

**Protecting Patron Records:
Confidentiality, Search Warrants, Subpoenas, and the USA PATRIOT ACT**

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New Jersey law continues to protect the confidentiality of library records, and remains unchanged since Congress enacted the USA PATRIOT Act.¹ Congress adopted the PATRIOT Act on October 26, 2001, to provide a comprehensive set of powers to the federal government in the service of law enforcement and intelligence gathering.

The New Jersey Confidentiality of Library Records Law (N.J.S.A. 18A:73-43.1) provides that:

Library records which contain the names or other personally identifying details regarding the users of libraries are confidential and shall not be disclosed except in the following circumstances:

- a. The records are necessary for the proper operation of the library,
- b. Disclosure is requested by the user, or
- c. Disclosure is required pursuant to a subpoena issued by a court or court order.

This means that library records can only be disclosed if the person making the request presents a subpoena issued by a court or court order.

Does the PATRIOT Act Change New Jersey's Library Confidentiality Law?

No. The PATRIOT Act makes it much easier for law enforcement officers to obtain court orders, including court-ordered subpoenas and search warrants. Librarians in New Jersey should continue to ask for court orders before disclosing confidential library records to the police or anyone else.

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," P.L. 107-56.

This memorandum sets forth my personal views and is not a legal opinion letter. Accordingly, this memorandum necessarily cannot serve as the basis for any public library's legal judgments. The law, particularly as it relates to Internet use, is changing rapidly, as new legislation is adopted and new court challenges are filed. Libraries seeking legal advice should retain counsel for analyses of their own particular situations and current law.

This is important not only for purposes of complying with the library confidentiality statute; it is also important for the purpose of complying with criminal law. If the police conduct a “search and seizure” without a proper court order, the evidence can be suppressed and convictions overturned. It is much better to insist on a court order than to comply with informal requests.

The New Jersey statute does not conflict with the PATRIOT Act or any other federal law, and there is no evidence that Congress intended to “occupy the field” of public library confidentiality. Of the 50 states, 48 have library confidentiality statutes.² In the late 1980’s Congress contemplated enacting a federal statute for library records, but did not want to preempt state law.³

What Does the USA PATRIOT Act Provide?

The USA PATRIOT Act empowers law enforcement by expanding the traditional tools of surveillance: wiretaps, search warrants, pen/trap orders and subpoenas. The Act makes changes, some large and some small, to more than 15 different statutes. The section of greatest interest to librarians is section 212 subsection 2702, which pertains to the voluntary disclosure of customer communications or records. A summary of the statute may be found through the ALA website or at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@L&summ2=M7>

² The state privacy laws can be found at www.ala.org/alaorg/oif/stateprivacylaws.html

³ Marc Rotenberg, Executive Director of the Electronic Privacy Information Center, was an aide to Senator Patrick Leahy in the late 1980’s. He made this assertion at a Rutgers symposium entitled “Privacy in Cyberspace: New Challenges for Higher Education,” March 18, 2002. The legislative history of the Video Protection Privacy Act of 1988, Pub. L. 100-618, 102 Stat. 3195, 18 U.S.C. Sections 2701 note, 2710, 2711, can be found at 134 Congressional Record, 100th Congress, 2d Session 1988, October 14 (Senate); October 19 (House), 88 CIS S 52325.

Historically, search-and-seizure law has been based on the Supreme Court's interpretation of the Fourth Amendment. The Fourth Amendment provides that

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by an Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

“The basic purpose of this Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” Berger v. New York, 388 U.S. 41, 53 (1967).

In order to meet the requirements of the Constitution, Congress enacted a legal procedure years ago that placed a judge between the authority of the state and the rights of citizens.⁴ Before conducting electronic surveillance, law enforcement officers had to apply for a court order, swearing or affirming that there was probable cause to believe that a specific crime had been or was about to be committed, and giving a particular description of the person, place or thing to be searched. It has been without question a burden to the police that they could not freely seize evidence, intercept phone calls, or use electronic evidence for surveillance of individuals without probable cause.

The PATRIOT Act has changed these requirements. Law enforcement officers can now obtain court orders merely by telling a judge that their surveillance is “relevant” to an ongoing criminal investigation. The person under surveillance does not have to be the target of the investigation. The judge must issue the orders. The Association of

⁴ See Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20, and the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-11 (1982).

Research Libraries has posted a very interesting summary of search-and-seizure law before and after the PATRIOT Act at www.arf.or/info/frn/other/matrix.pdf

This does NOT mean that librarians have to permit law enforcement officers to examine library records. It means that the law enforcement officers can *easily* obtain the court orders required by the New Jersey library confidentiality law.⁵ Librarians should insist that court orders be obtained before releasing patron information.

Can Libraries Take Steps to Protect the Privacy of their Patrons?

Libraries can, and should, adopt policies regarding public access to the Internet. A very important legal concept for the purpose of search-and-seizure law is the “reasonable expectation of privacy.” Accordingly, library policy should state whether patrons should expect that their computer use will be safeguarded as confidential. For example, the Princeton Public Library’s policy provides, in part:

... Consistent with our mission and the professional principles of public librarianship, this Internet Use Policy affirms the safeguarding of First Amendment rights, intellectual freedom, equity of access, confidentiality of information about users and their use of all library resources including electronic, and individual responsibility. The Library affirms the following principles and user rights as delineated in the American Library Association’s *Library Bill of Rights in Cyberspace*

With a policy like this in place, a library may choose to resist the efforts of law enforcement to examine patron records. For example, if the library receives a court-ordered subpoena which violates the library’s policy of confidentiality, the library can move to quash the subpoena.

⁵ Administrative Office of the Courts, 2001 Wiretap Report, www.uscourts.gov/wiretap01/contents.html. No judge anywhere in the United States denied a police wiretap request in 2001.

What is the Difference Between a Subpoena and a Search Warrant?

A subpoena is a command to appear at a certain time and place to give testimony on a certain matter. It can be addressed to a specific individual or to an organization, like a library. It can even be addressed to "the person most knowledgeable about such and such," in which case the organization must designate the most knowledgeable person. A subpoena may command a witness to bring certain documents, books, papers and other things (including computers). Ordinarily, a subpoena can be signed by an attorney. Here, in contrast, under the library confidentiality statute, a subpoena that asks for "personally identifying details regarding the users of libraries" *must* be signed by a *judge*.

A search warrant is an order issued by a judge, authorizing a law enforcement officer to search for and seize any property that constitutes evidence of the commission of a crime, property used as the means of committing a crime, contraband, etc. If the police have a search warrant, they should be permitted to conduct a search. The search can be done at the library.

Both a subpoena and a search warrant must be signed by a judge before a library can disclose information about patrons. The same is true for a "court order." The point is that libraries cannot disclose information about their patrons, even to law enforcement personnel, without an order of some kind, signed by a judge. If a subpoena is signed only by a lawyer or by a law enforcement officer, it is *not* adequate.

One difference between a search warrant and a subpoena is that a subpoena is issued ahead of time, whereas a search warrant permits the police to conduct a search on the spot. A library can move to "quash" a subpoena to protect the confidentiality of

innocent patrons. Search warrants, unlike subpoenas, do not give advance notice. If the police have a search warrant and say they need to take the computer away with them, the library must comply.

Who Can Be Told if a Library Receives a Subpoena or Search Warrant?

Court records are ordinarily part of the public domain. Accordingly, if a library receives a court-ordered subpoena, or some other kind of court order, the library may use its discretion to notify its board, the staff, the press and the public.

Search warrants must be honored on the spot. Search warrants are usually sealed and kept secret until they are executed, so the library is unlikely to receive advance notice when a search warrant is coming. The reason for this is straightforward: the police do not want suspects to learn from the public domain that their premises are about to be searched, lest the suspects conceal or destroy the evidence the police hope to find. For practical purposes, this means that if a library is served with a search warrant, there may be time to notify the director and the board so long as the police can be assured that the evidence will remain intact.

What Should I Do if the Police Ask for Patron Records?

The American Library Association has promulgated “Guidelines for Librarians on the USA PATRIOT Act: What to do before, during, and after a ‘knock at the door.’” The guidelines are available at www.ala.org.

These issues are complex, and every situation is different. Libraries should consult with their legal counsel and review their policies. The following suggestions should not be taken as specific legal advice, but provide general direction:

1. First, give the police a copy of New Jersey's Confidentiality of Library Records Law (NJSA 18A:73-43.1). The statute states that:

"Library records which contain the names or other personally identifying details regarding the users of libraries are confidential and shall not be disclosed except in the following circumstances:

- a. The records are necessary for the proper operation of the library,
- b. Disclosure is requested by the user, or
- c. Disclosure is required pursuant to a subpoena issued by a court or court order."

This means that library records can only be disclosed if the police have a subpoena issued by a court or court order.

2. Contact your local attorney and your local administration (library board president, county library commission chairperson, or college leadership such as the president or provost). They should be made aware of the situation.
3. Tell the police, your attorney and your administration that you cannot turn over the records without a subpoena signed by a judge or a court order signed by a judge. Remind them that if a defendant can escape conviction if the subpoena or court order is not properly signed by a judge.
4. Wait. It should not take long for law enforcement officers to get a court order.
5. If proper documentation is provided, turn the records over.