” (SAR) if you deal in cash alone. Thus a written document and identifiers are created and someone somewhere for the right price for any real or imagined need will be able to obtain that information about you.

Regardless of how badly you have been swindled, defrauded, injured or stolen from or raped, never report the incident or litigate over the issue. Litigation involves the divulgence of information within interrogatories. However, sense the above legislation is now the law of the land, lie (since no one will be able to independently verify your responses anyway).

Rep. Leach, Sen. Sarbanes, Sen. Gramm and State Sen. Peace have an equally misguided ally in the appointment of the new National Privacy Czar, Ohio State University law professor Peter Swire, co-author of a recent book on privacy issues.

In a recent interview as reported by Technology News (March 5, 1999) Swire is quoted as implying that big companies are already subject to intense scrutiny and their problems on privacy issues can be self-regulated. I suppose that was Ford Motor Co.’s thinking when it developed the Pinto fuel tank and decided for the sake of a few dollars, not to provide an inexpensive, easily installed system that would have reduced the potential for an exploding gas tank in a rear-end collision. More than a billion dollars was recently awarded against General Motors for similar reasons.

It took an attorney with the finances and crusading consumer attitude of Mark Robinson Jr. and his investigators to show the inherent flaws of “self-regulation.” Thomas and John Girardi, brothers in the Law Offices of Girardi and Keese, had to point out similar misguided thinking to the Los Angeles Rapid Transit District, Lockheed Aircraft and several petro chemical companies to the tune of hundreds of millions of dollars as did Sanford M. Gage, Esq., to the Los Angeles Unified School District. Raymond Paul Johnson, Esq. Continues to demonstrate the fality of corporate or governmental self regulation in federal whistle blower cases and failed cockpit jettison devices in combat aircraft. I could go on , but you get the point.

Swire also stated, “but there are all sorts of issues,” with smaller companies. (The implication is small companies are more likely to deliberately break federal or state law, knowing that multitudes will suffer damage and injury) Not one of the named defendants in any of the above matters involved a small company. Quite the contrary, they involved the largest, the U.S. government and its procurement and testing practices. Government is not benevolent nor is it a non-profit charity. Government only wants you to believe it is. Swire continued to say some regulation may be necessary.

The key word here is “some regulation,” which seems benign and which is difficult to argue against...but to paraphrase President Clinton, it is a matter of exactly what the meaning of “some” “is.”

Swire is supported by Joel Rodenberg, a law professor at Fordham University in New York, who in the same article is quoted as saying, “Time is up, the U.S. is diametrically opposed to the rest of the world where the trend is to adopt a set of privacy standards.”

The implication is the United States must come into line with the so-called privacy standards demanded by the European Community since same was developed by 29 of the largest countries in the world. Another implication is (as stated for the justification of part of SB 129) the United States and it’s economy in the future is based

solely on our economic interest in Europe.

It would seem continued access to the seven trillion dollar United States market is as important to the Europeans as theirs will be or is to us. Further, since these privacy ground rules were developed by 29 of the largest forward-thinking countries (which is why I suppose the lion's share of the war effort in Kosovo and the Persian Gulf is left to the United States) their approach to privacy is right and ours, again by implication according to Rodenberg is wrong.

We are just as wrong in this view today from Rodenberg and Swire's perspective, as we were in our collective view of Adolph Hitler, Joseph Stalin, Idi Amin, Pol Pot ,now Slobodan Milosevic and many others who, took advantage of a closed governance to reek havoc on the populace they ruled as tyrants. I continue to be amazed at how we fail to learn from our forefathers. James Madison stated that,

“Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power that knowledge gives.”

The possible answer is a “Special Master,” who upon exparte application and appropriate filling fees and substantial bond having been paid and posted, could issue a hybrid of Colorado's “Writ of Assistance” under clearly defined circumstances, much like the criminal equivalent of a search warrant.

If it can be shown following conclusion of the activity for which the information has been elicited, the information gatherer who had requested the “writ” from the “Special Master” had misled, deceived or otherwise misdirected the process, the applicant should be subject to the severest of exemplary and punitive damages.

Relief for misleading the “Special Master” to obtain a “writ” should rightly be precluded from being incorporated within any underlying resolution such as the then involved litigation, alternative dispute resolution, arbitration and negotiated settlement process. It must remain separate and apart from all other wrongs, negligently or deliberately inflicted. Redress and compensation for intrusive inquiry by a false or misleading application for the issuance of the proposed writ and related immunity can not be allowed to be inclusive within the underlying cause of action.

It must be litigated and resolved separately at a subsequent time. If the preponderance of evidence clearly demonstrates the foregoing, the information gatherer/requester should be held accountable for all sanctions available within the jurisdiction. Immunity and the mandate provided by the issuance of the writ is rescinded retroactively and the bond must be immediately forfeited.

The Special Master system can be supported by the fees that are required when the application is made to avoid any additional layer of taxpayer expense. The system and the related cost must be totally supported by the cost of application. The program as initially envisioned by this author already has the mechanisms in place for implementation at all levels of governance. There is no need for new or an additional beauracacy. The judiciary already in place will welcome the additional income from the filling fees.

As an example, presume there is a matter which requires access to what might be considered confidential or closed records of a given individual or commercial entity by an attorney contemplating litigation. The Legal Investigator then completes the necessary exparte application, post the required substantive bond, submits same to the Special Master, who in turn grants a writ if the clearly defined standards for issuance is met, providing immunity and authorizing access to the information gatherer.

The legal investigator is then allowed to obtain all information authorized, using all available tools and skills including but not limited to pretext accumulation, unencumbered by any restriction, having been granted an

immunity from allegations of intrusive invasion of privacy, so long as there is no representation of being a representative of governance or a law enforcement officer.

The writ will only be displayed or used in those situations wherein there is a stonewalling by the holder/possessor of the information sought, such as that contained within the commercial on-line databases of information brokers. The mandate and immunity would by extension apply to any holder of the sought after information. These sources of information would have a separate, distinct civil cause of action as well, if it is later shown by a preponderance of the evidence the Special Master had been misled, which resulted in the unwarranted issuance of the writ and the release of information in violation of the law mentioned herein.

In questions of allegations of absolute confidentiality, upon a showing of the writ, the information being sought must be supplied forthwith without notification to the entity, even to the extent of an impoundment in extreme or issues of great urgency to the Special Master or a freeze of the subject's resources. In the event the investigator is researching for a detailed story in the press of suspected wrongdoing, then of course, the information can be obtained but there would be no impoundment of the resources of the entity but the inquiry remains confidential and without notice to the entity.

The system as outlined is just that, a broad outline which will require substantial tightening and tweaking. However, it is a beginning and a step in the right direction. It will accomplish perhaps, compliance with the European Community desire for privacy and yet allow the United States to continue to participate within their economic market without unnecessary impediments. It must be recognized that additional restrictions to public and private information are in the pipeline and are being actively sought by very credible organizations and individuals...because of very flawed reasoning, without concern for the real world consequences, nor the true facts behind the inflamed rhetoric of the partially or completely misinformed.

When proposals such as SB 129, HR 30, S.187 or S.900 are put forward, one needs to ask themselves, how and by whom, are the watchers going to be—watched? Public records paid for and maintained at taxpayer expense including voters registries and department of motor vehicles must remain just that and be returned to the public for open access under clearly defined circumstances. According to author Brin, wherein he quotes Joseph Pulitzer as having stated clearly and succinctly the following:

“There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy.”

Brin credits Hal Norby when he recites; “Sacrificing anonymity may be the next generations price for keeping precious liberty, as prior generations have paid in blood.”

This writer can not recall anything with which he agrees more.

