

Case Study: A Grand Jury Subpoena in the PATRIOT Act Era

One Library's Lesson

Joan Airoidi

If the things I'm doing is considered a crime, then let history be a witness that I am a criminal. Hostility toward America is a religious duty and we hope to be rewarded by God." These words, written in the margin of a library book, alarmed a patron sufficiently to cause him to make a direct phone call to the Federal Bureau of Investigation (FBI) to report his findings. So began Whatcom County Library's year of learning, filled with lessons for library management, staff, patrons, and all who hold that the core principles of librarianship include the civil liberties that are written in the U.S. Constitution.

The story begins in Deming, a picturesque, rural, unincorporated community located in far northwestern Washington State near the foothills of the Cascades. A dedicated, energetic Friends of the Library group built the library in 1992 and is planning an expansion in the near future. The library is a branch of Whatcom County Library System (WCLS), a one-county regional library of nine branches and a bookmobile with a circulation of approximately twelve items per capita and growing.

An FBI agent stopped in at the Deming branch in June 2004 and asked whether the library could provide the names of persons who had borrowed the book *Bin Laden: The Man Who Declared War on America*, written by Yossef Bodansky.¹ Staff at the library told the agent that the matter would be communicated to library management per the WCLS policy. Management consulted counsel, who then called the local FBI for further information. The FBI reported that there was a handwritten note in the margin that had caused the agency concern. (The book had been confiscated by the FBI.) The library district's attorney told the agent that the library would not release any information without a subpoena or court order.

The library district's attorney, after researching the quote, wrote a letter to the FBI agent and reported that the writing in the margin was nearly a direct quote of a statement made by Osama Bin Laden in a 1998 interview. A subpoena was served to the library district's attorney. A special meeting of the WCLS board of trustees was posted, and the library district's attorney asked to attend the scheduled executive session of the meeting in order to clarify the issue and discuss the options. A resolution to proceed with a motion to quash the subpoena was passed based on the following rationale:

- The subpoena infringed upon constitutionally protected rights. A library is a cornerstone of First Amendment rights, an institution built on the concept of free expression of ideas; free exchange of information is a fundamental First Amendment right of the library, the patron, and the public.
- There was no substantial connection between the information sought and the subject of the grand jury proceedings, because of an inadequate foundation for inquiry.
- Libraries have the right to disseminate information freely, confidentially, and without the chilling effect of disclosure.
- The Supreme Court has recognized several times that individuals have a fundamental First Amendment right to receive information, free of the chilling effects of regulation of that right.
- The State of Washington has long recognized the privacy of library records and the need to protect records, indicating a person's reading choices from public disclosure (RCW 42.17.310[1]).
- The information was not readily available to the library district because its computer records contain only the names of the current book borrower and a maximum of one previous borrower if that borrower borrowed the book within the last ninety days.
- Production of records within the backups of the system would be a burden on the library district and in fact were maintained by the Bellingham Public Library. (The library district and the Bellingham Public Library have shared a common database and circulation system for more than a decade.)

The library district's attorney received notice that the grand jury subpoena was withdrawn and request to dismiss the motion to quash as moot without prejudice because of the fact that the circulation data is maintained on the system operated by the Bellingham Public Library. Since that time, the Bellingham Public Library and WCLS have examined and revised their circulation records retention policy and

Joan Airoidi (jairoidi@wcls.org) is the Director of the Whatcom County Library in Bellingham, Washington, winner of the 2005 Robert B. Downs Intellectual Freedom Award from the University of Illinois at Urbana-Champaign. Airoidi also was the recipient of PEN/"Newman's Own" First Amendment Award in 2005.

backup polices and are updating ownership of the records and procedures should another such incident take place. Prior to this incident, the WCLS board of trustees had passed a resolution to support an amendment of the USA PATRIOT Act and reaffirm the role of the public library as a foundation of democracy in Whatcom County.² Since then both the city of Bellingham and Whatcom County have also passed resolutions about the PATRIOT Act.

Another decision facing the board was whether to report this incident to ALA anonymously or to allow the story to be told. This article is testimony of that decision. Because of the sunset debate raising the similarities of this incident to elements of secrecy and confidentiality of the USA PATRIOT Act, the story of the Whatcom Public Library has generated national publicity and local and international e-mail responses. The vast majority have applauded the library's efforts. One library user wrote:

Know that there are many "senior citizen" library card holders like me with an interest in world developments as well as multicultural political and social commentary including dissent who, sadly, have not used their cards for same since the PATRIOT Act was passed. I applaud your going public with the incident you described.

Two caring and budget-conscious readers have sent WCLS replacement copies of the confiscated book. While the process was under investigation, the board and staff treated the request not to disclose the subpoena as a gag order, which highlighted the onerous nature of such secrecy. Had this been a PATRIOT Act subpoena, the gag order would have been mandatory, and all legal protections would have been off.

Going through this experience has reinforced for the board and staff the unchecked power of the PATRIOT Act. Our attorney Deborra Garrett has said, "It's not that privacy rights can never be invaded, but if the government seeks to invade them, the government has to show that it's absolutely necessary to do that."

Among the ironies of this story is the fact that the 9/11 Commission Report contains the quote written in the margin of the book checked out in Deming.³ That same report also describes an agenda of opportunity with the United Nations, equating "literacy as freedom" and that "the United States should rebuild the scholarship, exchange and library programs that reach out to young people and offer them knowledge and hope."⁴ A wonderful image, one to preserve in any country, including the United States of America.

The libraries of the future are being shaped by our action or inaction. If you choose action, here are some suggestions.

Be Aware

This experience has illustrated in harsh terms the importance of protecting our basic values, our bedrock constitu-

tional rights. According to Howard Foerstell, "The 'war on terrorism' is this nation's most loosely defined war, yet it has already been accompanied by more fundamental reductions in our constitutional rights than any other American conflict."⁵ The 342-page USA PATRIOT Act was passed quickly, at a time when fear and paranoia were rampant. It was not debated, some say not read, and definitely did not follow the traditional scrutiny, checks, and balances that a law of such scope and size should have to withstand. Although the WCLS subpoena was not a PATRIOT Act subpoena, it mirrored a PATRIOT Act subpoena in many ways. As informed American citizens, library boards and staff must follow current issues dealing with all forms of intellectual freedom issues and recognize the ways that their library services and their access to materials are impacted by the results. The ALA Office for Intellectual Freedom Web page features current news and issues.⁶

Attend Conferences and Informational Sessions

In this era of staff already stretched to their limits, attending conferences and training is invaluable. In the last few years, sessions focused on the PATRIOT Act held in various locations around the state of Washington as well as at the Washington Library Association's annual conference helped cut to the chase of the PATRIOT Act sections that affected libraries. Those sessions also provided a forum for debate; one included an FBI agent to build greater understanding of both sides of the issue. A recent League of Women Voters Meeting featured a panel discussion that included a border patrol agent talking about Homeland Security issues and changes as well as Washington's Congressman Rick Larsen's staff talking about the USA PATRIOT Act and amendments.

Hold Discussions with Board Members and an Attorney

Be aware of your state's confidentiality laws and prepare handouts for patrons so that the library's stand is clear. As policy makers, the board must take the time to deliberate issues of confidentiality freely and vigorously. This must take place before a subpoena or search warrant is issued to be effective rather than reactionary. It should be made clear to prospective board members that they may be required to take a stand on issues relating to First Amendment rights and what that really means. The line between being a responsible citizen and the professional principles of freedom of expression and freedom to read varies. Currently forty-eight states have laws protecting confidentiality of library records that will give structure to this discussion. It is obvious that tightly worded, clearly written policies must be enforced; this is not going to be

popular among staff, who pride themselves on the friendly and open local library customer service style—those days are history.

Records retention policies are also better addressed in a proactive way. What is reasonable for your community? What is the rationale for the length of time that records are kept and which is ultimately more costly to the library—not being able to locate the borrower of a lost CD from a set versus the attorney fees and staff and board time in fighting a government request for records? A procedure for conducting a privacy audit can be found in the book *Privacy in the 21st Century* by Helen R. Adams et al.⁷

Invite an attorney to speak with your board about liability and other elements of responding to governmental requests for information. Ideally you will find one that is committed to intellectual freedom and First Amendment rights through Lawyers for Libraries.

Check Procedures and Hold Training for Staff

When the policy is in place, procedures must be agreed upon, written, communicated, and distributed. WCLS held two sessions for staff with an attorney present to discuss the PATRIOT Act, answer staff questions, and assist in a process for handling governmental requests for information. At the time, this seemed like an important process, but it was treated casually, as if this would never really happen at our library. The Intellectual Freedom section of the ALA Web site has many helpful guidelines for dealing with confidentiality and coping with law enforcement.

Show the Public That You Are Taking a Proactive Stance

Include your confidentiality policy on your Web site and link to the ALA Office for Intellectual Freedom site. WCLS designed bookmarks in an FAQ format to address confidentiality. The following disclaimer is included under the question, “Who may access my records: The FBI may obtain your library records by following procedures established under the USA PATRIOT Act.”

Make Sure Your Collections Contain Thorough Coverage of Current Political Events

The media piques interest on topics, while libraries need to provide the depth. For example, seeking out works from Middle Eastern countries, both fiction and nonfiction, could spark understanding in ways that only a good book can. This is not a new concept. John N. Berry reports in an editorial in *Library Journal*:

For it has been rightly judged that, under political, social and religious institutions like ours, it is of paramount importance that the means of general information should be so diffused that the largest possible number of persons should be induced to read and understand questions going down to the very foundations of social order . . . which we, as a people are constantly required to decide, and do decide, either ignorantly or wisely.⁸

Be Prepared for the Press

Keep a log of events and prepare sound bites in advance so that the information is consistent. What does intellectual freedom really mean? What is the role of libraries in societal change and education? Can libraries advocate social or political causes? Vigorous debate on these questions must happen at the grassroots library staff and board level. The Library Bill of Rights, originally drafted in 1939, has grown and matured, giving structure, guidance, and a ready analysis for complex times. New editions of the *ALA Intellectual Freedom Manual* ensure that library staff can revisit the fundamentals that cannot change in light of current world political events.⁹ Civil liberties in this country have faced threats in the past, and each time the country has come to regret it. The difference this time is that “the war on terrorism is being waged against a hidden enemy who is not going to surrender in a ceremony.”¹⁰

Does this war require us to stand by and watch the chilling effect erode America’s libraries? Not according to the Library Bill of Rights, which affirms, “Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.”¹¹ In the opinion of Deborra Garrett, the attorney working with WCLS on this issue:

The library did not know the FBI’s reasoning when its agent asked for our records; we simply knew that the reason we were given verbally (the fact of the book with the writing in it) did not persuade us that the danger was so great that it justified violating our patron’s privacy. That’s why we went to court to ask a judge to void the FBI’s subpoena. The law provides for a judge to hear the reasoning of both sides, and then decide whether the danger is serious and imminent enough that it justifies disclosing records that would otherwise be private.

In our case, the system worked, and that is why we tell this story. Nat Hentoff’s hopeful book, *The War on the Bill of Rights and the Gathering Resistance*, includes the following quote from a letter to a group of young

lawyers written by former Supreme Court Justice William O. Douglas:

As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness.¹²

As librarians in this era of shadows, our responsibility is crystal clear.

References and Notes

1. Yossef Bodansky, *Bin Laden: The Man Who Declared War on America* (Roseville, Calif: Prima Publ., 1999).
2. Text of the proposed amendment to the USA PATRIOT Act is available by clicking on "Privacy" on the WCLS Web site, www.wcls.org.
3. National Commission on Terrorist Attacks upon the United States, *9/11 Commission Report* (New York: W. W. Norton, 2004), 70.
4. *Ibid.*, 377.
5. Herbert N. Foerstel, *Refuge of a Scoundrel: The PATRIOT Act in Libraries* (Westport, Conn.: Libraries Unlimited, 2004), vii.
6. ALA Office for Intellectual Freedom. Accessed Sept. 23, 2005, www.ala.org/ala/oif/intellectual.htm.
7. Helen R. Adams et al., *Privacy in the 21st Century: Issues for Public, School, and Academic Libraries* (Libraries Unlimited, 2005), 205.
8. John N. Berry III, "To Inform Democracy," *Library Journal* 129, no. 19 (Nov. 15, 2004): 8.
9. ALA Office for Intellectual Freedom, *Intellectual Freedom Manual* (Chicago: ALA Office for Intellectual Freedom, 2002), 3.
10. Richard C. Leone and Greg Anrig, eds., *The War on Our Freedoms: Civil Liberties in an Age of Terrorism* (New York: Public Affairs, 2003), 51.
11. Available from ALA Web site. Accessed Oct. 31, 2005, www.ala.org/ala/oif/statementspols/statementsif/libraryrights.htm
12. Nat Hentoff, *The War on the Bill of Rights and the Gathering Resistance* (New York: Seven Stories Pr., 2003), 158.

Additional Resources

Cole, David, and James X. Dempsey. *Terrorism and the Constitution*. New York: The New Press, 2002.

Lapham, Lewis. *Gag Rule: On the Suppression of Dissent and the Stifling of Democracy*. New York: Penguin, 2004.

Minow, Mary, and Tomas A. Lipinski. *The Library's Legal Answer Book*. Chicago: ALA, 2003.

Bodansky, Yossef. *Bin Laden: The Man Who Declared War on America*. Roseville, Calif.: Prima Publ., 1999.

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