

1981

Discovery and the Privacy Act: Exemption (b)(11) to the Conditions of Disclosure: What Qualifies as an "Order of the Court"?

John W. Williams

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Criminal Procedure Commons](#), [Evidence Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

John W. Williams, *Discovery and the Privacy Act: Exemption (b)(11) to the Conditions of Disclosure: What Qualifies as an "Order of the Court"?*, 15 U. Rich. L. Rev. 439 (1981).

Available at: <http://scholarship.richmond.edu/lawreview/vol15/iss3/2>

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

UNIVERSITY OF RICHMOND LAW REVIEW

VOLUME 15

SPRING 1981

NUMBER 3

DISCOVERY AND THE PRIVACY ACT: EXEMPTION (b)(11) TO THE CONDITIONS OF DISCLOSURE: WHAT QUALIFIES AS AN "ORDER OF THE COURT"?

*John W. Williams**

I. INTRODUCTION

On December 31, 1974, President Gerald Ford signed the landmark Privacy Act of 1974¹ into law. One of the key concepts of the Act is the principle of disclosure limitation, which limits the ability of the federal government to disclose the contents of personal records in its possession.² In the words of the Senate Governmental Operations Committee, this principle "is designed to prevent . . . the wrongful disclosure and use of personal files held by Federal agencies."³

The disclosure limitation principle, codified in paragraph (b) of the Act, "Conditions of Disclosure," requires that the government agency must first have a person's written consent before it can release or distribute any personal information from that person's

* Attorney, Civil Rights Division, Department of Justice, Washington, D.C.; J.D., George Washington University, 1980; B.A., Principia College, 1976. The views here expressed are those of the author and do not represent the position of the Department of Justice.

1. Privacy Act of 1974, 5 U.S.C. § 552a (1976), as amended by Pub. L. No. 94-183, 89 Stat. 1057.

2. See Privacy Protection Study Commission, *Personal Privacy in an Information Society*, 501-02 (1977).

3. S. REP. No. 93-1183, 93d Cong., 2d Sess. 1 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6916.

file.⁴ Wrongful or unauthorized release of personal information can result in either civil or criminal penalties against the government official responsible.⁵ The paragraph, however, allows for a number of exceptions to the requirement of prior written consent.⁶

The last exception allows the government to disclose personal information in response to a court order.⁷ On the surface, this exception seems quite reasonable. First, since a court order is presumably a mandatory judicial command which the government must either obey or risk punishment, it stands to reason that the government should not be required to obtain prior consent before making a release to the court. If the government was required to obtain release consent and was unable to do so, it would risk punishment for a situation over which it had little or no control. Furthermore, it should not be punished for adhering to the letter and spirit of the law in protecting constitutionally-grounded rights. Finally, it is reasonable to expect that the courts would exercise at least the same concern for an individual's personal privacy that the Act requires of the executive branch.

Unfortunately, a simple definitional problem, which has yet to be fully resolved, stands these assumptions on their heads. The Congress, neither in the statute or in the legislative history, adequately defined the meaning of "an order of a court." In particular, the Congress failed to specifically include or exclude subpoenas in the definition. If subpoenas are to be considered court orders for the purposes of the Privacy Act there will be potential for a grave undermining of the purpose of the Act.

This article will attempt to answer the question of whether a subpoena is a court order for the purposes of the Privacy Act. If it is a court order then the government would be required to disclose personal information without either prior approval or minimal judicial review. This article will point out that the subpoena and the discovery process fail to provide the safeguards found in the Act or expected from the court. However, if a subpoena is not a court order, the government can refuse to disclose personal information

4. 5 U.S.C. § 552a(b) (1976).

5. 5 U.S.C. §§ 552a(g)(D), (i)(1) (1976).

6. 5 U.S.C. §§ 552a(b)(1)-(11). *See note 21 infra.*

7. 5 U.S.C. § 552a(b)(11).

until consent is obtained or a judge scrutinizes the need for the information and issues an order. In doing so, the private citizen, as well as the government official who is liable for wrongful releases, continues to receive some measure of protection.

II. PROTECTION OF PERSONAL PROPERTY

Congress, in enacting the Privacy Act of 1974,⁸ declared "the right to privacy is a personal and fundamental right protected by the Constitution of the United States."⁹ Congress found that the privacy of an individual is directly affected by the dissemination of personal information by federal agencies,¹⁰ and that it was necessary and proper to regulate this dissemination of information.¹¹ The purpose of the Privacy Act "is to provide certain safeguards for an individual against an invasion of personal privacy"¹² by permitting the individual to determine what records pertaining to him can be disseminated¹³ and by permitting the individual "to prevent records pertaining to him obtained . . . for a particular purpose from being used or made available for another purpose without his consent."¹⁴

In order to achieve these goals, Congress prohibited federal agencies from disclosing any record contained in a system of records except pursuant to the written consent of the individual to whom the record pertains.¹⁵ This requirement is firm in its prohibition of disclosure of personal information "by any means of communication to any person, or to another agency."¹⁶ As a result, fed-

8. 5 U.S.C. § 552a and provisions set out (1976). See S. REP. No. 93-1183, 93d Cong., 2d Sess. 4 (1974) and H.R. REP. No. 93-1416, 93d Cong., 2d Sess. 4 (1974), reprinted in SOURCEBOOK ON PRIVACY, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974 (1976) (for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, price \$12.45) [hereinafter cited as SOURCEBOOK ON PRIVACY].

9. Privacy Act of 1974 § 2(a)(4), 5 U.S.C. § 552a note (a)(4) (1976).

10. *Id.* § 2(a)(1), 5 U.S.C. § 552a note (a)(1) (1976).

11. *Id.* § 2(a)(5), 5 U.S.C. § 552a note (a)(5) (1976).

12. *Id.* § 2(b), 5 U.S.C. § 552a note b (1976).

13. *Id.* § 2(b)(1), 5 U.S.C. § 552a note b(1) (1976).

14. *Id.* § 2(b)(2), 5 U.S.C. § 552a note b(2) (1976).

15. *Id.* § 3(b), 5 U.S.C. § 552a(b) (1976). See *Zeller v. United States*, 467 F. Supp. 487, 503 (E.D.N.Y. 1979); *Local 2047, Am. Fed'n of Gov't Employees v. Defense Gen. Supply Center*, 423 F. Supp. 481, 483 (E.D. Va. 1976), *aff'd*, 573 F.2d 184 (4th Cir. 1978).

16. Privacy Act of 1974 § 3(b), 5 U.S.C. § 552a(b). Guidelines established by the Office of Management and Budget indicate that "any means of communication" includes oral, writ-

eral agencies must take steps to verify the identity of the person seeking the information or to provide for prior written consent. For example, the U.S. Department of Justice requires that a person establish his identity by (1) presenting, if in person, a document bearing a photograph, such as a passport or identification badge, or two items that bear both a name and address, such as a driver's license or credit card; (2) providing, if by mail, a signature, address, date of birth, place of birth, and one other identifier, such as a photocopy of an identification card; or (3) submitting, either in person or by mail, a notarized statement swearing to his identity under the penalties for false statements pursuant to 18 U.S.C. § 1001.¹⁷ If the requesting individual is accompanied by another person, both are required to sign a form indicating that the Justice Department is authorized to discuss the personal information in the presence of the accompanying individual.¹⁸ Certain information is even more carefully protected, such as FBI identification records or "rap sheets."¹⁹ A request for a rap sheet must be accompanied by the requester's name, date and place of birth and a set of "rolled-inked" fingerprint impressions on standardized cards.²⁰

III. EXCEPTION (b)(11)

The Privacy Act prohibits the federal government from disclosing personal records unless certain conditions are met, but Congress has provided for eleven exceptions to those conditions.²¹ To-

ten and electronic or mechanical transfers between computers. *Privacy Act Implementation: Guidelines and Responsibilities*, 40 Fed. Reg. 28,948 (1975) [hereinafter cited as *OMB Guidelines*].

17. 28 C.F.R. §§ 16.41(b)(1)-.41(b)(3). For citations to the regulations promulgated by various federal agencies, see C. MARWICK, *THE 1980 EDITION OF LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT 168-70* app. (5th ed. 1979) [hereinafter cited as *LITIGATION MANUAL*].

18. 28 C.F.R. § 16.41(d) (1980).

19. FBI identification records or "rap sheets" are listings of fingerprints submitted to the FBI by other agencies or institutions in connection with arrests, employment, naturalization or military service. 28 C.F.R. § 16.31 (1980).

20. 28 C.F.R. § 16.32 (1980).

21. Privacy Act of 1974 § 3(b), 5 U.S.C. § 552a(b) (1976) lists the conditions and exceptions as follows:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

gether, these exemptions allow the federal government to disseminate information so long as any disclosures under the exceptions are "appropriate and consistent with the letter and intent of the Act and [the Office of Management and Budget] guidelines."²²

"The listed circumstances are broad enough to allow disclosure in almost all situations where there is a legitimate need for disclosure,"²³ however, disclosure is permissive, not mandatory.²⁴ The OMB guidelines clearly direct that "nothing in the privacy act (sic) should be interpreted to authorize or compel disclosure of records, not otherwise permitted or required, to anyone other than the indi-

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

22. *OMB Guidelines, supra* note 16, at 28,953.

23. Note, *The Privacy Act of 1974: An Overview*, 1976 DUKE L.J. 301, 311 (1976). The author continues: "Indeed, one may question whether the consent provision provides a real limitation upon agency activity." *Id.*

24. *OMB Guidelines, supra* note 16, at 28,953.

vidual to whom a record pertains pursuant to a request by the individual for access to it."²⁵

The eleventh exception, (b)(11), permits disclosure without consent of the subject of the information pursuant to an order of a court of competent jurisdiction.²⁶ This clause has been noted by commentators as one of the two or three "controversial"²⁷ or "questionable"²⁸ exceptions. These concerns arise in part because of the sparse language of the (b)(11) exception. The final text of the clause deleted a provision which would have given advance notice to individuals in order that those persons would have been able to seek legal relief from the demand for records in advance of their dissemination.²⁹ The Senate proposal of exception (b)(11) included an advance notice provision which provided that every federal agency covered by the Privacy Act was required to make reasonable efforts to serve advance notice on an individual before any personal information was made available to any person under compulsory legal process.³⁰ According to the Senate Report, the purpose of the section was to permit an individual advance notice so that he could take appropriate legal steps to suppress a subpoena for his personal data.³¹ Such a provision is more attractive than the provision adopted because it affords greater protection to the sub-

25. *Id.*

26. *Kelly v. Pension Benefit Guar. Corp.*, No. 79-0547 (S.D.N.Y. July 17, 1980). *See also Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980), which reads:

Weahkee [plaintiff employee in this employment discrimination action] next argues that the trial court committed reversible error in denying a motion to compel discovery of EEOC personnel files [of other employees] Weahkee claims he should have received. The EEOC objected to Weahkee's request for discovery because the Privacy Act, 5 U.S.C. § 552a(b)(11), prohibits release of personnel files without a court order. This objection, however, does not state a claim of privilege; a court order is merely one of the "conditions of disclosure." *Id.* § 552a(b) (heading). A court order under Fed. R. Civ. P. 37 in response to Weahkee's motion to compel discovery would meet the standards of that Act.

27. 2 J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS, AND THE LAW* § 21.05, at 21-12 (1980).

28. Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1326 (1975) [hereinafter cited as Project].

29. J. O'REILLY, *supra* note 27, at 21-12 to -13.

30. S. 3418, 93d Cong., 2d Sess. § 201(g) (1974), *reprinted in SOURCEBOOK ON PRIVACY*, *supra* note 8, at 97.

31. SENATE COMM. ON GOV'T OPERATIONS, *PROTECTING INDIVIDUAL PRIVACY IN FEDERAL GATHERING, USE AND DISCLOSURE OF INFORMATION*, S. REP. NO. 1183, 93d Cong., 2d Sess. 66 (1974), *reprinted in SOURCEBOOK ON PRIVACY*, *supra* note 8, at 151, 219.

ject's privacy interests by permitting him to take appropriate legal steps to suppress a subpoena without unduly burdening the requester, who would already be in court.³² The final text of the clause deleted the advance notice required and the legislative history of the Privacy Act offers no clue as to why this subsection was not adopted. In fact, the legislative history of exception (b)(11) is itself very sparse.³³ The only discussion of the exception appears in a brief floor debate in the House of Representatives. The entire debate reads:

AMENDMENT OFFERED BY MR. BUTLER

Mr. Butler. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Butler: Page 23, after line 25, insert the following: "(9) pursuant to the order of a court of competent jurisdiction."

Mr. Butler. Mr. Chairman, this is an amendment to the section of the bill dealing with conditions of disclosure. It is introduced for the purpose of making it perfectly clear that a lawful order of a court of competent jurisdiction would be an appropriate condition of disclosure.

Mr. Moorhead of Pennsylvania. Mr. Chairman, will the gentlemen yield?

Mr. Butler. I yield to the gentlemen from Pennsylvania.

Mr. Moorhead of Pennsylvania. Mr. Chairman, the gentleman has discussed his amendment with us, and we find no objection to the amendment.

The Chairman pro tempore. The question is on the amendment offered by the gentlemen from Virginia (Mr. Butler).

The amendment was agreed to.³⁴

What is not "perfectly clear," to use Congressman Butler's phrase, is what exactly would satisfy the requirement of an "order of the court." This question of interpretation arises whenever the federal government is served with a civil or criminal subpoena as

32. Project, *supra* note 28, at 1326.

33. See *Bruce v. United States*, 621 F.2d 914, 916 (8th Cir. 1980).

34. 120 CONG. REC. 36954 (1974), reprinted in *SOURCEBOOK ON PRIVACY*, *supra* note 8, at 936.

part of discovery proceedings in any case to which the government may or may not be a party. The central question is whether or not a subpoena is an "order of the court" for the purposes of (b)(11).³⁵ If the subpoena is not an order, the government is estopped from providing any information protected by the Privacy Act. The prohibition of the Act is absolute and the government is without any release discretion.³⁶ If a subpoena is an order, the information that is sought loses its highly protected status. The government then has the discretion to provide without the subject's consent, or refuse to provide, the information that is sought. A refusal to supply the information would necessitate a challenge to the subpoena on grounds other than the Privacy Act, and the risk of being held in contempt of the court.

This dilemma was addressed in the case of *Stiles v. Atlanta Gas Light Co.*³⁷ The district court, in an action under the Veterans' Re-employment Rights Act, held that the Privacy Act prevented disclosure of the subpoenaed documents in the custody of the Labor-Management Services Administration, a branch of the U.S. Department of Labor. The defendant's subpoena duces tecum was quashed because it fell outside the definition of exception (b)(11). The sparseness of the court's rationale has curious results, as the court noted:

Defendant also argues that the exception permitting disclosure of a record "pursuant to the order of a court of competent jurisdiction" is applicable in the instant action. 5 U.S.C. § 552a(b)(11). It asserts that the subpoena issued here is such an order of the court. Again, however, the court must disagree. Section 552a(b)(11) provides for those cases in which, for compelling reasons, the court *specifically* directs that a record be disclosed. Mere issuance in discovery proceedings of a subpoena—which is always subject to the power of the court to quash or limit—does not meet this standard. To so hold

35. Exception (b)(11), clearly, does not prevent discovery. *United States v. Brown*, 562 F.2d 1144, 1152 (9th Cir. 1978); *Christy v. United States*, 68 F.R.D. 375, 378 (N.D. Tex. 1975). In both cases, prison records were found to be discoverable under the Freedom of Information Act, 5 U.S.C. § 552 (1976), and not protected, in the face of a court order under (b)(11), by the Privacy Act. In *Clavir v. United States*, 84 F.R.D. 612, 614 (S.D.N.Y. 1979), the court held that (b)(11) could not block "court-ordered discovery."

36. Privacy Act of 1974 § 3(b), 5 U.S.C. § 552a(b) (1976).

37. 453 F. Supp. 798 (N.D. Ga. 1978).

would permit precisely the type of privacy invasions the Act sought to prevent.

In view of the foregoing, it is clear that the Privacy Act will prevent disclosure in this case of the subpoenaed documents unless the court specifically orders them produced pursuant to section 552a(b)(11).³⁸

While the court disagreed with the defendant's contention that a subpoena is an order of the court, it did not clearly adopt the opposite stand. The *Stiles* case seemed to adopt the definition, for the purpose of exception (b)(11), that a (b)(11) order comes into being when "the court *specifically* directs that a record be disclosed."³⁹ The court also adopted a standard of "compelling reason," although the source of its interpretation of exemption (b)(11) and its standard is not revealed. The court only stated that its holding is in accord with the purposes of the Privacy Act.⁴⁰

To help resolve the dilemma not clearly settled by *Stiles*, we must ask what Congress intended by the phrase "order of the court." Did the Congress intend to include or exclude subpoenas, or other discovery devices, from the scope of exception (b)(11)?

IV. CONGRESSIONAL INTENT

What did Congress intend with exception (b)(11)? It has been noted that

[a]t least one court [in the *Stiles* case] has concluded that a subpoena is not an "order of a court" within the meaning of exception 11, holding that the provision requires a specific court order directing disclosure. There is nothing in the legislative history of the Privacy Act of 1974 to suggest what Congress intended by the term.⁴¹

Indeed, as indicated earlier, the legislative history of the entire ex-

38. *Id.* at 800 (citation omitted).

39. *Id.* (emphasis in original).

40. *Id.*

41. *Bruce v. United States*, 621 F.2d 914, 916 (8th Cir. 1980) (citation and footnote omitted).

ception is nonexistent.⁴² On November 21, 1974, Congressman Butler rose on the floor of the House of Representatives to offer a ten word addition to the House of Representatives bill number 16373 which would become the Privacy Act of 1974. The proposed amendment had been discussed earlier with Congressman Moorhead, chairman of the subcommittee sponsoring the bill. The proposal was adopted without objection or debate⁴³ and became clause (b)(9) of the Privacy Act.⁴⁴ The House adopted the bill by a roll call vote of 353 to 1, with 80 members not voting.⁴⁵

On December 11, the House voted to replace the Senate version, S. 3418,⁴⁶ with H.R. 16373. Six days later, Senator Sam Ervin proposed Senate acceptance of the House substitution text of H.R. 16373 for S. 3418,⁴⁷ with exception (b)(9) remaining intact.⁴⁸ A very brief floor discussion ensued in which two further exceptions were added, and (b)(9) was renumbered as (b)(11).⁴⁹ No discussion of (b)(11) took place at this point or in subsequent debates.

The only legislative history remotely related to (b)(11) was subsection 201(g) of the earliest Senate bill.⁵⁰ This clause was designed to give advance notice of the release information to the individual to whom it pertained so that he could take legal steps to suppress

42. The present exception 11 was not included in either the Senate or House Bills and is, therefore, not discussed in the Senate and House Reports. There was no Conference Report. See S. Rep. No. 93-1183, accompanying S. 3418, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News, p. 6916; H.R. Rep. No. 93-1416, accompanying H.R. 16373, 93d Cong., 2d Sess. (1974). The first reference to the provision in congressional debate is in a recitation of the House bill in the Senate on December 17, 1974. 120 Cong. Rec. § 40,398 (1974). However, there is no discussion of the provision either on that date or in subsequent debates on the House and Senate Bills. *Id.* at 916 n.4.

43. See 120 CONG. REC. 36959 (1974) (remarks of Rep. Butler).

44. H.R. REP. No. 16373, 93d Cong., 2d Sess. § 27(b)(9) (1974), reprinted in SOURCEBOOK ON PRIVACY, *supra* note 8, at 437, 442.

45. 120 CONG. REC. 36976 (1974), reprinted in SOURCEBOOK ON PRIVACY, *supra* note 8, at 981.

46. S. 3418 provided for "an act to establish a Privacy Protection Commission, to provide management systems in Federal agencies and certain other organizations with respect to the gathering of information concerning individuals, and for other purposes." *Id.* at 984-85.

47. 120 CONG. REC. 40398 (1974).

48. 120 CONG. REC. 6741 (1974).

49. 120 CONG. REC. 36917 (1974).

50. S. 3418, 93d Cong., 2d Sess. § 201(g) (1974), reprinted in SOURCEBOOK ON PRIVACY, *supra* note 8, at 97.

a subpoena.⁵¹ The framers did not intend the clause to require compulsory legal process where it was not required,⁵² nor did they intend it to loosen any restrictions whereby information could only be obtained through court order or other legal process.⁵³ The provision was intended

to be a separate safeguard independent of any other exemption in the Act in order to carry out the principle that an individual should be on notice whenever any agency official is under judicial compulsion to surrender data, and . . . to allow the individual to exercise any existing rights under Federal and State laws and regulations to challenge the issuance of administrative or judicial orders.⁵⁴

This subsection and the principle of prior notification were not included in either the House or the final version of the proposed legislation. As noted previously, this failure has not gone unnoticed or uncriticized by commentators.⁵⁵ The House and Senate appear to have recognized this oversight as the final legislation does require that an agency "make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record."⁵⁶ This subsection adopts the principle of notice, albeit not prior notice. In fact, because the Act allows the government to withhold notification so long as the legal process which compelled the disclosure has not become public, the subject of the information might never be notified. This removes, in a number of instances, any opportunity to challenge the compulsory legal process. This result seems to contradict the *Perlman* decision⁵⁷ and its progeny which allow the subject of the disclosed information a privilege to challenge the disclosure order.

The situation is complicated when (b)(11) actions are recorded pursuant to the Privacy Act accounting requirements.⁵⁸ The Act

51. See notes 31-32 *supra* and accompanying text.

52. See note 31 *supra*, at 67, reprinted in SOURCEBOOK ON PRIVACY, *supra* note 8, at 220.

53. *Id.*

54. *Id.*

55. See J. O'REILLY, *supra* note 27; Project, *supra* note 28.

56. Privacy Act of 1974 § 3(e)(8), 5 U.S.C. § 552a(e)(8) (1976).

57. See text accompanying notes 157 & 158 *infra*.

58. Privacy Act of 1974 § 3(c), 5 U.S.C. § 552a(c) (1976).

requires each agency to keep an accurate accounting of the date, nature, and purpose of each disclosure and the name and address of the person or agency to whom the disclosure is made.⁵⁹ This accounting is required to be retained for five years or for the life of the record, whichever is longer.⁶⁰ Furthermore, particularly with respect to (b)(11), the agency must make the accounting available to the individual named in the record at his request.⁶¹ At an extreme, it is possible for a person to write for and receive an accounting of agency disclosures made under (b)(11) while being unable to challenge those disclosures.

To compound the confusion, the Privacy Act allows certain federal agencies to exempt themselves from some of the requirements of the Act.⁶² Under the Act, the Central Intelligence Agency⁶³ and any agency whose principal function pertains to the enforcement of criminal laws⁶⁴ can exempt itself from the requirements of subsection (c)(3) (disclosure of accounting) and subsection (e)(8) (notification of court-ordered disclosure).⁶⁵ These agencies, however, cannot remove themselves from the requirements of subsection (b)(11) (obtaining a court order) or subsection (c)(1) (accounting). On the other hand, law enforcement agencies other than those enforcing criminal laws⁶⁶ can not exempt themselves from the requirements of subsection (e)(8) (notification of court ordered disclosure).⁶⁷ Thus, the dilemma posed by (c)(3) (disclosure of accounting) can be resolved by exempting the agency from its requirements.

If an agency has exempted itself to the full extent allowable under the Privacy Act, it is entirely possible that the person about whom information is sought will never know of its release by the agency under court order. If the subpoena is to be accepted as the requisite court order, it is very likely that no judge will intervene in the disclosure. As a result, the citizen loses all possible safe-

59. *Id.* § 3(c)(1), 5 U.S.C. § 552a(c)(1) (1976).

60. *Id.* § 3(c)(2), 5 U.S.C. § 552a(c)(2) (1976).

61. *Id.* § 3(c)(3), 5 U.S.C. § 552a(c)(3) (1976).

62. *Id.* §§ 3(j), (k), 5 U.S.C. §§ 552a(j), (k) (1976).

63. *Id.* § 3(j)(1), 5 U.S.C. § 552a(j)(1) (1976).

64. *Id.* § 3(j)(2), 5 U.S.C. § 552a(j)(2) (1976).

65. *Id.* § 3(j), 5 U.S.C. § 552a(j) (1976).

66. *Id.* § 3(k)(2), 5 U.S.C. § 552a(k)(2) (1976).

67. *Id.* § 3(k), 5 U.S.C. § 552a(k) (1976).

guards. One cannot challenge an unknown release. Even if one later learns about a release of privileged information, the agency has been freed from liability, and thus loses all interest in challenging the subpoena. The citizen cannot even turn to the courts as the disclosure would have already taken place. There is no effective judicial buffer to a release in response to a subpoena. The end result could be the loss of all privacy protection intended by the Act.

The law recognizes that even though some records, such as records of past criminal activity and prison records, are private, disclosure may be warranted by the public interest.⁶⁸ It has been noted that in such cases the public's right to know exceeds the accused's interest in privacy, at least as to identification and details of background. In these cases, it can be argued that the criminal waives his right to remain protected by societal privacy interests, particularly where the past fact sought to be discovered is precisely relevant to the present criminal activity.⁶⁹ However, if the subpoena is accepted as a court order, as in the scenario portrayed above, the conflict between privacy rights and public interest cannot even be addressed prior to the release of the information. This contradicts the Privacy Act's expressed purpose of promoting governmental respect for the privacy of citizens.⁷⁰

The interplay of FOIA and the Privacy Act permits an individual whose privacy is at stake to insist that a neutral magistrate superintend and permit disclosure of private matters only to the extent which valid public interests require. Disclosures made pursuant to court order are then exempt from [the Act].⁷¹

The issuance of a subpoena provides no opportunity to measure or challenge the validity of the public interest. This was illustrated in *Bruce v. United States*⁷² where a subpoena was issued by the Clerk of the Criminal District Courts of Dallas County, apparently at the request of the state prosecutor. Although the subpoena or-

68. *Providence Journal Co. v. FBI*, 460 F. Supp. 778, 785 (D.R.I. 1978).

69. *J. O'REILLY*, *supra* note 27, at 16-14 to -15. See FED. R. CRIM. P. 16(a)(1)(B); FED. R. EVID. 405(b); *J. O'REILLY*, *supra* note 27, at § 16.05 and accompanying footnotes.

70. S. REP. NO. 93-1183, 93d Cong., 2d Sess. 4 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6916.

71. *Providence Journal Co. v. FBI*, 460 F. Supp. 762, 767-68 n.9 (D.R.I. 1978).

72. 621 F.2d 914 (8th Cir. 1980).

dered release of the records directly to the presiding judge, there was no affirmative order of disclosure on the part of the court nor any other prior judicial approval.⁷³ The court stated, "[f]or purposes of this appeal only, we assume, but do not decide, that the subpoena was not an 'order of a court' within the meaning of exception 11."⁷⁴

"[E]xception (11) to § 552a(b) makes it completely clear that the Act cannot be used to block the normal course of court proceedings, including court-ordered discovery."⁷⁵ To balance the right of privacy under the Act with the public interest in disclosure, especially in releasing criminal records, the courts have taken the affirmative step of issuing a specific order directing release of records.⁷⁶

V. EXCEPTION (b)(11) IN PRACTICE

Not only did exception (b)(11) generate little legislative history, it has produced very little case law. *Stiles v. Atlanta Gas Light Company*⁷⁷ remains the leading case. Based on *Stiles* and *United States v. Brown*,⁷⁸ the U.S. Department of Justice takes the position that the mere issuance of a subpoena in discovery proceedings does not meet the standard of (b)(11).⁷⁹ The Department's guide-

73. *Id.* at 916 n.5.

74. *Id.* at 916.

75. *Clavir v. United States*, 84 F.R.D. 612, 614 (S.D.N.Y. 1979). See *United States v. Brown*, 562 F.2d 1144 (9th Cir. 1978).

76. *Christy v. United States*, 68 F.R.D. 375 (N.D. Tex. 1975). See also *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir. 1980); *United States v. Brown*, 562 F.2d 1144 (9th Cir. 1978).

77. 453 F. Supp. 798 (N.D. Ga. 1978). For a discussion of the *Stiles* case, see text beginning at note 37 *supra*.

78. 359 U.S. 41 (1959). The *Brown* case is discussed in the text beginning at note 122 *infra*.

79. *Privacy Act-Discovery Proceedings*, 28 U.S. ATTORNEYS' BULL. No. 21 at 702 (October 10, 1980). The entire passage reads:

Privacy Act-Discovery Proceedings

Assistant U.S. Attorneys are reminded that the Privacy Act of 1974 (5 U.S.C. 552a) provides that "no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. . . ." except in certain situations. 5 U.S.C. 552a(b). The last of those certain situations enumerated in the Act, (b)(11), permits disclosure of a record "pursuant to the order of a court of competent jurisdiction." Please note that it is the Department's policy that the mere issuance in discovery proceedings of a

lines for the United States attorneys directly parallels *Stiles* and states that "the court must specifically direct that the specific records in question be disclosed."⁸⁰ An order issued in *Segar v. Bell* is an example of a court's "specific direction."⁸¹

It is clear from the case law that federal district courts can be "courts of competent jurisdiction" and can order disclosure pursuant to exception (b)(11).⁸² Although not clarified by federal case law, state and municipal courts can serve as courts of competent

subpoena, which is always subject to the power of the court to quash or limit, does not meet the standard of (b)(11). In order to come within the Privacy Act exception permitting disclosure the court must specifically direct that the specific records in question be disclosed. See *United States v. Brown*, 562 F.2d 1144 (9th Cir. 1978) and *Stiles v. Atlanta Gas Light Company*, 453 F. Supp. 798 (1978).

80. *Privacy Act-Discovery Proceedings*, *supra* note 79, at 702.

81. *Segar v. Bell*, No. 77-0081 (D.D.C. July 28, 1978) (order pursuant to Privacy Act, 5 U.S.C. § 552a(b)(11)). The order, in its entirety reads:

ORDER

Upon consideration of the motion of defendants, and the entire record herein, it is by the Court, pursuant to its authority under the Privacy Act of 1974, including that provision found at 5 U.S. Code § 552a(b)(11), hereby

ORDERED that agents, employees and officers of Criterion Analysis, Inc. shall be permitted to have access to all documents and records maintained by the Drug Enforcement Administration and by the Department of Justice, including those records identifying or relating to any individual or individuals for the purposes of performing an expert statistical analysis of the personnel patterns and practices of DEA as they relate to hiring, training, promotion and discipline. And it is

FURTHER ORDERED by the Court that officers, agents and employees of Criterion Analysis, Inc. shall keep confidential all information coming into their possession or to their attention and shall return any such information to the Drug Enforcement Administration or to the Department of Justice at the conclusion of this suit, or shall destroy such information. And it is

FURTHER ORDERED that any information relating to individuals or any information coming into existence as a result of their analysis may be communicated to attorneys for defendants. And it is

FURTHER ORDERED that statistical analysis and information relating to the statistics of the Drug Enforcement Administration, in the areas described above, may be made part of the record of this case or otherwise made public, provided however that no statistics or other information relating to the Drug Enforcement Administration in the areas described above shall be made part of the record of this case or otherwise made public if they will result in the identification of a specific individual.

DATED this 28th day of July, 1978:

82. *Kelly v. Pension Benefit Guar. Corp.*, No. 79 Civ. 9547 (HFW) NP 723 (S.D.N.Y. July 17, 1980). See also *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980); *Bruce v. United States*, 621 F.2d 914, 916-17 (8th Cir. 1980); *United States v. Brown*, 562 F.2d 1144, 1152 (9th Cir. 1978).

jurisdiction for purposes of exception (b)(11),⁸³ as can courts of limited jurisdiction, such as U.S. Courts of Military Appeals.⁸⁴

Stiles has been relied upon to varying degrees in subsequent case law dealing with exception (b)(11). The first discussion of *Stiles* to appear in subsequent case law is found in *Bruce v. United States*.⁸⁵ The Eighth Circuit "assumed," in a very narrow decision, specifically limited to the facts, that a subpoena was not an order of a court within the meaning of exception (b)(11), but refused to issue any decision on this point. The court indicates that prior to the *Stiles* decision, several federal agencies, including the Department of Defense and the General Services Administration, felt that a subpoena was equivalent to an order.⁸⁶ However, the court recognized that federal regulations implementing the Privacy Act would change in response to *Stiles*.⁸⁷

83. *Marchiondo v. Traub*, No. 12,740 (N.M., Nov. 14, 1979) (per curiam). The Supreme Court of New Mexico declared that "a State court is a 'court of competent jurisdiction' as that term is used within the Freedom of Information Act and the Privacy Act of 1974. . . ." *Id.* See also, *Saulter v. Municipal Ct. for Oakland-Piedmont Judicial Dist.*, 75 Cal. App. 3d 231, 245-46, 142 Cal. Rptr. 266, 275 (1977).

84. *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A. 1977), *on remand*, 6 M.J. 719 (A.F.C.M.R. 1978).

85. 621 F.2d 914 (8th Cir. 1980).

86. *Id.* at 917. The court summarized this inference by noting:

The rules promulgated by the DOD under the Act indicate that the Department equates a subpoena with an order of a court.

[Records may not be disclosed without prior written consent unless disclosure will be]

(11) Pursuant to the order of a court of competent jurisdiction.

(i) When a record is disclosed under compulsory legal process and when the issuance of that *order of subpoena* is made public by the court which issued it, make reasonable efforts to notify the individual to whom the record pertains. 32 C.F.R. § 286a.8(b) (emphasis added).

In addition, GSA's own regulations in effect at the time of release in this case provided that records could be released to a state or county court for use in a criminal prosecution "upon receipt of a proper court order or subpoena," subject to certain exceptions not applicable in the present case. General Services Administration, *Release and Access Guide for Military Personnel and Related Records at the National Personnel Records Center*, NPRC 1865.16 (Dec. 29, 1972).

Id. at 917 n.7.

87. The present Office of Management and Budget (OMB) guidelines for the use of federal agencies in implementing the Privacy Act merely repeat the language of exception 11 without elaboration. Office of Management and Budget, *Privacy Act Implementation: Guidelines and Responsibilities*, 40 Fed. Reg. 28948, 28955 (1975). The government advises, however, that OMB is in the process of developing a new guide-

The cases of *In re Vaughn*⁸⁸ and *Metadure Corp. v. United States*⁸⁹ also refer to *Stiles*. Although the case of *Weahkee v. Norton*⁹⁰ does not refer specifically to *Stiles*, the court held that a court order under Rule 37 of the Federal Rules of Civil Procedure would meet the standards of (b)(11).⁹¹

The *Stiles* decision in turn made reference to *United States v. Brown*,⁹² which indicated that (b)(11) could not prevent discovery. The *Brown* decision referred to *Christy v. United States*,⁹³ which was decided before the Privacy Act took effect. The *Christy* court, nevertheless, spoke to the proposed (b)(11) exception, holding that (b)(11) could not preclude discovery of the criminal record of a prison inmate. Recognizing that (b)(11) prohibited disclosure of personal data unless pursuant to a court order, the *Christy* court issued such an order.⁹⁴ The *Christy* court found that the information sought was discoverable under Rule 405(b) of the Federal Rules of Evidence.⁹⁵ This would imply the government would not lose any of its privileges against discovery under (b)(11). The court also indicated that the possible injury to the subject was remote and that the court would "forestall any misuse of the information with the prophylaxis available under Rule 26(c)."⁹⁶

VI. WHAT IS A SUBPOENA?

Some American courts have considered a subpoena to be an order of the court.⁹⁷ In one case, *In re Simon*,⁹⁸ the bankrupt, Simon, had been held in contempt for failing to appear before a referee in

line to implement the *Stiles* decision.

621 F.2d at 917 n.8.

88. 496 F. Supp. 1080 (N.D. Ga. 1980).

89. 490 F. Supp. 1368 (S.D.N.Y. 1980).

90. 621 F.2d 914 (10th Cir. 1980).

91. *Id.*

92. 562 F.2d 1144 (9th Cir. 1978).

93. 68 F.R.D. 375 (N.D. Tex. 1975).

94. *Id.*

95. Rule 405(b) states that "[i]n cases in which character or a trait of character of a person is an essential element of a . . . claim . . . , proof may also be made of specific instances of his conduct." FED. R. EVID. 405(b).

96. 68 F.R.D. 375 (N.D. Tex. 1975).

97. *In re Simon*, 297 F. 942, 944 (2d Cir. 1924); *Holbrook v. Cafiero*, 18 F.R.D. 218, 219 (D. Md. 1955); *Leas & McVitty v. Merriman*, 132 F. 510, 513 (W.D. Va. 1904).

98. 297 F. 942, 944 (2d Cir. 1924).

bankruptcy under a writ of subpoena. Simon's counsel questioned whether a subpoena fell within section 6b of the Bankruptcy Act, which provided "that the court might discharge bankruptcy unless 'in the course of the proceedings in bankruptcy [he had] refused to obey any lawful order of, or to answer any material question approved by the court.'"⁹⁹ Counsel argued that a subpoena could not be termed an order of the court as the word "order," contained in the statute, must be interpreted in the sense in which it is usually employed. Counsel further argued that it had not seen it employed to include a subpoena.¹⁰⁰ The court responded by finding that a subpoena is a writ, that a writ is a mandatory precept issued by a court, and that because it is mandatory, and is issued by a court, it is an order of the court.¹⁰¹

The *Simon* court did acknowledge that a subpoena is not actually issued by a judge:

The fact that a writ of subpoena is actually signed in writing by the clerk of the court, and does not contain the written signature of the judge of the court, makes it none the less the court's order. The signature of the judge is printed in the concluding clause, which constitutes the test of the writ. It is there in attestation of the fact that the writ is issued by authority.

. . .
The subpoena, issued under the seal of the court, and bearing the test of the judge, and signed by the clerk, is "the order of the judge" or of the court referred to in the passage above quoted. . . . By virtue of the authority thus granted, the District Court, not the clerk, is empowered to issue its writ of subpoena, and when issued its command is that of the court, not that of the clerk. A clerk is an officer of the court, whose duties are chiefly ministerial, and who is without authority to exercise judicial powers without constitutional or statutory authorization.¹⁰²

The *pro forma* nature of the subpoena, as acknowledged in *Simon*, has been codified in the Federal Rules of Criminal¹⁰³ and

99. *Id.* at 943 (citing Bankruptcy Act § 14b(6) (1910)).

100. 297 F. at 943.

101. *Id.* at 944.

102. *Id.* at 944-45.

103. 18 U.S.C. (1976).

Civil¹⁰⁴ Procedure. Rule 17 of the Federal Rules of Criminal Procedure describes a subpoena:

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before him, but it need not be under the seal of the court.¹⁰⁵

The Advisory Committee notes on this subdivision indicate: “[t]his rule is substantially the same as Rule 45(a) of the Federal Rules of Civil Procedure,”¹⁰⁶ which reads:

Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.¹⁰⁷

Subpoenas, by definition, are standardized, blank forms, that are distributed by the clerk of the court *prior* to the completion of the form.

The use of subpoenas under the Federal Rules is broad. For example, Civil Rule 26 specifically states that there are no limits on the frequency of use of the discovery tools.¹⁰⁸ This rule also sets

104. 28 U.S.C. (1976).

105. FED. R. CRIM. P. 17(a).

106. FEDERAL RULES (Crim. Proc.) 53 (West 1979).

107. FED. R. CIV. P. 45(a).

108. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

forth the scope of discovery,¹⁰⁹ as does Rule 34 with regard to subpoenas duces tecum.¹¹⁰ The Criminal Rules allow discovery into statements made by the defendant,¹¹¹ the defendant's prior record,¹¹² various documents and tangible objects,¹¹³ and reports of examinations and tests.¹¹⁴ A subpoena duces tecum, especially in a civil matter, may be served upon the plaintiff without leave of court after commencement of the action and upon any other party with or after service of the summons and complaint upon that

FED. R. CIV. P. 26(a).

109. Rule 26 reads, in part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

110. Rule 34 reads, in part:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

FED. R. CIV. P. 34(a).

111. FED. R. CRIM. P. 16(a)(1)(A).

112. FED. R. CRIM. P. 16(a)(1)(B).

113. See FED. R. CRIM. P. 16(a)(1)(C), which reads:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

and, FED. R. CRIM. P. 16(b)(1)(A), which reads:

If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

114. FED. R. CRIM. P. 16(a)(1)(D), (b)(1)(B).

party.¹¹⁵ "This rule does not preclude an independent action against a person not a party for production of documents and things. . . ."¹¹⁶ Because of the latitude allowed under the Rules, there has been abuse of discovery. In reviewing the Civil Rules, the Advisory Committee on Civil Rules of the Judicial Conference discussed the widespread criticism of abuse of discovery and considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.¹¹⁷

American courts have recognized that discovery by subpoena has two stages; the issuance of the subpoena, and its enforcement. The bipartite nature of the subpoena was reaffirmed when Richard Nixon attempted to challenge the grand jury subpoena duces tecum for a number of White House tape recordings. The court noted that *United States v. Burr*¹¹⁸ recognized a distinction between the issuance of a subpoena and the ordering of compliance with that subpoena, but that the distinction did not concern judicial power or jurisdiction. A subpoena duces tecum is an order to produce documents or to show cause why they need not be produced. An order to comply does not make the subpoena more compulsory; it simply maintains its original force.¹¹⁹ In a more recent case¹²⁰ pertaining to an exception in the Fair Credit Reporting Act (FCRA)¹²¹ which is analogous to exemption (b)(11), the Supreme

115. FED. R. CIV. P. 34(b).

116. FED. R. CIV. P. 34(c).

117. FEDERAL RULES (Civ. Proc.) app. 5 (West 1979) (Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure). The Advisory Committee went on to state:

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

118. 25 F. Cas. 30 (1807) (Case No. 14,692d).

119. *Nixon v. Sirica*, 487 F.2d 700, 709-10 (D.C. Cir. 1973).

120. *In re Vaughn*, 496 F. Supp. 1080 (N.D. Ga. 1980).

121. The Fair Credit Reporting Act, 15 U.S.C. § 1681 (1976) [hereinafter cited as FCRA] is designed "to insure . . . a respect for the consumer's right to privacy." *Id.* § 1681(a)(4). As noted, a FRCA exception parallels exemption (b)(11):

Court's decision in *Brown v. United States*¹²² was cited in support of the proposition that there is a functional distinction between the issuance of a subpoena and an order for its enforcement.

A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

When the petitioner first refused to answer the grand jury's questions, he was guilty of no contempt. He was entitled to persist in his refusal until the court ordered him to answer. Unless, therefore, it was to be frustrated in its investigative purpose, the grand jury had to do exactly what it did—turn to the court for help. If the court had ruled that the privilege against self-incrimination had been properly invoked, that would have been the end of the matter. Even after an adverse ruling upon his claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer. The court did so.

When upon his return to the grand jury room the petitioner again refused to answer the grand jury's questions, now in direct disobedience of the court's order, he was for the first time guilty of contempt.¹²³

Litigation involving FCRA exception 1681b(1) is instructive when attempting to divine the meaning of "order of a court." This clause is applicable to any requester of consumer reports under the FCRA, including government agencies, such as the Internal Reve-

15 U.S.C. § 1681b
Permissible purposes of
consumer reports

(1) In response to the order
of a court having jurisdiction
to issue such an order.

5 U.S.C. § 552a(b)
Conditions of Disclosure

(11) Pursuant to the order
of a court of competent
jurisdiction.

For more information about the FCRA, see 116 CONG. REC. 35941 (1970) (remarks of Sen. Proxmire); Foer, *What Every Lawyer Should Know About Consumer Reports*, 61 A.B.A.J. 857 (1975).

122. 359 U.S. 41 (1959).

123. *In re Vaughn*, 496 F. Supp. at 1082 (citing *Brown v. United States*, 359 U.S. at 49-50).

nue Service. A government agency that seeks a report from a consumer reporting agency must first obtain a court order or comply with one of the other exceptions under 1681b.¹²⁴ Only the Federal Trade Commission, because of its special statutory power incident to its rule as the enforcer of the FCRA, is exempt from the requirements of exception 1681b(1).¹²⁵

In 1978, within a period of five weeks, two district court opinions were issued directly contradicting each other on the meaning of "order of a court" under the FCRA. In *In re Credit Information Corp.*,¹²⁶ the court quashed a grand jury subpoena, holding that it was not an order of the court. The court reasoned:

In view of the grand jury's essentially investigatory and prosecutorial function, the Court believes it would ignore reality to consider a grand jury subpoena an order of the court. The Court also believes that such a characterization would be inconsistent with the function Congress intended a court order to serve under the Act, *i.e.*, to ensure that a consumer's privacy is not unduly impinged upon by disclosure of his credit file to third-parties, including governmental investigative agencies, which are not seeking the information for credit-related, business purposes. In order to provide this protection for the consumer, it is necessary for a court to consider the purposes for which disclosure is sought and to make a reasoned determination as to whether granting the requesting party access to the consumer's file for such purposes would violate the consumer's rights. Because a grand jury subpoena, like that of a governmental administrative agency, is issued without any judicial consideration, but rather *pro forma* by the clerk of the court at the request of and for the purposes of the prosecutor, it does not provide the protection for consumer privacy which Congress sought when it required a court order under § 1681b.¹²⁷

A month later, the court in *In re TRW, Inc.*¹²⁸ reached the opposite result, holding that a grand jury subpoena is an order. The

124. *United States v. Puntorieri*, 379 F. Supp. 332 (E.D.N.Y. 1974).

125. *Fed. Trade Comm'n v. Retail Credit Co.*, 357 F. Supp. 347 (D.D.C. 1973), *rev'd*, 515 F.2d 988 (D.C. Cir. 1975).

126. 457 F. Supp. 969 (S.D.N.Y. 1978).

127. *Id.* at 971-72 (footnote omitted).

128. 460 F. Supp. 1007 (E.D. Mich. 1978).

court reasoned that a grand jury is a judicial body having functions independent of the prosecutorial arm of the government. The court concluded that it would not be inconsistent with the purpose of the FCRA to equate a grand jury subpoena with a court order, since the purpose of the FCRA is "to prevent *unreasonable or careless* invasions of privacy."¹²⁹ The court, however, recognized that a grand jury subpoena is issued without the authorization of a judge.¹³⁰

Two years later, the same issue was addressed in the case of *In re Vaughn*.¹³¹ The court opened its discussion by noting that the people charged with the protection of personal information are understandably reluctant to risk violating disclosure laws. Under the FCRA, consumer reporting agencies which violate the disclosure restrictions may be subject to civil liability¹³² and individuals who violate the Act may be subject to criminal prosecution.¹³³ Similarly, an individual who violates the Privacy Act may be subject to criminal penalties.¹³⁴

After refusing to join the courts in *Credit Information* and *TRW* in the debate over the function of the grand jury, the *Vaughn* court determined that a grand jury subpoena is not an order. The court found a number of factors to be dispositive. First, citing Rule 17 of the Federal Rules of Criminal Procedure,¹³⁵ the court found "it significant that a subpoena is issued by the clerk, in blank, to whomever requests one,"¹³⁶ and that the clerk "exercises no discretion, let alone judicial discretion, in issuing a subpoena."¹³⁷ Second, citing *Stiles*¹³⁸ for support, the court recognized that courts may quash a subpoena.¹³⁹ Third, the court noted the functional difference between a subpoena and an order as suggested by the Su-

129. *Id.* at 1009 (emphasis added).

130. *Id.*

131. 496 F. Supp. 1080 (N.D. Ga. 1980).

132. 15 U.S.C. §§ 1681(n), (s) (1976).

133. 15 U.S.C. § 1681(r) (1976).

134. 5 U.S.C. § 552a(i)(1) (1976).

135. See text accompanying note 105 *supra*.

136. 496 F. Supp. at 1082.

137. *Id.*

138. See discussion in text beginning at note 37 *supra*.

139. 496 F. Supp. at 1082.

preme Court case of *Brown v. United States*.¹⁴⁰ Fourth, the court recognized the inability of the subpoena process to protect the privacy of personal information:

The Court believes that the legislative purpose of protecting the privacy of credit information would be frustrated unless the Court allows the individuals on whom credit information is sought to respond to such a motion. Indeed, the possibility for such parties to respond to a motion for an order, absent where the government simply issues a subpoena, is another compelling reason for holding that a subpoena is not an order. Accordingly, if the government moves for an order compelling that which it seeks through the subpoena in question here, it shall serve such motion upon those individuals whose records are sought in the subpoena in question.¹⁴¹

The government moved for reconsideration of the order quashing the grand jury subpoena in *In re Vaughn*. In reaffirming its original order, the court clarified and strengthened its original rationale.

[T]he Court stated that requiring the prosecutor to obtain an order would enhance the privacy of a consumer credit information by invoking the Court's processes at an earlier stage than if the grand jury simply issued a subpoena which someone later moved to quash. Requiring the prosecutor to move for an order would cause the prosecutor to articulate the need for and relevancy of the information sought. Further, as indicated in the previous order, requiring service of the motion upon the person whose credit information is sought would also promote the privacy purposes of the FCRA.¹⁴²

The court also rebutted the government's argument that "the shroud of secrecy surrounding grand jury proceedings"¹⁴³ can replace the protection of the FCRA. The court concluded that while in many instances the two protections seem duplicative, Congress chose to enact an additional measure of protection for credit information which would be very significant in instances where the

140. *Id.* (quoting *Brown v. United States*, 359 U.S. 41, 49-50 (1959)).

141. *Id.* at 1083.

142. *Id.* (citation omitted).

143. *Id.*

prosecutor's motion for disclosure is denied and as a result the information is not disclosed even to the prosecutor and grand jury.¹⁴⁴ Finally, the court declared that basic principles of statutory construction support, and perhaps even dictate, such a result.¹⁴⁵ The court held that the "plain and unambiguous" meaning of the term "order" did not comprehend a subpoena.¹⁴⁶ The decision and rationale of the court is itself "plain and unambiguous;" a subpoena is not an "order of a court."

The FCRA is not the only law requiring a court order that has been interpreted by the courts. Federal interpretation of a New York statute is also instructive. The New York tax code provides, in part:

Except in accordance with *proper judicial order* or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner . . . to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article. . . .¹⁴⁷

Relying upon decisions of the New York courts,¹⁴⁸ the New York Department of Taxation and Finance attempted to challenge a federal grand jury subpoena as not being a "proper judicial order" in *In re Grand Jury Subpoena for New York State Income Tax Records*.¹⁴⁹ Two questions confronting the district court were whether a federal grand jury subpoena is a "proper judicial order" within the meaning of New York Tax Law § 697(e) and, if it is not, whether compliance with the subpoena is nonetheless mandatory by virtue of the Supremacy Clause of the United States Constitution.¹⁵⁰ The court found that the grand jury subpoena at issue was not a "proper judicial order," as defined by the New York courts, but held that compliance with the subpoena was mandated by the

144. *Id.* (emphasis added).

145. *Id.*

146. *Id.*

147. N.Y. TAX LAW § 697(e) (McKinney Supp. 1978-1979) (emphasis added).

148. *See, e.g.,* New York State Dep't of Tax v. New York State Dep't of Law, 44 N.Y.2d 575, 378 N.E.2d 110, 406 N.Y.S.2d 747 (1978).

149. 468 F. Supp. 575 (N.D.N.Y. 1979).

150. *Id.* at 576.

Supremacy Clause.¹⁵¹

In its dictum, the district court expressed its belief that compliance with the subpoena would not subvert New York's interest in safeguarding individual privacy because federal grand jury proceedings are conducted secretly.¹⁵² The court balanced the desire on New York's part to encourage honest tax reporting by protecting returns with the greater necessity of thorough grand jury investigations into violations of federal law.¹⁵³ Pending a written showing by federal prosecutors that the subpoenaed information is relevant and necessary to the grand jury investigation,¹⁵⁴ the court ordered compliance with the subpoena.

On appeal by the New York Tax Department, the court held that, in most instances, an order denying a motion to quash a grand jury subpoena is not appealable.¹⁵⁵ Thus, the court refused to consider the merits of New York's claim of privilege. However, in its discussion of the inroads made into the general rule that a pre-contempt disclosure order is not appealable,¹⁵⁶ the court discussed the *Perlman* doctrine:¹⁵⁷

Under the doctrine when a subpoena is addressed to a person who has custody of material as to which another person has a privilege of non-disclosure, the person who has the privilege may appeal a disclosure order immediately. The reason for allowing the appeal in these circumstances is that the holder of the privilege has no power to cause the custodian of the information to risk a contempt citation for non-disclosure. Thus, denying the holder of the privilege the right to appeal from the disclosure order "would practically defeat the right to any review at all."¹⁵⁸

151. *Id.* at 577-78.

152. *Id.* at 577.

153. *Id.*

154. *Id.* at 578 (footnote omitted).

155. *New York Dep't of Taxation v. United States*, 607 F.2d 566, 571 (2d Cir. 1979). *See, e.g.*, 28 U.S.C. § 1291 (1976).

156. 607 F.2d at 569.

157. *Perlman v. United States*, 247 U.S. 7 (1918). For an account of the development of the *Perlman* doctrine, see *National Super Spuds, Inc. v. New York Mercantile Exch.*, 591 F.2d 174, 177-81 (2d Cir. 1979).

158. 607 F.2d at 570 (references, footnote omitted) (quoting *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940)).

The *Perlman* doctrine, when raised in this context, recognizes that the person to whom the information pertains has a privacy privilege that is extremely difficult to exercise.

In discussing the functional differences between a subpoena and a court order, most of these cases infer that the subpoena itself has two phases or is bipartite. The bipartite nature of the subpoena is established in the federal rules of criminal and civil procedure in two forms. The first form, the "[m]ere issuance in discovery proceedings of a subpoena—which is always subject to the power of the court to quash or limit,"¹⁵⁹ was unsuccessfully relied upon in *Stiles*. The civil rules give the court the power to issue protective orders¹⁶⁰ and quash subpoenas.¹⁶¹ Likewise, the criminal rules permit the courts to issue protective or modifying orders¹⁶² and quash subpoenas.¹⁶³ These rules give the courts latitude in denying, re-

159. 453 F. Supp. at 800.

160. FED. R. CIV. P. 26(c), which reads in part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

161. FED. R. CIV. P. 34(b).

162. FED. R. CRIM. P. 16(d)(1), which reads:

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

163. FED. R. CRIM. P. 17(c).

stricting or deferring discovery by either party.¹⁶⁴ If the court were actually involved in the framing and issuance of the original subpoenas the need for protective or modifying orders or motions to quash would be minimized. However, the legislative history of Rule 16 of the Federal Rules of Criminal Procedure makes it clear that "the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or to issue a protective order."¹⁶⁵

The second form in which the bipartite nature of the subpoena is exposed is in the sanctions set forth in the rules for failure to make discovery or comply with the order.¹⁶⁶ Again, the legislative history is clear. "The Committee agrees that the parties should, to the maximum possible extent, accomplish discovery themselves. The court should become involved only when it is necessary to resolve a dispute or to issue an order pursuant to subdivision (d)."¹⁶⁷ Thus, it was the intention of the framers of the Federal Rules that the courts would not become involved in the discovery or subpoena process until after a conflict arose. This puts the courts into the second phase of the bipartite process and recognizes the reality that issuance of subpoenas is more an administrative formality

164. See Notes of Committee on the Judiciary, House Report No. 94-247, *reprinted in* FEDERAL RULES (Crim. Proc.) 50 (West 1979).

165. *Id.*

166. See FED. R. CIV. P. 37(a) (motion for order compelling discovery), (b) (failure to comply with order), and (d) (failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection). See also FED. R. CRIM. P. 16(d)(2), which reads:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

and 17(g), which reads:

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

167. Notes of Committee on the Judiciary, House Report No. 94-247, *reprinted in* FEDERAL RULES (Crim. Proc.) 50 (West 1979).

than a judicial decision.

VII. WHY A SUBPOENA IS NOT A COURT ORDER

Over fifty years ago, Justice Louis Brandeis, in his famous dissent in the case of *Olmstead v. United States*,¹⁶⁸ set forth the basic constitutional principle of individual privacy.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment.¹⁶⁹

President Richard Nixon, in his 1974 State of the Union speech to Congress, addressed the need to protect individual privacy, which ultimately became the Privacy Act of 1974.¹⁷⁰

One of the basic rights we cherish most in America is the right of privacy. With the advance of technology, that right has been increasingly threatened. The problem is not simply one of setting effective curbs on invasions of privacy, but even more fundamentally one of limiting the uses to which essentially private information is put, and of recognizing the basic proprietary rights each individual has in information concerning himself.

Privacy, of course, is not absolute; it may conflict, for example, with the need to pursue justice. But where conflicts occur, an intelligent balance must be struck.

One part of the current problem is that as technology has increased the ability of government and private organizations to gather and disseminate information about individuals, the safeguards needed to protect the privacy of individuals and communications have not kept pace. Another part of the problem is that clear

168. 227 U.S. 438 (1928).

169. *Id.* at 478.

170. State of the Union Message to Congress, January 30, 1974, reprinted in Congressional Record, Jan. 30, 1974 (daily edition), p. H372.

definitions and standards concerning the right of privacy have not been developed and agreed upon.¹⁷¹

It is clear that the Privacy Act was designed to safeguard individual personal privacy,¹⁷² a fundamental right protected by the Constitution.¹⁷³ The right is safeguarded by two primary mechanisms: (1) the citizen's power to determine what records containing information about himself are disseminated,¹⁷⁴ and (2) the citizen's power to prevent unauthorized dissemination.¹⁷⁵ This protection is absolute; the government has no discretion.

Congress requires that no agency shall disclose personal information without the subject's consent. The requirement is rigid. It prohibits unconsented release by any means of communication, such as a subpoena, to any person or agency, such as parties in litigation.¹⁷⁶ Failure to abide by this prohibition can result in civil penalties¹⁷⁷ or criminal prosecution of the violating official.¹⁷⁸ At least one federal official, a former U.S. attorney, has been so convicted.¹⁷⁹

To aid in the conduct of legitimate and necessary business, the Congress allows eleven exceptions to the strict requirements of section (b) (conditions of disclosure). Exception (b)(11) is one of these. As the OMB guidelines indicate, these exceptions are not mandatory, but permissive.¹⁸⁰ In other words, these are the maximum, not the minimum, limits of government disclosure.

As the bare legislative history of the Privacy Act indicates, the

171. *Id.* Perhaps ironically, a number of actions sanctioned by the Nixon White House gave added momentum to privacy legislation: the break-in at the Democratic National Committee's headquarters, revelations of "White House enemies' lists," the break-in of the office of Daniel Ellsberg's psychiatrist, the wiretapping of phones of government employees and news reporters, and the surreptitious taping of White House meetings.

172. Privacy Act of 1974 § 2(b), 5 U.S.C. § 552a note (b) (1976).

173. *Id.* § 2(a)(4), 5 U.S.C. § 552a note (a)(4) (1976).

174. *Id.* § 2(b)(1), 5 U.S.C. § 552(a) note (b)(1) (1976).

175. *Id.* § 2(b)(2), 5 U.S.C. § 552(a) note (b)(2) (1976).

176. *Id.* § 3(b), 5 U.S.C. § 552a(b) (1976).

177. *Id.* § 3(g)(1), 5 U.S.C. § 552a(g)(1) (1976).

178. *Id.* § 3(i)(1), 5 U.S.C. § 552a(i)(1) (1976). See *Rowe v. Tennessee*, 431 F. Supp. 1257, 1264 (E.D. Tenn. 1977), *vacated on other grounds*, 609 F.2d 259 (6th Cir. 1979).

179. [1977] ATT'Y GEN. REP. 84 (opinion of Douglas M. Gonzales).

180. OMB Guidelines, *supra* note 16, at 28,953.

Senate considered an advance notification requirement so that the person about whom information was sought could act to enjoin any compulsory legal process or subpoena.¹⁸¹ The absence of this clause in the final legislation gives rise to two possible conclusions. First, it may have been felt that the government was the appropriate instrumentality to protect personal privacy under exception (b)(11). There is no guarantee, however, that the interests of the government (the holder of the information) and the subject of the information (the holder of the privacy privilege) will coincide.¹⁸² It is entirely possible that the government will view the release of information as posing no danger to the subject and the subject will never be aware of the release until actual harm comes to him. The government is not the best arbitrator of this decision. This is the underlying message of the Privacy Act.

Second, Congress may have believed that the courts, through the legal process, would adequately protect the privacy of information. This protection would be an absolute fiction if subpoenas were accepted as orders of the court under (b)(11), particularly since individuals would have no prior notice of releases. Subpoenas are not really issued by the courts in anything remotely resembling a judicial proceeding.¹⁸³ Rather, they are standardized forms issued in blank and signed by the clerk before the blanks are filled in.¹⁸⁴ Subpoenas are not seen or reviewed by judges prior to their issue. For this reason, subpoenas fail to provide any judicial safeguards necessary under exception (b)(11).

The bipartite nature of the discovery process, between issuance of a subpoena by a clerk and enforcement by a judge,¹⁸⁵ emphasizes the differences between a subpoena and a court order. This functional difference has been recognized by the Supreme Court.¹⁸⁶

181. S. 3418, 93d Cong., 2d Sess. § 201(g) (1974), reprinted in SOURCEBOOK ON PRIVACY, *supra* note 8, at 97.

182. *Perlman v. United States*, 247 U.S. 7 (1918).

183. See *In re Simon*, 297 F.2d 942 (2d Cir. 1924); FED. R. CRIM. P. 17(a); FED. R. CIV. P. 45(a).

184. See *In re Vaughn*, 496 F. Supp. 1080 (N.D. Ga. 1980); *In re TRW, Inc.*, 400 F. Supp. 1007 (E.D. Mich. 1978).

185. See *United States v. Burr*, 25 F. Cas. 30 (1807) (Case No. 14,692d); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

186. *Brown v. United States*, 359 U.S. 41, 49-50.

This difference is also seen in the ability of the court to quash or amend subpoenas.¹⁸⁷

Perhaps the best argument against considering a subpoena a court order was spelled out in *In re Vaughn*.¹⁸⁸ The parallel between (b)(11) and 15 U.S.C. 1681b(1) is remarkable. The Fair Credit Reporting Act, like the Privacy Act, is designed to insure a respect for the individual's right of privacy by the holder of personal information. This protection does not surpland or cannot be surplanted by other protections, such as grand jury secrecy. It is a unique safeguard of its own.

The *Stiles* decision, as sparse as it is, gives the best guidance available on what will constitute a court order for the purpose of (b)(11). "Section 552a(b)(11) provides for those cases in which, for compelling reasons, the court *specifically* directs that a record be disclosed."¹⁸⁹ Anything less would fail to protect the valuable right of privacy. "[I]t is clear that the Privacy Act will prevent disclosure . . . unless the court specifically orders [subpoenaed documents] produced pursuant to section 552a(b)(11)."¹⁹⁰ Subpoenas do not qualify.

187. FED. R. CRIM. P. 16(d)(1), 17(e); FED. R. CIV. P. 26(c), 34(b).

188. 496 F. Supp. 1080 (N.D. Ga. 1980).

189. 453 F. Supp. 798, 800 (N.D. Ga. 1978).

190. *Id.*

