

AGENTS' INSTRUCTIONS CONCERNING SUBPOENAS COVERED BY THE RIGHT TO FINANCIAL PRIVACY ACT

The Right to Financial Privacy Act (hereafter, the “Act”)¹ affects subpoenas served on a “financial institution” for records concerning a “customer” of that financial institution as defined by the Act. “Financial institution” basically includes traditional banks and savings and loan institutions, credit unions, and credit card issuing institutions. Investment firms, for example, would not be financial institutions under the Act unless they issue credit cards or offer draft accounts. “Customer” includes an individual or a partnership of five or fewer partners. Larger partnerships and corporations (regardless of the number of corporate owners) are not “customers” under the Act.

The purpose of the Act is to provide added privacy to a customer’s financial records. Concerning subpoenas for financial records,² the Act requires that a customer be notified of the Government’s intention to obtain financial records prior to the actual service of a subpoena. Upon receiving such notification, then, a customer may file a motion in Federal district court to challenge the subpoena. To prevail, the customer must be able to show that the records sought are either not relevant to your investigation, are unduly broad in scope, or that the investigation itself is either unauthorized or baseless. Accordingly, most challenges are unsuccessful because subpoena requests are screened for the same attributes before they are approved.

SUBPOENA REQUEST PACKAGES

In addition to the standard documents (request memo, cover letter to the subpoena recipient, draft subpoena, draft appendix, Privacy Act notice, and Certificate of Compliance) included in a subpoena request, subpoena requests for financial records subject to the Act must also include:

- Customer notice letter
- Statement of customer rights under the Right to Financial Privacy Act
- Instructions for completing and filing a motion and sworn statement
- Blank motion form
- Blank statement form
- Certificate of Service³
- Certificate of Compliance⁴

¹ 12 USC 3401 et seq.

² It is permissible under the Act for banks to reveal the name and account number of a customer without a subpoena. Some will still demand a subpoena for such information, however. In those cases, simply include, in your subpoena request, words describing the financial institution’s refusal to provide the information. The IG will then issue a subpoena rather than debating the matter.

³ Customers use this form to notify the investigator that the customer is, or has filed a motion with a particular court. While the form is provided to the customer, there is no legal requirement for the customer to so notify the investigator. Therefore, investigators may not assume that a motion has not been filed simply because the investigator did not receive a certificate of service.

Be sure to include, in your customer notification letter, the address and phone number for each Federal district court (clerk's office) where the customer may file a motion to challenge. Generally, that would include the court having jurisdiction over the customer's place of residence, and the court for the Eastern District of Virginia (location of the DoD Inspector General).⁵ In overseas cases, include the court having jurisdiction in the geographical area covering the customer's home of record and/or last place of residence. The court for the District of Columbia also hears cases involving extraterritorial jurisdiction. A good resource for locating district court offices is found at <http://www.uscourts.gov/links.html> .

REQUIRED INVESTIGATOR ACTIONS FOLLOWING RECEIPT OF SIGNED SUBPOENAS FOR FINANCIAL RECORDS AFFECTED BY THE ACT

1. Serve notice on the customer by providing:
 - a. Notice to customer
 - b. Statement of customer rights under the Right to Financial Privacy Act
 - c. Copy of the subpoena and appendix (if there is an appendix)
 - d. Instructions for completing motion and statement
 - e. Blank motion form
 - f. Blank statement form
 - g. Certificate of Service
2. Customer can be notified in person or via certified mail (return receipt).
3. Wait for a period of 10 business days following in-person notification and 14 calendar days following notification by mail.⁶
4. Contact the clerks of court in all potential jurisdictions. Unless there is already an open criminal or civil case with the court, the motion you are looking for will likely be treated as a miscellaneous civil filing.
5. If a motion to challenge has not been filed, serve the subpoena on the financial institution and provide them with your certificate of compliance. If a motion to challenge has been filed, obtain as much information about it as possible from the court clerk and contact the DoD IG subpoena program manager and your Assistant US Attorney/military Staff Judge Advocate. The court may rule with no further action required on your part, or the Government may need to file a counter motion. You may not serve the subpoena until the court has denied the customer's motion.

⁴ Form completed by the investigator and provided to the financial institution certifying that the investigator has complied with the requirements of the Right to Financial Privacy Act, i.e., that the investigator has properly notified the customer and waited the requisite 10 or 14 days prior to taking custody of the subpoenaed documents.

⁵ 401 Courthouse Square, Alexandria, VA 22320. Phone: (703) 299-2100

⁶ Under Rule 6 of the Federal Rules of Civil Procedure, in computing the waiting time, the day that notice is made is not counted in the total. Additionally, if the 10th or 14th day is Saturday, Sunday, or legal holiday, or the office of the clerk of court is not accessible that day due to inclement weather, the final day will be the next day that is not one of the aforementioned days. When the period of time is less than 11 days, such is the case for RFPA subpoena service when the notification to the customer is in person, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation. In other words, when counting 10 days after notifying a bank customer in person, count only business days. "Legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President of the Congress of the United States, or by the state in which the district court is held.