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Fair Credit Reporting Act: Is A Grand Jury Subpoena A Court Order?

FAIR CREDIT REPORTING ACT: IS A GRAND JURY SUBPOENA A COURT ORDER?

The American economy depends, in large part, on the credit system.[1] The credit system in the United States functions effectively by means of credit reporting agencies that gather information on an individual's creditworthiness for possible future dissemination to merchants and other lenders.[2] Businessmen need credit information in order to make

[1] The term credit system refers to the practice of contracting debts to purchase goods and services. J. RULE, PRIVATE LIVES AND PUBLIC SURVEILLANCE 177 (1974) [hereinafter cited as RULE]. Liberal lending policies permit individual Americans lacking cash-in-hand to purchase many essential items such as home appliances, houses, and cars. *Id.* at 178; James & Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Articles V and VI*, 57 GEO. L. J. 923, 924 (1969) [hereinafter cited as James & Fragomen]. Businesses as well as consumers benefit from the use of credit. RULE, *supra*, at 178. Indeed, large retail firms sometimes gross major profits from collection of interest charges. *Id.*

Due to the advantages the credit system afforded both consumers and businessmen, the American economy transformed itself in the years following World War II from a "pay-as-you-go" to a "buy-now-pay-later" system. James & Fragomen, *supra*, at 923. Since 1945, consumer credit has grown at a rate four and one half times the growth rate of the national economy. 1968 U.S. CODE CONG. & AD. NEWS 1966. In 1968, the consumer debt was reported as $105 billion in outstanding bills and $8 billion in monthly credit extensions, a total figure representing 12% of the gross national product. *Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary Pursuant to S. Res. 233*, 90th Cong., 2d. Sess. 1 (1968). In 1979, the outstanding consumer debt totalled $382 billion. STATISTICAL ABSTRACT OF THE UNITED STATES 527 (1980) (data of Board of Governors of Federal Reserve System, Flow of Funds Accounts—Credit Market Debt Outstanding 1960-1979, Table 865). Almost every adult American has information about his credit rating contained in a credit reporting agency's files. 115 CONG. REC. 33,408 (1969) (statement by Sen. William Proxmire, main sponsor of the Fair Credit Reporting Act (FCRA)). *See generally* H. BLACK, BUY NOW, PAY LATER 37 (1961) ("If your name is not in the records of at least one credit bureau, it doesn't mean that you don't rate. What it does mean is that you are either under twenty-one or dead."); McNamara, *The Fair Credit Reporting Act: A Legislative Overview*, 22 PUB. L. J. 67, 67 (1973) [hereinafter cited as McNamara] (credit system has become permanent fixture in American life); Note, *Fair Credit Reporting: Are Misleading Reports Reasonable?* 55 N.Y.U. L. REV. 111, 111 (1980) [hereinafter cited as *Misleading Reports*] (credit reports are indispensable to business); Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L. J. 509, 509 (1969) [hereinafter cited as *Credit Investigations*] (cash transaction will become as rare as the American bald eagle).

[2] McNamara, *supra* note 1, at 68. The remarkable growth of the installment credit industry was responsible for a parallel expansion of the agencies that supply consumer credit information. Comment, *The Fair Credit Reporting Act Amendments: Enforcement of the Legislative Trust?* 45 MISS. L. J. 95, 96 (1974) [hereinafter cited as *Legislative Trust*]. Originally, the credit system operated by means of information exchange regarding a customer's credit reliability between merchants. McNamara, *supra* note 1, at 68. If a merchant was unable to obtain information on a particular individual, the businessman would send an agent to determine the individual's creditworthiness. *Id.* Eventually the agents formed independent agencies, which are today essential to the maintenance of a credit system. *Id.* Indeed, credit agencies that use electronic data processing techniques are big business. *Id.* As of 1974, approximately 2,600 credit bureaus operated throughout the

sound judgments about with whom to engage in commercial transactions.[3] Operating concurrently with the commercial need for access to consumer credit information, however, is the individual's right to privacy.[4] Especially in today's computerized society, information pro-

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United States. Feldman, *The Fair Credit Reporting Act—From the Regulators Vantage Point*, 14 SANTA CLARA LAW. 459, 460 (1974) [hereinafter cited as Feldman]. The nation's credit bureaus furnished approximately 100 million reports per year by 1974. *Id.*; *see* RULE, *supra* note 1, at 179.

[3] McNamara, *supra* note 1, at 68. Credit bureaus provide merchants with easily accessible information concerning credit standing that enables the businessmen to screen customers who may be bad credit risks. *Id.* A favorable credit report is a necessary condition for granting credit. RULE, *supra* note 1, at 177. Credit agencies thus perform a vital role in assuring the free flow of credit. McNamara, *supra* note 1, at 68-69.

[4] *See* Comment, *The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs*, 44 ALB. L. R. 589, 601 (1980) [hereinafter cited as *Use and Abuse*]. The legal recognition of the right to privacy originated, in part, due to an 1890 *Harvard Law Review* article penned by Samuel Warren and Louis Brandeis. *Id.* at 593; *see* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter cited as Warren & Brandeis]; *cf.* Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981) (analysis of social and legal concepts existing in nineteenth century America supports conclusions of Warren and Brandeis that right of privacy has legal foundation). Warren and Brandeis maintained that court-granted protections of intellectual and artistic property rights constituted a right of privacy in the individual. *See* Warren & Brandeis, *supra*, at 198-205. The development of right to privacy jurisprudence stems from two major sources, the common law and the United States Constitution. *See Use and Abuse*, *supra*, at 593-99.

The common law recognizes four causes of action in tort for invasion of privacy. *Id.* at 599. The four torts include appropriation of the plaintiff's name or image for advertising purposes, misrepresentation of the plaintiff's reputation by false publicity, intrusion upon the plaintiff's solitude, and public disclosure of acts concerning the plaintiff's private life. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

The second source of right to privacy jurisprudence derives from judicial interpretation of the United States Constitution. Note, *Fair Credit Reporting Act: The Case for Revision*, 10 LOY. L.A. L. REV. 409, 416 (1977) [hereinafter cited as *The Case for Revision*]. Although the Constitution makes no specific mention of the right to privacy, the Supreme Court has found an implicit right to privacy under the first and fourth amendments, and a privacy right coming within the penumbral emanations of the ninth and fourteenth amendments. *Use and Abuse*, *supra*, at 593-94; *see* U.S. CONST. amends. I, IV, IX, & XIV; *see, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (right of privacy founded in fourteenth amendment extends to woman's freedom to have abortion); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (right of privacy is individual's right to be free from unwarranted government intrusion into fundamental decisions pertaining to contraception); Katz v. United States, 389 U.S. 347, 351-52 (1967) (constitutional protections extend under fourth amendment to what individual seeks to protect as private); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (state law forbidding use of contraceptives violates right of privacy emanating from penumbra of Bill of Rights); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466-67 (1958) (right to privacy in associations is peripheral first amendment right).

The right to informational privacy is an expansion of the traditional right "to be let alone." *See* McNamara, *supra* note 1, at 88-92 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *But see* Katz v. United States, 389 U.S. 347, 353 (1967) (overruled *Olmstead*). Informational privacy rights imply that an individual should have the ability to control the collection and dissemination of information pertaining to his private life. *The Case for Revision*, *supra*, at 419; *Use and Abuse*, *supra*, at 600-01.

cessing techniques may infringe on the scope of an individual's informational privacy.[5] An individual cannot expect to receive credit, insurance, or government-sponsored benefits without giving up the degree of personal freedom necessary to enable businessmen and governmental agencies to make responsible decisions.[6] Safeguards, however, are necessary

[5] Rapid scientific and social changes created a need to make informed business decisions more rapidly. D. SANDERS, COMPUTERS AND MANGEMENT IN A CHANGING SOCIETY 53-54 (2d ed. 1974) [hereinafter cited as SANDERS]. The computer provides the means with which to handle the complex decisions of today's business world. *Id.* Many organizations have embraced computers as a natural informational tool. *Use and Abuse*, *supra*, at 589-90. The depersonalization of information processing jeopardizes an individual's right to privacy more significantly than the more inefficient and less widespread information exchange method that merchants employed prior to the advent of big business credit agencies. *Id.* at 589; *see* note 2 *supra*. *See generally* RULE, *supra* note 1, at 205-12. Additionally, computer errors regarding programming, incorrect data output, and incorrect interpretation are not easily detectable. McNamara, *supra* note 1, at 87-88. Security problems also jeopardize privacy rights since the data contained in computer banks are available to anyone with an access key. *Id.* at 89.

Without deciding the issue, the United States Supreme Court has recognized the threat to privacy accompanying computerized data collection techniques, especially when the government is the purchaser of information. *See* Whalen v. Roe, 429 U.S. 589, 605 (1977) (threat to privacy implicit in collection of personal information in government-maintained data banks). *See generally* 115 CONG. REC. 2411-13 (1969) (remarks of Sen. William Proxmire).

[6] *Use and Abuse*, *supra* note 4, at 601. The consumer must waive some objections to the collection of credit information, but the information-gathering activity should not surpass the limits of relevancy and necessity and should employ techniques that are both fair and minimally intrusive. *Id.*

The rapid expansion in the use of credit and the parallel growth in the reporting industry precipitated quality control problems relating to dissemination of erroneous information and invasion of privacy. *Legislative Trust*, *supra* note 2, at 96-97. One area of potential abuse stems from the widespread use of credit reports beyond the traditional merchant-customer relationship. *See Credit Investigations*, *supra* note 1, at 510; Feldman, *supra* note 2, at 461. The subscribers to the services of credit reporting agencies include traditional lenders, retailers, and service industries including oil companies. *Credit Investigations*, *supra* note 1, at 510. Yet, other subscribers consistently use credit reports in making decisions that relate only indirectly to the granting of credit. *See id.* Insurance companies purchase millions of credit reports each year to evaluate the risks involved in granting individuals different types of insurance. Feldman, *supra* note 2, at 461. Prospective employers use credit reports to evaluate applicants. *Id.* Landlords also retain credit bureau services. *Credit Investigations*, *supra* note 1, at 510. Consequently, credit reporting agencies include a wide range of informational details in each report. For example, a typical report lists an individual's basic identification and credit items such as name, address, marital status, bank references, and bill-paying habits. *Id.* A report also may detail the individual's salary, bank balance, outstanding debts, current charge accounts, and employment history. *Id.* Credit reports often include legal actions such as records of arrest, divorce, and law suits. *Id.* Most intrusively, a credit report may provide less verifiable information concerning an individual's drinking habits, the nature of his character, or his reputation in the community. *Id.* The sources for the credit bureau's files are also diverse, ranging from public records to employers and neighbors. *Id.* Due to biased sources or incomplete investigations, a credit agency may prepare an obsolete report or one containing irrelevant information that causes considerable problems for the individual. *Id.* at 511; McNamara, *supra* note 1, at 84. For specific examples of individuals who have encountered problems due to intrusive and inaccurate reports, *see* 115 CONG. REC. 2411-13 (1969) (remarks of Sen. William Proxmire).

to prevent the possibility of abuse in the field of information collection and dissemination.[7]

In 1970, Congress provided one such safeguard when it enacted the Fair Credit Reporting Act (FCRA).[8] The FCRA attempts to balance the need for credit reporting against the consumer's right to privacy in section 1681b of Title 15 of the United States Code (section 1681b).[9] Section 1681b sets forth the basis upon which a consumer reporting agency[10] may furnish credit information.[11] Normally, a credit bureau governed by

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[7] McNamara, *supra* note 1, at 68. Prior to the enactment of the FCRA, a consumer had no control over the content of credit reports and no ability to correct errors. *Legislative Trust*, *supra* note 2, at 97-98. The consumer also had no adequate remedy against reporting agencies that had made errors or invaded individual privacy in compiling the report. *Id.* Although private causes of action exist under a tort or constitutional law theory, such means of redress are too costly and time consuming for individual consumers to pursue. *See Use and Abuse*, *supra* note 4, at 598. Furthermore, before 1971, the consumer reporting industry was largely unregulated. Feldman, *supra* note 2, at 461. Only one state had legislation regulating credit bureaus at the time of enactment of the FCRA. *See* OKLA. STAT. ANN. tit. 24, §§ 81-85 (1955); 115 CONG. REC. 2414 (1969) (remarks of Sen. William Proxmire).

[8] Pub. L. No. 91-508, Title VI, 84 Stat. 1127 (*codified as amended* 15 U.S.C. §§ 1681-1681t (1976 & Supp. II 1978)). Congress enacted the FCRA on October 26, 1970, but the FCRA did not become effective until April 25, 1971. Other federal legislation designed to protect an individual right to privacy includes the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (Supp. IV 1980) and the Privacy Act, 5 U.S.C. § 552(a) (1976).

[9] 15 U.S.C. § 1681b (1976); *see Misleading Reports*, *supra* note 1, at 112-13; notes 2-6 *supra*. Congress intended that the FCRA protect consumers and regulate the credit reporting industry with a minimum amount of disruption and additional expense. Feldman, *supra* note 2, at 489. *See also* R. CLONTZ, FAIR CREDIT REPORTING MANUAL 1.3 (1977) [hereinafter cited as CLONTZ].

[10] Under the FCRA, a consumer reporting agency is any person or organization who, for monetary fees, regularly engages in the practice of gathering consumer credit information with the ultimate purpose of furnishing consumer reports to third parties. 15 U.S.C. § 1681(a)(f) (1976).

[11] Fair Credit Reporting Act, § 604, 15 U.S.C. § 1681b (1976). Section 1681b provides as follows:

> Permissible purposes of reports.
>
> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> (1) In response to the order of a court having jurisdiction to issue such an order.
>
> (2) In accordance with the written instructions of the consumer to whom it relates.
>
> (3) To a person which it has reason to believe—
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> (B) intends to use the information for employment purposes; or
>
> (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
>
> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's

the FCRA[12] may issue credit reports only to persons or organizations that have a legitimate business need for the information.[13] Congress, however, provided two exceptions to the legitimate business need requirement.[14] A consumer reporting agency also may furnish information in accordance with the consumer's written instructions or in response to a valid court order.[15] In recent years, a controversy has developed surrounding the court order exception to the business need requirement.[16] The controversy concerns whether a grand jury subpoena constitutes a court order within the meaning of the FCRA.[17] Determination of the issue requires analysis of both the congressional purpose behind enactment of the FCRA[18] and the nature and function of the grand jury institution.[19]

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financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Id.

[12] The FCRA applies to any credit bureau that regularly engages in the gathering and dissemination of credit information for a fee in interstate commerce. *See* 15 U.S.C. § 1681(a)(f) (1976); CLONTZ, *supra* note 9, at 1.19-.21; note 10 *supra.*

[13] 15 U.S.C. § 1681b (1976); *see* note 11 *supra* Exactly what constitutes a legitimate business need is difficult to define. *See* 115 CONG. REC. 2413 (1969) (remarks of Sen. William Proxmire). Apparently, the thrust of the FCRA's legitimate business need language is to insure that only those persons or organizations who intend to use credit information in connection with consumer credit or other transactions involving, for example, insurance, may obtain consumer credit reports. *Id.* at 2415. In other words, credit bureaus should issue reports only to organizations who need the information to protect themselves against unreasonable business risks. *The Case for Revision, supra* note 4, at 424. Determining who needs the information and to what extent is a difficult task. For example, automobile insurers need to know an individual's driving record before taking the risk of issuing insurance to that person. Comment, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother is Watching You,* 2 HASTINGS CONST. L. Q. 773, 802 (1975). Life insurance companies need to know an individual's medical history and must determine if the individual participates in hazardous hobbies and activities in evaluating insurance risks. *Id.* Employers need information pertaining to an applicant's education, abilities, and experience in determining the person's suitability for a particular position. *Id.* Presumably, as a logical extension of these examples, a lawyer might claim that he has a legitimate need for reports on his clients or prospective witnesses. *See* Note, *Protecting Privacy in Credit Reporting,* 24 STAN. L. REV. 550, 558-59 (1972).

[14] 15 U.S.C. § 1681b (1976); *see* note 11 *supra.*

[15] 15 U.S.C. § 1681b (1976); *see* note 11 *supra.*

[16] *See, e.g., In re* Gren, 633 F.2d 825 (9th Cir. 1980); *In re* Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253 (D. Md. 1981; *In re* Grand Jury Subpoena Duces Tecum concerning Credit Bureau, Inc., 498 F. Supp. 1174 (N.D. Ga. 1980); *In re* Vaughn, 496 F. Supp. 1080 (N.D. Ga. 1980); *In re* TRW, Inc., 460 F. Supp. 1007 (E.D. Mich. 1978); Application of Credit Info. Corp., 457 F. Supp. 969 (S.D.N.Y. 1978); notes 6-7 *infra. See generally* Williams, *Discovery and the Privacy Act: Exemption (b)(11) to the Conditions of Disclosure: What Qualifies As an "Order of the Court"?* 15 RICH. L. REV. 439 (1981) [hereinafter cited as Williams].

[17] *See* text accompanying notes 68-76 *infra.*

[18] *See* text accompanying notes 20-35 *infra.*

[19] *See* text accompanying notes 38-65 *infra.*

The FCRA closely parallels Senate Bill 823, one predecessor of the current statute.[20] The purpose of Senate Bill 823 was to require credit bureaus to institute reasonable procedures for guaranteeing both the accuracy and confidentiality of information contained in each consumer's file.[21] The sponsors of the bill were concerned particularly about the need for confidentiality as a means to secure an individual's right to privacy.[22] A question arose concerning governmental access to credit reports due largely to the American democratic philosophy that discourages intrusive government surveillance of its citizens' private lives.[23]

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[20] *See* Congressional Record, S. 823, 91st Cong., 1st Sess., 115 CONG. REC. 2415-16 (1969); McNamara, *supra* note 1, at 92-93. Senator William Proxmire sponsored Senate Bill 823, which was the primary source for the FCRA's finalized version. *Id.* The FCRA had more remote origins in 1968 when Congressman Clement Zablocki of Wisconsin introduced the first Fair Credit Reporting Bill. *See* H.R. 15267, 90th Cong., 2d Sess. (1968). Zablocki's bill, however, was never reported out of the House Committee on Banking and Currency. *See* McNamara, *supra* note 1, at 74. Subsequently, the House Subcommittee on Invasion of Privacy began hearings on credit bureaus. *Id.* at 75. In an effort to forestall legislation, the credit bureau industry held meetings to establish procedural guidelines designed to curb the abuses of the credit reporting industry. *See Legislative Trust*, *supra* note 2, at 103-04. *See generally* Denny, *Federal Fair Credit Reporting Act*, 88 BANKING L. J. 579 (1971) (informal chronological development of credit reporting legislation). The credit industry's guidelines, although impressive, did not satisfy Senator Proxmire's wish to protect the American consumer's right to privacy. *See* McNamara, *supra* note 1, at 76-77; CLONTZ, *supra* note 9, at 1.6-1.7. Proxmire accordingly introduced Senate Bill 823 two and one half weeks after the credit industry announced its guidelines. McNamara, *supra* note 1, at 77.

[21] 115 CONG. REC. 2414 (1969) (remarks of Sen. William Proxmire).

[22] *See* 115 CONG. REC. 2413 (1969) (remarks of Sen. William Proxmire while introducing Senate Bill 823). Senator Proxmire noted the disturbing lack of public standards to insure that credit information remain confidential unless subscribers of credit reporting services legitimately use the information for its intended purpose. *Id.*; *see* note 7 *supra*. Credit bureaus maintain in their consumer credit files information pertaining to a person's employment, income, marital status, habits, characters, morals, and bill paying records. 115 CONG. REC. 2413 (1969); note 6 *supra*.

Proxmire noted that during the 1960s, the executive branch had proposed the establishment of a national data bank that would contain the type of personal information that credit reporting agencies store. 115 CONG. REC. 2410-11 (1969). The plan met with vigorous opposition due to its "big brother" implications. *Id.* Proxmire contended that, under private auspices, the credit reporting industry was amassing the same type of personal data bank with no public safeguards to assure confidentiality of the information. *Id.*; *see* notes 4-7 *supra*.

[23] 115 CONG. REC. 2413 (1969); *see* Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's* (pt. 1), 66 COLUM. L. REV. 1003, 1018-20 (1966). According to Mr. Westin, modern democratic theory recognizes that an individual's interests extend beyond political activity to include areas such as sports, arts, literature, religion, and family. *Id.* at 1019. Individuals freely assert claims to personal privacy against both the state and society in order to pursue these nonpolitical interests without government intrusion. *Id.* A democracy relies on privacy as a shield for individual life and on publicity as a check on government interference. *Id.* Westin contrasts the democratic society with the totalitarian state, which relies on secrecy and surveillance for the regime and on full disclosure for its citizens. *Id.* at 1018-19; *see* note 22 *supra*.

Prior to the enactment of the FCRA, credit agencies had diverse and often vague policies concerning access to consumer credit files.[24] A majority of credit bureaus freely issued credit reports to noncreditor governmental investigatory agencies such as the Internal Revenue Service and the Federal Bureau of Investigation on the grounds that voluntary cooperation with the agencies' investigations was in the public interest.[25] A few credit agencies jealously guarded the confidentiality of consumer credit information and permitted noncreditors access only upon the consumer's express consent.[26] Senate Bill 823 favored the limited access policy and provided that noncreditors could not receive credit reports without the consumer's written permission.[27]

While Senate Bill 823 was pending before the Senate, the issue of government access to credit information generated considerable discussion and debate.[28] One faction contended that fourth amendment protections against unreasonable search and seizure extend to credit reports.[29] An opposing faction maintained that governmental agencies concerned

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[24] 115 CONG. REC. 2413 (1969) (remarks of Sen. William Proxmire); 114 CONG. REC. 24,903 (1968) (remarks of Sen. William Proxmire).

[25] 115 CONG. REC. 2413 (1969) (remarks of Sen. William Proxmire).

[26] *Id.*

[27] 114 CONG. REC. 24,903 (1968) (remarks of Sen. William Proxmire); 115 CONG. REC. 2415 (1969), S. 823 § 164(f).

[28] *See* 115 CONG. REC. 2413 (1969) (remarks of Sen. William Proxmire). *See also Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency on H.R. 16340*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Hearings*]. At the hearings on the House counterpart to Senate Bill 823, witnesses appearing before the subcommittee debated over the contents of § 35 of H.R. 16340, which provided as follows:

> Access by governmental agencies.
>
> A consumer reporting agency may not furnish information on individuals in its files, except identifying information such as names, addresses, former addresses, places of employment, or former places of employment to a governmental agency for purposes other than those listed under section 34(b) unless pursuant to legal process.

Id. at 154-55; *see H.R. 16340, 91st Cong., 2d Sess.* § 35, *Hearings* at 7; notes 29-30 *infra.*

[29] *See Hearings, supra* note 27, at 605-06. One representative of the pro-protection faction was Dr. Harry Jordan, Chairman of TRW, Information Services, Inc., who testified before a House subcommittee concerning § 35 of H.R. 16340. TRW granted information to governmental law-enforcement agencies only pursuant to legal process. *See* 115 CONG. REC. 2413 (1969). Jordan objected to the "pursuant to legal process" language of § 35 as not providing the consumer with any real protection. *Hearings, supra* note 28, at 154. In Jordan's view, use of the "legal process" phrase left the abusive investigative procedures available to governmental agencies intact. *Id.* at 154-55; *see* text accompanying notes 70-71 *infra* (discussing prosecutorial use of subpoena power).

The American Civil Liberties Union also criticized § 35 since it would permit any governmental agency to obtain any consumer information by means of a simple subpoena. *Hearings, supra* note 28, at 233 (remarks of Mr. Speiser, Director, Washington Bureau, ACLU). The view of the ACLU was that the subpoena process represented an inadequate means to justify credit report dissemination. *Id.* The ACLU urged that the bill provide more stringent procedures to give consumers notice and an opportunity to contest the request for information. *Id.*

with the revenue and law enforcement departments should have unlimited access to credit reports.[30] Congress eventually rejected all proposals that would permit the free flow of credit information to governmental agencies.[31] In its final form, the FCRA permits government agencies the right to receive only identifying information about a consumer such as name, address, and places of employment.[32] Absent a specific, legitimate business need,[33] a noncreditor may obtain credit information only by means of the consumer's cooperation or the power of a court order.[34] The FCRA thus represents a statutory compromise between the individual's right to privacy and the business world's need for information by permitting dissemination of more than identifying information only upon the superior authorization of the consumer or the judicial system.[35]

Although the FCRA restricts access to intrusive information by means of the court order requirement, the statute and its legislative history neither mention the precise scope of the "court order" terminology nor indicate whether a grand jury subpoena comes within the court order exception.[36] One consideration in determining whether a grand jury subpoena constitutes an adequate justification for the release of credit reports consistent with the FCRA's privacy concerns[37] is the nature and function of the grand jury institution and its subpoena power.[38] Both the common law and federal statutes are responsible for defining the scope of the grand jury's power and function.[39] At its incep-

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[30] *See Hearings*, *supra* note 28, at 605-06. Mr. Richard Kleindienst, Deputy Attorney General representing the United States Justice Department, urged that any legislation pertaining to the credit reporting agency should permit the government's law-enforcement agencies free access to credit reports. *Id.* at 605-06 (letter from Mr. Kleindienst). In a letter to the House subcommittee, Kleindienst emphasized that credit reports are useful, and often critical, in criminal investigations. *Id.* at 605. Credit reports often assist in locating witnesses, suspects, and fugitives and in pinpointing the "makings" of white collar crimes. *Id.* Requiring law enforcement agencies to obtain court orders would result in unnecessary delays and an increased burden on the courts. *Id.* at 605-06. *See also id.* at 603-04 (letter from Hugo Rinta, General Counsel of the United States Treasury) (urging that governmental law-enforcement agencies need access to credit reports).

[31] *See* Fair Credit Reporting Act, §§ 604 & 608, 15 U.S.C. §§ 1681b & 1681f (1976); note 11 *supra*.

[32] 15 U.S.C. § 1681f (1976). Section 1681f of Title 15 operates independently of § 1681b. *Id.*; *see* 15 U.S.C. § 1681b (1976).

[33] *See* note 13 *supra*.

[34] *See* Fair Credit Reporting Act § 604, 15 U.S.C. § 1681b (1976); note 11 *supra*.

[35] *See* text accompanying note 15 *supra*.

[36] *See In re* Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253, 1255-56 (D. Md. 1981) (contrasting FCRA's silence on grand jury subpoena issue with Right to Financial Privacy Act's specific exemption of grand jury subpoenas); text accompanying notes 85-97 *infra*.

[37] *See* text accompanying notes 2-6 *supra*.

[38] *See* text accompanying notes 39-55 *infra*.

[39] *See* L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 6:34 (1946) [hereinafter cited as ORFIELD]. *See generally* 18 U.S.C. §§ 3321-3328 (1976) and §§ 3331 &

tion, the grand jury was an inquisitorial body that decided whether to charge individuals with particular crimes.[40] Gradually, the grand jury evolved into a two-function body, acting as a "sword" to combat crime and as a "shield" to screen indictments.[41] Although the latter role was responsible for the grand jury provision of the fifth amendment,[42] the investigatory function retains greater significance in modern criminal procedure.[43]

3332 (1976) (special grand jury provisions); FED. R. CRIM. P. 6 (grand jury procedure). This note only considers federal grand jury proceedings. For a comprehensive summary of state grand juries, *see* L. KATZ, JUSTICE IS THE CRIME 247-365 (1972) [hereinafter cited as KATZ]; National Association of Attorneys General, *Statewide Grand Juries* (1977).

[40] *See* R. YOUNGER, THE PEOPLE'S PANEL 1 (1963) [hereinafter cited as YOUNGER]. The grand jury institution originated in England during the reign of Henry II. *Id.* Originally, the grand jury was an important accusatory instrument of the Crown. *Id.* at 2. Eventually, however, the grand jury developed into an independent body that shielded the citizenry from royal persecution. *Id.* To insure a broad range of inquiry, grand jurors made a pledge of secrecy that made no exceptions, even in favor of the government. *See* PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 375 (1977) [hereinafter cited as PERSONAL PRIVACY].

[41] *Id.* In the American colonies, the grand jury system took on an expanded role as an investigatory and reporting agency that acted to correct public wrongs. *Id.*; M. FRANKEL & G. NAFTALIS, THE GRAND JURY 3 (1977) [hereinafter cited as FRANKEL & NAFTALIS]. The colonists viewed the grand jury as a shield for the individual against arbitrary or malevolent prosecutors. *Id.* Indeed, the grand jury functioned as a bulwark of individual liberty by protecting subjects of investigations from premature or inappropriate public disclosure. PERSONAL PRIVACY, *supra* note 40, at 375. Additionally, the colonists viewed the grand jury institution as a kind of "people's watchdog" that would search out and disclose government corruption or matters needing legislative attention. FRANKEL & NAFTALIS, *supra*, at 3. During the industrial age, the institutional structure of the grand jury continued in the "watchdog" vein. PERSONAL PRIVACY, *supra* note 40, at 375. The nature and scope of grand jury investigations created a need for grand jurors to have assistance in collecting and analyzing information. *Id.* Government investigative agencies and attorneys provided the necessary work-force. *Id.*

[42] *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1015 (5th ed. 1980) [hereinafter cited as KAMISAR]. The fifth amendment to the United States Constitution preserved the grand jury institution by requiring that grand juries initiate federal prosecutions through presentment or indictment. *Id.* The fifth amendment provides in relevant part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. CONST. amend. V. Presentment is the formal process by which a grand jury initiates an independent investigation and makes charges. ORFIELD, *supra* note 39, § 6:107. An indictment is a formal charge that the grand jury issues upon evidence established during a prosecutor's examination. *See* Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 WASH. & LEE L. REV. 110, 111 n.10 (1981). Although the fifth amendment refers to the term "presentment," federal law now provides only for use of the indictment. *See* KAMISAR, *supra*, at 1015 n.6; FED. R. CRIM. P. 7 (indictment and information).

[43] *See* KAMISAR, *supra* note 42, at 712-13. In the eighteenth century, in response to public criticism, Congress made the calling of federal grand juries discretionary for indictment purposes, except in capital cases. *See* KATZ, *supra* note 39, at 14; 1 Stat. 119 (1790). Trained police departments and prosecutors can investigate individual crimes more efficiently. KATZ, *supra* note 39, at 15. Grand juries are most useful, therefore, as devices to investigate government offenses. *Id.*

The United States Supreme Court has recognized the grand jury's broad investigatory powers that help to make the grand jury an effective and valuable prosecutorial device.[44] The primary advantage of a grand jury investigation is its subpoena power, which stems from the grand jury's close connection with the court that impaneled it.[45] The Supreme Court has stated that the force and weight of a grand jury subpoena would be meaningless without a link to the court that supplies the enforcement contempt mechanism.[46] Subpoenas, however, are relatively easy to obtain and are subject to few restrictions.[47] Rule 17 of the Federal Rules of Criminal Procedure, for example, permits the issuance of a federal grand jury subpoena in blank by the clerk of court.[48] In other

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[44] *See* Blair v. United States, 250 U.S. 273, 282 (1919). The Supreme Court noted that a grand jury is a "grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation. . . ." *Id. See also* United States v. Mandujano, 425 U.S. 564, 571 (1976) (law vests grand jury with substantial powers in order that grand jury may adequately discharge its public responsibility).

[45] *See* KAMISAR, *supra* note 42, at 713.

[46] United States v. Calandra, 414 U.S. 338, 346 n.4 (1974) (quoting FED. R. CRIM. P. 17(c)) (grand jury must rely on court to compel production of documents and testimony of witnesses). In *Calandra*, a grand jury questioned witness Calandra concerning loan-sharking records that federal agents had obtained during a search of Calandra's office. *Id.* at 341. Calandra claimed that since the agents illegally seized the evidence, questions pertaining to the records were impermissible. *Id.* The Supreme Court agreed that the agents procured the evidence in violation of the fourth amendment, but declined to extend the exclusionary rule to grand jury proceedings. *See id.* at 348. In making its decision, the *Calandra* Court reviewed the historical role and functions of the grand jury, citing with approval the following language from Brown v. United States, 359 U.S. 41, 49 (1959), *rev'd*, 382 U.S. 162 (1965):

> [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.

414 U.S. at 346 n.4; *accord*, United States v. Stevens, 510 F.2d 1101, 1106 (5th Cir. 1975).

A court compels compliance with grand jury subpoenas by means of the contempt process. FED. R. CRIM. P. 17(g). For a thorough discussion of the contempt process in the grand jury context, *see* Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 MICH. L. REV. 483 (1975).

[47] *See* Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 AM. CRIM. L. REV. 651, 684 (1977) [hereinafter cited as Wilson & Matz]; note 73 *infra* (analysis of distinction between court order and subpoena). Together with the search warrant with its stringent requirements of probable cause, the grand jury subpoena represents the only form of a compulsory legal process available for general inquiries into violations of the law. *See* PERSONAL PRIVACY, *supra* note 40, at 376.

[48] FED. R. CRIM. P. 17(a). Rule 17(a) provides in pertinent part:

> For attendance of Witnesses; Form; Issuance. 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

words, a judge rarely sees or approves a subpoena request unless the prosecution moves for an order to compel or the subpoenaed party moves to quash the request.[49] Yet the Supreme Court has decided that the probable cause requirement of the fourth amendment does not apply to grand jury subpoenas.[50] A grand jury need show only the propriety of its investigation and the relevance to that investigation of the subpoenaed items or testimony.[51] Although the fourth amendment does protect against a grand jury subpoena that is unreasonably broad,[52] the Supreme Court has refused to hamper a grand jury's investigatory powers by application of the exclusionary rule to grand jury proceedings.[53] Furthermore, a grand jury can serve a subpoena on anyone, ranging from the target of the investigation to the President of the United States.[54] Grand jury subpoenas, therefore, have a long reach, enabling grand juries to have access to information more easily than either the police or the courts.[55]

Another factor adding to the grand jury's effectiveness as an investigatory agency is the secrecy requirement attached to grand jury

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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. . . .

Id.; *see* Wilson & Matz, *supra* note 47, at 684.

[49] *See* note 73 *infra* (analysis of distinction between court order and subpoena and judge's role in subpoena process).

[50] United States v. Dionisio, 410 U.S. 1, 8-18 (1973). In *Dionisio*, the Supreme Court held that neither a summons to appear before the brand jury nor its directive to make a voice recording violated the fourth amendment's prohibition against unreasonable searches and seizures. *Id.* The Court noted that a grand jury must be able to carry on investigations free from preliminary showings and other external hindrances if the grand jury is properly to perform its constitutional mission. *Id.*

[51] *See In re* Grand Jury Proceedings (Schofield I), 486 F.2d 85, 93 (3d Cir. 1973). In *Schofield I*, the Third Circuit held that no contempt citation could issue if the government could not show by affidavit that each subpoenaed item was relevant to the grand jury's investigation and was not sought for secondary purposes. *Id.* In a later decision, however, the Third Circuit found sufficient a short affidavit declaring simply that the subpoenaed items were necessary to the investigation. *In re* Grand Jury Proceedings, 507 F.2d 963, 967 (3d Cir.) *cert. denied*, 421 U.S. 1015 (1975). The government's burden to demonstrate relevance is slight, however, since the grand jury must retain its broad investigatory powers. *Id.* at 965-66, 968; *see* Wilson & Matz, *supra* note 48, at 684-86.

[52] *See* Hale v. Henkel, 201 U.S. 43, 76-77 (1906). *See also* Boyd v. United States, 116 U.S. 616, 633-34 (1886) (fifth amendment privilege against self-incrimination applicable to grand jury proceedings).

[53] *See* United States v. Calandra, 414 U.S. 338, 353-55 (1974). The *Calandra* Court noted that the grand jury traditionally has been permitted to pursue its investigatory functions unimpeded by evidentiary and procedural restrictions applicable to a criminal trial. *Id.* The Court maintained that any deterrence of police misconduct resulting from application of the exclusionary rule to grand jury proceedings would be minimal compared to the potential damage the rule could cause to the grand jury's functions. *Id.*

[54] Wilson & Matz, *supra* note 47, at 684; *see* United States v. Nixon, 418 U.S. 683, 702 (1974); United States v. Dionisio, 410 U.S. 1, 9-10 (1973).

[55] *See* text accompanying notes 45-54 *supra*.

proceedings.[56] Rule 6 of the Federal Rules of Criminal Procedure prohibits any grand juror, interpreter, stenographer, or attorney from disclosing matters occurring before the grand jury.[57] Rule 6, however, does not prohibit a grand jury witness from divulging testimony or other matters revealed to him during the course of his examination.[58] At least five objectives underlie the grand jury secrecy provisions.[59] The objectives are to prevent the escape of a person whose indictment may be pending, to insure the grand jurors' freedom of deliberation, to prevent tampering with witnesses scheduled to appear at trial, to encourage citizens who have information on the commission of crimes to come forth, and to protect the innocent accused from damaging public exposure.[60] The effectiveness of the majority of the objectives depends, however, on the cooperation of the individuals involved,[61] including both persons who are subject to criminal contempt citations for unauthorized disclosure of grand jury proceedings,[62] and witnesses themselves who often welcome the shroud of secrecy surrounding grand jury proceedings.[63] Despite the contempt sanction, however, the threat of prosecution has not been entirely effective in preventing leaks to the press.[64] Nonetheless, with witness cooperation, grand jury secrecy rules

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[56] *See* KAMISAR, *supra* note 42, at 715-16.

[57] FED. R. CRIM. P. 6(e)(2). Rule 6 provides for several exceptions to the general rule of secrecy pertaining to grand jury proceedings. *Id.* 6(e)(3). Disclosure may be made to a government attorney for use in the performance of his duties or pursuant to a court order. *Id.*

[58] *Id.*; *see* KAMISAR, *supra* note 42, at 716.

[59] *See* United States v. Proctor & Gamble Co. 356 U.S. 677, 681-82 n.6 (1958); KAMISAR, *supra* note 42, at 716-17. At least one commentator has noted that the principal reason for grand jury secrecy is to protect the innocent from injustice and irreparable injury in the form of social stigma. Kaufman, *The Grand Jury—Its Role and Its Power*, 17 F.R.D. 331, 333 (1954).

[60] 356 U.S. at 681-82 n.6.

[61] KAMISAR, *supra* note 42, at 716-17.

[62] *See* text accompanying notes 46 & 57 *supra.*

[63] KAMISAR, *supra* note 42, at 716. Witnesses may be more willing to cooperate with a grand jury investigation if they know that no public disclosure of their identities and testimony will result. *Id.*

[64] *See* Frankel & Naftalis, *supra* note 41, at 85-86. The commentators state that grand jury leaks are a nagging and persistent problem. *Id.* at 85. To counter the problem, the authors suggest that Congress enact a specific statute that would criminally punish persons who leak grand jury materials. *Id.* at 86. *See also* KAMISAR, *supra* note 42, at 717 n.f. In 1980, the General Accounting Office issued a report on the security procedures of federal grand juries. *See* 67 A.B.A. J. 144 (1981). According to the *American Bar Journal*, the report revealed hundreds of instances of public disclosure of privileged information resulting in the disappearance and possible murder of grand jury witnesses, delayed and frustrated investigations, and reputation damage of unindicted persons. *Id.* The report concluded that the security provisions pertaining to grand jury investigations were not adequate to protect grand jury secrecy since federal district courts took little or no precautions to limit access to grand jury materials. *Id.* at 144-45.

The Report of the Privacy Protection Study Commission indicates that additional problems exist with respect to grand jury secrecy. *See* PERSONAL PRIVACY, *supra* note 40, at

generally deter the leaks that accompany other types of investigations.[65]

Due to the secrecy provisions of grand jury proceedings, therefore, the grand jury system contains certain safeguards to assure a degree of individual privacy.[66] The question remains whether the safeguards provide the degree of privacy Congress intended to guarantee when it enacted section 1681b of the FCRA.[67] The majority of courts responding to the subpoena question cast the inquiry strictly in terms of the nature of the grand jury rather than in terms of the grand jury's privacy protections.[68] Generally, the courts are in agreement that the judiciary technically controls the functions of grand juries.[69] Yet, the majority of

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375-78. The report points out that government attorneys are responsible for deciding when to issue a grand jury subpoena. *Id.* at 376. Government attorneys and federal agents organize the subpoenaed evidence, and prepare reports describing the contents of subpoenaed documents before deciding to present the evidence to the grand jury itself. *Id.* at 376-77. When the agents present the evidence to the grand jury, the information comes under the grand jury's seal of secrecy. *Id.* at 377. Information that never comes before the grand jury, however, is not subject to any secrecy requirements, but becomes part of an investigative record generally available for government use. *Id.* In essence, the report concludes, grand jury subpoenas are administrative tools. *Id.* the traditional secrecy provisions can no longer justify, therefore, the unique compulsion powers of the grand jury system. *Id.* The Commission thus proposed that Congress statutorily provide both that evidence subpoenaed by the grand jury cannot be maintained in any record apart from those under the seal of the grand jury, and that the grand jury may only subpoena documents in which an individual has a legitimate expectation of confidentiality under certain stringent conditions. *See id.*

[65] KAMISAR, *supra* note 42, at 716.

[66] *See* text accompanying notes 44-65 *supra.*

[67] *See* text accompanying notes 4-9 *supra.*

[68] *See, e.g., In re* Gren, 633 F.2d 825, 827 (9th Cir. 1980); *In re* Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253, 1254-55 (D. Md. 1981); *In re* Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc., 498 F. Supp. 1174, 1176 (N.D. Ga. 1980); *In re* TRW, Inc., 460 F. Supp. 1007, 1009 (E.D. Mich. 1978); Application of Credit Info. Corp., 457 F. Supp. 969, 971 (S.D.N.Y. 1978).

At least one court has refused to participate in the debate concerning the characterization of a grand jury as an arm of the prosecutor or an appendage of the court in determining whether a grand jury subpoena constitutes a court order under the FCRA. *See In re* Vaughn, 496 F. Supp. 1080, 1082 (N.D. Ga. 1980). In concluding that a grand jury subpoena is not a court order, the *Vaughn* court mentioned the debate, but based its decision on factors indicating that a court order is superior in power to a subpoena. *See* 496 F. Supp. at 1082-83; note 73 *infra* (analysis of distinction between court order and subpoena).

[69] *See, e.g., In re* Gren, 663 F.2d 825, 827 (9th Cir. 1980) (true that courts are responsible for calling grand juries into existence); *In re* Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253, 1254 (D. Md. 1981) (technically accurate that grand jury is judicial body); *In re* Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc., 498 F. Supp. 1174, 1177 (N.D. Ga. 1980) (grand jury status as constitutional entity does not make it immune from court supervision); *In re* TRW, Inc., 460 F. Supp. 1007, 1009 (E.D. Mich. 1978) (federal grand jury is judicial body created by fifth amendment to United States Constitution).

Under the Federal Rules of Criminal Procedure, the judicial branch has the responsibility to summon grand juries according to public need. *See* FED. R. CRIM. P. 6. The courts retain extensive authority over the grand jury institution. *See* United States v. Calandra,

courts point out that the grand jury's technical classification as primarily a judicial body ignores the realities of grand jury proceedings.[70] According to the majority view, a grand jury is, for all practical purposes, a law enforcement agency that acts as an investigative and prosecutorial arm of the government.[71] Additionally, the majority of courts note that although grand jury subpoenas are issued under the seal of the court, the court clerk issues the subpoenas in blank to anyone requesting them, a factor that supports a non-judicial characterization of grand juries.[72] Therefore, the majority view continues, grand jury subpoenas do not constitute court orders under the FCRA particularly since Congress clearly intended to deny government agencies access to consumer credit information unless an agency could convince a court that sufficient need for the information justified a court-ordered invasion of a consumer's privacy.[73]

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414 U.S. 338, 346 n.4 (1974); Brown v. United States, 359 U.S. 41, 49 (1959); text accompanying note 46 *supra*. The grand jury, therefore, is formally a creature of the court. *See* FRANKEL & NAFTALIS, *supra* note 41, at 20.

[70] *See In re* Gren, 633 F.2d 825, 827 (9th Cir. 1980); *In re* Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253, 1254 (D. Md. 1981); *In re* Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc. 498 F. Supp. 1174, 1176 (N.D. Ga. 1980); Application of Credit Info. Corp., 457 F. Supp. 969, 971 (S.D.N.Y. 1978).

The grand jury is an important investigative instrument of the prosecutor. *See* Wilson & Matz, *supra* note 47, at 683; 8 MOORE'S FEDERAL PRACTICE §§ 6.02(1) & (6) (2d ed. 1972). Typically, the United States Attorney determines what matters the federal grand jury should investigate. Wilson & Matz, *supra* note 47, at 683. Prosecutors, as professionals, take an active role in the functioning of the grand jury system due to the layman grand juror's inability to direct investigations. *Id.* The scope of grand jury investigations is subject to few court-made limitations, making the grand jury a potent tool for the prosecutor. *Id.*; *see* FRANKEL & NAFTALIS, *supra* note 41, at 4-5; PERSONAL PRIVACY, *supra* note 40, at 376-77; text accompanying notes 39-55 *supra*.

[71] *See In re* Gren, 633 F.2d 825, 827 (9th Cir. 1980); *In re* Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253, 1254-55 (D. Md. 1981); *In re* Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc., 498 F. Supp. 1174, 1176 (N.D. Ga. 1980); Application of Credit Info. Corp., 457 F. Supp. 969, 971 (S.D.N.Y. 1978).

[72] *See, e.g., In re* Gren, 663 F.2d 825, 827 (9th Cir. 1980) (courts exercise no prior control upon use of grand jury subpoenas that are analogous to administrative subpoenas); *In re* Grand Jury Subpoena Duces Tecus Concerning Credit Bureaus, Inc., 498 F. Supp. 1174, 1176-77 (N.D. Ga. 1980) (grand jury dependence on court mandates lesser status of subpoenas); *In re* Vaughn, 496 F. Supp. 1080, 1082 (N.D. Ga. 1980) (subpoena not court order since court clerk issues subpoena at request of prosecutor); Application of Credit Info. Corp., 457 F. Supp. 969, 971-72 (S.D.N.Y. 1978) (grand jury subpoena is functional tool of prosecutor that receives no judicial consideration before issuance). *But see In re* Grand Jury Proceedings, 503 F. Supp. 9, 12 (D. N.J. 1980) (grand jury subpoena is writ coming directly from court); *In re* TRW, Inc., 460 F. Supp. 1007, 1009-10 (E.D. Mich. 1978) (grand jury subpoena has no need of extra judicial approval to constitute court order).

[73] *See In re* Gren, 633 F.2d 825, 827 (9th Cir. 1980); *In re* Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253, 1254-55 (D. Md. 1981); *In re* Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc., 498 F. Supp. 1174, 1175 (N.D. Ga. 1980); *In re* Vaughn, 496 F. Supp. 1080, 1082 (N.D. Ga. 1980); Application of Credit Info. Corp., 457 F. Supp. 969, 971 (S.D.N.Y. 1978); text accompanying notes 23-24 *supra*.

An analysis of the distinction between a subpoena and a court order strengthens the majority view that a grand jury subpoena is not a court order under the FCRA. The

Other courts analyze the technical functions of the grand jury system more rigidly, concluding that grand juries are appendages of the court and that grand jury subpoenas are, therefore, court orders.[74] In the

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description of a subpoena is nearly identical under the Federal Rules of Criminal and Civil Procedure. FEDERAL RULES (Crim. Proc.) 53 (West 1979). FED. R. CIV. P. 45(a) provides as follows:

> 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.

Id. Compare FED. R. CIV. P. 45(a) *with* FED. R. CRIM. P. 17(a) (quoted in note 48 *supra*). Subpoenas are, therefore, merely standardized forms that the clerk of court issues in blank to the requesting party. Williams, *supra* note 16, at 457. Both the criminal and civil rules permit liberal discovery of evidence through use of the subpoena process. *See* FED. R. CRIM. P. 16 (permissible areas of discovery in criminal proceedings; FED. R. CIV. P. 26 (scope of discovery) & 34 (subpoena duces tecum process). The Federal Rules additionally provide, however, that courts have the power to quash subpoenas and to issue protective or modifying orders. *See* FED. R. CRIM. P. 17(c) & 16(d)(1); FED. R. CIV. P. 34(b) & 26(c). In other words, through use of its judicial order power, the court is the ultimate authority in determining the validity of and need for subpoenaed information.

The United States Supreme Court has recognized the distinction between the mere issuance of a subpoena and a court order for its enforcement in Brown v. United States, 359 U.S. 41, 49-50 (1959). The *Brown* case involved a grand jury witness who refused to answer the grand jury's questions. *Id.* at 42. The Supreme Court acknowledged that the witness was within his rights to refuse to answer until the grand jury obtained a court order, which by means of its contempt sanction, compelled the witness to respond. *Id.* at 49-50. The *Brown* decision emphasizes that, in the hierarchy of court proceedings, a court order is much more powerful than a subpoena. *Accord,* Stiles v. Atlanta Gas Light Co., 453 F. Supp. 798, 800 (N.D. Ga. 1978) (mere discovery issuance of subpoena that is subject to power of court to quash or modify does not constitute specific judicial directive compelling disclosure of records pursuant to Privacy Act of 1974). If a court directly participated in the issuance of a subpoena, little need would exist for procedural rules that permit quashing or modification of subpoenas pursuant to court order. Williams, *supra* note 16, at 467. Furthermore, if a subpoena and a court order were truly equivalent, neither grand juries nor private litigants would need to turn to a court for enforcement of discovery subpoenas. *See* note 46 *supra.*

The significance of court orders derives from the direct involvement of a judge who determines whether an order is appropriate only after hearing articulated reasons concerning the need for and relevancy of the desired information. *See In re* Vaughn, 496 F. Supp. 1080, 1083 (N.D. Ga. 1980) (requiring court order for dissemination of credit information causes prosecutor to articulate need for and relevancy of information). Courts enter the discovery process only after a conflict arises concerning a subpoena. *See* FED. R. CRIM. P. 16(d)(2) & 17(g); FED. R. CIV. P. 37(a); Notes of Committee on the Judiciary, House Report No. 94-247, *reprinted in* FEDERAL RULES (Crim. Proc.) 50 (West 1979) (legislative history of Federal Rules of Criminal Procedure indicate that courts should involve themselves in discovery only to resolve disputes). Subpoenas, therefore, are merely administrative formalities while court orders are valid, enforceable judicial decisions. Williams, *supra* note 16, at 467-68; *cf. In re* Grand Jury Proceedings, 503 F. Supp. 9, 12 (D. N.J. 1980) (order of court includes oral or written judicial commands, subpoenas, writs of execution, or other processes without regard to form or procedure so long as issued from court of United States).

[74] *See In re* Grand Jury Proceedings, 503 F. Supp. 9, 12 (D. N.J. 1980); *In re* TRW, Inc., 460 F. Supp. 1007, 1009 (E.D. Mich. 1978); note 69 *supra.*

minority view, a federal grand jury functions as a judicial body because it is part of the federal constitutional system.[75] Additionally, at least one court following this analysis emphasizes that federal judges summon, instruct, and advise grand jurors that they are to operate independently of the United States Attorney.[76]

Although the courts facing the grand jury subpoena issue reach opposing results, most use the same misleading analysis in attempting to resolve the question of whether a grand jury subpoena should be a court order for the purposes of the FCRA.[77] The grand jury institution is susceptible to classification as both an arm of the prosecutor and an appendage of the court.[78] An analysis based solely upon a rigid classification of the institution is, therefore, an inaccurate way to determine if a grand jury subpoena constitutes a privacy safeguard equal to that of a court order for the purposes of the FCRA. The primary inquiry in cases presenting the issue should be whether a grand jury, as a unique body, provides consumers with adequate privacy protections when it subpoenas credit reports without the added security measure of a court order.

Grand jury subpoenas are powerful devices[79] that are subject to a few procedural restrictions and have a long and sweeping reach.[80] Yet, subpoenas can be obtained without the direct involvement of the court.[81] Grand jury proceedings provide secrecy provisions to insure not only the effectiveness of an investigation, but also the privacy of individuals under investigation.[82] The secrecy provisions, however, are far from infallible, considering that witnesses are not subject to criminal sanctions for disclosure of information.[83] Therefore, if a grand jury subpoena is

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[75] *See In re* Grand Jury Proceedings, 503 F. Supp. 9, 12 (D. N.J. 1980); *In re* TRW, Inc., 460 F. Supp. 1007, 1009 (E.D. Mich. 1978). *Accord,* United States v. Johnson, 319 U.S. 503, 513 (1943) (grand jury is part of federal constitutional system).

[76] *See In re* TRW, Inc., 460 F. Supp. 1007, 1009 (E.D. Mich. 1978); FED. R. CRIM. P. 6.

[77] *Cf. In re* Vaughn, 496 F. Supp. 1080 (N.D. Ga. 1980); *see* text accompanying notes 68-76 *supra.*

[78] *See* text accompanying notes 69-70 *supra.*

[79] *See* text accompanying notes 45-55 *supra.*

[80] *See* text accompanying notes 46-55 *supra.*

[81] *See* text accompanying notes 48-50 *supra.*

[82] *See* text accompanying notes 56-65 *supra.*

[83] *See* text accompanying notes 57-58 *supra.* Under the FCRA, in contrast to the secrecy provisions of grand juries, credit reporting agencies are subject to both civil and criminal penalties for wrongful disclosure of consumer credit information. *See* 15 U.S.C. §§ 1681n, 1681o, & 1681r (1976 & Supp. II 1980). For example, officers of credit reporting agencies that knowingly and willfully disclose information to unauthorized persons are subject to a $5000 fine, imprisonment of one year, or both. *Id.* § 1681r. Negligent or willful noncompliance with any provisions of the FCRA subjects a credit reporting agency to civil liability for actual damages to the consumer, court costs, and in the case of willful noncompliance, punitive damages. *Id.* §§ 1681n-1681o. Credit reporting agencies are reluctant, therefore, to disseminate information without first ascertaining that the FCRA authorizes disclosure.

found to be the equivalent of a court order, the individual faces considerable risk that his credit report, containing many potentially damaging and irrelevant items, may become a matter of public record.

The legislative history of the FCRA does not discuss grand jury subpoenas.[84] In another act dealing with privacy rights, the Right to Financial Privacy Act (RFPA),[85] Congress specifically indicated that the court order exception permitting access to financial institution customer records would include grand jury subpoenas.[86] The legislative history of the RFPA indicates that grand jury access is permissible under the RFPA since grand juries are very important law enforcement mechanisms that have adequate internal secrecy provisions.[87] Since the general purpose of both the FCRA and the RFPA is to protect an individual's right to privacy,[88] Congress arguably would have treated grand juries in a similar manner had it explicitly considered the subpoena problem while the FCRA was pending.[89] Upon a closer examination of the RFPA, however, Congress expressly provided for many more types of exemptions for the release of financial institution records than it did for the release of credit reports under the FCRA.[90] Since a grand jury subpoena is one of many permissible reasons for information disclosure, grand jury secrecy provisions may provide adequate privacy protections within the context of the RFPA and, at the same time, not provide sufficient privacy protections under the FCRA.

The FCRA explicitly states that strict control over consumer reporting agencies is necessary in order to assure the individual right to privacy.[91] Furthermore, credit reports potentially contain much more

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[84] *See* text accompanying note 36 *supra.*

[85] 12 U.S.C. §§ 3401-3422 (Supp. IV 1980).

[86] The Right to Financial Privacy Act (RFPA) limits access of government agencies to financial institutions' customer records. *Id.* § 3402.

[87] *See* H.R. 1383, 95th Cong., 2d Sess. 228 (1978), *reprinted in* [1978] U.S. CODE CONG. & ADMIN. NEWS 9358.

[88] *See* 12 U.S.C. §§ 3401-3422 (Supp. IV 1980); 15 U.S.C. §§ 1681-1681t (1976 & Supp. II 1978; notes 4 & 9 *supra.*

[89] At least one court has rejected the argument analogizing the FCRA and the RFPA. *See In re* Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253, 1255-56 (D. Md. 1981). The Maryland district court declared that the two acts relate to different policy considerations. *Id.* The court maintained that credit information is a small part of all possible financial records and that Congress indicated that credit information is particularly sensitive. *Id.*; 15 U.S.C. § 1681 (1976).

[90] *See* 12 U.S.C. § 3413 (Supp. IV 1980). Other exemptions that the RFPA provides include, for example, disclosure pursuant to administrative subpoenas, the Internal Revenue Code, legitimate law enforcement inquiries, Federal Rules of Criminal Procedure, and investigation instituted by General Accounting Office. *Id.* Furthermore, the RFPA provides a specific section dealing with grand jury information. *See id.* § 3420. The FCRA, on the other hand, permits dissemination of credit information (absent a specific legitimate business need) only upon the consent of the consumer or pursuant to a court order. *See* text accompanying notes 10-15 & notes 33-35 *supra.*

[91] *See* 15 U.S.C. § 1681a(4) (1976 & Supp. II 1978); note 4 *supra.*

damaging and wideranging information than do financial institution records.[92] The nature of the computerized information industry and the intrusive investigations that credit bureaus undertake render more difficult the problem of guaranteeing the right to privacy.[93] In view of the problems inherent in the grand jury system,[94] the right to privacy should not be undermined further by permitting grand juries to subpoena credit reports.[95] Congress intended to provide an additional measure of security in imposing the court order requirement.[96] The court order requirement, therefore, does not merely duplicate the secrecy protections of the grand jury system, nor does it allow access to information as easily as grand jury subpoenas that the clerk of court issues proforma. Grand jury subpoenas, therefore, are not, and should not be considered the functional equivalent of court orders within the scope of the FCRA.[97]

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[92] *See* note 6 *supra*. Credit reports cover and investigate many personal and private aspects of an individual's life. Financial institution records, on the other hand, contain information that an individual voluntarily has chosen to release to banking institutions.

[93] *See* text accompanying notes 5-7 *supra*.

[94] *See* text accompanying notes 47-55 & 61-64 *supra*.

[95] *See* note 4 *supra*.

[96] *See* note 11 *supra*.

[97] *See generally* Williams, *supra* note 16.