

The USA PATRIOT Act and Archivists¹

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The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, otherwise known as the USA PATRIOT Act, is a very complex piece of legislation. Prior to assessing its impact on archivists, a few broad comments on the law are in order.

First, it is important to stress that there is much in the Patriot Act that is not objectionable. No one is likely to object, for example, to the provisions seeking to limit money laundering and other financial transactions that support terrorism. In addition, prior to passage of the Patriot Act, federal law allowed government agents to wiretap the phone calls only of individuals suspected of being engaged in certain specific crimes; the Patriot Act, I think reasonably, adds terrorism to that list of crimes. The Act has tightened the control over the use of certain highly dangerous pathogens in universities, but the scientists with whom I have spoken at Cornell University admit that the requirements the Patriot Act imposes are not unreasonable. There are provisions as well for compensating victims of terrorism. A reasonable case could be made that in some areas, such as the tracking of individuals who remain in the US on expired visas, the Patriot Act does not go far enough. And many of the provisions of the Patriot Act have a “sunset clause.” They will expire at the end of 2005 unless renewed, giving critics of the Patriot Act a chance to document any abuses that may have occurred. In short, the Patriot Act, in spite of the impression often given, is far from the worst bill Congress has ever passed.

Second, it is important to realize that many of the things that have made civil libertarians and librarians nervous have little to do with the Patriot Act itself. Thousands of people were arrested and held without legal representation immediately after 9/11 – and before the Patriot Act was passed. Government efforts to restrict access to information about water supplies, utilities, and other potential terrorist targets – including in some cases removing this information from depository libraries and government web sites – have nothing to do with the provisions of the Patriot Act itself. The Attorney General’s call to federal agencies to limit as much as possible the agencies’ responses to Freedom of Information Act requests is similarly independent of the Patriot Act and its provisions.

Yet in spite of the good that resides in the Patriot Act, and in spite of the fact that it has become the generic whipping boy for many of the government’s actions, it is still worthy of close examination by all citizens. The government’s track record in protecting civil liberties during times of war and crisis has not been good. One need only think of

¹ Presented at the Spring, 2004 meeting of the New England Archivists in Worcester, Mass. An abbreviated version of the paper is to appear in the October, 2004 issue of the *NEA Newsletter*.

Lincoln's suspension of the writ of habeas corpus during the Civil War, or the internment of American citizens of Japanese ancestry during World War II (an action which was condoned by the Supreme Court, by the way, and which has yet to be repudiated by them). It is not unreasonable for civil libertarians to be especially wary during wartime that the defense of America does not come at the cost of American values.

We, however, in our professional lives are not civil libertarians, but are archivists. The question before us this afternoon is a simple one: what impact does the Patriot Act have on us **as archivists**, and what (if anything) do we need to do differently now that the Act has passed. This paper discusses how we, as archivists, need to address the Patriot Act. First, I will discuss the real, though slight, risk the Patriot Act poses for archivists. In particular, I want to talk about its implications for the privacy of our patrons. Thinking about this issue forces us to reconsider what exactly we mean when we talk about the confidentiality. Second, I will discuss some of the concrete steps that archives can take to lessen the potential negative impact on the archives. One plus of the Patriot Act is that it has forced libraries to review their procedures for responding to requests by law enforcement for information. Archivists need to do the same thing. Lastly, I want to talk about something that no one else is talking about, namely the archival and records management issues associated with terrorism investigations. As archivists, we are committed to upholding the right of the public to have access to the records of government as a means of insuring the accountability of government officials. The Patriot Act threatens that fundamental archival principle, and it is one on which we can speak out.

Dangers to Archives in the Patriot Act

Let's examine the first issue: what dangers may reside in the Patriot Act for archivists? Our librarian colleagues have been outspoken on the Patriot Act, to the extent that Attorney General John Ashcroft has mocked them as fueling "baseless hysteria." What has gotten the librarians so angry? It is the renewed threat to the confidentiality of library records.

There is often great interest in what people read. There is a strong belief that what someone reads is a reflection of that person's interests, and maybe that person's personality. I am sure many of you remember when there were charge cards in books that carried the names of individuals who had checked out the books in the past, and the thrill you had in discovering who else shared your interests. When Clarence Thomas was nominated to the Supreme Court, some enterprising reporter checked his video circulation records. In the movie "All the President's Men," there is an inspiring scene in which Woodward and Bernstein visit the Library of Congress to track what books had been requested by the White House, and end up spending hours paging through paper call slips. In the 1980s, the FBI institutionalized the use of library records in intelligence investigations with the formation of the Library Awareness program. In this program, the FBI attempted to recruit librarians to help track the reading habits of Russian nationals and other suspect individuals.

At the same time as the FBI program was forming, an alternative position came to dominate the library profession. The First Amendment guarantees to all of us Freedom of Speech. By extension, it includes as well a “Freedom to Hear” and a “Freedom to Read.” The right to speak our mind, or to differ with the opinions of the government, does us little good if people can’t hear or read what we are saying. Lawyer Julie Cohen has postulated that we have as well a right to read **anonymously**. Again, if we are worried what others might think about what we are reading, we will limit what we read – and the freedom of expression that this country values will suffer.

The growing awareness of the importance of confidentiality led to the passage in many states of strict library confidentiality laws. New York’s is typical, if perhaps a little stronger than most. It guarantees that all library records, including records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, and the use of audio-visual materials, films or records, shall remain confidential. The New York State legislature explained why there is this need when they passed the law. A library, they noted, as “the unique sanctuary of the widest possible spectrum of ideas, must protect the confidentiality of its records in order to insure its readers’ right to read anything they wish, free from the fear that someone might see what they read and use this as a way to intimidate them. Records must be protected from the self-appointed guardians of public and private morality and from officials who might overreach their constitutional prerogatives. Without such protection, there would be a chilling effect on our library users as inquiring minds turn away from exploring varied avenues of thought because they fear the potentiality of others knowing their reading history.”

In the eyes of librarians, the Patriot Act threatens the confidentiality of library records. Section 215 of the Act amends the Foreign Intelligence Surveillance Act, or FISA, so that FBI agents can now seek subpoenas to require the production of business records, including library circulation records, in terrorism investigations. Of course, even under state library confidentiality laws, the records were always subject to a subpoena issued by a judge. The New York law, for example, explicitly states that library records “shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute.”

What has changed with the Patriot Act, and what has gotten the librarians so upset, is not that records that were once confidential are now accessible, but that the method for gaining legal access to those records has changed. A secret FISA court, and not a regular Federal court, issues FISA orders. Since 1979, the government has requested approximately 14,000 such orders, and none of them have been rejected by the court (raising fears that this is a rubber stamp procedure). Individuals who are served with a FISA order are not permitted to report it to anyone. In addition, the Patriot Act authorizes several other kinds of searches, including “sneak and peek” warrants and “pen and trap” searches, all of which makes the reading habits of the public potentially more accessible to the federal terrorism investigators.

The Patriot Act poses less of a potential threat to the privacy of archival patrons than to library patrons. First, the likelihood that we will have in our collections information that would be of interest to either terrorists or their pursuers is small. The declassified information in archives about either nuclear or biological weapons, for example, is unlikely to be of much contemporary use to modern terrorists. A clever terrorist might realize that archives can contain information about the construction of buildings, power plants, and water systems that could be of use to someone planning an attack – but again, there is no assurance that subsequent structural and systematic alterations to the original designs, changes that are documented in active records still with agencies rather than in archival records, will not vitiate any advantage terrorists might secure from their use of archival records. The age of most archival records severely limits their practical usefulness to contemporary terrorists. And the small likelihood of terrorists actually seeking to use archival records means that the likelihood that the FBI will come seeking information about the use of those records is equally small.

Are archivists expected to protect the privacy of the users of archival records? The archival code of ethics teaches us that we should be respectful of patron privacy, but our commitment has always been less than that of our library colleagues. No archivist feels that individuals should be able to consult an archival collection anonymously. We always require identification and often a reference interview before someone can consult a collection. Furthermore, archivists seldom discard records of archival use, preferring to preserve them in case of theft. Such records can reveal who worked with records (and thus may have taken them). Previous users may also have copies of or notes on missing records that can help prove ownership if, as has happened, the accused thief claims the records belong to him or her.

The problem that we as archivists face is that it is difficult for us to claim that it is permissible to use archival circulation records, and potentially violate patron privacy, in cases that involve theft from the archives, but that it is unacceptable to violate patron privacy in cases of foreign terrorism.

Terrorist use of archival records is not the only concern we may have. Hopefully some of you are actively soliciting the records of community organizations and individuals that reflect the broad ethnic, religious, and political diversity in America. Some of these organizations or individuals may, in the eyes of the FBI, support, condone, or involve individuals suspected of terrorism. Federal counter-terrorism investigators, therefore, may be interested in using the records themselves as part of their counter-terrorism initiatives. Will we be able to solicit successfully the records of groups that may feel threatened by the government? Will the local mosque or Palestinian social club or anti-war activist group be willing to develop an archival program if they know that their records might be subject to FBI investigation?

I don't know the answer to these questions, but I do know that threat the Patriot Act poses to archival collection building is likely to be minimal. The truth is that archival records have always been subject to subpoena, in spite of any restrictions

imposed by the donor on their use. In the famed Braden case at the Wisconsin Historical Society, when the government sought to secure copies of a restricted collection, the Historical Society argued that a general right of “archival privilege” existed. This argument was soundly rejected by the courts, and the restricted collection was opened to government agents by court order. We have never been able to promise our donors that material deposited in our repositories was safe from prosecutorial investigation. The Patriot Act is a useful reminder to us of how limited the protections we can offer the public are. It seems unlikely that potential donors will decline to donate materials solely because now a court order securing access to the collection can come from a secret Federal FISA court rather than from a more open federal district court.

Lastly, the good news is that the nature of archival records would seem to limit their usefulness to federal prosecutors. The Braden case is the only case in the archival literature of which I am aware that discusses a subpoena issued against archival repositories; the practical risk that any archival repository will be issued a subpoena under the provisions of the Patriot Act seems equally small. The likelihood that we will have in our collections information that would be of interest to either terrorists or their pursuers is small. The declassified information in archives about either nuclear or biological weapons, for example, is unlikely to be of much contemporary use to modern terrorists. A clever terrorist might realize that archives can contain information about the construction of buildings, power plants, and water systems that could be of use to someone planning an attack – but again, there is no assurance that subsequent structural and systematic alterations to the original designs, changes that are documented in active records still with agencies rather than in archival records, will not vitiate any advantage terrorists might secure from their use of archival records. The age of most archival records severely limits their practical usefulness to contemporary terrorists. And the small likelihood of terrorists actually seeking to use archival records means that the likelihood that the FBI will come seeking information about the use of those records is equally small.

The slightly increased legal threat to the privacy of users and donors of archival collections is the primary impact on archives of the Patriot Act. There are also provisions of the Patriot Act that can impact all organizations and institutions, including archives. For example, the strengthened visa requirements found in part in the Patriot Act have made it harder for foreign students to study in the United States, with the result that foreign applications are down at American universities. Similarly, students who are already enrolled in American universities are finding it harder to get visas to continue their studies, and in some cases have had to leave school. If a university archives relied on foreign-born student employees, it might find its work negatively impacted.

In addition, while it seems unlikely, some archives may provide general public access to the Internet similar to that offered by many libraries. If a presumed terrorist was using the public access terminal for email or web surfing, the FBI might be interested. Under a Patriot Act subpoena, the FBI can come in and seize all computers, routers, and backup servers, crippling the operation of the archives. (They could also do this, by the way, if one used a computer-based registration and circulation system for

tracking patron requests, since Section 215 allows them to gain access to “any tangible thing.”) The impact on an archives could be catastrophic.

PROTECTING ARCHIVES FROM THE PATRIOT ACT

Even though I would argue that the presumed risk of federal investigations in archives under the Patriot Act is small, the consequences of such actions to the archives could be immense. What steps, therefore, should archives take in advance to protect themselves? I would argue that there are at least four things that archives should do in advance of an FBI agent appearing at the door.

First, you should have in place written policies about what staff should do if law enforcement agents suddenly appear demanding records or computers, and you should ensure that all staff (including student employees and night security guards) are aware of what procedures should be followed. As you have heard, one of the most disturbing features of FISA orders is that individuals presented with such an order are not allowed to tell anyone else. Many institutions, after thorough consultation with their legal counsel, have adopted a policy that in effect modifies this restriction. In these institutions, if any government official, no matter whether he or she is carrying a regular subpoena, a FISA order, or just is seeking information, approaches a university staff member for assistance, that staff member is supposed to contact either his or her supervisor or the university counsel’s office immediately. Staff are instructed not to interfere with the government agents, especially if they have a subpoena or written order, but they also cannot remain silent – they should seek direction from their supervisor as soon as possible.

The policy should also make clear that staff should never voluntarily provide information about patrons to law enforcement officials unless they have a justifiable fear for the health or safety of the individual or the public. In a university setting, releasing such information may be an unauthorized violation of FERPA. Most archivists want to be helpful and provide needed information, especially if the person asking is a law enforcement official. We must remind our staff, however, that we have an ethical and sometimes legal obligation to protect the privacy of our users as well.

Lastly, the policy should stress that staff should not contact law enforcement officials without the knowledge and approval of the archives’ supervisory staff. Some of the most draconian provisions of the Patriot Act involve instances in which institutions voluntarily invite the FBI in for assistance with suspected computer hacking or other violations. The invitation gives the FBI pretty much a free hand to conduct a free-ranging investigation, the scope of which is beyond your control. There are obviously times when it is appropriate to bring in law enforcement officials – but front-line staff should not be making this decision.

In addition to having a policy on how to respond to law enforcement inquiries in place, you may want to get to know officials in the local police and FBI offices in advance of any inquiry. An ongoing relationship with the FBI may decrease the

likelihood that they will show up one morning with a truck and start hauling equipment away. If you are part of a larger institution, it is likely that someone at your institution is in contact with the local officers. Find out who that is.

The third thing that you can do to prepare for possible Patriot Act inquiries, in addition to preparing a written policy and getting to know your local law enforcement contacts, is to review your record retention policies. Libraries have attempted to protect the privacy of library users and limit the likelihood of intrusive searches by destroying records that might be of interest to law enforcement officials. Remember, the Patriot Act does not require you to create any new records, nor does it require that you keep the records you are already creating. If you are deeply concerned about doing all that you can to protect the privacy of the users of your archives, now might be a good time to review your data retention policies. Does the presumed benefit of old circulation and photocopy records for criminal investigations really outweigh the possible risk they pose to the privacy of patrons? If not, perhaps they should be routinely destroyed. Similarly, is it really useful to keep old reference letters and other correspondence? I suspect most of us would answer yes, but it may be useful to review your practices.

The last thing that I would urge as a response to the Patriot Act is what you are doing today – namely learning more about it. The debate over the Patriot Act is not over. Many of the expiring provisions of the Patriot Act are being reintroduced and extended in legislation often referred to as Patriot Act II. Many amendments to the existing Patriot Act have been introduced to fix what many see as its flaws. Most notable among these is the Senate's "Library and Bookseller Protection Act," which would exempt library and archives circulation records from exposure under Section 215 of the Patriot Act. If you feel that the Patriot Act has gone too far, asking your representatives in Washington to support this legislation would be a reasonable action.

Archival Access to Patriot Act Investigations

There is one area in particular where archivists can play an important role in the debate over the Patriot Act. As you have heard, much of the public criticism of the Patriot Act concerns the fact that many of the actions it authorizes take place in secret. Where foreign intelligence and terrorism are concerned, there are few other options; one does not want to alert a presumed foreign terrorist that he or she is under investigation. We know, however, that secret government operations can quickly go awry, and that justified investigations of potential foreign terrorists can turn into general investigations of people who simply disagree with the government. Normally the judicial system is supposed to provide a check on unbridled government actions, but under FISA and the other laws affected by the Patriot Act, there is fear that the courts have become a rubber stamp.

There is, however, within our system a second check on the possibly dangerous actions of government: the accountability of governments when their actions become known. Archives play an important role in assuring the transparency and accountability of governments. The massive FBI investigations of civil rights and peace activists in the

1960s and 1970s may not have been known at the time, but the records documenting FBI actions are available now. We can learn what they did wrong. And we can hope that the knowledge that some day their actions will become known may serve as a small deterrent to the most egregious actors now. Eventually Patriot Act investigations of enduring value will enter the national archival system. Current FOIA regulations, however, stipulate that records that could disclose the identity of a confidential source are exempt from disclosure. There is no time limit on that exemption. It is very easy as well to deny access to records based on broad assertions of national security interests. The records of possible misdeeds committed under the auspices of the Patriot Act could remain hidden from view hundreds of years from now. The Patriot Act should further be amended so that as much of its operations as are practical are conducted in the open, and that all investigatory records will at some appropriate time in the future be open.

While critics of the Patriot Act rail against the law, what they really fear are prosecutorial and governmental excesses and abuses. In light of the complaints of critics, it is reasonable that archives spend some time reflecting on what we mean by confidentiality and the extent of our obligations to protect it. Most of all, though, we need to think about how government abuses can be avoided. Greater court oversight of actions is one possible solution. Increasing the transparency and accountability of government, by providing citizens with access to information about government actions is another. That is a role that archives can play.