Zeitschrift: Beiträge zur Finanzgeschichte = Contributions à l'histoire de la finance = Contributions to financial history

Herausgeber: Verein für Finanzgeschichte Schweiz und Fürstentum Liechtenstein

Band: 2 (2002)

Heft: -: English edition

Artikel: Banking confidentiality and historical research : legal opinion prepared for the Association for Financial History (Switzerland and Principality of Liechtenstein)

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DOI: https://doi.org/10.5169/seals-1078962

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Banking Confidentiality and Historical Research

Legal opinion prepared for the Association for Financial History (Switzerland and Principality of Liechtenstein)

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1 Background and relevant issues

1 In 1993, the Association for Financial History (Switzerland and Principality of Liechtenstein)[1] commissioned Urs Zulauf to produce a legal opinion on the following issues[2]:

1. Do banks have an obligation under certain circumstances to allow people who are undertaking independent historical research to access their archives?
2. In what way does banking confidentiality restrict a bank's freedom to grant an external banking historian access to its archives?
3. From a legal point of view, what constraints must apply to any arrangements for external researchers to use a bank's archives?

2 The Association now wants to carry out a new assessment of the situation. Taking into account the developments that have occurred since 1993, there should now be an examination of:

> 'the relationship between historical research in bank archives and Swiss law. In particular, clarification is sought on the extent to which access to bank archives and the publication of sources from these archives is determined by the law'.

3 Zulauf came to the following main conclusions in his legal opinion:

a. The bank has no obligation to provide historians with information (Para. 2)[3].

b. The bank is obliged to maintain confidentiality about banking relations with its customers (Para. 31); or to put it the other way round: the bank may not make customer data available to third parties without special justification (Para. 36).
Apart from cases where it has a legal obligation to provide information, the bank is permitted to disclose customer data if the customer has approved this course of action, or if the bank or a third party has an overwhelming interest at stake; great caution must be exercised before a justified interest can be assumed (Para. 39).

It is assumed that the customer wants confidentiality to be maintained (Para. 34).

c. If a business relationship comes to an end, the obligation to maintain confidentiality remains in place as long as the customer or his legal successors retain a legitimate interest (Para. 37 and 38).

4 Shortly after ZULAUF had delivered his legal opinion, the issue of dormant accounts became extremely topical. As a result, measures were taken by both the private sector and the state which had an impact on banking confidentiality. This is why it is now worth revisiting ZULAUF's findings in the light of recent developments.

5 The following legal opinion first gives a brief description of these private sector and state measures (N 9ff.); this is followed by an overview of banking confidentiality (N 21ff.); there is then an examination of what account these measures took of banking confidentiality (N 50ff.), and finally conclusions are drawn (N 63ff.).

2 Developments since 1993

21 Historical context

6 The history of dormant assets began immediately after the Second World War[4] when the Allies called on neutral states to make dormant assets belonging to victims of National Socialism available to the *Comité intergouvernemental pour les Réfugiés*. In addition, the Washington Agreement of 25 May 1946 proposed that German assets be given to the Allies for reparation purposes. Switzerland's governing Federal Council took a negative view of these requests, but the problem was now firmly on the agenda. The Swiss government thus ordered surveys to be carried out at the banks to find such assets. The first SBA survey of assets belonging to victims of the Nazis was conducted in 1947; it was limited to the major banks, which reported Sfr 482,000[5]. When the results of a second survey in 1956 produced a figure of only Sfr 862,410, the Federal Council was minded to depart from its intention (taken in 1952) to draft a special law. Under pressure from parliamentary actions and public sentiment, however, a law was finally passed. The Federal Decree on Assets in Switzerland Belonging to Foreign or Stateless Victims of Political, Racist or Religious Persecution was enacted on 20 August 1962[6].

7 The Federal Decree obliged financial institutions to register assets if 'the last known owner was a foreigner or stateless person, if there had been no definite contact with the owner since 9 May 1945, and if the owner was known or suspected to have fallen victim to racial, religious or political persecution' (Art. 1 Para. 1). These assets had to be reported to a central registry, and were then managed by a General Custodian, who also initiated investigations into the whereabouts or fate of the owners. Information about the 'circumstances' of missing owners could only be passed on to their legal successors. The Federal Decree regulated the use of registered assets; the last payment was made in August 1980.

8 Zulauf produced his legal opinion on 21 May 1993, shortly before the end of a long period during which there was little discussion of dormant assets. On 20 August 1993, however, the subject was taken up again by the *Frankfurter Allgemeine Zeitung;* further newspaper articles followed and at the end of 1994 a first motion was submitted to the Swiss parliament. The situation soon became so fraught that the SBA, the Swiss government and the FBC felt compelled to act[7].

22 Individual measures

221 SBA's guidelines of 9 September 1995[8]

9 The Federal Decree of 1962 did not stop people making inquiries to the banks, the FBC and the SBA about assets belonging to dead relatives; in fact, there were a great number of such inquiries (though they did not all relate to assets belonging to victims of the Nazis or assets that had been dormant since 9 May 1945). Because there was no central contact point, the applicants had to address their inquiries to the individual banks. The FBC considered this situation untenable and urged the SBA to create a central contact office. In the *SBA Guidelines on the Handling of Dormant Accounts, Custody Accounts and Safe Deposit Boxes at Swiss Banks* of 9 September 1996, the Bank Ombudsman's Office was appointed as the central contact point. It forwarded requests (after examining them) to all the banks. The bank at which the assets were held would then make contact with the applicant. Assets were considered to be dormant if the bank had not heard anything from the client or his authorized agents for at least ten years.

10 The Guidelines were revised on 1 July 2000[9]. Their main purpose now is to prescribe preventative measures to ensure that contact with clients or their legal successors is never lost in the first place. If contact is lost, the banks must initiate a search. Dormant assets are to be reported to SEGA Aktienregister AG (SAG). Only the Bank Ombudsman, who continues to act as the central contact point, has access to

SAG's data. As agents of the banks, both SAG and the Ombudsman are obliged to maintain banking confidentiality.

11 Once the Guidelines were passed in 1995, the SBA carried out further surveys at selected institutions in June of that year, and at all the banks in September 1995. The September survey, which related to accounts opened before 9 May 1945 and dormant since that date, yielded a total of Sfr 40.9 million.

222 Establishment of the Volcker Commission (Independent Committee of Eminent Persons, ICEP)[10]

12 On 2 May 1996, the SBA agreed in a Memorandum of Understanding (MoU) with the *World Jewish Restitution Organization* and the *World Jewish Congress* to set up a commission of experts, made up equally of representatives of the Jewish organizations and of the Swiss banks, under the chairmanship of Paul A. Volcker. The commission's job was to arrange for audit companies to *examine the methods* used by the Swiss banks to search for dormant assets. The auditors had access to all bank documents. In its letter to Mr. Volcker of 29 January 1997, the FBC declared that 'the examinations carried out by the FBC-approved auditors mandated by the ICEP, as well as their international partner firms, are extraordinary audits pursuant to Art. 23bis Para. 2 of the Banking Act and Art. 49 Para. 2 of the Banking Ordinance. This decision removes any doubt about the auditors' authority to have full and unfettered access to all the relevant bank documents, which may include client dossiers protected by banking confidentiality.'[11]

223 Establishment of the Bergier Commission (Independent Commission of Experts, ICE)[12]

13 On 13 December 1996, Switzerland's parliament approved the *Federal Decree on the Historical and Legal Investigation into the Fate of Assets which Reached Switzerland as a Result of the National-Socialist Regime*[13].

The Decree stated that an independent commission of experts should investigate the volume and the fate of dormant *assets in Switzerland belonging to victims of the Nazis*. The banks were to allow members of the Commission and their researchers to 'view all files which might help the investigation' (Art. 5).

14 According to the explanatory report accompanying the bill, the aim of the investigation was to 'strengthen the credibility of Switzerland and reinforce trust in the Swiss financial center'[14]. 'In the interests of throwing light on our own history and in the interests of the Swiss financial and economic center, there must be transparency about what happened during a difficult period, as well as an objective appraisal of the facts.'[15] The Federal Council agreed with this; in terms of both foreign policy and domestic policy, it said, Switzerland had an interest in a historical reassessment of the question of what happened to assets that belonged to the Nazi's victims[16].

15 The Federal Decree was valid until 31 December 2001.

224 Publication of name lists[17]

16 On 25 June 1997, the FBC issued a *Circular on the Registration and Publication of Dormant Assets from the Period Before or During the Second World War*[18]. Citing Art. 23bis Para. 2 of the Banking Act, it called for 'client data relating to client assets that were held prior to 9 May 1945 and that have been dormant ever since to be reported to ATAG Ernst & Young, Basel (ATAG), which has been mandated by the Swiss Bankers Association as the registration office. ATAG will publish the data in accordance with a publicly announced concept' (Para. 5). 'All information known by the bank about the client relationship' was to be registered, especially the personal details of the clients and of any authorized agents, the date the account was opened, and the current size of the assets (Para. 14).

17 The SBA published the first list of 1,756 foreign-owned dormant accounts on 23 July 1997. The client's last name, first name, town of residence and country of residence were given; but not the name of the bank. Claimants were to contact ATAG.

18 The SBA published a second list of 10,758 Swiss clients and another 3,687 foreign clients on 29 October 1997.

19 The Federal Government then published another 580 names. These were people whose (small) assets had been transferred to an 'heirless assets' fund when the Federal Decree of 1962 was implemented.

20 The final list published was based on data that the auditors mandated by the ICEP had assembled for their own comparative purposes. Its publication was in response to a request by the ICEP that was approved by the FBC. On 5 February 2001, the SAB published 20,825 names. This list was intended to give Holocaust victims an opportunity to submit claims to the 'Justice Fund' that the Swiss major banks had undertaken to set up as part of the settlement they had made on 12 August 1998 with the Jewish class action plaintiffs.

3 Banking confidentiality

31 Historical notes

21 In his legal opinion (Para. 33), Zulauf examines how long banking confidentiality has been recognized under civil law. He makes the convincing case that, as a manifestation of the fiduciary obligation under the law of mandate, the banker's obligation to maintain confidentiality can be traced back to the SCO of 1881.

22 It is not entirely clear what moved the legislators who passed the Banking Act of 1934 to make infringement of the duty of confidentiality a criminal offence. There is evidence of an intention to crack down on banking espionage by foreigners; but the main motivation here would appear to be the protection of general economic interests rather than of bank customers[19].

23 The current version of Art. 47 of the Banking Act dates from the revision of 1971[20]. Potential offenders were defined more precisely; it was made clear that the duty of confidentiality continued even after the end of the employment relationship or professional dealings; and the reservation of the duty to testify and provide information in legal proceedings under federal or cantonal law was introduced.

24 Commentators on the 1934 Act had denied that the Act conferred such a duty[21]; but in the explanatory report of 1970, it was already regarded as self-evident[22]: hence it follows that the duty to testify developed in the course of applying the law in practice. Art. 47 of the Banking Act must not, therefore, be read in isolation, but must be placed in the overall legal context. The boundaries of banking confidentiality are not immutable; they can be moved as a result of subsequent legislation. This was the case, for example, with international judicial assistance in criminal cases, which first became institutionalized in law when Switzerland

signed up to the European Convention on Mutual Assistance in Criminal Matters[23] in 1967[24].

32 Legal basis

25 For the client, banking confidentiality is a right (hence 'bank client confidentiality'); for the bank it is a duty. The owner of the secret is the client, not the bank.

26 Banking confidentiality is based on Art. 13 FC, which guarantees the *protection of privacy* as a basic right for every individual. According to Art. 35 Para. 1 FC, basic rights must find expression throughout the entire system of laws.

27 Protection of privacy finds direct expression in the SCC's provisions relating to the legal *protection of personal rights* (Art. 27ff.). Protected personal rights include the right to guard one's secret and private affairs. Bank client data falls under this concept of private affairs[25]. The data protection law is concerned with the processing of personal information, which is just one aspect of the protection of private affairs[26].

28 Bank client confidentiality is a *component of the contract* between the customer and the bank[27]. Provided that the contract is subject to the provisions of the law of agency[28], the banker is obliged to maintain confidentiality because of Art. 398 Para. 2 SCO[29]. It is also worth mentioning here that in banking business, the obligation to maintain confidentiality has to be regarded as a binding code of conduct for bankers, which serves to protect clients and which derives from the precept of acting in good faith (Art. 2 SCC)[30].

29 Art. 47 of the Banking Act, which threatens to punish illegal violations of banking confidentiality, provides a strengthening of protection under civil law, though hardly a legal basis for such protection. The right to protection of confidentiality would exist in any case, even if violations of this right were not criminally prosecuted[31].

30 The concept that secret affairs should also be protected under criminal law is widespread in the Swiss legal system. Anybody that betrays a secret vouchsafed to him during the exercise of his profession will be punished. This applies not only to bankers, but to clergymen, doctors, lawyers, notaries, etc. (Art. 321 SPC), to civil servants and public officials (Art. 320 SPC), to stock exchange employees and securities brokers (Art. 43 Stock Exchange Law) and to employees that betray a manufacturing or business secret (Art. 162 SPC). There is no such thing as a historian's confidentiality duty.

33 Information protected by banking confidentiality

31 The bank is fundamentally obliged to treat all information that it acquires about a client during the course of a business relationship in confidence[32]. In particular, this duty of confidentiality extends to the very fact that a business relationship exists[33]. The decisive fact in determining the scope of confidentiality protection is the *will of the client* as 'owner' of the secret. If the client does not say concretely what he wants or if his conduct does not allow the bank to draw a reliable conclusion[34], his supposed will is to be divined according to the principle of good faith: what can we assume the client wants on the basis of his general conduct and the overall circumstances?[35] Two points must be considered here: firstly, the assumption always has to be that the client desires full confidentiality; secondly, we are dealing not just with the protection of individual client confidentiality, but also with the protection of an overall economic interest (see N 22 above).

34 Persons protected by banking confidentiality

32 Protection of confidentiality extends not only to information about the client himself, but also to information about third parties that appear in connection with this client's banking relationship, e.g. authorized agents and beneficial owners[36].

33 It should be made clear that the term 'clients' does not just refer to natural persons. Legal entities also have a right to the protection of their secret and private affairs pursuant to the SCC and the data protection law (N 27 above); the obligation to maintain confidentiality applies to them, too (N 28).

34 When a natural person dies or a company merges, the right to confidentiality passes to the legal successor[37]. There is no legal successor when legal entities are wound up. They have to keep their books for ten years in a secure place[38]; but the right to view these books is restricted[39].

35 Duration of duty of confidentiality

35 According to Art. 47 Para. 3 of the Banking Act, the obligation to maintain confidentiality must be respected even after the end of the employment relationship or professional dealings. No time limitation is envisaged, so we can assume that the obligation to maintain confidentiality is unlimited in time unless it lapses because the client's right comes to an end at some point.

36 The right to secrecy and privacy is a personal right guaranteed by the constitution and protected by law (see N 26ff. above). Personal rights are inseparably tied to the holder of these rights. This implies two things: that the rights are protected as long as the holder is alive, and that they cannot be inherited. It is undisputed that there is an exception from the latter principle when it comes to protection of bank client confidentiality: the right to secrecy about client data *relating to the assets concerned* (but not very personal data) passes to the heirs[40]. On the one hand, this means that no disclosure of client data is permitted during a client's lifetime, unless there is a justification (see N 42ff.); on the other, it remains open to question whether the heir's right to confidentiality is somehow limited in time or not.

37 The banal explanation for why there is no law on this issue is probably that the law allows those responsible for bookkeeping to destroy accounting records and business correspondence after ten years (Art. 962 SCO), and clearly the legislator assumes that this is precisely what they do. However, client data can voluntarily be kept (archived) for longer and, in particular, can be stored in non-written form – i.e. in the banker's memory. The confidentiality of the data is not affected either by the fact that it is kept voluntarily, or by the form of storage.

38 ZULAUF wants to make the duration of the confidentiality obligation dependent on the existence of a legitimate interest on the part of the client[41]. However, he leaves us none the wiser as to the criteria by which legitimacy (or illegitimacy) should be judged. His theory thus remains a postulate (albeit one worthy of consideration[42]), but it does not provide any practical help in decision-making. Even if the banker could determine the nature of the interest, it is not his place to make this assessment.

39 There is a current example of an illegitimate interest in confidentiality: the banker who suspects that a client's assets derive from a crime may (Art. 305ter Para. 2 SPC) or must (Art. 9 Money Laundering Act) prefer charges against his client. However, precisely this example shows that the law's job is to define the conditions for lifting the duty of confidentiality in general, and in particular with regard to time. A banker who decides on his own initiative that his duty of confidentiality has come to an end is running an incalculable risk and putting himself in a very difficult position in terms of the law of evidence. It must be remembered that an infringement of banking confidentiality by a banker will be prosecuted *ex officio*.

36 Permitted disclosure of customer data

40 Anyone causing illegal harm or loss to someone else shall be liable to pay compensation (Art. 41 Para. 1 SCO). Anyone committing an act that is punishable by law shall be liable to prosecution (Art. 1

SPC). However, neither the obligation to pay compensation under civil law nor penal liability applies if the harm caused is lawful. In the case we are examining, this means that the disclosure of client data – i.e. an infringement of banking confidentiality – is permissible if it can be justified.

41 Two types of justification are possible: the legal (see N 42ff. below) and the supra-legal (N 47ff.). Common to both types is the fact that the impingement on the legal asset must be proportionate, i.e. it must be restricted to the degree necessary[43]. For example, a bank pressing charges against a client can only disclose to its lawyers data which is necessary to conduct the case.

361 Legal justifications

361.1 Disclosure demanded or allowed by the law

42 According to Art. 32 SPC, acts are not punishable if the law orders them or declares them permissible. Such acts are not illegal in terms of Art. 41 SCO.

43 Based on the proviso in Art. 47 Para. 4 of the Banking Act, the law makes the duty to testify and provide information obligatory in accordance with federal and cantonal regulations. This does not just apply to a duty during legal proceedings, but also to the provision of information to, for example, the regulatory authorities, the bankruptcy office or the guardianship authorities.

44 Art. 47 Para. 1 of the Banking Act implies that the bank can use agents[44]. According to the CDB, members of the supervisory commission and investigating officers are agents of all the banks; an individual bank uses a lawyer as an agent to conduct legal proceedings[45] or uses an external computer center as an agent to handle the electronic processing of its data[46]. Disclosing customer secrets (within reason) to these agents is an act permitted by the law.

361.2 Self-defense and emergencies

45 The justification of self-defense (Art. 33 SPC, Art. 52 Para. 1 SCO) allows someone to defend himself against physical attack. This is not, however, relevant to banking confidentiality.

46 An action is considered to have been taken in an emergency (Art. 34 SPC, Art. 52 Para. 2 SCO) if it serves to rescue one's own or another person's legal asset (life, limb, freedom, honor, assets) from a direct threat that cannot be resisted in any other way. An emergency that entitles a bank to disclose client data could occur, for example, in connection with threat of sanctions by another country[47].

362 Supra-legal justifications

362.1 Consent by the injured party[48]

47 Client data may be disclosed if the client agrees to this of his own free will.

48 By contrast with the professional duty of confidentiality of clergymen, lawyers, doctors, etc. (Art. 321 SPC), the possibility of the supervisory authorities releasing a person from banking confidentiality is not provided for[49].

362.2 Preservation of legitimate interests[50]

49 'This extra-legal justification occurs if the action is a necessary and appropriate means to achieve the legitimate aim, if it is the only possibility in this respect, and if it is clearly less weighty than the interest that the perpetrator is seeking to preserve.'[51] Preserving significant interests is therefore legal, even if it involves the infringement of less significant, legally protected interests. The decisive factor is the evaluation of the relative importance of the interests concerned. The significant interests can be one's own, or those of a third party.

4 Banking confidentiality and developments since 1993

41 In relation to the SBA surveys

50 The aim of all of the SBA surveys was to ascertain the total sum of dormant assets. There was no disclosure of client data. The figures that were delivered and published gave no clue to the identity of individual customers. Banking confidentiality was not affected.

42 In relation to the SBA guidelines of 9 September 1995

51 According to these guidelines, the Bank Ombudsman acted as contact point for all inquiries from people looking for (dormant) assets at Swiss banks. It forwarded these inquiries to the banks. The bank holding the assets concerned asked the Ombudsman for the documents that had been submitted and could discuss borderline and doubtful cases with him. It would inform the Ombudsman of a positive result. Data was, therefore, disclosed to the Ombudsman.

52 However the guidelines state expressly that with such inquiries the contact point was acting 'on behalf of the banks and the supposed customer', and thus that the Ombudsman, too, was bound by banking confidentiality. We thus have the legal justification of lawful disclosure of client data to an agent of the bank; in addition, the Ombudsman can be seen as the client's agent (initially without mandate), who depending on the nature of the actual business activity conducted would also be accorded a right to see the relevant client data.

53 With regard to the new guidelines on 1 July 2000, the legal situation is basically the same.

43 In relation to the Volcker Commission

54 The auditing companies appointed by the ICEP were given access to client data. But the FBC's decision to define their investigations as extraordinary audits pursuant to the Banking Act meant that the auditors were also bound by banking confidentiality. 'These persons are therefore forbidden from passing on the identity of individual bank clients or information that would make their identification possible to third parties, including the ICEP.'[52]

55 Auditors are normally appointed by the bank and thus act on behalf of the bank. In this case, the auditor was imposed upon the banks from the outside. Art. 49 Para. 2 of the Banking Ordinance provides the FBC with the opportunity to appoint an auditor itself in order to carry out an extraordinary audit. Regardless of whether an auditor is chosen by the bank or prescribed by the FBC, this auditor is subject to banking confidentiality pursuant to Art. 47 Para. 1 of the Banking Act, since the law is not geared to the mode of appointment but to the function. The disclosure of client data to auditors was permitted by the law.

44 In relation to the Bergier Commission

56 The banks were to give members of the Commission and their research team access to all bank documents relevant to the investigation. The members were subject to official secrecy (Federal Decree Art. 3)[53]. According to Art. 320 Para. 1 SPC, anyone who reveals a secret entrusted to him or discovered by him in his role as the member of an authority or as a civil servant shall be punished.

57 Switzerland's foreign and domestic policy interests were given as the reason for the enactment of the Federal Decree of 1996; the aim was to reinforce the nation's credibility and strengthen trust in its financial center. The interests of Switzerland as a whole were considered to carry more weight than bank clients' interests in keeping their bank data secret from the Commission or, where data was published, from the general public. In addition, personal data had to be made anonymous if

its publication would have endangered the predominant interests, meriting protection, of living persons.

45 In relation to the publication of name lists

58 The name lists were published at the behest of the FBC. In its circular of 25 June 1997, the FBC gave three reasons for the breach of banking confidentiality: it referred to the lifting of banking confidentiality vis-à-vis the Bergier Commission; it mentioned the unusual length of dormancy and the major historical hiatus caused by the Second World War and the Holocaust; and it emphasized that those entitled to the dormant assets would only be put in a position to assert their rights if the information was published.

59 The first reason is not convincing. With the Bergier Commission the disclosure of client data was only made to a limited group of people, all of whom were subject to official secrecy[54]. The Commission's investigations served the overall interests of Switzerland, not the specific interests of claimants.

60 The second reason seems to imply that the protection of confidentiality expires after a certain amount of time. But this is probably not what the FBC wanted to say. It is far more that the two elements of lengthy dormancy and Holocaust victimhood should be seen as a single aspect; what is more, the issue is not the expiry of an illegitimate right to confidentiality on the part of the heirs, but one of giving heirs an opportunity to access their inheritance.

61 In this way the second reason overlaps with the third with its invoking of the preservation of legitimate interests as a justification. The interest of the dormant client and his legal successors in maintaining banking confidentiality is set against their interest in getting hold of the assets to which they are entitled. The latter interest is justifiably regarded as the more important. Because, as ZULAUF succinctly puts it, 'banking confidentiality could not survive over the long term if it was di-

rected against the bank customers whom it purports to protect'[55]. This consideration applies just as much to banking confidentiality as an institution in which there is a national interest as it does to banking confidentiality as a right of protection for individual customers.

62 Due regard was paid to the demand that only necessary data be disclosed (N 41 above) in that only the personal details of the customers concerned were published.

5 Results

51 The relative importance of banking confidentiality

63 Our aim is to judge the nature of the relationship between historical research into bank archives on the one hand, and Swiss law on the other, and especially to decide whether developments since 1993 have brought any new insights.

64 In summary we can say that banking confidentiality as an institution has not been called into question in any way by the events that have occurred since 1993. With all the measures described – which were, after all, taken under unusual circumstances – due regard was always paid to banking confidentiality, and efforts were made to protect the confidentiality of customer data wherever possible. The auditing companies mandated by the ICEP were not allowed to disclose personal details relating to the client relationships they examined; the auditors were made subject to banking confidentiality. The Bergier Commission was established by federal decree 'because public offices, archives and private individuals are to be obliged to provide information, which means that official secrecy, as well as legal or contractual professional secrecy is affected'[56]; an existing legal provision can only be modified by another legal provision, but not by an instruction – not even if this instruction is issued by the federal government. The Commission's researchers were subject to official secrecy. When the lists of names were published, these were limited to the (unavoidable) revelation of the personal details of the clients of that time.

65 There have, then, always been justifications for curtailing banking confidentiality. If a historian[57] (or, we should add, anyone else) is to be given access to bank archives, there has to be a justification for doing so. If there is not, banking confidentiality will be violated.

521 Disclosure demanded or allowed by the law?

66 There is no law that says that banks have to grant historians access to their archives. The federal decree of 1996 does contain a ruling of this type; but quite apart from the fact that this is no longer in force, it only ever applied to a specific group of historians (not for every historian) who were working on behalf of the federal government (not of their own accord) on subjects prescribed by the federal government (rather than freely chosen by the historians themselves).

67 The law allows the use of agents to carry out certain types of business (N 44). The mandate calls on the agents to carry out this business in the interests and according to the wishes of the client. This is not the situation if a historian is undertaking his own research. It is impossible to construe a mandate relationship in such circumstances.

68 Swiss law does not contain a stipulation which allows access to bank client data after a specific period of time. There are no criteria that de-legitimize the right (of the client's legal successors) to the maintenance of banking confidentiality (N 28).

522 Self-defense and emergencies

69 Neither of these justifications (N 45f.) is applicable to the relationship between banks and historians.

523 Consent by the injured party

70 Bank customer data can be accessed if the customer concerned authorizes this (N 47) or, if he is no longer alive, if his heirs authorize this. Zulauf gives a lucid account of the legal and practical difficulties involved in the latter case[58]. Owing to these difficulties, consent to infringement remains a rather hypothetical possibility. The situation is, of course, exacerbated if access is to be granted to data about a number of clients.

524 Preservation of legitimate interests

71 In the light of the definition of the preservation of legitimate interests handed down by the Federal Supreme Court (N 49), historical bank research is a legitimate aim which can only be achieved if access is granted to bank archives. The only question is whether the interest in research obviously outweighs the interest in maintaining banking confidentiality.

72 In my opinion, this is clearly not the case. Bank client confidentiality does not rank as a constitutional right, but it is still the concrete manifestation of a basic constitutional right (N 26). The interests of research do not enjoy a comparable status[59]. What is more, banking confidentiality protects not only the bank customer, but also an overall economic interest (N 22). If access were granted to data on a large number of customers – perhaps from several banks – for the purposes of research into banking history, this could be regarded as a violation of the institution of banking confidentiality that runs contrary to the collective interest.

73 As for the possibility of rendering personal data anonymous for publication, banking confidentiality is violated as soon as an unauthorized person is allowed to inspect the protected client data. It is probably not technically possible for the bank to render the data anonymous before allowing inspection[60].

53 Summary

74 According to the current legal situation it does not seem to me that there is any legal possibility of allowing historians to see client files without the client's authorization. If events since 1993 have made anything clear, it is that any lifting of banking confidentiality in the interests of historical research requires an explicit legal foundation.

Notes

1 At that time called the Association for Banking History (Switzerland and Principality of Liechtenstein).
2 The legal opinion is published in ZSR 1994 I 105ff.
3 This issue is not pursued further here; the situation remains the same and developments since 1993 have not brought any changes.
4 For more on the following, JUNG 558ff.
5 Surveys were also carried out in 1949, 1950 and 1958, but these only related to Polish assets. JUNG 565ff.
6 AS 1963 427; Report in BBl 1962 I 933. Cf. ZULAUF 1997 N 5f. and JUNG 571ff.
7 JUNG 584f., 588ff. and Chronology 800ff.
8 ZULAUF 1997 N 9f.; JUNG 584f. Text in BF 98/45-14.
9 For more on the following, JUNG 595.
10 ZULAUF 1997 N 14; JUNG 588ff. Text of MoU in BF 98/21-1.
11 Letter from the FBC to Paul A. Volcker, reproduced in BF 98/21-4.
12 ZULAUF 1997 N 15; JUNG 589, 661ff.
13 SR 984; Report by the National Council's Commission for Legal Affairs, BBl 1996 IV 1165.
14 Commission Report, BBl 1996 IV 1166.
15 Commission Report, BBl 1996 IV 1171.
16 Federal Council's response, BBl 1996 IV 1185f.
17 ZULAUF 1997 N 18ff.; JUNG 590ff.
18 BF 98/21-7.
19 AUBERT et al. 94f.; BERGER 185ff.; ZULAUF 1997 N 28, 32.
20 BBl 1970 I 1160ff., 1182.
21 Cf. e.g. GEORGES CAPITAINE, Le secret professionnel du banquier (Geneva 1936) 43ff.
22 BBl 1970 I 1182f.
23 SR 0.351.1.
24 Cf. PAOLO BERNASCONI, IARH N 2; in: Schmid (ed.), Kommentar Einziehung, organisiertes Verbrechen und Geldwäscherei, Vol. II (Zurich 2002).
25 AUBERT et al. 44f.; BERGER 184 I lit. a; BODMER/KLEINER/LUTZ, BankG 47 N 2, 7; ZULAUF 1997 N 30.
26 AUBERT et al. 46ff.; ZULAUF 1997 N 33.
27 BBl 1970 I 1161; AUBERT et al. 48ff.; BODMER/KLEINER/LUTZ, BankG 47 N 2; AUBERT 1997 N 31. – Opposing view: BERGER 184 II lit. c.
28 Which is often the case; Berner Kommentar FELLMANN, SCO 394 N 51, 360; CHRISTIAN THALMANN, Die Sorgfaltspflicht der Bank im Privatrecht, ZSR 1994 II 127f.

29 Berner Kommentar FELLMANN, SCO 398 N 40ff.; AUBERT et al. 50. The opposing view expressed by BERGER (184 II lit. c) is based on a complete misreading of the nature of bank contracts as long-term agency agreements.

30 AUBERT et al. 50f.; BERGER 185 lit. b; ZULAUF 1997 N 31.

31 AUBERT et al. 52f.; BERGER 185ff. lit. e; ZULAUF 1997 N 32.

32 AUBERT et al. 91f.; BERGER 187f. lit. a and c; BODMER/KLEINER/LUTZ, BankG 47 N 4; ZULAUF 1997 N 27. For permitted disclosure N 40ff. below.

33 AUBERT et al. 92, 98; ZULAUF 1997 N 27.

34 If the customer indicates his bank account on his stationary, one can assume that he does not want to keep it secret.

35 BERGER 188 lit. a and c; ZULAUF 1997 N 28f.

36 For more on this concept, cf. WERNER DE CAPITANI, GwG 4 N 31ff., in: Schmid (ed.), Kommentar Einziehung, organisiertes Verbrechen und Geldwäscherei, Vol. II (Zurich 2002).

37 AUBERT et al. 319ff.; BODMER/KLEINER/LUTZ, BankG 47 N 17; ZULAUF 1997 N 41.

38 SCO 590 Para. 1 for legal communities, SCO 747 for corporate entities.

39 SCO 590 Para. 2: proprietors and their heirs; SCO 963: duty of disclosure in disputes which affect the business if an interest worthy of protection is proved.

40 BODMER/KLEINER/LUTZ, BankG 47 N 17; ZULAUF 1997 N 41.

41 ZULAUF 1997 N 40.

42 It is, however, somewhat paradoxical that during a client's lifetime, his desire for confidentiality is crucial, even if it is irrational, foolish or damaging (ZULAUF 1997 N 29), while after his death, proof of an interest is required.

43 AUBERT et al. 57, 108; Berner Kommentar BREHM, SCO 52 N 24, 42; Basler Kommentar SCHNYDER, SCO 52 N 11; TRECHSEL/NOLL 122. Cf. BGE 113 Ib 169 E.7b.

44 The isolated interpretation by BERGER (187 I), who maintains that the law only says that agents can also violate banking confidentiality, but not whether the bank is permitted to bring the agent into its confidence, is not convincing.

45 See BGE 121 IV 45.

46 BBl 1970 I 1187.

47 BODMER/KLEINER/LUTZ, BankG 47 N 92.

48 AUBERT et al. 106; ZULAUF 1997 N 28; TRECHSEL/NOLL 138ff.

49 AUBERT et al. 57.

50 TRECHSEL/NOLL 135ff.

51 BGE 120 IV 213 E.3a.

52 Letter of 29 January 1997 from the FBC to Paul A.Volcker, BF 98/21-4; repetition of the declaration in the FBC's press release of 30 January 1997, BF 98/21-5. For more on the publication of the lists of names produced by the auditors, cf. N 58ff. below.

53 See BBl 1996 IV 1177f.

54 The Commission was in fact allowed to publish personal data under certain circumstances. In my view this invasion of the privacy of (mostly deceased) bank clients was, however, not vital, and barely justifiable.

55 Zulauf 1997 N 47.

56 BBl 1996 IV 1171 (Report of the National Council's Commission).

57 Question: What is a historian? How can he prove he is one?

58 Zulauf 1997 N 41ff.

59 An official secret was disclosed to a journalist. In order to identify the perpetrator, the journalist's telephone was tapped. Switzerland's Federal Supreme Court determined that this was not allowed, for reasons including the following: 'Owing to the great importance of the basic right to press freedom in a democratic, constitutional state, the public interest in identifying and punishing the infringement of official secrecy concerned did not outweigh the interest in preserving freedom of expression and freedom of the press, i.e. in the protection of journalists' sources that derives from these freedoms' (BGE 123 IV 249 E.c). Media freedom is a basic right according to the constitution (Art. 17 FC).

60 The dubious nature of the protection afforded by anonymous publications is shown by the argument about the novel 'Tod eines Kritikers' by Martin Walser. A mere change or covering up of a name is not sufficient if other elements allow one to draw conclusions about the true identity of the person concerned.

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All of these works contain further references to other literature.

Abbreviations

AS	Official Collection of Swiss Federal Law (up to 1987)
BankG	Bankengesetz (Banking Act)
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (official organ of the Swiss government)
BF	Bank- und Finanzmarktrecht, edited by Luc Thévenoz and Urs Zulauf (Zurich, published annually; 1998 edition is quoted)
BGE	Bundesgerichtsentscheid (Decree of the Federal Supreme Court)
CDB	Agreement on the Swiss Bank's Code of Conduct with regard to the Exercise of Due Diligence (Code of Conduct)
FC	Swiss Federal Constitution of 18 December 1998
FBC	Swiss Federal Banking Commission
GwG	Geldwäschereigesetz (Money Laundering Act)
SBA	Swiss Bankers Association
SCC	Swiss Civil Code
SCO	Swiss Code of Obligations
SPC	Swiss Penal Code
SR	Systematic Collection of Swiss Federal Law
ZSR	Zeitschrift für Schweizerisches Recht