

**OBTAINING DISCOVERY FROM FINANCIAL INSTITUTIONS
UNDER THE TEXAS FINANCE CODE**

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A. “Exclusive” Method.

- I. Section 59.006 provides the “exclusive method” for obtaining discovery of records from a financial institution. TEX. FIN. CODE §59.005(a).
 - In other words, you cannot simply issue a subpoena with a 10-day response time just before your deposition.
 - This includes all types of national and state banks and credit unions.
2. Prior to 1999, the procedure was found at §30.007 of the CPRC.
 - Simply re-codified with minor changes.

B. Requirements.

- I. Must give at least 24 days to comply with request.
 - Attorneys often ignore this requirement because they issue 3rd party subpoenas, and perceive the subpoenas to fall outside of 30-day discovery requirements.
 - Texas courts have held that subpoenas providing less than 24 days to respond are invalid. See *Enviro Protection, Inc. v. National Bank of Andrews*, 989 S.W.2d 454 (Tex.App.—El Paso 1999). “The Bank was therefore never under an obligation to produce anything...[the] subpoena...never possessed the authority of law.” *Id.*
2. Must pay financial institution’s costs of complying.
 - “Before the financial institution complies with the record request, the requesting party pays the financial institution’s reasonable costs of complying with the record request...” TEX. FIN. CODE §59.005(b)(2).
 - By statute, this includes costs of reproduction, postage, research, delivery and attorney’s fees.
 - In *Enviro Protection*, court held this prevented any obligation of the bank to respond. See *Enviro Protection*, 989 S.W.2d 454.

- In *Calhoun v. Ying*, 2006 WL 2076038 (Tex.App.—Hous. (1st Dist.) 2006) (Memo Op.), court held that when requesting refused to pay costs, there was reason to grant a protective order.
3. When customer is a party to the proceeding, all requirements are satisfied.
- Customer then bears burden of preventing or limiting the financial institution’s compliance, including the filing of a motion to quash or for protective order. TEX. FIN. CODE §59.005(e).
 - Financial institution is “not liable” to its customer for disclosure of a record in compliance with §59.006. *Id.*
4. When customer is not a party, there are additional requirements.
- If customer is not a party, requesting party must also:
 - (a) Give notice to the customer of their rights under §59.006(e), and provide copy of the request (TEX. FIN. CODE §59.006(c)(1));
 - (b) File a certificate of service indicating the customer has been mailed or served with the notice (TEX. FIN. CODE §59.006(c)(2)); and
 - (c) Request the customer’s written consent authorizing the production (TEX. FIN. CODE §59.006(c)(3)).
 - If the customer grants written consent, requirements are now satisfied. However, this rarely happens.
 - If the customer does not grant written consent, the requesting party “may” file a motion for *in camera* inspection of the record “as its sole means of obtaining access to the record.” TEX. FIN. CODE §59.005(d).
 - (a) The tribunal “may” inspect the record to determine its relevance, and may order redaction of portions that should not be produced. *Id.*
 - (b) The tribunal “shall” enter a protective order preventing the produced record that from being disclosed to any person not a party to the litigation, and from being used for any purpose other than resolving the dispute before the tribunal. *Id.*

C. Time for production.

- I. §59.006(f) provides that a financial institution may not be ordered to produce record before the later of:

- 24th day after service of request;
- 15th day after receipt of customer consent; or
- 15th day after date court orders production after *in camera* inspection. TEX. FIN. CODE §59.005(f).

D. Other Issues.

1. In spite of many arguments to the contrary, the statute explicitly provides that it does not create a right of privacy in the requested record. §59.006(a); *see also Martin v. Darnell*, 960 S.W.2d 838 (Tex.App.—Amarillo 1997).
2. There are 8 exceptions to the statutes' coverage, provided at §59.006(a)(1)-(8) including:
 - Requests from governmental agencies, including requests arising from investigation of criminal offenses;
 - Requests from a duly appointed receiver for the customer; and
 - Requests in a garnishment proceeding where the financial institution is the garnishee, and the customer is the debtor.
3. Federal Courts have held that §59.006 is merely procedural, and therefore not applicable to post-judgment discovery sought under the Federal Rules of Civil Procedure.
 - "The language of 59.006 establishes that it is a procedural provision...Therefore, §59.006 cannot be characterized as a state-created substantive privilege." *British Intl. Ins. Co. v. Seguros La Republica, S.A.*, 200 F.R.D. 586 (W.D.Tex. 2000).