Issues Raised by the US Patriot Act and Library Policy Considerations

December 11, 2002 Satellite Teleconference, Safeguarding our Patron’s Privacy, Cosponsored by AALL, ALA, ARL, MLA, SLA
See www.arl.org/patriot/

Presentation to the UIUC Library Faculty January 21, 2003

By Paul D. Callister, JD, MSLIS
Law Reference Librarian and Assistant Professor of Library Administration

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I. What are the Issues for Libraries?

   A. Scope of Inquiry

      1. More than Just Patriot Act: Sausage affecting 15 other acts:

         a) Electronic Communications Privacy Act of 1986 (ECPA)

         b) Computer Fraud and Abuse Act of 1986 (CFFA)

         c) Foreign Intelligence Surveillance Act of 1978 (FISA)

         d) Family Educational Rights and Privacy Act of 1974 (FERPA)

         e) Cable Television Consumer Protection and Competition Act of 1992

         f) Omnibus Crime Control and Safe Streets Act of 1968 (Wire Tap Statute)
g) Federal Rules of Criminal Procedure

2. Influenced by the Times (Probable v. Possible) and Changes in Law Enforcement Policy

   a) 9/11 (introduced less than a week after 9/11 and signed into law Oct. 26, 2001).

   b) Attorney General John Aschoft issued revised Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (“FBI Guidelines”)

      (1) From “’specific and articulable facts’ indicating criminal activity” to “’reasonable indication’ of criminal activity” to “prompt and extremely limited checking leads”, “preliminary investigations” (up to 180 days), “criminal intelligence investigation” for years involving “interrelation of various sources and types of information.”

      (2) At issue: searching the Internet, use of private sector databases, attendance at public events.¹

3. Other Law and Regulations Pertaining to Warrants, Court Orders, Wire Taps, and Court Orders

   a) State and Federal

   b) Case Law

   c) Agency Regulations and Rules

      (1) Federal Rules of Criminal Procedure

4. Consider Issues in Two Capacities

   a) Services to Patrons and University

   b) Employer

5. Consider with respect to crime, terrorism and

intelligence gathering

a) Evidence of the Crime

b) Commission of the Crime (Computer Tresspass)

B. Major Issues

1. In General

a) Use of Warrants and Court Orders as Opposed to Subpoena

b) Application of Various Law to Libraries

c) Records Retention, Signage and Resource Usage Policy

d) Withdrawal of US Government Information

   (1) Additional FOIA exceptions

e) Voluntary Disclosure

f) Probability v. Possibility

2. Use of Warrants and Court Orders as Opposed to Subpoena

a) Quiz

b) Warrants

   (1) For a variety of information types

   (a) Basic Subscriber or Customer Information

   (b) Transaction and Account Information

   (c) Email

   (d) Stored Voice Mail (transmitted via computer)

   (e) Non-electronic (not on chart—18 USC 3103(a) “seize any property that constitutes evidence of criminal offense”
(2) Extended Use (See NJ Article and Table)

(a) Nationwide for investigation of domestic or international terrorism (any district in which activities related to the terrorism may have occurred)

(b) Extended “basic subscriber or customer information” to include items computer network information (i.e., payment information, session times and duration, identity or temporary network addresses, email headers, etc.) See 18 USC 2703 (c)(2)

(i) What is “content?”

(a) Email headers

(b) Web addresses

(ii) Anywhere in the address chain

(c) NJ Law Rev. Article

(3) Higher Standard (“Probable Cause”)

(4) Technical Issues of Execution of a Warrant

(a) Refusal

(i) Punishable by

(a) Courts with Contempt Power

(b) Obstruction of Execution of Process (Criminal Offense)

(ii) What constitutes refusals:

(a) To move

(b) Refuse entry

(c) Entering Premises after being told not to

(d) “secreting” object of search after learning of warrant

(iii) Defenses
(a) in some jurisdictions, invalid or irregular warrant is not invalid if valid on its face

(b) Use of Force and “Knock and Announce” Rules

(i) Constitutional limitation (“unreasonable search and seizure”)

(a) “must be judged by their reaction to the circumstances as they reasonably appear to exist to trained law enforcement officers when the decision to enter was made.”

(b) Generally, “knock and announce” rule (meaning “reveal identity to the owner, occupant or one in rightful possession of the property to be searched or thing seized” (but see (b))

(c) Unless required by statute, no requirement to exhibit, read, or even have warrant in possession

(d) “Destruction of property that is not reasonably necessary to execute” the warrant (e.g., leaving cigar and ashes in bed is not ok, breaking lock on gun vault is ok)

(ii) Illinois Law

(a) Must knock and announce “absent exigent circumstances”

(i) Armed or sign of violence

(ii) Probable cause

(iii) Defendant is present

(iv) Danger to police

(v) Nature of object of warrant

(vi) Ease of destruction of
(vii) Probability of escape
(viii) Useless gesture

(b) No Knock Warrants

(c) “Failure to announce” is not a per se constitutional violation (but is a factor)

(d) Must leave copy of warrant for items seized

(c) Who my Execute

(i) Federal civil officer “authorized to enforce or assist in enforcing any federal law”

(ii) Persons authorized by the president

(iii) City police (often have county county-wide jurisdiction)

(iv) State use of National Guards

(v) Illinois Judge may designate specific individual

(d) When

(i) Time may be fixed by Judge or by Statute

(ii) May be at night

(a) Federal—in day time unless for “reasonable cause” authorized at night (e.g., destruction of evidence, armed and dangerous, flight)

(b) Illinois—at any time (day or night)

(iii) Within reasonable time

(a) Illinois (general within 96 hours)
(e) Scope—Where, What and Who

(i) Search wrong place is a search without a warrant.

(ii) General searches are prohibited

(iii) Unnamed items may be seized if “in plain view, and reasonably believe constitute evidence of a crime” or if “receptacle of a described item (computer)” or “sufficient nexus to the described items” or “not practical to sort through items on the premises”

(iv) Unnamed persons—searched only if independent probably cause

   (a) “furtive gestures and emotions”

   (b) Often warrant will authorize search any person on premises and will name individuals

   (c) Detention, apart from search, is generally permitted (to protect from attack, destruction and concealment of evidence)

(f) Remedies for Unconstitutional or Unreasonable Searches

(i) Quash evidence—for the defendants

(ii) Motion for Return of property

   (a) Must show entitled to possession

   (b) Can ask for receipt

(iii) Money Damages

   (a) could loose right to if search was with consent (actual or apparent authority)

   (b) not whether injury was done to property, but rather the officers executed search in a “reasonable
and orderly manner”

(i) Being able to view the search is important

(ii) Not liable for removing obstructions if careful and orderly manner and not guilty of wanton destruction of property

(iv) Personal liability of agent or officer

(a) qualified immunity in some states
(if reasonable officer possessing the same information believed search was lawful)

(b) good faith that warrant was valid

(v) Malicious procurement of warrant or wrongfully causing or conducting a search is a crime in some states

c) Court Orders

(1) Kinds (see table)

(a) Contents of wire or electronic information (with notice, unless motion otherwise, to subscriber or customer, which is unlike warrant) 18 USC 2703(b)

(b) Records of electronic communication service or remote computing service (without notice) 18 USC 2703(c)—addresses, headers (what is content?)

(c) Pen/Trap Order 18 USC 3122 or 50 USC 1842 (FISA order) (real-time dialing, signaling info, address, ports, headings).

(d) Real time communications (content) via secret FISA orders

(2) Standard to get is lower

(a) “Specific and articulable facts”—contents or records of wire or electronic information or remote computing service

(b) For non-FISA Pen/Trap Order “Relevant to an
ongoing criminal investigation”

(c) For FISA Pen/Trap Order—not a US citizen or concerns protection against terrorism and intelligence activities (“not solely based upon conduct protected under the first amendment”)

(3) Non disclosure requirement for Pen Registers and Traps

(4) Compliance with Order

(a) Presumably must be able to read and respond as dictated

   (i) Who addressed to

   (ii) Timing

   (iii) Items to be seized or persons and communications covered by Pen Register or Trap

(b) Threat of Contempt of Court

(c) Obstruction of Execution of Process

(d) Must provide assistance in installation of pen registers and traps

(5) Remedies

(a) For Wire or Electronic Communications or records concerning such—Motion by Service provider that

   (i) information or records requested are unusually voluminous in nature or

   (ii) compliance with such order would cause an undue burden

(b) Reimbursement for costs

(c) Civil actions for abuse

d) Subpoena

(1) Easiest to obtain
(a) “relevant to the investigation”

(b) FISA order

(i) “any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely up on the basis of activities protected by the first amendment”

(ii) Non disclosure requirement

(2) Generally time to respond to subpoena

3. Application to Libraries

a) In General—Library-Patron Privilege

(1) May be statutory protections (although federal law overrides) see
http://www.ala.org/alaorg/oif/stateprivacylaws.html

(a) 75 ILCS 70/1—registration and circulation records of a library are confidential (must have a court order)

(b) 5 ILCS 140/7—exempts “library circulation and order records identifying library users with specific material” from FOIA requests

(2) Library-patron privilege is trumped by “states interest in well-founded criminal charges and the fair administration of criminal justice.” Brown v. Johnson, 328 N.W.2d 510, 512-13 (Iowa 1983), cert denied. True even though investigation was “only preliminary,” “no suspects were identified,” and information was not limited “to any named library patrons.” Subpoena sought “records of all persons who have checked out certain books” dealing with witchcraft and related topics.

(3) Library-patron privilege is more likely to trump
when it is a civil suit (seeking identities of defendants) that is the basis for the subpoena. See Quad/Graphics v. Southern Adirondack Library System, 664 N.Y.S. 2d 225 (NY Sup. Ct. 1997). “Library, as the unique sanctuary of the widest possible spectrum of ideas, must protect the confidentiality of its records in order to insure its readers’ right to read anything they wish, free from fear that someone might see what they read and use this as a way to intimidate them.”

(a) Illinois court order could permit under 5 ILCS 140/7.

b) With Respect to Disclosure of Content or Records by Electronic Communications Services or Remote Computer Services

(1) Bohach v. City of Reno, 932 F. Supp. 1232 (D. Nev. 1996). Officers sought halt of investigation into misuse of computer paging system. One of the legal issues was whether the city and Reno Police Department was a “provider of electronic communications service” under a 18 USC 2701 (related to section 2703 amended by the Patriot Act). District court found that they were ruling “the Reno Police Department’s terminals, computer and software, and the pagers it uses to its personnel, are, after all, what provide those users with the ‘ability to send or receive electronic communications.’”

(2) Crowley v. Cybersource and Amazon.com, 166 F. Supp. 2d 1263 (N.D. Cal. 2001). Distinguished between online merchant who communicates by email and an electronic communication service or remote computing service.

(3) Implications for libraries

(a) if we enable electronic communication for our patrons or employees with software or computer hardware, we may be found to be an electronic communications service and subject to compliance with warrants, orders and subpoenas of electronic information.
(b) How does our “no email” on public terminal policy affect this?

(c) Even if we are not a “provider of electronics communications service” are we a “remote computer service”? We provide internet access and our online catalog, ILL, and databases permit patrons to save information (searches, etc.).

(d) How do services such as “remember search,” “remember titles,” digital ILL, clip searches affect us?

(e) Do circulation records themselves fall within these sections? Not as records, but maybe as content subject to 18 USC 2703(b).

4. Records Retention, Signage and Resource Usage Policy

a) Why worry?

   (1) Because we don’t want to be found to be an electronic communications service or remote computer service.

   (a) Litigation strategy (not a response to an officer with a warrant)

   (b) Preserves reader’s rights

   (2) May have limited effect because of other applicable law.

b) Limit amount of work to comply

c) How do we show entitled to documents, records, computer equipment, etc.

d) Offset reaction by other needs (i.e., use email and to acquire information)

e) Weigh the probability

5. Withdrawal of Government Information

a) Organizations and Sites tracking removed information
(1) OMB Watch  
http://www.ombwatch.org/article/articleview/213/1/104/#agency

(2) Additional FOIA exceptions

6. Voluntary Disclosure
   a) Way to limit liability (?)
   b) Signage

7. Probability v. Possibility
   a) Less Likely
      (1) Few examples in the case law to draw from
      (2) Are libraries electronic communications services or remote computer services?
   b) More Likely
      (1) 9-11
      (2) More Aggressive Law Enforcement Policies such as the Attorney General Guidelines

II. Our Library Policy

   A. Current Draft Guidelines dated 10/21/02

   1. Do they adequately address distinction between Warrants, Orders, and Subpoena?
      a) Failure to announce
      b) Failure to bring or present warrant
      c) Stepping away (compare to ALA guidelines) without anything further
      d) Moving if ordered
      e) Not entering if so ordered
f) Detention of and searches of persons

g) Complying with order for “immediate” delivery

h) Risk of contempt of court or obstruction of execution of process

2. Do they address the different issues of investigations of patrons v. investigations of employees?

   a) Investigations of employees may more likely involve

      (1) searches of persons

      (2) detention of persons

      (3) failure to announce

3. Do they address issues such preventing damage or loss? Or limiting liability?

   a) Staying on premises

   b) Asking for receipt

   c) Asking for copy of warrant

   d) Not giving permission

   e) Voluntary disclosure to law enforcement

4. Do they address facilitating pen registers and traps?

   a) Who will assist and monitor

   b) Tracking hours for compensation

   c) Responding to voluminous requests

5. Are the guidelines readily accessible?

6. Are staff members being trained?

7. Should we adopt the ALA guidelines? Are they sufficient?
B. Records Retention, Signage, Resource Usage and other Policies

1. Does restricting email use on terminals help?
2. Does it interfere with information seeking process
3. What about catalog functions? Saved searches and titles?
4. What about ILL digital and other requests?
5. Can we easily prove possession of documents, records and equipment?
6. Address computer trespass
   a) Voluntary disclosure (warning)
   b) Other ways to limit exposure/liability (Patriot Act only protects with respect to ECPA)

C. Tracking Information Removed by Government Agencies

1. Should we report it?
2. Who do we report to?
3. Compliance by depository libraries

D. Role with Respect to Influencing Political Action

1. What forum and among what organizations should we address our concerns?
2. Encourage professional organizations and take a role in promoting legislation protecting the sanctity of the right to read (privacy and access to information)