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 email 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 *Policy on the Confidentiality of Library Records*, its *Policy Concerning Confidentiality of Personally Identifiable Information*, and the *Code of Ethics*.

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."[1]

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.

[1] While library registration records are not included in this policy, libraries must be cautious about making these records available to third parties.

- 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, which includes procedures for the staff and board to follow if the library is served with a court order for 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. Assure that all kinds and types of records are covered by the policy, including data-related logs, digital records, and system backups.

- Be aware of library practices and procedures that place information on public view, e.g., 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.

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.

- 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.

<u>During the visit:</u>

- Staff should immediately ask for identification if they are approached by an agent or officer, and then immediately refer the agent or officer to the library director or other designated officer of the institution.

- The director or officer should meet with the agent with library counsel or another colleague in attendance.

- If the agent or officer does not have a court order compelling the production of records, the director or officer 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 director or officer 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 court order, the library director or officer should immediately refer the court order to the library's legal counsel for review.

If the court order is in the form of a subpoena:

- 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.[2]

- 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.

- Require that the agent, officer, or party requesting the information submit a new subpoena in good form and without defects.

- 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:

- A search warrant is executable immediately, unlike a subpoena. The agent or officer may begin a search of library records as soon as the library director or officer 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 assure that the search conforms to the terms of 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.

[2] Usually, the library can file a motion to quash the subpoena or a motion for a protective order. Normally, a hearing is held where the court will decide if good cause exists for the subpoena or if it is defective, and then decide whether the library must comply with the subpoena. Consult with counsel on all issues, including the payment of costs if the library is the unsuccessful party.

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.

- 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 assistance from Jenner & Block, the Freedom to Read Foundation's legal counsel. Simply call the Office for Intellectual Freedom (1-800-545-2433, ext. 4223) and inform the staff that you need legal advice. OIF staff will assure that an attorney from Jenner & Block 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 court order 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. 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.

- 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
http://www.ala.org/alaorg/oif/privacyinterpretation.html

Policy on Confidentiality of Library Records
http://www.ala.org/alaorg/oif/pol_conf.html

Policy Concerning Confidentiality of Personally Identifiable Information About Library Users
http://www.ala.org/alaorg/oif/pol_user.html

American Library Association Code of Ethics
http://www.ala.org/alaorg/oif/ethics.html

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http://www.ala.org/alaorg/oif/guidelineslibrary.html

American Library Association
Office for Intellectual Freedom
April 2002