

Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library and its Staff

Increased visits to libraries by law enforcement agents, including FBI agents and officers of state, county, and municipal police departments, are raising considerable concern among the public and the library community. These visits are not only a result of the increased surveillance and investigation prompted by the events of September 11, 2001, and the subsequent passage of the USA Patriot Act, but also as a result of law enforcement officers investigating computer crimes, including e-mail threats and possible violations of the laws addressing online obscenity and child pornography.

These guidelines, developed to assist libraries and library staff in dealing with law enforcement inquiries, rely upon the ALA's

- Privacy: An Interpretation of the Library Bill of Rights;
- Questions and Answers on Privacy and Confidentiality;
- Policy on Confidentiality of Library Records;
- Suggested Procedures for Implementing Policy on Confidentiality of Library Records;
- Policy Concerning Confidentiality of Personally Identifiable Information about Library Users;
- Code of Ethics.

See also Privacy and Confidentiality; Intellectual Freedom Issues; and the Privacy Tool Kit on OIF's Web site.

Fundamental Principles

Librarians' professional ethics require that personally identifiable information about library users be kept confidential. This principle is reflected in Article III of the Code of Ethics, which states that "[librarians] protect each library user's right to privacy and confidentiality with respect to information sought or received, and resources consulted, borrowed, acquired, or transmitted." Privacy: An Interpretation of the Library Bill of Rights, notes that "[p]rotecting user privacy and confidentiality has long been an integral part of the mission of libraries."

Currently, 48 states and the District of Columbia have laws protecting the confidentiality of library records, and the Attorneys General of the remaining two states, Hawaii and Kentucky, have ruled that library records are confidential and may not be disclosed under the laws governing open records. Confidential library records should not be released or made available in any format to a federal agent, law enforcement officer, or other person unless a court order in proper form has been entered by a court of competent jurisdiction after a showing of good cause by the law enforcement agency or person seeking the records.

General Guidelines

Confidentiality of library records is a basic principle of librarianship. As a matter of policy or procedure, the library administrator should ensure that:

- The library staff and governing board are familiar with the ALA Policy on Confidentiality of Library Records, the Policy Concerning Confidentiality of Personally Identifiable Information about Library Users, and other ALA documents on users' privacy and confidentiality.

- The library staff and governing board are familiar with their state's library confidentiality statute or attorney general's opinion.
- The library adopts a policy on users' privacy and confidentiality. Such policies should inform users about their expectation of privacy and how the library handles their confidential information.
- The library adopts staff policies that inform the staff and board about the procedures to follow if the library is served with judicial process (search warrants or subpoenas) seeking library records or if law enforcement agents conduct inquiries in the library.
- The library staff is familiar with the library's policy on confidentiality and its procedures for handling court orders and law enforcement inquiries.

Library Procedures Affect Confidentiality

Law enforcement visits aside, be aware that library operating procedures have an impact on confidentiality. The following recommendations are suggestions to bring library procedures into compliance with most state confidentiality statutes, ALA policies on confidentiality and its *Code of Ethics*:

- Avoid creating unnecessary records. Only record a user's personally identifiable information when necessary for the efficient operation of the library.
- Avoid retaining records that are not needed for efficient operation of the library. Check with your local governing body to learn if there are laws or policies addressing record retention and in conformity with these laws or policies, develop policies on the length of time necessary to retain a record. Ensure that all kinds and types of records are covered by the policy, including data-related logs, digital records, and system backups.
- Once record retention policies are in place, ensure that records are destroyed or archived on schedule. A library cannot destroy records after it receives notice from law enforcement agents that the records may be subject to judicial process.
- Be aware of library practices and procedures that place information on public view; for example, the use of postcards for overdue notices or requested materials, staff terminals placed so that the screens can be read by the public, sign-in sheets to use computers or other devices, and the provision of titles of reserve requests or interlibrary loans provided over the telephone to users' family members or answering machines.
- Remember that there is no affirmative duty to collect or retain information about library patrons on behalf of law enforcement.

Recommended Procedures for Law Enforcement Visits

Before any visit:

- Designate the person or persons who will be responsible for handling law enforcement requests. In most circumstances, it should be the library director, and, if available, the library's legal counsel.
- Train all library staff, *including volunteers*, on the library's procedure for handling law enforcement requests. They should understand that it is lawful to refer the agent or officer to an administrator in charge of the library, and that they do not need to respond immediately to any request.
- Review the library's confidentiality policy and state confidentiality law with library counsel. Communicate those policies to both staff and volunteer workers in the library.

- A court order may require the removal of a computer workstation or other computer storage device from the library. Have plans in place to address service interruptions and any necessary backups for equipment and software.

During the visit:

- Staff should immediately ask for identification if they are approached by an agent or law enforcement officer, and then record the information. If possible, verify the information with the local FBI office or the police department. The agent or officer should then be immediately referred to the library director or the designated supervisor.
- The director or supervisor should meet with the agent with another colleague in attendance. If possible, one person should take notes if a record of the encounter is needed in the future.
- If the agent or officer does not have a court order compelling the production of records, the library director should explain the library's confidentiality policy and the state's confidentiality law, and inform the agent or officer that users' records are not available except when a proper court order in good form has been presented to the library.
- Without a court order, neither the FBI nor local law enforcement has authority to compel cooperation with an investigation or require answers to questions, other than the name and address of the person speaking to the agent or officer. If the agent or officer persists, or makes an appeal to patriotism, the library director should explain that, as good citizens, the library staff will not respond to informal requests for confidential information, in conformity with professional ethics, First Amendment freedoms, and state law.
- If the agent or officer presents a search warrant or other judicial process, the library director should immediately call the library's counsel and ask for assistance.

If the judicial process is in the form of a subpoena:

- Remember that a subpoena does not require an immediate response from the library. Thank the officer serving the subpoena and inform him or her that the library will respond to the subpoena within the time allotted and in conformity with the law. Immediately refer the subpoena to the library's legal counsel.
- Counsel should examine the subpoena for any legal defect, including the manner in which it was served on the library, the breadth of its request, its form, or an insufficient showing of good cause made to a court. If a defect exists, counsel will advise on the best method to resist the subpoena.
- Through legal counsel, insist that any defect be cured before records are released and that the subpoena is strictly limited to require release of specifically identified records or documents. If there does not appear to be good cause for the subpoena, or if it seems too broad or intrusive, ask your attorney to file a motion to quash the subpoena in its entirety.
- Require that the agent, officer, or party requesting the information submit a new subpoena in good form and without defects.
- If you decide to comply with the subpoena after consulting with legal counsel, review the information that may be produced in response to the subpoena before releasing the information. Follow the subpoena strictly and do not provide any information that is not specifically requested in it.
- If disclosure is required, ask the court to enter a protective order (drafted by the library's counsel) keeping the information confidential and limiting its use to the particular case. Ask that access be restricted to those persons working directly on the case.

If the court order is in the form of a search warrant:

- Unlike a subpoena, a search warrant may be executed immediately. The agent or officer may begin a search of library records as soon as the library is served with the court's order.
- Ask to have library counsel present before the search begins in order to allow library counsel an opportunity to examine the search warrant and to ensure that the search conforms to the terms of the search warrant.
- If the officer refuses to delay the search, examine the warrant. Ensure that the warrant has been issued by a local or federal court in your state and is current and not expired. If you question the validity of the warrant, call the issuing court to confirm the validity of the warrant.
- The warrant will include information that identifies the premises to be searched and the items or records to be produced under the warrant. Ask that the officer observe the boundaries set by the search warrant.
- Cooperate with the search to ensure that only the records identified in the warrant are produced and that no other users' records are viewed or scanned. Staff should be trained not to discuss the warrant with the officer, identify any documents, or to volunteer information without first consulting with the library's counsel.
- Record and keep an inventory of the records or items seized from the library. If possible, keep the originals and provide the agent with copies (or make copies for the library's reference).
- While most law enforcement officers will cooperate with a library's request to allow counsel to examine the warrant, it is possible that an officer will refuse to delay his or her search. Train staff to step aside and not to interfere with the officer in those cases. They should continue their attempt to notify the library director and library counsel, and make every effort to keep a record of the incident.

If the court order is a search warrant issued under the Foreign Intelligence Surveillance Act (FISA) (USA Patriot Act amendment):

- The recommendations for a regular search warrant still apply. However, a search warrant issued by a FISA court also contains a “gag order.” That means that no person or institution served with the warrant can disclose that the warrant has been served or that records have been produced pursuant to the warrant.
- The library and its staff must comply with this order. No information can be disclosed to any other party, including the patron whose records are the subject of the search warrant. Note that the FISA gag order permits the person receiving the FISA warrant to inform the library director and those members of the staff who are needed to produce the records.
- The gag order does not change a library's right to legal representation during the search. The library can still seek legal advice concerning the warrant and request that the library's legal counsel be present during the actual search and execution of the warrant.
- If the library does not have legal counsel and wishes legal advice, the library can still obtain legal assistance through the Freedom to Read Foundation's legal counsel. Simply call the Office for Intellectual Freedom (800-545-2433, ext. 4223) and inform the staff that you need legal advice. OIF staff will ensure that an attorney returns your call. You do not have to and should not inform OIF staff of the existence of the warrant.

After the visit:

- Review the subpoena or search warrant with library counsel to ensure that the library complies with any remaining requirements, including restrictions on sharing information with others.

- Review library policies and staff response and make any necessary revisions in light of experience.
- Be prepared to communicate with the news media. Designate one person who will be responsible for communicating with the media. Develop a public information statement detailing the principles upholding library confidentiality that includes an explanation of the chilling effect on First Amendment rights caused by public access to users' personally identifiable information, and share it with your staff, so they are able to communicate the library's message to their acquaintances and neighbors in the community.
- If possible, notify the ALA about your experience by calling the Office for Intellectual Freedom at 800-545-2433, extension 4223.

See also:

- Privacy: An Interpretation of the Library Bill of Rights;
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- American Library Association Code of Ethics;
- Privacy Tool Kit

**American Library Association
Office for Intellectual Freedom
April 2004**

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