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Received through the CRS Web

Libraries and the USA PATRIOT Act

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Summary

The USA PATRIOT Act, P.L. 107-56, enacted to help track down and punish terrorists and to prevent further terrorism, contains no provisions specifically directed at libraries or their patrons. It has several provisions, however, that might apply in a library context. The most frequently mentioned of these is Section 215, which amends the business record sections of the Foreign Intelligence Surveillance Act (FISA). On December 22, 2005, the House and Senate enacted a bill (S. 2167) that extended the sunset of certain provisions of the USA PATRIOT Act (including section 215), originally set to expire on December 31, 2005, until February 3, 2006. On February 2, 2006, Congress passed H.R. 4659, which further extended the sunset to March 10, 2006. The pending conference version of H.R. 3199 amends section 215 and postpones its expiration until December 31, 2009.

Before the USA PATRIOT Act, federal authorities engaged in gathering foreign intelligence information or conducting an investigation of international terrorism could seek a FISA court order for access to hotel, airline, storage locker, and car rental business records. Section 215 amended the procedure so that in a foreign intelligence or international terrorism investigation, federal authorities may obtain a FISA order for access to *any tangible item no matter who holds it*, including by implication library loan records and the records of library computer use. Although past practices have apparently made the library community apprehensive, the extent to which the authority of Section 215 has been used, if at all, is unclear. Media accounts of federal investigations involving library patrons ordinarily do not distinguish between simple inquiries, grand jury subpoenas, criminal search warrants, FISA physical search orders, and FISA tangible item orders. Moreover, the Justice Department has indicated that as of March 30, 2005, the authority under Section 215 had been exercised on 35 occasions but had not been used in any instance to secure library, bookstore, gun sale, or medical records.

Background. The USA PATRIOT Act (the Patriot Act), P.L. 107-56, 115 Stat. 272 (2001), was enacted in the wake of the terrorist attacks of September 11, 2001, to

provide federal authorities “with the appropriate tools required to intercept and obstruct terrorism.” The act has no provisions that mention libraries as such and does not appear to have any provisions directly aimed at libraries. The American Library Association (ALA) and some its members appear to be particularly concerned, however, about the impact upon them of provisions of more general application, particularly amendments to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801-1862.

In fact, the ALA Council has recently adopted a resolution that, among other things, declares that the ALA “considers sections of the USA PATRIOT Act ... a present danger to the constitutional rights and privacy rights of library users and urges the United States Congress to: 1. provide active oversight to the implementation of the USA PATRIOT Act and other related measures ... and 3. amend or change the sections of these laws and the guidelines that threaten or abridge the rights of inquiry and free expression....” *Resolution on the USA Patriot Act and Related Measures That Infringe on the Rights of Library Users* (January 29 2003), available at [<http://www.ala.org>].

The sensitivity of the library community may be attributable in part to its experience with a past investigative program of the Federal Bureau of Investigation (FBI). Beginning in the early 1960s, Soviet intelligence services apparently sought to systematically collect unclassified information available in U.S. libraries, particularly scientific and other technical libraries. The practice seems to have included research by Soviet agents and the employment of innocent university students to do the research. In order to keep abreast of Soviet activities, the FBI solicited the assistance of librarians in the institutions that might be targeted by the Soviets and formalized the approach at least in the New York area as the Library Awareness Program. When the program’s existence came to light, the library community objected vehemently, and the program was apparently dropped, *see generally, FBI Counterintelligence Visits to Libraries: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988); *The FBI’s Library Awareness Program: Is Big Brother Reading Over Your Shoulder?* 65 NEW YORK UNIVERSITY LAW REVIEW 1532 (1990).

Legal Environment. The FBI has authority to conduct both criminal and foreign intelligence investigations, 28 U.S.C. 533-535; 28 C.F.R. §0.85. The judges of the Foreign Intelligence Surveillance court, assigned from elsewhere on the federal bench to a court established under FISA, may authorize FBI agents conducting a foreign intelligence investigation to wiretap, conduct physical searches, or use pen registers or trap and trace devices (instruments to secretly identify the source and addressees of telephone calls made to and from a particular telephone), 50 U.S.C. 1801-1846. The FBI enjoys similar judicially-assisted, investigative powers in criminal cases, 18 U.S.C. 2510-2522, 2701-2708, 3121-3127. In addition, without recourse to the courts, the FBI in foreign intelligence cases may issue so-called national security letters (NSL) demanding a limited amount of customer identifying information from communications, financial, and credit reporting concerns, 18 U.S.C. 2709, 12 U.S.C. 3414, 15 U.S.C. 1681.

Although the library community stoutly defends the importance of library-patron confidentiality, federal law has yet to recognize its privileged status, F.R.Evid. 501; 22 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE, §§5430, 5431 (1980 & 2002 Supp.) (nevertheless suggesting that a limited research privilege akin to a newsman’s privilege might some day be recognized). Notwithstanding any intrusion upon library-patron confidentiality, as a general rule libraries and librarians must comply with

federal grand jury subpoenas, federal search warrants, and other federal court orders. Moreover, federal investigators are free to request and receive any assistance from libraries and librarians that they are willing to provide.

The Patriot Act amended and generally expanded the judicially-assisted criminal and foreign intelligence investigative powers and the NSL authority as well. Moreover, Section 215 of the Patriot Act amended the FISA provisions authorizing FISA court orders for FBI access to business records and other tangible items in foreign intelligence and international terrorism investigations. It is Section 215 that is most often mentioned when the Patriot Act's impact upon libraries is discussed.

Business Records and Other Tangible Items: Prior to passage of the Patriot Act, FISA empowered the judges of the FISA court to grant the FBI access to certain business records, 50 U.S.C. 1861-1863 (2000 ed.). As noted below with an emphasis on the components later changed, the procedure called for the following:

- a FISA court order granting FBI access to the business records of
 - *common carriers (airlines, bus companies, and others in the business of passenger transportation);*
 - *businesses that provided public accommodations (hotels, motels, etc.);*
 - *storage locker facilities; or*
 - *vehicle rental agencies;*
- either (1) in order to gather foreign intelligence information, i.e., information that
 - related to the U.S. ability to protect against:
 - attacks or other hostile acts of a foreign power its agents;
 - sabotage or international terrorism committed by a foreign power its agents; or
 - clandestine intelligence activities by a foreign power, its intelligence services, or agents; or
 - related to:
 - U.S. national defense or security; or
 - the conduct of U.S. foreign affairs;
- or (2) in order to conduct an investigation to protect against international terrorism, i.e., of
 - dangerous or violent crimes
 - apparently intended to
 - coerce a civilian population;
 - - influence government policy by coercion; or
 - - affect government conduct by kidnaping or assassination; and
 - that are committed overseas or are international in nature or effect;
- *upon a specification of a reason to believe that the records sought were those of a foreign power or one of its agents; and*
- those to whom the order was directed were required to comply and were forbidden to disclose the existence or specifics of the order.

Section 215 of the Patriot Act rewrote the business records provisions, 50 U.S.C. 1861-1862, so that now:

- a FISA judge may grant an FBI request for an order granting access to *any relevant tangible item* (including books, records, records, papers, documents, and other items);
- either (1) in order to gather foreign intelligence information *that does not concern an American*, i.e., information that
 - related to the U.S. ability to protect against:
 - attacks or other hostile acts of a foreign power its agents;
 - sabotage or international terrorism committed by a foreign power its agents; or
 - clandestine intelligence activities by a foreign power, its intelligence services, or agents; or
 - related to:
 - U.S. national defense or security; or
 - the conduct of U.S. foreign affairs;
- or (2) in order to conduct an investigation to protect against international terrorism, i.e.,
 - dangerous or violent crimes
 - apparently intended to
 - coerce a civilian population;
 - influence government policy by coercion; or
 - affect government conduct by kidnaping or assassination; and
 - that are committed overseas or are international in nature or effect;
- or in order to conduct an investigation to protect against clandestine intelligence activities;
- *as long as any investigation of an American is not based solely on the American's exercise of his or her 1st Amendment rights*; and
- those to whom the order is directed are required to comply and are forbidden to disclose the existence or specifics of the order.

Press accounts of the library community's misgivings mention features introduced by Section 215 as well as those that pre-date its enactment. They refer to the fact that FISA court proceedings are conducted behind closed doors and that record holders and other custodians of the tangible items covered by a FISA order are bound to secrecy, *USA Today*, A3 (December 17, 2002) ("Now, an agent merely must convince the secret Foreign Intelligence Surveillance Court that such records could aid a terrorism probe. Along with the search warrant comes a gag order"); *Miami Herald*, 1 (September 1, 2002) ("The FBI can make its case in a special 'spy court' — a secret, closed proceeding...Once contacted by agents, a librarian can't tell anyone about the records request"). These are conditions that existed before the amendments of Section 215, albeit in a more limited context.

On the other hand, they point out that the FISA provisions that once applied to motel records now may also reach records relating to the use of a public library's books and computers, and allude to the disappearance of the requirement of probable cause or "reason to believe" that the records involve the activities of a foreign power or its agents, *Contra Consta Times*, 35 (October 20, 2002) ("Section 215 allows federal agents to get

a search warrant to examine certain ‘business records’ as part of terrorism investigations, and that can include records from public libraries”);¹ (“... the Patriot Act eliminates the need to show probable cause before invading a patron’s privacy. The new law allows the FBI to go to a secret foreign intelligence court, claim the information desired is part of a terrorism investigation and walk away with a court order allowing it to take a look at all the Internet traffic emanating from a library on a particular day. Moreover, librarians are prohibited from disclosing anything about law enforcement’s visit”).

It is not clear how often, if at all, the new authority granted by Section 215 might be used to secure records or other library items. Accounts in the popular press often speak in general terms making it difficult to distinguish simple FBI requests, grand jury subpoenas, criminal search warrants, FISA physical search orders, national security letters, and FISA tangible item orders. Justice Department officials have revealed that the authority had been used on 35 occasions as of March 30, 2005, but had yet to be used to acquire library, bookstore, gun sale, or medical records.² They have argued, however, that terrorists should not be allowed to exploit library and other services with impunity.³ On the other hand, they concede that Section 215 is not as clearly stated as they might prefer but have expressed a general willingness to support clarifying amendments.⁴

Post-USA PATRIOT Act Legislative Developments. H.R. 3199 as it emerged from conference postpones section 215’s expiration date until December 31, 2009 and adjusts it in several respects. Among other changes, it would:

- require the FBI Director, Deputy Director, or Executive Assistant Director to approve section 215 orders for access to library records;
- insist upon minimization standards;
- add an explicit relevancy requirement;
- require that the items sought be described with particularity, that recipients be given a reasonable time to comply, and that orders be limited to those things that would come within the reach of a grand jury subpoena or other court-ordered production;
- amend the nondisclosure provisions to explicitly permit the recipient to seek legal advice;
- authorize recipients to petition the FISA court to modify or set aside unlawful section 215 orders; with appellate review available;

¹ *St. Petersburg Times*, [<http://pqasb.pqarchiver.com/sptimes/141062981.html?MAC=76d995da7e9f339c14d469099e3d2307&did=141062981&FMT=FT&FMFS=FT&date=Jul+23%2C+2002&author=&pub=St.+Petersburg+Times&printformat=&desc=A+chill+in+the+library+Series%3A+EDITORIALS>].

² United States Department of Justice, *Fact Sheet: USA PATRIOT Act Provisions Set for Reauthorization* (April 5, 2005), available on June 21, 2005 at [http://www.usdoj.gov/opa/pr/2005/April/05_opa_163.htm].

³ See, e.g., *Oversight of the USA PATRIOT Act: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005), testimony of Attorney General Alberto R. Gonzales, available on June 21, 2005 at [http://judiciary.senate.gov/testimony.cfm?id=1439&wit_id=3936].

⁴ *Oversight Hearing on the Implementation of the USA PATRIOT Act: Hearings Before the House Committee on the Judiciary*, 109th Cong., 1st Sess. (2005), statement of Deputy Attorney General James B. Comey, available on June 21, 2005, at [<http://judiciary.house.gov/media/pdfs/comey060805.pdf>].

- provide for enhanced Congressional oversight; and
- call for Department of Justice’s Inspector General to audit use of the authority under section 215 for any signs of abuse.

In other legislative action, the House, on June 17, 2005, agreed to an amendment to the Commerce, State, Justice appropriations bill for FY2006 (H.R. 2862) offered by Representative Sanders which would preclude the use of funds appropriated under the bill to implement the authority of Section 215 to acquire library or book store records, 151 *Cong. Rec.* H4534-542, H4551. The Senate Appropriations Committee struck the amendment from its version of the bill, S.Rept. 109-88 (2005). Representative Sanders has also introduced a free standing amendment, H.R. 1157, that would remove library and bookstore records from the coverage of Section 215 but emphasize that they remain subject to a FISA physical search order.

In other committee actions, the Senate Select Committee on Intelligence has reported S. 1266 (Senator Roberts), which would make an amended version of Section 215 permanent, S.Rept. 109-85. The amended section would make explicit the relevancy threshold standard for issuance of an order; would expressly allow disclosure to the recipient’s attorney; and would establish a procedure for judicial review of either an order (unreasonable or oppressive orders might be modified or set aside), the nondisclosure component of an order (subject to modification absent an FBI certification that disclosure would endanger national security), or both. S. 1266 would also establish procedures with similar features for judicially enforceable administrative subpoenas to be used in national security investigations.

Other bills address many of the same issues if in a somewhat different manner. For instance, rather than a relevancy standard, several would return to a standard of “special and articulable facts” for the belief that the information pertains to a foreign agent, S. 317 (Senator Feingold), H.R. 1526 (Representative Otter) (SAFE Act), S. 737 (Senator Craig) (SAFE Act).⁵ S. 737 would also create a procedure for judicial review and establish time limits for the nondisclosure requirements contained in the Section’s orders.

⁵ The SAFE Act proposals are discussed in CRS Report RL32907, *Security and Freedom Ensured Act (SAFE Act)(H.R. 1526) and Security and Freedom Enhancement Act (SAFE Act)(S. 737): Section by Section Analysis*, available in an abridged form as CRS Report RS22140, *The SAFE Acts of 2005: H.R. 1526 and S. 737 — A Sketch*, both by (name redacted).

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