INTELLECTUAL FREEDOM SINCE 9/11: THE USA PATRIOT ACT, ETC. AND INDIANA LIBRARIES

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Within six weeks of the horrendous events of September 11, 2001, a mere blink of the eye in the usual legislative process, Congress passed and the President signed into law, Public Law 107-56, the "Uniting and Protecting America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" also know as the "USA PATRIOT Act" or the "Anti-Terrorism Act of 2001." It received bi-partisan support and near unanimous approval in both the United States House and Senate. It is 132 pages long and amends approximately fifteen sections of the United States Code.

There is no doubt that those who voted for this act did so with the entirely worthy intent of strengthening American security in the face of further terrorist threats. It should also be obvious that, regardless of intentions, any legislation of this magnitude, passed so swiftly, with so little public debate is bound to have a few problems — some foreseen and accepted by legislators as necessary to meet the terrorist threat and others unforeseen or ignored in the rush to "do something."

Here is the text of the legislative history included at the act on the Thomas web site.

CONGRESSIONAL RECORD, Vol. 147 (2001):

Oct. 23, 24, considered and passed House.
Oct. 25, considered and passed Senate.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 37 (2001):

Oct. 26, Presidential remarks.[1]

For any act of this significance, anyone familiar with the legislative process would expect to find a long list of committee hearing and mark up sessions often accompanied by committee prints. Together they would document the debate over a bill and clarify congressional intent. The latter is especially important when inevitable questions are raised as to the meaning of any given section of a law. In this case, there were no such hearings and there is no such documentation.

While libraries are not mentioned specifically in this act, they and some of their most cherished values are most definitely affected, most specifically patron privacy.

As part of their mission America's libraries affirm the liberties articulated in the First Amendment to the United States Constitution. From the right to a free press comes intellectual freedom, the freedom of citizens to choose to read, view and otherwise access the products of a free press — especially the holdings of their libraries. A crucial element of that freedom is the confidentiality of patron records.[2] Confidentiality ensures an atmosphere in which citizens may exercise their First Amendment rights to read and think and believe as they will without fear of intimidation. The loss of such privacy chills that atmosphere inhibiting the exercise of this most personal of liberties. Most states have enacted laws protecting the confidentiality of library records. The Indiana Library Federation has advocated and Indiana Legislature has enacted such laws.

Before taking a look at patron privacy issues it should be noted that, in addition to the passage of the USA PATRIOT Act, several recent congressional and administrative actions also affect America's libraries. These include, but are by no means limited to, the withdrawal of items previously distributed through the Superintendent of Documents Depository system, the withdrawal of information from government web sites, executive extension of security classification of government documents, executive orders delaying the release of presidential papers, the recent passage of H.R. 5005, the "Homeland Security Act of 2002", P. L. 107- 296 and the revision of the Attorney General's guidelines for FBI surveillance.

Most of these actions involve limiting access to government information by libraries and the citizens they serve. Their stated intention is to deny valuable information to terrorists. Of course, that information then becomes unavailable for other legitimate purposes. Most folks know what road is paved with good intentions.

While most of these actions will ultimately affect the ability of Indiana libraries to meet the information

needs of its citizens, few of them are likely to affect most Indiana libraries directly. However, the recent passage of the Homeland Security Act, the proposed "Terrorism Information and Prevention System" (TIPS), the revision of the Attorney General's guidelines for FBI surveillance and the passage of the USA PATRIOT Act among other actions are of direct concern. Not much can be said about the Homeland Security Act setting up the new department. It's just too new to know all of the implications. However, the Attorney General's new guidelines and USA PATRIOT Act are another matter.

This article, then, concentrates on the content and practical effects of these two actions, one congressional and one administrative, on Indiana libraries and on potential actions Indiana libraries and their users might take in response to them.

Disclaimer: While this author has over twenty years of experience advocating intellectual freedom, he is not an attorney. Therefore, nothing in this article should be construed as giving legal advice. For that, the reader must consult his or her own attorney. In fact, the reader (or the reader's institution) should consult an attorney ASAP as will become clear later in this text. To avoid misleading readers, no attempt has been made to cite specific sections of the law. The interrelationship of the sections is too technical and intricate to take such a risk. However, sections 206, 214, 215, 216, 218, 219 and 220 would be good places to begin such an analysis.

THE USA PATRIOT ACT

In the interest of improving the ability to gather information on potential terrorist activities, several provisions of the USA PATRIOT Act make it easier for government agents to gain access to "business records." For the purposes of this law, libraries are businesses.[3] Valiant efforts were made by library advocates in our professional organizations and by members of congress to include an exemption for library records but to no avail. There are no exemptions or exclusions for libraries.

Please note, state laws protecting such records still apply to attempts by local and state authorities to access such records, but they do not apply to federal actions taken under the authority of the USA PATRIOT Act. With moves in many states to enact local versions of the USA PATRIOT Act, this may change. The Indiana Library Federation, through the diligent work of its Legislative Committee, keeps track of proposed state legislation affecting Indiana libraries. Keep an eye out for alerts from them as to any pending legislation. In other words, if local authorities come to a local library, the old rules still apply. If federal agents arrive at the door, many of the rules have changed.

The USA PATRIOT Act authorizes federal authorities to seek subpoenas and search warrants under the auspices of the little known Foreign Intelligence Surveillance Act (FISA). This act set up a special court system several years ago to oversee foreign intelligence gathering. The court has rarely "gone public" since its inception.

DIGRESSION: DEFINITIONS

First of all, it is very important to understand the difference between a subpoena, a warrant and a request for information whether they be federal, state or local. Again, please remember that this is a lay person's understanding.

A SUBPOENA is an order signed by a judge compelling the named party or parties to produce certain named articles, items, records or persons at a specific place by a specific time. Since there is usually time provided between service of a subpoena and the date and time for compliance, a subpoena may be challenged in court. It is crucial that subpoenas be examined by one's attorney to determine if they meet all legal requirements and to make certain that only the required material is turned over.

A WARRANT, on the other hand, can and will be executed on the spot. There is no appeal. A judge has already issued the order authorizing the search for and seizure of materials or information or, in the case of an arrest warrant, a person. While one has the right to request that one's attorney be present during the execution of warrants, government agents are not required to wait for his or her arrival. They may do so as a courtesy and to assist in the identification of the required information — but they don't have to. Any attempt to delay the execution of a search warrant could be considered obstruction of justice. Don't go there.

After the Enron/Arthur Anderson debacle, it almost goes without saying that, once a subpoena or warrant is issued, no information should be deleted or otherwise disposed of in any way. On the other hand, the USA PATRIOT Act does not contain any new provisions requiring the retention of library records. Each library remains free to set its own policies and procedures. The important thing is to have policies and procedures in place and to follow them carefully.

Please keep in mind that in most cases involving libraries the subpoena or warrant will name the institution. It is the institution represented by its officials and its attorney who are being ordered to produce data.

Lastly, a REQUEST for information can come from any government official (local, state or federal) at any time for any reason and may be made of anyone on the premises. The only limits upon such requests are the policies or guidelines of the agency in question at the

time of the request. A request is just that, a request. Generally, one does not have to provide any answers. Of course, exigent circumstances do occur, another reason for seeking local legal counsel and developing clear policies and procedures as soon as possible.

These basic distinctions among subpoenas, warrants and requests are true of federal, state and local jurisdictions. The main differences are the authorizing court and the officers serving the paper or asking the questions.

THE USA PATRIOT ACT, CONTINUED

Warrants and subpoenas issued under the USA PATRIOT Act are essentially the same as any other federal or state warrant or subpoena with the following qualifications. Some may come as a surprise. In most cases involving federal, state, or local subpoenas or warrants one may directly appeal to the courts or indirectly to lawmakers through the press raising questions, expressing outrage — generally creating a stink. With subpoenas this may be done before compliance, with warrants after compliance.

The USA PATRIOT Act authorizes government officials to request subpoenas and warrants from FISA courts with a secrecy provision ("gag" order) stating that no one be told of the order other than the responsible officials WITHIN the institution in question and their attorney. Any such subpoena or warrant should clearly state this condition. While not unique in the American legal system (grand jury subpoenas may contain such secrecy provisions), the secrecy provision in this particular act may actually go much further.

It is certainly understandable that authorities would not want the subject(s) of a terrorism investigation to become aware of that investigation. However, it is equally clear that the use of a secrecy provision greatly reduces the ability of the subjects of such orders to hold government accountable for the misuse of their provisions.

The secrecy provisions of the USA PATRIOT Act not only prohibit the notification of the persons whose records are the target of an investigation (understandable under the circumstances) but of anyone else — even of the simple fact that a warrant has been executed or a subpoena served. The American Library Association's "USA PATRIOT Act" web page, while encouraging libraries to seek legal counsel and offers the services of the Freedom to Read Foundation if they so choose, specifically cautions callers that "You do not have to and should not inform OIF staff or anyone else of the existence of the warrant."[4]

The Freedom to Read Foundation has joined the American Civil Liberties Union among others in filing a request for information about the use of such powers under the Freedom of Information Act. The request seeks statistical data and is careful not to request information which might compromise national security.[5]

In addition it is possible that the wording of the USA PATRIOT Act might actually bar an institution or its attorneys from appealing such an order anywhere but in the FISA court system under which it was issued. This presents a special problem because of one of the innovations of this act. Court orders issued under the act may be sought by government officials in any FISA authorized federal court for any location within the United States.

Previously government officials needed go to a federal court within a given geographical jurisdiction to obtain an order. Now, in recognition of the potential interstate nature of terrorist activities, court orders may be sought anywhere for service anywhere. While this definitely facilitates the investigation of terrorist activities, it could seriously impede the ability of libraries to file appeals. Taking one's case to the nearest federal judge might be a violation of the act.

In addition, the standard to be met for the issuance of such orders has been lowered. The act specifies that the government need only demonstrate that the request for the subpoena or warrant is related to a current ongoing terrorism investigation, a significantly lower threshold than that of the previous need for "probable cause." Again, this lower standard is understandable given both the seriousness of the concern (terrorism) and the difficulties and ambiguities involved in such investigations. But it is an extremely low standard and the lower the standard the easier potential abuse becomes.

The act also contains provisions for in the installation of wire taps and other electronic surveillance devices which require separate treatment for adequate coverage.

THE ATTORNEY GENERAL'S FBI GUIDELINES

So far the topic has been subpoenas and warrants. What about requests? Due to abuses by the FBI and others during the 1960s and 70s (most famous being the "Library Awareness Program"), Attorney General William French Smith published guidelines on March 7, 1983 (revised by Attorney General Dick Thornburgh in 1989) which limited FBI activities in America's libraries and other public places. On May 30, 2002 Attorney General John Ashcroft issued far less strict revised guidelines under which FBI agents may conduct surveillance of citizens in libraries (among other locations such as places of worship) .[6]

Such surveillance may involve observation of patrons or requests for information from staff. How-

ever, absent a warrant or subpoena there is still no requirement that one answer questions. There are certainly few librarians who don't want to cooperate with legitimate terrorism investigations even of an informal nature. At the same time it is especially important in such informal inquiries to follow local patron confidentiality policies and procedures and to refer such inquiries to the library's administration and attorney.[7]

WHAT TO DO?

So, what should Indiana librarians do? Potential actions fall into three broad categories, 1) preparing or revising local policies and procedures in light of the current state of the law, 2) educating library boards, staff and patrons about those policies and procedures and 3) working for a change in the law which would recognized the legitimate confidentiality concerns of American libraries.

In the unlikely event a library doesn't have a confidentiality policy, now is the time to prepare one. If a library has such a policy, now is the time to review it. Start with an inventory of data being recorded and retained. Be especially careful to identify data linked to individual patrons. Check for paper, fiche and electronic storage including electronic backups — along with the bins in the basement! Don't stop with the initial record; there may be copies. If there is a third party system provider, check to see if they keep patron-linked data. Some folks are going to be surprised at how much is stored.

Once the quantity is known, ask how much of it is really needed. When does patron identifying information need to be collected in the first place? For that data which must be collected, how long does it need to remain linked to the person? Develop clear policies as to what patron linked data is collected and for how long. Develop clear procedures for de-linking data from individual patrons and for the actual deletion of data. Specify frequency and responsibility.

Lastly and above all, follow these policies and procedures. It will do a library no good to have the best patron confidentiality protection policies and protocols possible if they are not followed. While there are no federal mandates as to what records libraries must keep, there are mandates as to what records cannot be destroyed. They are called subpoenas and warrants. Once they are issued, it is too late to clean things up.

A second set of policies and procedures also needs to be revised or developed: what to do when warrants, subpoenas or requests are received from federal, state or local government agents. The heart of any such policy is the simple admonition to any and all staff to contact the library's attorney and their supervisor or boss. The details of how such contact should be made will, of course, vary from library to library. However, it is crucial that everyone associated with the library know what to do and whom to contact day or night, weekday or weekend.

The most likely scenario is that FBI agents will come in during regular business hours, ask for the director and politely but firmly execute their orders. Most agents are lawyers. Over the last two decades they, as a group, have developed a healthy respect for civil liberties. Make them welcome. Hopefully, if the person with whom the agents make initial contact is a staff member, student worker, page or volunteer, they will be allowed to make the appropriate referrals.

A highly unlikely but not impossible scenario might be the appearance of persons who claim to be federal agents, waving official looking documents at or making requests of support staff, say a night security person outside of normal operating hours. In any and every case, each library person needs to know what to say, what to do and whom to contact. Therefore, the final, crucial task is to communicate confidentiality policies and procedures to all library personnel.

Lastly, readers may want to try to do something about the USA PATRIOT Act itself. The first reaction of many is to challenge the act in court. While it is true that librarians have frequently been willing to go to court to challenge legislation which threatens intellectual freedom on even the most controversial of issues (e.g. COPA and CIPA), librarians are not stupid. Given the current environment, i.e. the wide-spread concern for national security and the fact that we are at war (though undeclared) and major court decisions related to it, it is quite likely that such a challenge would be futile. In fact, it might make matters worse. If the law is challenged and upheld, a precedent will have been set and confirmed at the highest level.

The strategy under most serious consideration is to seek an amendment to the USA PATRIOT Act providing some greater level of protection for library patron records than is now present in the law. The general feeling is that even this effort would probably be unsuccessful in the current climate. The most likely time for a revision is when several sections of the act come up for review under the act's sunset provisions. While not all portions of the law fall under this provision, the ones most applicable to libraries will be up for review in 2005.

The most realistic approach at the moment may be to work to avoid the passage of even more draconian legislation, and to continue to educate patrons and legislators alike as to the importance of patron confidentiality for the continued flourishing of personal liberty among American citizens.

RESOURCES

Lastly, in addition to contacting one's attorney, it would be an excellent idea to go to the American Library Association's Office for Intellectual Freedom Web site and read through the lengthy documentation provided there.[8] Under "Intellectual Freedom Alerts" there are six "boxed" categories of direct interest. Of special interest is the document "Guidelines for Law Enforcement Inquiries."[9] It is written as a sample handout for staff. The information throughout this site is detailed, authoritative, up to date and free.

A second, excellent source for further information which describes the major issues and includes a sample procedure for dealing with law enforcement inquires is the Web site containing the participant handouts from "Safeguarding Our Patrons' Privacy: What Every Librarian Needs to Know about the USA PATRIOT Act & Related Anti-Terrorism Measures," a teleconference held on December 11, 2002 from 12:00-3:00 p.m. EST and sponsored by the American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association.[10]

SUMMARY

Consult your attorney, revise your policies, and educate your staff!

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[3] Hockeimer, Henry E., Jr. *USA Patriot Act Is Broader than You Might Imagine; from Libraries to Universities to Trucking Companies, Sweeping Provisions of the Act Change the Status Quo*. New Jersey Law Journal, vol. 168, no. 3 (April 15, 2002). Expanded Academic ASAP accessed August 9, 2002.

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[5] *FTRF files FOIA suit against USA PATRIOT Act*. Freedom to Read Foundation News. Vol. 27. No. 3-4 (November 2002), pp. 1-2.

[6] Ashcroft, John. Attorney General's on Guidelines General Crimes, Racketeering and Terrorism Investigations, May 30, 2002, <http://www.usdoj.gov/olp/generalcrimes2.pdf> (January 2, 2003).

[7] American Library Association, Office for Intellectual Freedom. *FBI in Your Library*, September 18, 2002, <http://www.ala.org/alaorg/oif/fbiinyourlibrary.html> (January 2, 2003).

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[10] American Library Association et al. *Safeguarding Our Patrons' Privacy: What Every Librarian Needs to Know about the USA PATRIOT Act & Related Anti-Terrorism Measures*. Teleconference, December 11, 2002, <http://www.arl.org/patriot/> (January 2, 2003). See "Participants Materials."

Editor's Note: Since this article was written, ALA reorganized its Web site and most of the ALA URLs listed above have changed. All of the ALA documents cited in this article can be located by starting at the Office For Intellectual Freedom Web page at <http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Default622.htm>

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