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## Protecting Criminals vs. Protecting Privacy: A Librarian's Dilemma?

Lynne Gamble

*California Polytechnic State University - San Luis Obispo*, [lgamble@calpoly.edu](mailto:lgamble@calpoly.edu)

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## PROTECTING CRIMINALS VS. PROTECTING PRIVACY: A LIBRARIAN'S DILEMMA?

*Lynne Gamble*

After 9/11, Kathleen Hensman, a librarian in Palm Beach, Florida recognized some of the terrorist hijacker suspects from photographs shown on TV. She realized that at least one of the men, Marwan Al-Shehhi, had used public computers in the downtown Delray library and reported this information to local police.<sup>1</sup> Her “good citizen” action, surprisingly to most Americans, created a storm of criticism among her librarian colleagues across the country, many feeling that she had violated the library profession’s “sacred duty” to protect patron privacy—unless forced into disclosure by a court ordered subpoena.” Then, when Chicago Library Commissioner, Mary Dempsey, appeared on a national TV talk show chastising Kathleen Hensman for reporting information to law enforcement, a wave of criticism hit the American Library Association for its seeming intention to encourage librarians to shield criminals.<sup>2</sup> The ALA published a weak rebuttal statement supporting President Bush and Congress in “protecting the many hard-fought freedoms we enjoy as Americans.” Then the statement goes on to encourage librarians to follow state confidentiality laws, the same laws that conflict with and are superceded by the *USA PATRIOT Act*.<sup>3</sup>

To many librarians, a definite conflict exists between the act of a citizen to report persons considered dangerous to national security, and the commitment of librarians to keep patron information private. Does the conflict of protecting criminals versus protecting privacy really exist?

## **Privacy and the USA PATRIOT Act**

What is privacy and how does the *PATRIOT Act* affect privacy? Defined by a librarian, Rhoda Garoogian in *Library Trends*, "Privacy, as a term... means the unavailability to others of information about oneself."<sup>4</sup> The American Library Association, the primary national U.S. library organization in its Code of Ethics declares that patrons have a right to privacy. In its increasing advocacy for patron privacy, the ALA "reinterpreted its Library Bill of Rights" and has proposed a resolution: "Resolved, that the ALA considers sections of the *USA PATRIOT Act* are a present danger to the constitutional rights and privacy of library users." The California Library Association has followed with its own condemnation of the *USA PATRIOT Act*: "Be it further resolved that the California Library Association calls for the amendment of those sections of the *USA PATRIOT Act* that violate fundamental rights and liberties guaranteed in the United States Constitution."<sup>5</sup>

### **What does the *PATRIOT Act* do?**

A provision, Sec. 215, in the lengthy *USA PATRIOT Act* allows the FBI to seek records from a library by getting a subpoena from a federal judge in a Foreign Intelligence Surveillance Court. The investigators only have to provide convincing evidence that the patron may be linked to a terrorist plot or to a known terrorist. Previously, getting a subpoena for confidential library records was more involved and had to meet the substantial legal standard of probable cause for criminal cases. Library records subpoenaed could include the patron's checkout record, interlibrary loan record, or a computer use record of web sites visited or e-mail sent or received. Access to library records is considered important to the FBI because several of the 9/11 hijackers communicated by e-mail from public library computers.

According to Mary Minow, a library law consultant who works with ALA, "the legislation is broad and changes immigration laws, tightens controls on money laundering, and greatly expands the legal use of electronic surveillance."

The Act greatly expands the use of roving wiretaps. This means that a wiretap order targeted to a person is no longer confined to a particular computer or telephone. Instead, it may rove wherever the target goes, which may include library computers. The new law allows a court to issue an order that is valid anywhere in the U.S. This greatly increases a library's exposure to court orders. Further, the use of pen/trap<sup>6</sup> orders is now technology neutral and applies to the Internet as

well as telephones...now email headers and URLs visited are available...including, for example, the keywords used in Google searches...

Much of the Act expands the *Foreign Intelligence Surveillance Act* (FISA) in which the standards for courts to approve surveillance of foreign intelligence gathering are far less demanding than those required for approval of a criminal wiretap, which requires a showing of probable cause.<sup>77</sup>

### **ALA and Censorship**

ALA has long been a leading organization opposing censorship, and endorsing intellectual freedom (free access to all materials and all viewpoints). They have helped librarians across the country faced with patrons demanding that certain books be removed from their libraries. Librarians opposing censorship have long been grateful for the ALA's support.

Then came the Internet and computer access. ALA and children's advocates parted company during the long debate within the ALA between school /children's librarians and others, spearheaded by the Intellectual Freedom Committee of ALA, over the use of anti-pornography filters on children's computers in libraries. Opposing filters to block pornography on adult computers in libraries was generally acceptable, but ALA eventually expanded its position to oppose filters to block pornography on computers used by children in libraries, and have allied with the ACLU in fighting libraries across the country over internet filtering.

Ironically, school and children's librarians have always blocked pornography and sexually explicit materials from their collections, mainly by just not buying it. Yet, when three California county library systems bought filters for their computers, they were faced with lawsuits by the ACLU, and consequently, removed the filters. Ann Brick, Staff Counsel of the ACLU of Northern California, in her letter to Santa Clara County Library District members says, "We must not permit a political or ideological agenda presented in the guise of eliminating harmful matter from the Internet to drive decisions about the intellectual growth and freedom of our youth."<sup>78</sup> Now the ALA and the ACLU have joined to oppose the Children's Internet Filtering Act, passed by Congress, which requires filters on children's computers in public libraries receiving federal funding.

### **ALA and Privacy**

ALA defines privacy as "the right to open inquiry without having the subject of one's interest examined or scrutinized by others." In 1999, the ALA Council

asked that the issue of privacy and confidentiality in libraries be reexamined in light of the use of new technologies. The task force recommended revisions of the existing policies on confidentiality of library records and the development of new model privacy policies and privacy “best practices” documents for libraries. In 2001, a privacy subcommittee was established by the Intellectual Freedom Committee, and in 2002, the Council adopted a reinterpretation of the Library Bill of Rights called “Privacy: An Interpretation of the *Library Bill of Rights*.” It is in this new document (unknown to many librarians) that security concerns are addressed, “Library policies must not violate applicable federal, state, and local laws,” and it begins innocently enough. “However, in accordance with Article IV of the *Library Bill of Rights*, librarians should oppose the adoption of laws that abridge the privacy right of *any* library user.” This document then urges libraries to “destroy information in confidential or privacy protected records in order to protect from unauthorized disclosure. Information that should be regularly purged or shredded includes personally identifiable information on library resource use, material circulation history, and security/surveillance tapes and logs.”

### **ALA Codes and Statements**

ALA codes and statements, the *Library Bill of Rights*, etc. are not laws and are not binding on the library profession. A librarian does not have to be a member of ALA or swear to uphold the *Library Ethics Code*. Moreover, ALA does not accredit libraries.

### **California Laws on Privacy**

California has its own privacy laws concerning libraries (Cal. Gov. Code Sec. 6267) which states that all registration and circulation records of libraries supported by public funds are to remain confidential except by order of the appropriate superior court. In total, forty-eight states have privacy laws. However, the *USA PATRIOT Act* overrides all state laws in dealing with terrorists.

### **Protecting Criminals or Protecting Privacy?**

Librarians, regardless of ALA’s threatening or ominous tone in its privacy documents, should follow the law. Even ALA says to follow the law, i.e. do not destroy evidence requested after a court order, as did a library in New Hampshire. We should also protect patron privacy and provide a pleasant and secure place for intellectual pursuits. We attempted to do all these things before the *USA PATRI-*

*OT Act* and we can still do them. We can also determine for ourselves what laws are threats to privacy, and what laws should be enacted for national security.

Are librarians just suspicious of the FBI and how they have acted in the past? In the 1980's, the FBI established a FBI Awareness Program and asked thirteen libraries to participate in watching for "subversives" reading communist and socialist materials. In fact, many librarians remember the surveillance during the Vietnam Anti-War Protests and the efforts of the FBI to get membership lists of the Students for a Democratic Society and anti-war groups.

On the other hand, has the American Library Association taken a left hand turn on the political spectrum? Barbara Comstock, Director of Public Affairs at the U.S. Department of Justice says, "This provision (the section of the *PATRIOT Act* applying to libraries) is generally applicable to all businesses, and it specifically protects first Amendment rights. In order for a court to grant a warrant under the provision, there must be some other evidence linking the person to the crime of terrorism. The act cannot be used against U.S. citizens just because of what they read or what websites they have been visiting."<sup>9</sup>

Judith Krug, director of ALA's Office for Intellectual Freedom, contends that the Delray Beach librarian may have broken the law, "She contacted the FBI before the *PATRIOT Act* took effect, at a time that state privacy laws still prevailed." Krug further contends that the *PATRIOT Act* takes our rights away: "We're being forced to go against our professional ethics, but the only way to overcome this is to act illegally. It's awful."<sup>10</sup>

However, librarian and good citizen Kathleen Hensman did not turn over any library records, she only reported on what she saw and heard in a public place. Since when are citizens not supposed to respond to law enforcement looking for suspects? Is a librarian supposed to ignore a "Ten Most Wanted" criminal suspect because he/she is seen in the library and not on the street?

### **Greater Threats**

Greater threats to intellectual freedom and privacy come from copyright laws that are making materials unavailable or costly, and from the private sector. Chain bookstores and video stores compile customer records, and sell them to advertisers. Web sites use cookies to track your interests, and this data is sold to others. The movie and recording industries are tracking illegal uses to individual computers; they want free reign to remove files from your computer without having to pay for any damage incurred.

Private and government agencies want our medical records, or want them in a national database. Computerized financial and payroll records are hacked and stolen, and surveillance cameras are everywhere.

### More International or More “Out of Touch”?

Meanwhile, the ALA will continue debating privacy issues at its annual conference in June, though doubtless the rank and file members will not be there. After all, the ALA is meeting in *Canada* this year. 

### Endnotes

1. De Vise, Daniel. “Terror Hunt May End Privacy at the Library.” *Miami Herald News* 1 Sept. 2002. <<http://www.Miami.com/mld/miamiherald/news/3979136.htm>>.
2. Harrell, David. “Dempsey Draws Flack for Televised Comments. Inside: Serving Chicago’s North Side Neighborhoods.” 12 Dec. 2001. <[http://www.epagecity.com/site/epage/3467\\_162.htm](http://www.epagecity.com/site/epage/3467_162.htm)>.
3. All ALA documents and statements may be found at the American Library Association. Office for Intellectual Freedom Alert: USA Patriot Act website <<http://www.ala.org/alaorg/oif/usapatriotact.html>>.
4. Garoogian, Rhoda. “Librarian/Patron Confidentiality: An Ethical Challenge.” *Library Trends* 40 (1991).
5. The California Library Association published their Patriot Resolution statement on their website <[http://www.cla-net.org/html/CLA\\_Patriot\\_Resolution.html](http://www.cla-net.org/html/CLA_Patriot_Resolution.html)>.
6. Pen/traps, as opposed to wiretaps recording conversations, only record incoming and outgoing phone numbers. Applied to computers, they record “routing, addressing and signaling information” i.e., e-mail addresses/headers and web sites visited. See 18 U.S.C. 3121-3127 for provisions.
7. Minow, Maryj “Library patron internet records and freedom of information laws.” *California Libraries* 4 April 1999: 8-9. Reprinted at <<http://www.llrx.com/features/usapatriotact.htm>>.
8. Brick, Ann. Letter to the Santa Clara Library System from the ACLU. Posted on the Northern California ACLU website <<http://www.aclunc.org>>.
9. Comstock, Barbara. Press Release. U.S. Department of Justice web site. <<http://www.uspolicy.be/issues/terrorism/comstock.112202.htm>>.
10. De Vise, Daniel. Ibid.