

ALA American Library Association Washington Office

USA PATRIOT Act Reauthorization

The USA PATRIOT Act reauthorization legislation was signed into law by President Bush on March 9, 2006. The changes in the new law are outlined below.

Sunset Provisions

- A sunset of December 31, 2009 was established for Section 215 (the “library provision”) of the USA PATRIOT Act.
- No sunset was established for Section 505, the section of the Act that has to do with National Security Letters.

Section 215

Search Standards

Section 215 of the 2001 USA PATRIOT Act diminished the standards under which the FBI can obtain library records in the course of an investigation. The reauthorized bill outlines slightly more stringent standards than the original legislation, but does not meet the high standard ALA had encouraged to ensure library patron privacy.

- Under the original PATRIOT Act, the FBI had only to assert that records were “sought” for an authorized investigation “to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.”
- Under the new legislation, the FBI can obtain any patron’s library records when they present facts showing “reasonable grounds” to believe that the records are “relevant” to an authorized investigation.

Individualized Suspicion

ALA argued for an “individualized suspicion” clause in the PATRIOT Act reauthorization—language requiring the FBI to show that a person is suspected of a crime before seizing his or her library records.

Although the reauthorized statute includes language encouraging individualized suspicion, it does not **require** the FBI to show that a person whose records are sought is suspected of a crime—so the reauthorized bill leaves the door open to wide search order requests.

Sufficient Particularity

ALA worked to change the original PATRIOT legislation to require the FBI to describe the records they are seeking with “sufficient particularity” to allow those records to be identified. The reauthorized law does meet this standard—reducing the danger that the FBI will engage in fishing expeditions in library records.

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Section 215, continued

Approval

The law requires the Director of the FBI, or (if delegated) the FBI's Deputy Director or Executive Assistant Director for National Security, to personally approve any request for records from a library or bookstore.

Gag Order

The 2001 PATRIOT Act disallows the recipient of a Section 215 Order from telling anyone that he or she has received the order. ALA lobbied to have the gag order provision removed—and two Federal District Court judges (one in Connecticut, and one in New York) have ruled that the Section 215 gag order is unconstitutional. These decisions are stayed pending the government's appeal.

The reauthorized PATRIOT Act does not remove the gag provision, but it reforms the original legislation by:

- allowing disclosure of receipt of a Section 215 order to "any person to whom disclosure is necessary to comply with such order"
- explicitly allowing a recipient to consult an attorney and to obtain legal advice or assistance "with respect to the production of things in response to the order"
- allowing disclosure to "other persons as permitted" by the Director of the FBI or the Director's designee.
- removing a requirement that a Section 215 order recipient inform the FBI of the identity of an attorney to whom disclosure was or will be made. But the recipient is required, if requested by the Director of the FBI, to identify anyone other than an attorney to whom disclosure is made or will be made.

Challenges to Subpoena

The original PATRIOT legislation disallowed a Section 215 recipient from challenging the subpoena in court. The reauthorization legislation does allow a recipient to challenge a Section 215 order, but with these restrictions:

- a challenge can occur only in a special "petition review panel" of the Foreign Intelligence Surveillance (FISA) court
- challenges can only be filed in order to determine the "lawfulness" of the order. It is not clear why a FISA review panel would find that a FISA judge issued an unlawful order.

Challenges to Gag Order

The reauthorization legislation also allows a Section 215 order recipient to challenge the gag order attached to the subpoena. But again, there are restrictions:

- recipients may challenge the gag order only after one year
- the FISA judge may only overturn the gag if:
 - a) the government does not assert that the gag removal would hurt national security
 - b) the judge finds that there is no reason to believe that the disclosure may endanger national security, interfere with an investigation, interfere with diplomatic relations, or endanger the life or the safety of any person."

Section 215, continued

Minimization Requirements

The statute now requires the Attorney General to adopt minimization procedures that:

- minimize the retention, and prohibit the dissemination, of information concerning unconsenting Americans (consistent with the need to obtain, produce, and disseminate foreign intelligence information).
- require that information identifying any United States person will not be made public without the person's consent, *unless* the "person's identity is necessary to understand foreign intelligence information or assess its importance."

Reports

The reauthorized PATRIOT Act requires that the DOJ submit unclassified reports annually in April to the House and Senate Committees on the Judiciary, the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.

These reports will include information on the total number of orders involving the production of:

- library circulation records, library patron lists, book sales records, or book customer lists that were either granted, modified, or denied
- firearm sales records; tax return records; educational records; or medical records containing information that would identify a person.

It also requires the DOJ to report to Congress in April of each year on:

- the total number of applications made for orders approving requests for the production of tangible things
- the total number of such orders that were granted, modified, or denied. It appears that the latter reports will be unclassified.

Section 505 of the PATRIOT Act

Standards:

The reauthorized PATRIOT Act now includes language asserting that libraries, when functioning in their traditional roles – including providing Internet access--are not subject to National Security Letters (NSLs). The provision may be subject to adjudication due to potentially conflicting language.

Disclosure

The original PATRIOT Act banned the recipient of a National Security Letter from disclosing the fact to any person. The reauthorized PATRIOT Act allows disclosure of receipt of a National Security Letter to: "any person to whom disclosure is necessary to comply with such order." It also explicitly allows a recipient to consult an attorney and to obtain legal advice or assistance "with respect to the production of things in response to the order;" and also allows disclosure to "other persons as permitted" by the Director of the FBI or the Director's designee.

The law says that if the Director of the FBI or his designee certifies that disclosure of a National Security Letter would harm national security, interfere with an investigation, interfere with diplomatic relations, or endanger life or physical safety, receipt of the Letter may not be disclosed to other than those persons to whom disclosure is necessary to comply with such order, or to an attorney to obtain legal advice or assistance with respect to the request. Persons to whom disclosure is made are subject to the same non-disclosure provisions.

The statute establishes new penalties for "knowingly and with intent to obstruct an investigation or judicial proceeding" by violating the gag order. Penalties include a prison term of up to 5 years. However, language in the original legislation establishing a penalty of up to one year in prison for "knowingly and willfully" violating the gag order was removed .

Challenges

A recipient of a National Security Letter is allowed challenge the request in a U.S. District Court. The court may set aside the NSL order if it is "unreasonable" or "oppressive," or "otherwise unlawful."

The statute now allows a challenge to the gag order in a U.S. District Court. However, if the government certifies that a challenge would harm national security, interfere with an investigation, interfere with diplomatic relations, or endanger life or physical safety, that certification must be treated as "conclusive." If a year has elapsed since issuance of the order, the issuing official must re-certify--but certification is still conclusive.

Enforcement

The law allows the government to go to a U.S. District Court to seek enforcement of the NSL, makes violation of the enforcement order punishable as contempt, and states that the court must close any contempt hearing to the extent necessary to prevent the unauthorized disclosure of a request.

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