INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
APRIL 28, 2003

THE USA PATRIOT ACT AND BEYOND: IMPACT ON LOCAL GOVERNMENTS

Theresa Chmara[1]

Following the events of September 11, 2002, Congress passed the USA Patriot Act – new anti-terrorism legislation that expanded the authority of the Federal Bureau of Investigation ("FBI") to secure access to many types of records, including paper records, stored electronic data and electronic communications. It also expanded the authority of the FBI to access records from any business or entity. This legislation raises grave concerns for libraries and booksellers. Revealing what a patron has been reading, viewing or accessing either in the book stacks or on the Internet creates a chill on the exercise of First Amendment rights. Patrons will avoid reading controversial books or accessing materials on sensitive topics if they believe that what they read will be used as an indicator of what they

---

[1] Theresa Chmara is a partner with the Washington, D.C. office of Jenner & Block. She is a 1985 *cum laude* graduate of Boston College and a 1988 *cum laude* graduate of Georgetown University Law Center. Theresa Chmara has been with Jenner & Block since June 1, 1988. While at Jenner & Block, she has been a trial and appellate litigator working on matters involving advertising, antitrust, administrative, Constitutional, and First Amendment issues. She has litigated matters in court, arbitration proceedings and argued appeals before both the United States Court of Appeals for the District of Columbia Circuit and the Seventh Circuit. She is a member of the bars of the United States Supreme Court, District of Columbia, New Jersey and various federal court districts.

are thinking or actions they may have taken. Local government attorneys who serve as counsel for public libraries must be prepared to assist those libraries faced with requests for patron use records under the USA Patriot Act or under traditional law enforcement mechanisms.

THE FISA COURT

Federal agents seeking information under the USA Patriot must seek approval from the Foreign Intelligence Surveillance Court ("FISA Court"). Proceedings in the FISA Court are conducted in secret and neither the subject of the investigation nor the entity whose records are sought can be involved in the process. The Act provides further that "[n]o person shall disclose to any other person (other than those persons necessary to produce any tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section." 18 U.S.C. § 1861(d) (2003). The secrecy of the application process and the further requirement not to reveal the receipt of a request for information makes it difficult for a recipient of a request for information under the USA Patriot Act to challenge the request. Although a person or entity receiving a request for information pursuant to the USA Patriot Act should be able to consult a lawyer, they plainly cannot reveal that they have received such a request to anyone else. It is difficult, therefore, to maintain

oversight of the statute and assess any abuses by federal agents.

In a decision dated November 18, 2002, the United States Foreign Intelligence Surveillance Court of Review ("FISA Appellate Court"), reviewed the statutory mandate and constitutionality of the Foreign Intelligence Surveillance Act and the role of the FISA court. At issue was whether the FISA court had properly imposed restrictions on the government's access to electronic surveillance. In reviewing the particular request at issue, the FISA appellate court also held that FISA was constitutional because the surveillances authorized are reasonable. *In re Sealed Case,* File 02-001 (Foreign Intelligence Court of Review 2002).

Several groups have indicated an intention to file an action in federal district court to challenge the provisions of the USA Patriot Act. To date, no challenges have been filed.

THE USA PATRIOT ACT

Prior to the passage of the USA Patriot Act, the government could access information through the secret FISA Court related only to "a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility" and information could be requested only if there were "specific and articulable facts giving reason to believe that the person to whom the records pertain is a

foreign power or an agent of a foreign power." 18 U.S.C. § 1862 (2000) (amended by the USA Patriot Act). The USA Patriot Act expands greatly the power of federal agents to seek information. The FBI can now seek access to any business records of any business or entity. Moreover, the USA Patriot Act only requires a showing by the FBI that "the information likely to be obtained is foreign intelligence information not concerning a United States person or is *relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities*." 18 U.S.C. § 1861 (2001) (emphasis added). Thus, the FBI now may seek information about United States citizens through the secret court. The statute is not limited to allowing access to information about a foreign power or the agent of a foreign power.

The amended statute allows access to a broad range of documents. Section 215 of the USA Patriot Act permits access to "any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 1861 (2001). This broad language plainly would encompass circulation records and records of Internet searches in libraries. The Act does not allow access to documents if the investigation concerns a United States citizen and is "conducted solely upon the basis of activities protected by the first amendment to the

Constitution." *Id.* This protection does not, however, eliminate the First Amendment concerns related to the USA Patriot Act. While the government apparently could not institute an investigation into an individual "solely" because he made a speech about terrorists, they nonetheless apparently could investigate a person's reading habits if the person whose records are sought happened to work with or live near a suspected terrorist – even if the subject of the investigation did not otherwise appear to have any involvement in terrorist activities. The federal law enforcement officials need only show that the information is "relevant." The FBI no longer is required to demonstrate probable cause that the subject of the investigation is involved in a crime or terrorist activities.

PROPOSED LEGISLATIVE AMENDMENTS RELATED TO LIBRARIES

Many groups have urged Congress to amend the USA Patriot Act. In March, 2003, Congressman Sanders of Vermont introduced the Freedom To Read Protection Act. *See* H.R. 1157. The Freedom to Read Protection Act exempts libraries and booksellers from the provisions of the USA Patriot Act, allowing law enforcement agents to pursue access to information from libraries and booksellers only through traditional methods of law enforcement that allow the recipient of the request to challenge the request. A large group of Democratic and Republican members of Congress have joined Congressman Sanders in sponsoring the

legislation.

FOIA REQUESTS RELATED TO THE USA PATRIOT ACT

Groups concerned about the impact of the USA Patriot Act also have filed Freedom of Information Act ("FOIA") requests regarding the utilization of the USA Patriot Act. Dissatisfied with the response from the Department of Justice, a lawsuit was filed on October 24, 2002, challenging the government's failure to fully respond to the FOIA request. That case is pending in the United States District Court for the District of Columbia. *See American Civil Liberties Union, et al. v. Department of Justice*, Civil Action No. 02-CV-2077 (D.D.C.).

REQUESTS FOR PATRON RECORDS UNRELATED TO THE USA PATRIOT ACT

Even outside the context of the USA Patriot Act, a library may receive a request for patron use information from either a law enforcement agency or a private individual. Cases arise both in the criminal context and the civil context. A number of cases have arisen in the context of a divorce or child custody proceeding where one spouse attempts to secure access to the reading materials of the other spouse. Most often, the issue arises in the context of a criminal investigation. In some cases, law enforcement officials make a good faith effort to target only information for which there is a compelling need. In other cases, they

plainly are engaged in a fishing expedition. In either case, the need for the information, whether requested in good faith or not, may be outweighed by the important First Amendment rights at stake.

In general, an attorney representing a library must work with staff to insure that procedures are in place for contacting legal counsel if a law enforcement official or person appears at the library with either a search warrant, subpoena or informal request for patron use information. Often, the request may be given to a clerk working at the desk, not a trained professional librarian. Every staff member must be instructed and trained to respond to requests for patron use information. Staff must be trained to call legal counsel and must be instructed on the differences between informal requests, subpoenas and search warrants.

Additionally, attorneys representing libraries must work with the library to develop library confidentiality policies that will protect the First Amendment privacy rights of patrons. In order to ensure that patrons will fully exercise their right to receive information in the library, patrons must be confident that the library will do all it can to protect those rights. Under no circumstances should a library staff member ever produce information pursuant to an informal request; state statutes may impose penalties for the production of patron use records in the absence of a subpoena or court order.

If the library receives a subpoena, staff should be instructed to contact legal counsel immediately. Legal counsel must then assess whether the library can respond to the subpoena without revealing the reading and viewing records of a patron. If production of the requested information will impact First Amendment rights, then legal counsel may need to file a motion to quash the subpoena – which will allow a court to conduct the necessary balancing of law enforcement and constitutional interests to determine if the information should be disclosed.

When preparing to file a motion to quash a subpoena, the starting point for any analysis is the Supreme Court's holding in *Branzburg v. Hayes*. The Court held in that case that "grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg v. Hayes*, 408 U.S. 665 (1972). More recently, the Supreme Court has reaffirmed that "[g]rand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass." *United States v. R Enterprises*, 498 U.S. 292 (1991). The same principles apply to other law enforcement inquiries. The standard should be even higher in the context of civil proceedings.

The application of *Branzburg* has differed somewhat in the Circuits because it is a plurality opinion. Under either the majority or minority views, the first question is whether there is a First Amendment interest and a particularized harm

to First Amendment principles if the information is produced. In order to establish a First Amendment interest, the attorney representing the library must use the long line of cases holding that there is an important right to receive information encompassed by the First Amendment. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Counsel also must determine if the state in which the library is located has a confidentiality provision for library patron records to demonstrate the recognition by the legislature that an important interest is at stake. Virtually every state has addressed the confidentiality of patron records in some fashion.

Finally, counsel must secure affidavits from library personnel, library board trustees or members of the community to show that patrons will be chilled in the exercise of their First Amendment rights if they believe that their reading habits -- which are not criminal in and of themselves -- can be the subject of law enforcement inquiry.

The second question in such a case is whether the government has shown that there is a compelling need for the information that outweighs the First Amendment interests. Applying *Branzburg*, some circuits apply a test that is very

protective of First Amendment rights:

(1) Is the information sought relevant to the investigation?

(2) Can the information be obtained by alternative means?

(3) Is there a compelling need for the information?

See In re Grand Jury Subpoena Duces Tecum, 78 F.3d 1307 (8th Cir.), *cert. denied*, 117 S.Ct. 432 (1996); *In re Grand Jury Proceedings*, 776 F.2d 1099 (2d Cir. 1985); *In re Grand Jury Subpoena*, 701 F.2d 115 (10th Cir. 1983); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972), *overruled in part on other grounds*, *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988).

Applying *Branzburg*, a minority of courts inquire only whether there is abuse of a grand jury function, such as government harassment or bad faith. *See, e.g., In re Grand Jury P87-3 Subpoena Duces Tecum*, 955 F.2d 229 (4th Cir. 1992).

This issue has arisen in several cases related specifically to bookstores and libraries. In *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, (D.D.C. Apr. 6, 1998), Independent Counsel Ken Starr issued a subpoena to Kramerbooks as well as Barnes & Noble seeking information about the book buying habits of Monica Lewinsky in connection with his investigation of President Clinton. The court held that the following test applies where a First

Amendment right is asserted in response to a grand jury subpoena: (1) the government must demonstrate a compelling need for the information sought; and (2) the government must show a sufficient connection between the information sought and the grand jury investigation. The case was settled before the court was required to make the determination regarding compelling need and nexus because Ms. Lewinsky consented to the release of her customer records.

In *Brown v. Johnston*, 328 N.W. 2d 510 (Iowa 1983), a subpoena was directed to the library seeking the names of all patrons who had borrowed any books on witchcraft. Importantly, the court recognized that a qualified privilege exists and that forced disclosure of library records would chill citizens' reading of unpopular or controversial books. Despite the extremely broad nature of the request, however, the court did not quash the subpoena in that case.

Other courts have quashed subpoenas from law enforcement personnel that appear to be engaged in fishing expeditions. For example, a sheriff in Decatur, Texas once served several libraries with a request for the names of all patrons who had borrowed books on child bearing, which he believed would help him solve a child abandonment case. The library sought legal assistance and filed a motion to quash the subpoena. In an unpublished opinion, the court agreed with the library that the subpoena should be quashed. The court concluded that the government

could not demonstrate either a compelling need or nexus. The law enforcement officials had failed to demonstrate that the person who had abandoned a child had borrowed a library book as an aid to giving birth to the child. Law enforcement plainly was engaged in a fishing expedition.

These issues arise in the civil context as well. In *In the Matter of Quad Graphics, Inc. v. Southern Adirondack Library Systems,* 174 Misc. 2d 291, 664 N.Y.S. 2d 225 (N.Y. 1997), an employer sought information from a library that would link its employees with specific library identification cards. The employer knew that several employees were using a dial-up link to the library to make unapproved and costly calls during the work day. The employer could identify the library user numbers and needed information from the library to link those numbers to particular patrons. The court held that a library was not obligated to disclose patron information in response to a FOIA request. The Court relied on New York's confidentiality statute as well as the legislative history of that statute.

Some cases may involve a search warrant, as opposed to a subpoena. In general, staff should be instructed to contact legal counsel if a law enforcement officer arrives with a search warrant. Staff should be instructed to request that the law enforcement officer wait for the arrival of counsel prior to beginning the search. Nonetheless, the law enforcement officer may not accede to the request.

In that case, library staff must cooperate with the law enforcement officers. In at least one case, however, a Colorado bookstore was able to challenge a search warrant.

In the first instance, the Tattered Cover bookstore in Denver, Colorado received a subpoena request for information about the book purchases of an individual that was the subject of an illegal drug investigation. Apparently law enforcement individuals had discovered a methamphetamine lab in a home in which several individuals lived. They also found several books on how to make methamphetamines in the home. They then found a discarded invoice in the trash from the Tattered Cover bookstore which listed the customer's name and price of purchases, but not the titles of the books purchased. Law enforcement officials were attempting to determine the book purchases made by the individual in an apparent attempt to argue that the person who read about methamphetamines was the person who had committed the crime of making methamphetamines. Tattered Cover, with the assistance of legal counsel, resisted responding to the subpoena request on the ground that it protected the privacy and First Amendment interests of its customers.

The illegal drug investigation was being conducted by a task force including local law enforcement officials from several jurisdictions as well as federal law

enforcement. Federal law enforcement agents, which issued the original subpoena, understood the First Amendment issues raised by the bookstore and did not demand compliance with the subpoena. In the meantime, several local law enforcement officials approached a district attorney in one jurisdiction in order to persuade him to apply for a search warrant on their behalf. The district attorney was concerned about the First Amendment implications of such a search warrant and instructed the officers to return to the crime scene to interview additional witnesses and conduct additional fingerprint analysis. Instead, the law enforcement officials decided to proceed to another district attorney in a different jurisdiction for a search warrant. The law enforcement officers never informed the second district attorney or the court asked to approve the search warrant about the First Amendment concerns raised by the Tattered Cover or the first district attorney approached about a search warrant. Without any opportunity to consider the First Amendment and privacy concerns raised by the Tattered Cover on behalf of itself and its customers, the court signed the search warrant.

Five police officers then proceeded to the Tattered Cover to search customer purchase records. The owner of the bookstore, Joyce Meskis, with the assistance of legal counsel, persuaded the second district attorney and officers to wait five days before executing the search warrant. During those five days, counsel for the

Tattered Cover prepared a lawsuit requesting that the court enjoin or prohibit the officers from executing the search warrant.

Tattered Cover was supported by many organizations in an *amicus* capacity. Tattered Cover and groups such as the American Library Association and the American Booksellers Association for Free Expression argued that it would set a dangerous precedent to assume that the commission of a crime (the construction of a methamphetamine lab) could be proven by showing who had purchased certain books (the books related to the methamphetamine manufacture and drug laboratory construction). It was equally possible that a housemate was trying to determine what another housemate was building. Simply reading a book could not prove that the same person committed the crime.

The trial court agreed that the burden was on the government to establish a compelling need and held moreover that the request for all purchasing records of an individual *even for a one month period* constituted a fishing expedition for which the government had failed to establish a compelling need. However, the court held that the Tattered Cover was required to produce the information related to the particular invoice found in the exterior trash can.

The Colorado Supreme Court disagreed, holding that the law enforcement officials had failed to "demonstrate that its need for this evidence is sufficiently

compelling to outweigh the harmful effects of the search warrant." *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002). The Court held that "both the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution protect an individual's fundamental right to purchase books anonymously, free from governmental interference" and that "[l]aw enforcement officials implicate this right when they seek judicial approval of a search warrant authorizing seizure of customer purchase records from an innocent, third-party bookseller." Applying a balancing test, the Supreme Court of Colorado concluded that "the City's need for the invoice . . . is not sufficiently compelling to outweigh the harm that would be caused by execution of the search warrant."[2]

When faced with the issue of a subpoena directed to the library, counsel representing the library must conduct the following factual research to support the argument that the information should not be produced absent a court order finding that there is a compelling interest in producing the information that clearly

---

[2] *Id.* The Supreme Court also held that the Colorado constitution requires that "an innocent, third-party bookstore must be afforded an opportunity for a hearing prior to the execution of any search warrant that seeks to obtain its customers' book-purchasing records." *Id.*

outweighs the First Amendment interests at stake:

- Does the library have a policy about releasing patron use information? Is the policy publicized? Do patrons rely on that policy? Can they sign affidavits to that effect to show particularized harm to First Amendment interests?

- Can library personnel, including members of the Board of Trustees, attest to the fact that release of patron use information -- in the absence of a compelling need -- would result in a chilling effect in that patrons would be less likely to exercise their borrowing privileges?

- Has the library adopted the Bill of Rights of the American Library Association? The ALA has a specific policy that strongly recommends that libraries -- as a matter of professional standards -- resist requests for confidential library patron information even if made in the form of a subpoena unless there has been a showing of good cause and a court has ordered such records disclosed.

- Is the request overbroad and burdensome? Does the library have the resources to respond to the request? Even without the issue of the First Amendment, the library may move to quash the subpoena if the request is too broad.

Counsel for the library must also conduct legal research to support the claim that important First Amendment principles are at stake:

- Does the state in which the library is located have a confidentiality statute protecting patron records from disclosure?

- Do federal or state rules governing subpoenas provide an applicable ground for quashing the subpoena that does not involve the First Amendment, such as burdensomeness or undue cost?

- How has the jurisdiction in which the library is located applied

Branzburg v. Hayes, 408 U.S. 665 (1972)?

CONCLUSION

Legal counsel representing libraries must be certain that all staff are trained in responding to requests for information that arise through informal means, subpoenas and search warrants. Lawyers representing libraries must work with staff to develop policies that govern the confidentiality of patron use information. Library staff then should be trained concerning applicable state laws and counseled that the USA Patriot preempts any protections offered by state law. In all circumstances, library stuff should be cautioned to consult with legal counsel prior to producing any information to non-library staff that would implicate the First Amendment rights of a patron by revealing what a particular patron was reading, viewing or researching in the library.