

The Erosion of Library Patron Privacy in the Age of Terrorism: How Libraries in California Must Adjust to the USA PATRIOT Act

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Three years ago, one would not imagine that libraries would become entangled in the frontlines of what would become a “war on terrorism,” or that the reading records of library patrons would no longer have their historical confidentiality. It is because this new war involves intelligence gathering within the United States and abroad for use in terrorist attacks, that the federal government’s desire for information can lead to the front door of local libraries. Libraries are, after all, the repositories of information about the reading habits and interests of our citizens. The managers of our libraries are being challenged with complying with this potential increase in law enforcement demands while at the same time protecting the First Amendment based privacy rights of their patrons.

The USA PATRIOT Act¹ was enacted by Congress less than two months² after the terrorist attacks of September 11, 2001. It was enacted to help track down and punish terrorists and to prevent further terrorism.³ Although it contains no provisions specifically directed at libraries or their patrons,⁴ it does, however, contain four provisions that allow access to library loan records and records of library computer use.

I. PRODUCTION OF RECORDS

The first provision, generally referred to as the “production of records” provision of the Foreign Intelligence Surveillance Act (“FISA”), allows the Federal Bureau of Investigation (“FBI”) to gain access to any tangible things (including books, records, papers, documents and other items) from anyone who holds them if the records are sought in connection with an investigation to

protect against international terrorism or clandestine intelligence activities. Before the FBI may require the production of records, access to them must be approved by a special magistrate who must be assured that the investigation is not conducted solely upon the basis of First Amendment activities.⁵ This provision has been interpreted by the library community as allowing access to library loan records and records of library computer use.

The PATRIOT Act contains a self-executing “gag order” that prohibits any person from disclosing to any other person (other than those persons necessary to produce the tangible things) that the FBI has sought or obtained items under the production of records provision.⁶ It also provides that any person who, in good faith, produces tangible items under an order pursuant to this section shall not be liable to any other person for such production.⁷

The American Library Association (“ALA”) has interpreted the production of records provision as allowing an FBI agent to present a FISA search warrant for library circulation records, Internet use records (including computer sign-in sheets) and registration information stored in any medium.⁸ Libraries and librarians served with such a warrant or order may not disclose its existence to any person, or the fact that the records or information was or was not provided to the FBI. Only those library personnel who are “necessary to produce the tangible things under this section” may be informed of the warrant or order and the response thereto.

In the past, the federal government was authorized by FISA to collect business records in limited situations, such as records relating to common carriers, physical storage facilities and vehicle rental facilities, and only by way of a court order issued under traditional standards of proof.⁹ Under the PATRIOT Act, the specific types of businesses or entities from which information can be obtained are deleted, and the court order can now apply to any person or entity. In addition, an FBI agent is not required to demonstrate “probable cause” of the existence of facts to support the belief that a crime has been committed or may be committed. Rather, the agent must only provide sufficient information to convince a special magistrate that the investigation satisfies guidelines approved by the Attorney General and that the records are sought to protect against international terrorism or clandestine intelligence activities.¹⁰ Although the statute prohibits the granting of search warrants for investigations that are “conducted solely upon the basis of activities protected by the First Amendment to the Constitution,” it is unclear how that prohibition will be applied by the FBI and the special magistrate.

Under California law, registration and circulation records of any library that is supported in whole or part with public funds are required to be kept confidential and not disclosed to any person except in limited situations.¹¹ One of the permitted situations for disclosure is upon an “order of the appropriate superior court.”¹² Although California statutory law does not specify the standards or criteria a superior court must use in ordering the disclosure of the information,

the PATRIOT Act preempts California law when disclosure is sought by the federal government in situations covered by its provisions. Computer “sign-in” sheets, if created and maintained by libraries, may be characterized as a type of library “registration” record and could otherwise be exempt from disclosure under California law. However, those records may now be accessed under the procedures specified by the PATRIOT Act.

II. “PEN AND TRAP” ORDERS

A second provision of the PATRIOT Act that has potential application to libraries is a provision that extends the use of telephone monitoring devices (sometimes referred to as “pen register” devices and “trap and trace” devices, and collectively as “Pen and Trap” devices) to computers so as to monitor Internet communication to and from the computer.¹³ These devices allow law enforcement officials to secretly place on computers a form of “caller ID” that provides the FBI with the capability of identifying whom a computer user is communicating with over the Internet.¹⁴

This “Pen and Trap” provision allows the Attorney General to make an application for an order to install a “Pen and Trap” device for any investigation to protect against international terrorism provided the investigation is not conducted solely upon the basis of First Amendment activities.¹⁵ The provision requires the entity controlling the computer to furnish any information, facilities, or technical assistance necessary to accomplish the installation of the device and to do so in a manner that protects the secrecy of the device.¹⁶ As with the production of records provision, persons who cooperate in the installation of the device are immune from liability for having done so.¹⁷

A library that provides Internet access to patrons may one day receive a court order requiring cooperation in the monitoring of a patron’s electronic communications sent through its computers or network. If that occurs, the library would be required to cooperate in the placement of a “Pen and Trap” device on one or more of its computers.

III. ROVING WIRETAPS

The third tool in the PATRIOT Act that is potentially applicable to libraries is the use of “roving wiretaps.”¹⁸ A “roving wiretap” is a

type of court order that allows the investigating agency to obtain a single court order to monitor the content of electronic communications from any location and on any device, including e-mail and Internet communications.¹⁹ The owner of the facility to which the roving wiretap is to be attached is required to provide sufficient technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect the secrecy of the device.²⁰

This means that a library that provides Internet access may be required to comply with a court order requiring cooperation in the monitoring of a patron’s electronic communications sent through its computers by allowing the placement of a roving wiretap device on its network.

IV. NATIONAL SECURITY LETTERS

The fourth tool is a provision that allows the FBI to request information from wire or electronic service providers relating to communication transactional records in the custody of the provider.²¹ This provision is sometimes referred to by the manner in which the information is requested, which is by a “National Security Letter.” Although a library would not normally be considered a wire or electronic service provider, the Department of Justice has indicated that this provision could apply to libraries and authorize access to records about who used a library’s Internet terminal.²² This requires the government to interpret libraries that offer Internet access as a “communications service provider” and to construe the information sought as “subscriber information.” The main distinction between the government’s use of a National Security Letter to obtain this information and the other tools mentioned in this article, is that with a National Security Letter, no federal magistrate is required to approve the request for information.

V. PREPARING FOR A LAW ENFORCEMENT VISIT

The ALA’s Office for Intellectual Freedom has developed guidelines for handling law enforcement inquiries and requests under the PATRIOT Act.²³ The most relevant and significant guidelines are summarized below.

The ALA recommends that the library designate a person who will be responsible for

handling law enforcement requests and then training library personnel on how to initially respond to the request. It may be necessary to modify the library’s confidentiality policy to reflect the realities of the PATRIOT Act, including advising library patrons that the confidentiality rules are subject to the statute. Libraries should also plan for potential service interruptions necessary to accommodate a court order as well as any down-time to computer equipment made necessary by the order.

The ALA recommends that the library staff be trained to ask for appropriate identification of law enforcement officers and to refer them to the point-person in charge of the response. The point-person, who may often be the library director, should inform and include legal counsel, if possible, in the meeting with the law enforcement officer. If the agent or officer presents a court order, the library director or officer should immediately refer the court order to the library’s legal counsel for review.

If the court order is in the form of a subpoena, the library’s counsel should examine the subpoena for its legal sufficiency. If a defect exists, the library’s counsel should advise regarding the best response. If information is required to be produced, it is appropriate that the library’s counsel review the information to make sure that the subpoena has been followed strictly.

If the court order is in the form of a search warrant, it is executable immediately, unlike a subpoena. The agent or officer may begin a search of library records as soon as the library director or officer is served with the court’s order. It may be appropriate to have legal counsel present before the search begins in order to allow counsel to examine the search warrant and to assure that the search conforms to the terms of the search warrant.

If the court order is a FISA search warrant, it will also contain a “gag order.” Consequently, no information can be disclosed to any other party, including the patron whose records are the subject of the warrant. In our opinion, the gag order does not change a library’s right to legal representation during the search. The library can still seek legal advice concerning the warrant and request that its legal counsel be present during the actual search and execution of the warrant.

CONCLUSION

The effect of the PATRIOT Act on libraries is yet to be fully known. While the library community is apprehensive of the chilling effect on patron use of libraries, the evidence of any change in the type or volumes of library patron usage, and the degree of general public knowledge of the PATRIOT Act among library users, is unclear. Letters that the Department of Justice has sent to Congress about the use of the statute with respect to libraries indicates the information is classified.²⁴ However, the Attorney General recently stated in a speech “Not a single American’s library records has been reviewed under the PATRIOT Act.”²⁵ Nonetheless, the level of concern that the PATRIOT Act has generated within the library community is strong and has forced libraries to revisit long-held assumptions and principles of patron privacy. Libraries are well-advised to become familiar with the types of orders that can be made under the statute and to be prepared in advance of such an order with established rules and guidelines.

ENDNOTES

- 1 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“PATRIOT Act”), Public Law 107-56, 115 Stat. 272 (2001).
- 2 The PATRIOT Act was passed by Congress on October 26, 2001 as H.R. 3162 (Rep. Sensenbrenner, F. James, Jr.).
- 3 Congressional Research Service, Report to Congress, February 26, 2003, p. 1 <http://www.ala.org/Content/Navigation>

- Menu/Our_Association/Offices/ALA_Washington/Issues2/Civil_Liberties_Intellectual_Freedom_Privacy/The_USA_Patriot_Act_and_Libraries/CRS215LibrariesAnalysis.pdf.
- 4 Id. at 1.
- 5 PATRIOT Act, supra note 1 at § 215 (amending 50 U.S.C. §1861).
- 6 Id. at § 215(d) (amending 50 U.S.C. §1861 (d)).
- 7 Id. at § 215(e) (amending 50 U.S.C. §1861(e)).
- 8 American Library Association, Office of Intellectual Freedom, “The USA PATRIOT Act in the Library (April 2002), at <http://www.ala.org/alaorg/oif/usapatriotlibrary.html>.
- 9 Public Law 95-511.
- 10 PATRIOT Act, supra note 1 at § 215(a), (b) (amending 50 U.S.C. §1861 (a) and (b)).
- 11 Cal. Gov.C. §§ 6254 (j) and 6267.
- 12 Id. § 6267 (c).
- 13 PATRIOT Act, supra note 1 at § 216 (amending 50 U.S.C. §1842).
- 14 Congressional Research Service, Report to Congress, “The USA PATRIOT ACT: A Legal Analysis, page 5 (April 15, 2002), at <http://www.fas.org/irp/crs/RL31377.pdf>.
- 15 PATRIOT Act, supra note 1 at § 216 (amending 50 U.S.C. §1842 (a)).
- 16 Id. (amending 50 U.S.C. §1842 (d)).
- 17 Id. (amending 50 U.S.C. §1842 (f)).
- 18 Id. at § 206, (amending 50 U.S.C. §1805 (c)).
- 19 <http://www.ala.org/Content/Navigation>

- Menu/Our_Association/Offices/Intellectual_Freedom3/Intellectual_Freedom_Issues/usapatriotlibrary.pdf.
- 20 PATRIOT Act, supra note 1 at § 206 (amending 50 U.S.C. §1805 (c)(2)(B)).
- 21 Id. at §505 (amending 18 U.S.C. § 2709(a)).
- 22 Letter from Daniel J. Bryant, Assistant Attorney General, to Rep. John Conyers, Jr., Ranking Minority Member of the U.S. House Committee on the Judiciary, dated July 26, 2002, at p. 4, http://www.house.gov/judiciary_democrats/dojpatriotresponseltr72602.pdf.
- 23 “Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library and its Staff,” (April 2002), at <http://www.ala.org/alaorg/oif/guidelineslibrary.html>.
- 24 See note 22.
- 25 Remarks of Attorney General John Ashcroft, Protecting Life and Liberty, Memphis, Tenn. (September 18, 2003), available at <http://www.usdoj.gov/ag/speeches/2003/091803memphisremarks.htm>.

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