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FILE # ML-42458-02 OPINION COMMITTEE
I.D. # 42458

February 19, 2002

The Honorable John Cornyn
Office of the Attorney General
Attn: Susan Gusky, Opinions Committee
209 West 14th Street
P. O. Box 12548
Austin, Texas 78711-2548

RQ-0514-98

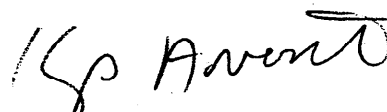
Dear General Cornyn:

I would like to request an opinion on behalf of the Independent Bankers Association of Texas (IBAT) regarding Section 521.126 of the Transportation Code, which prohibits the use of information on the magnetic stripe on a driver's license for any purpose other than law enforcement or governmental purposes.

I have enclosed a letter from IBAT dated January 7, 2002, expressing their belief that banks should be allowed to use the magnetic stripe to verify the validity of the driver's license in order to carry out certain governmental functions assigned to banks in light of the recent enactment of the USA Patriot Act and the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001. As the letter states, IBAT believes that this new federal legislation, which imposes new requirements on banks, supports the position that banks are in fact performing critical governmental purposes necessitating access to the magnetic stripe.

I appreciate your assistance in this opinion request. Please contact me if I may be of any service in completing this opinion.

Sincerely,


Kip Averitt

Independent Bankers
Association of Texas

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Senior Vice President

January 7, 2002

The Honorable Kip Averitt
Representative
Texas House of Representatives
215 Mary, Ste. 303
Waco, TX 76701

RE: Request for Attorney General Opinion

Dear Representative Averitt:

On behalf of the Independent Bankers Association of Texas ("IBAT"), I am soliciting your assistance in requesting an attorney General Opinion regarding Section 521.126 of the Transportation Code. As Chair of the House Financial Institutions Committee, you have developed an awareness of issues relating to the community banks of Texas that we would like to utilize at this time. As you know, IBAT is a trade association representing approximately 600 independent community banks domiciled in Texas. Those banks are subject to a number of laws, mostly federal, that require banks to perform a number of governmental functions. Section 521.126 of the Transportation Code prohibits the use of information on the magnetic stripe on a driver's license for any purpose other than law enforcement or governmental purposes. IBAT believes that banks should be able to use the magnetic stripe on the driver's license to verify the validity of the driver's license in order to carryout certain governmental functions assigned to banks.

On February 12, 2001, the Attorney General issued Opinion No. JC-0337 on this same subject. In that letter, General Cornyn concluded that magnetic stripe information contained on a driver's license or identification card issued by the Department of Public Safety could be utilized only by law enforcement and other governmental agency personnel acting in their official capacities. Since that opinion was issued, however, the United States Congress has enacted the USA Patriot Act and the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ("Patriot Act"). We believe that this new federal legislation, which imposes stringent new requirements on banks, supports our position that banks are in fact performing critical governmental purposes necessitating access to the magnetic stripe.

As a practical matter, it is my understanding that there are both hardware and software available on the market that will allow a driver's

Your Community Bankers

license or ID card to be swiped with the information on the magnetic stripe read by the machine. The software then verifies that the information on the magnetic stripe matches that on the front of the card. If it does not, then the card is suspect as a likely forged means of identification. Right now, this is one of the best ways by which a bank can verify identification when it engages in several different typical banking transactions, including opening an account or cashing an instrument for a non-customer.

The Patriot Act includes a Title 3 that imposes additional due diligence and record keeping practices on financial institutions. Among these are new "Know Your Customer" requirements under *31 USC § 5318(l); Act Section 326*. Although the regulations have not been written for this yet, the statute requires that institutions verify customer identification, maintain records of verification, and compare identification with government lists of known or suspected terrorists. In addition, the Money Laundering Act of 1987 included Know Your Customer requirements for financial institutions. In short, banks are required to verify the identity of potential customers whenever they open up new accounts. Identification is also required for cash transactions subject to currency transaction reports *31 CFR § 103.28*. In addition, banks are required to maintain certain logs under the Bank Secrecy Act when monetary instruments are purchased *31 CFR § 103.29*. Those logs must reflect the methodology of identity verification used by the bank. In each of these regulations, driver's licenses are specifically recommended for identity verification.

If in the course of verifying identity, the bank determines that the customer matches the list published by the Office of Foreign Asset Control, then the bank is required to file a report and block assets. As noted by President Bush in various of his press releases, this is a critical component of fighting terrorism – being able to freeze the assets of the terrorists. Allowing banks to verify identity cards and driver's license by swiping the magnetic stripe is a key component of this critical governmental function.

In addition, banks are required to participate in the financial institution data match, which is a part of child support collections. IBAT has already heard from numerous banks who have determined that either their bank records are flawed or the information request from Tier Technologies is flawed. They are finding numerous partial matches. Again, ability to verify identity when accounts are opened may assist the banks in obtaining the best possible information for the accounts and thus better matches for child support collection.

Under the Gramm-Leach-Bliley Act privacy title, banks are required to implement certain safeguards of customer information. Again, these guidelines were finalized after the date of the Attorney General Opinion noted above. As a part of the safeguarding processes, institutions must implement appropriate methods for screening new employees. Clearly, criminal background checks are warranted for certain positions. However, the basic verification of driver's license would assist the bank in assuring that it complies with these critical safeguards required in the privacy section of the Gramm-Leach-Bliley Act.

Banks are also required by law to file suspicious activity reports when they detect a problem. This too was enhanced by the Patriot Act, although the requirement was already a part of law. The most recent report by the Financial Crimes Enforcement Network reflects a tremendous increase in reported identity theft. Again, the ability to detect fraudulent identification cards will assist banks in filing these suspicious activity reports, and, hopefully, detect identity theft as early as possible. According to FinCen, 267 ID theft reports were made in 1999, 637 in 2000, and 332 in the first four months of 2001. This is a burgeoning area of concern (see the SAR Activity Review published by FinCen - Trends, Tips and Issues, Issue 3, October 2001).

In construing a statute, Section 311.023 of the Government Code indicates that a court may consider among other things the consequences of a particular construction and the object sought to be obtained. In the case of this statute, the object to be obtained is the protection of the privacy of the individual driver's license or identity card owner. We believe that a construction of the statute permitting banks to use the magnetic stripe for limited purpose of detecting fraudulent identification will not violate the privacy of the individual. This information is not marketed to third parties, it is not used internally for the bank for its own marketing, rather it is used only to detect fraud.

Furthermore, the consequences of construing the statute to permit banks to use the magnetic stripe in furtherance of their duties under federal law certainly furthers important governmental purposes. While legislative history is important, we believe that the testimony recited in JC-0337 merely reflects that use of the magnetic stripe by bars to detect underage drinkers is not equivalent to law enforcement of underage drinking rules. It does not speak to the issue of what is a valid governmental purpose. Rather, the entire colloquy between Senator Nixon and Ms. Sibert revolves around the meaning of "law enforcement".

The community banks of Texas are ready to assist the federal government in detecting terrorist activity through detecting suspicious movements of cash and by identifying and freezing assets of terrorists. However, these institutions should not be denied the tools necessary to effectively and efficiently carryout their role. Your assistance in requesting an opinion on this issue would be gratefully appreciated.

Cordially,

Christopher L. Williston, CAE
President and CEO

CLW:rpl