

# The Patriot Act a Decade Later: A Literature Review of Librarian Responses and Strategies

By Christopher Shaffer

## Introduction

The Patriot Act was passed as a result of the 9/11 terrorist attacks on the World Trade Center and the Pentagon. Although the law was passed in a spirit of cooperation between Democrats and Republicans, it was also rushed through both houses of Congress in an effort to show that the government was swiftly addressing potential terrorist threats within the United States. The bill was passed into law on October 26, 2001, only six weeks after the 9/11 attacks.

For librarians, Section 215, stating that authorities are provided greater access to any tangible item through the Foreign Intelligence Surveillance Act, has been troubling. Under the guidelines of the Code of Ethics put forth by the American Library Association (ALA), librarians uphold the principles of intellectual freedom and resist all efforts to censor library resources. The ALA further asserts that librarians should protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted (The American Library Association, 2012). Set to expire at the end of 2005, the Patriot Act was reauthorized in February, 2006, and again in May, 2011. This article will examine librarian responses to the Patriot Act that exist within the literature while also considering appropriate responses to the Patriot Act for practicing librarians currently in the field.

## Literature Review

Articles concerning the topic of the Patriot Act tend to be either direct and practical in nature, meaning they explain the law and provide coping strategies to deal with it, or they tend to be more historical in outlook, explaining the history of the Foreign Intelligence Surveillance Act (FISA), and how an arm of the government intended to be used to investigate foreign crime suspects is now being used to secretly investigate American citizens. Both perspectives of study are critical for librarians, who need to both understand the nature and background of the Patriot Act as well as how to cope with the day to day concerns surrounding it.

The Patriot Act is in conflict with some of the most basic tenants of librarianship (Jaeger, Bertot, & McClure, 2003;

Wheeler, 2005, and Matz, 2008). The official name of the Patriot Act is "The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act)." As Jaeger, Bertot, & McClure (2003) point out though, a large part of what the Patriot Act actually succeeds in accomplishing is reopening an ugly chapter in American history known as the Red Scare. In 1954, the authors explain that the Federal Bureau of Investigation (FBI) was given the authority to "conduct covert, warrantless searches and seizures whenever FBI agents believed national security might be involved" (Jaeger, Bertot, & McClure, 2003, p. 296). A wide variety of people were investigated that included White House policy advisors, Congressional staff members, civil rights organizations, anti-war demonstrators, the Democratic Party, and many more.

FISA was intended to do the exact opposite of what the Patriot Act has caused it to do. FISA was supposed to serve as a concrete demarcation line between foreign and domestic intelligence gathering. By creating this dividing line, FISA protected the fourth Amendment rights of American citizens in criminal investigations. Probable cause was required in order for search warrants to be obtained, which protected against unreasonable searches and seizures (Jaeger, Bertot, & McClure, 2003, p. 297).

Bowers (2006) further asserts that FISA actually came into being to protect American citizens from inappropriate government intrusions into their affairs. The law was created in response to improper government spying on Vietnam protestors and activists such as Martin Luther King, Jr. (Bowers, 2006, p. 380). Bowers also points out the irony that so many other types of records are deemed as sacrosanct by the federal government and cannot be violated without due process, but there are no such laws for libraries. She asserts that while "federal legislation grants privacy rights regarding video rental records, cable records, banking records, and health records, there is still no federal legislation that provides protection for library records (Bowers, 2006, p. 378).

The Patriot Act was rushed through Congress in only 45 days, far different from the typically lengthy process that most legislation is subjected to. According to Matz (2008), it was a "hasty and emotional response to a crisis situation (Matz,

2008, p. 71). Of particular concern to librarians, was Section 215 of the law, which severely modified guidelines for searching third party records of client transactions, such as those held by libraries on their patrons (Matz, 2008, p. 74).

As it became time to renew the various provisions of the Patriot Act, more concerns arose. The definition of foreign power was extended to include anyone thought to be affiliated with a terrorist organization, meaning that American citizens could be viewed as suspects eligible for a FISA warrant. The requirement that the subject under investigation be in potential violation of a federal law was dropped, and as with the first version, there was a gag order in place, that prevented United States citizens from knowing that their government had ever investigated them (Jaeger, Bertot, & McClure, p. 301-302).

The Patriot Act seeks to destroy the very liberties that its authors claim are defended by the law (Wheeler, 2005, p. 80). Wheeler's article takes a thorough look throughout American history at the numerous times in which the United States government has abridged the rights of its citizens in the name of safety. Examples range from John Adams and the Alien and Sedition Acts, passed at the beginning of the Republic, to government abuses during two Red Scares, to the more recent actions taken by the government against civil rights and anti-war protestors during the 1960s and 1970s.

For aforementioned reasons, the Patriot Act causes severe ethical dilemmas for librarians who view freedom of access and freedom of privacy as fundamental to their profession (Fifarek, 2002 and Trushina, 2004). Many librarians view the *ALA Code of Ethics* as a set of absolute rules, and that the librarian is a neutral agent connecting users with information (Trushina, p. 418). In this light, the librarian has no obligation to report to authorities any suspicious searches by patrons. Unfortunately, when working within an ethical code, it must be realized that ethics and the law are not the same. Should officers of the court demand information on patron records, the *ALA Code of Ethics* will do little to prevent a librarian from running afoul of the law if he or she refuses to provide the demanded information. Keeping this in mind, librarians may want to consider developing a policy stating that patrons have no expectation of privacy, and then educate users about the government's ability to investigate their records without their knowledge. It is also possible to use technology to the patrons' advantage and set workstations to regularly reboot, thereby clearing their caches and erasing patrons' browsing histories (Fifarek, p. 371).

As a consequence of the Patriot Act, librarians have developed procedures to cope with requests and demands for user information by the government. Typically, these policies call for rejecting any informal requests by government officials for patron information. If information is demanded in an official manner, such as with a court order librarians will then turn the matter over to the director, who with the benefit of legal counsel can make the appropriate judgment as to whether the

order is legitimate, and what or how much information must be released to authorities. It is worth noting that even when complying with court orders, many librarians still strongly disagree with disseminating information about their patrons. In Falk's (2004) discussion of the subject, the sub-heading reads: "legal invasions of privacy" (Falk, 2004, p. 283). This would seem to indicate that whether the act is deemed legal or not, it is still inappropriate.

Somewhat ironically, the very individuals librarians are trying to protect from actions of the United States government are often remarkably unconcerned about the protection of their information. In responses to questionnaires, patrons frequently indicated they were not anxious about matters affecting privacy and few indicated they had been victims of a governmental invasion of their privacy. Furthermore, which should not be considered particularly shocking with the manner in which social media has convulsed both the United States and the world; respondents indicated they felt comfortable providing substantial personal information to websites. In an ironic twist though, patrons also indicated that they expected librarians to maintain the security of their personal data, and reject the exploitation of that data (Sturges et al., p. 49). These viewpoints appear to be in conflict, but may indicate a need for further education of the public regarding the sharing of information in an online environment. Patrons seem to want privacy, based on their responses that they expect their privacy to be protected by libraries. However, they do not seem to realize that they are surrendering their privacy through many of the activities they are engaging in via the Internet.

One reason librarians may hold the right of privacy so dearly is that they genuinely view themselves as democratic institutions that are fundamental to the concept of liberty. Byrne (2004) calls on libraries to support democracy by "creating community spaces in which community members can learn, imagine, and discover" (Byrne, 2004, p. 15). In so doing, patrons are able to learn about and question current issues of the day, free from worry about government intrusion. This, in turn, leads to discussion both inside and outside of the library in the form of informed debate, which can then lead to an informed electorate that can influence policy decisions by elected officials. In order for freedom to flourish, especially intellectual freedom—the freedom to read and be informed—citizens need to know they can pursue their intellectual interests without being persecuted. To deny the opportunity for an informed electorate to develop destroys freedom itself (Judith Krug as quoted by Martorella, 2006, p. 110-111). A further example of the government secrecy following 9/11 can be found in its obstruction of the Freedom of Information Act (FOIA). Martorella points out that the strength of FOIA stemmed from the belief that "all government records are open to the public except those excluded by law" (Martorella, 2006, p. 113). However, in the name of national security, following 9/11 the Bush administration began to clamp down on information the government released, and also withdrew some information that was already

in the public domain (Martorella, 2006, p. 118-119). The Patriot Act lends itself, particularly in librarian circles, to Orwellian comparisons. The problem created by the Internet is that it is a reflection of society, and because it is so new, individuals and governments are continuing to develop systems to manage it. As with any society there are those who do good and those who do bad. This rings true throughout cyberspace. As a result of the first pedophilia rings and later concerns over terrorists developing plots similar to 9/11, governments have developed a particular interest in the searching habits of some individuals. Attempts to circumvent constitutional freedoms because individuals are using a computer rather than a telephone are not only illogical, but illegal and are a clear threat to freedom of expression (Nijboer, p. 257).

The extent to which Section 215 of the Patriot Act has been used to gain access to patrons' library records is the subject of considerable debate. Some have argued that in spite of the media attention the law has received, it is "only a relatively small issue as it related to the act as a whole and has never been used in a real-world case in the years since the act was passed" (Martins and Martins, 2005, p. 58). However, since there is also a gag order in place concerning FISA court orders, it is actually impossible to know the extent to which the Patriot Act has been used to gain access to patrons' private information. Estabrook, as cited by Albitz (2005), found that six percent of public library respondents and five percent of academics indicated that an authority of some sort has requested information from them concerning patron records since September 11, 2001 (Albitz, 2005, p. 285). In an environment of secrecy it is impossible to truly know the extent to which the Patriot Act is being utilized.

Plucky librarians have found legal methods by which they can circumvent the gag order component of the Patriot Act. As of 2003, the Santa Cruz County, California library director began each board meeting by announcing simply that "the FBI has not been here this month" (Drabinski, 2006, p. 77). In creating this tradition, the board would know that if those words were never spoken at the start of a meeting that a request had been made from the FISA court. While such acts do not prevent the sharing of patron records, they do at least eliminate some of the secrecy that surrounds much of the Patriot Act, thereby casting a ray of light onto the constitutionally murky actions of the government.

Concerns surrounding stress rates among informational professionals relating to librarians coping with government intrusion into the online lives of their patrons specifically has led to the coining of the term "technostress." Fleet and Wallace (2003), assert that the new legislation forces librarians to ask several different ethical questions in order to cope with the new normal. These questions include considerations regarding the professional obligations librarians have regarding patron privacy, for example, "Are librarian professionals at odds with the public and the profession's views on balancing privacy and security," "Are statements assuring the public that all

measures will be taken to ensure their privacy actually true," "To what extent does the librarian-patron relationship change now that once strictly verbal transactions are now recorded data as a result of virtual librarianship?" (Fleet and Wallace, 2003, p. 190). These questions include considerations regarding the professional obligations librarians have regarding patron privacy. All of these questions are important ethical dilemmas for librarians as they continue to try to provide the same level of service in not only a new virtual environment, but also in the face of the Patriot Act.

## Conclusion

To some degree, libraries and the government may always be in a certain degree of conflict over patron privacy. There may be occasions when the government has a legitimate interest in investigating patron records, and there are undoubtedly members of the library profession who will always disagree with divulging any patron information under any circumstances. These facts though, fail to properly demonstrate the current dilemma the Patriot Act presents to American citizens. If records are to be perused by an arm of the State, certainly due process should be followed. By extension, certainly citizens should expect to be informed that they are suspected of a crime and are consequently having their records examined. The FISA court, originally intended to protect Americans from such abuses is now being misused so that it eliminates the very protections it was meant to provide.

## References:

- Albitz, B. (2005). Dude, where are my civil rights? *The Journal of Academic Librarianship*, 31(3), 284-286.
- The American Library Association*. Code of Ethics of the American Library Association, Retrieved April 3, 2012, <http://www.ala.org/advocacy/proethics/codeofethics/codeethics>
- Bowers, S. (2006). Privacy and Library Records. *The Journal of Academic Librarianship*, 32(4), 377-383.
- Byrne, A. (2004). Libraries and democracy--management implications. *Library Management*, 25(1/2), 11-16.
- Drabinski, E. (2006). Librarians and the Patriot Act. *Radical Teacher*, 77(Winter), 12-14.
- Falk, H. (2004). Privacy in libraries. *The Electronic Library*, 22(3) 281-284.
- Fifarek, A. (2002). Technology and privacy in the academic library. *Online Information Review*, 26(6), 366-374.
- Fleet, C. & Wallace, D. (2003). Virtual libraries—real threats: Technostress and virtual reference. *Reference & User Services Quarterly*, 42(3), 188-191.

Jaeger, P., Bertot, J., & McClure, C. (2003). The impact of the USA Patriot Act on collection and analysis of personal information under the Foreign Intelligence Surveillance Act. *Government Information Quarterly*, 20, 295-314.

Martins, C. & Martins, S. (2005). The impact of the USA PATRIOT Act on records management. *The Information Management Journal*, May/June, 52-58.

Martorella, G. (2006). Impact of 9/11 on access to government information: Libraries in the aftermath of 9/11. *The Reference Librarian*, 45(94), 2006.

Matz, C. (2008). Libraries and the USA PATRIOT Act: Values in conflict. *Journal of Library Administration*, 47(3), 69-87.

Nijboer, J. (2004). Big brother versus anonymity on the Internet: Implications for Internet service providers, libraries and individuals since 9/11. *New Library World*, 105(1202/1203), 256-261.

Struges, P., Davies, E., Dearnley, J., Iliffe, U., Oppenheim, C., & Hardy, R. (2003). User privacy in the digital library environment: An investigation of policies and preparedness. *Library Management*, 24(1/2), 44-50.

Trushina, I. (2004) Freedom of access: Ethical dilemmas for Internet librarians. *The Electronic Library*, 22(5), 416-421.

Wheeler, M. (2005). The politics of access: Libraries and the fight for civil liberties in post-9/11 America. *Radical History Review*, 93(4), 79-95.

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