

# **SAFEGUARDING OUR PATRONS' PRIVACY:**

## **What Every Librarian Needs to Know About the USA PATRIOT Act & Related Anti-Terrorism Measures**

**A Satellite Teleconference Cosponsored by:**

American Association of Law Libraries  
American Library Association  
Association of Research Libraries  
Medical Library Association  
Special Libraries Association

**December 11, 2002**  
12:00-3:00 p.m. EST

# **SAFEGUARDING OUR PATRONS' PRIVACY:**

## **WHAT EVERY LIBRARIAN NEEDS TO KNOW ABOUT THE USA PATRIOT ACT & RELATED ANTI-TERRORISM MEASURES**

### **AGENDA**

- 12:00-12:15 p.m.      Pre-broadcast Activities at Remote Sites  
Ice Breaker Exercise  
Introduction of the Program
- 12:15-2:15 p.m.      **Basics of the USA PATRIOT Act, the FBI Guidelines, and Homeland Security  
Legislation**  
Thomas M. Susman, Partner, Ropes & Gray, Washington, D.C.
- Implications for Libraries**  
James Neal, Vice President and University Librarian,  
Columbia University Libraries  
Gary Strong, Director, Queens Borough Public Library
- Question and Answer Segment
- Policies, Protocols, and Procedures per the PATRIOT Act**  
Tracy Mitrano, Policy Advisor, Director of Computer Law and Policy,  
Office of the Vice President for Information Technology, Cornell University  
James Neal  
Gary Strong
- How Libraries Should Respond**  
Tracy Mitrano  
James Neal  
Gary Strong  
Thomas Susman
- Question and Answer Segment
- Issues and Concerns**  
Constitutional Issues: Tracy Mitrano  
Library Values: James Neal and Gary Strong  
Legislative Realities: Thomas Susman
- Question and Answer Segment
- Conclusion**
- 2:15-3:00 p.m.      Post-broadcast Activities at Remote Sites

## SPEAKER BIOGRAPHIES

**TRACY MITRANO** received a Bachelor of Arts degree in English and History from the University of Rochester in 1981, a doctorate in American history from Binghamton University in 1988, and a law degree from Cornell Law School in 1995. She has taught American political, social, and religious history at the University of Buffalo, women's and constitutional history at Syracuse University, and family and social policy at Cornell University. She is a member of the New York State Bar Association and was in private practice for five years. Currently she is the Policy Advisor and Director of the University Computer Policy and Law Program for the Office of Information Technologies at Cornell University. <tbm3@cornell.edu>

**JAMES NEAL** is currently Vice President for Information Services and University Librarian at Columbia University, providing leadership for university academic computing and network services and a system of 22 libraries. Previously, he served as Dean of University Libraries at Indiana University and Johns Hopkins University, and held administrative positions in the libraries at Penn State, Notre Dame, and the City University of New York. Neal has served on the Council and Executive Board of the American Library Association, on the Board and as President of the Association of Research Libraries, and as chair of OCLC's Research Library Advisory Council, as well as on numerous international, national, and state professional committees. Neal is a frequent speaker at national and international conferences, consultant and published researcher with a focus in the areas of scholarly communication, intellectual property, digital library development, organizational change, human resources development, and library fundraising. He has represented the American library community in testimony on copyright matters before Congressional committees and was an advisor to the U.S. delegation at the World Intellectual Property Organization (WIPO) diplomatic conference on copyright. He was selected the 1997 Academic/Research Librarian of the Year by ALA's Association of College and Research Libraries. <jneal@columbia.edu>

**GARY E. STRONG** has served as Director of the Queens Borough Public Library since September 1994. For nine consecutive years, the Queens Library has achieved the highest circulation levels of any public library system in the nation. Before coming to Queens, he was the State Librarian of California, the top administrative post in the California State Library system, from 1980 to 1994. He was a founder and member of the board of directors of the California State Library Foundation and is now a director emeritus of that body. Since coming to the Queens Library, he has won the Distinguished Service Award from the Chinese-American Librarians Association (1996) and has been named to the New York State Board of Regents Advisory Council for Libraries. He serves on the board of the New York Metropolitan Reference and Research Library Agency (METRO) and was elected Vice President of that organization in October 1999. He serves on the IFLA Committee on Copyright and Other Legal Matters, and as the IFLA Representative to the United Nations. Mr. Strong is the author and editor of numerous journal articles on library and literacy issues, and in 1988 won the H.W. Wilson Periodical Award for his editorial work on the California State Library Foundation Bulletin (1982 -1994). <gstrong@QueensLibrary.org>

**THOMAS M. SUSMAN** is a partner in the Washington Office of Ropes & Gray, where he conducts a diverse legislative and regulatory practice. Before joining Ropes & Gray in 1981, Mr. Susman served on Capitol Hill for over 11 years. He was Chief Counsel to the Senate Subcommittee on Administrative Practice and Procedure and General Counsel to the Antitrust Subcommittee and to the Senate Judiciary Committee. Prior to that he clerked for Judge John Minor Wisdom on the Fifth Circuit U.S. Court of Appeals, and was Special Assistant to the Assistant Attorney General in the Office of Legal Counsel, U.S. Department of Justice. He graduated from Yale University and received his J.D. with high honors from the University of Texas Law School, where he was editor-in-chief of the Texas Law Review. For over a decade Mr. Susman has been working with the library community on issues that include access to government information, the Children's Internet Protection Act, the General Agreement on Trade in Services, the Government Printing Office, consolidation in the publishing industries, and the USA PATRIOT Act. Mr. Susman frequently testifies before Congress and lectures in the U.S. and abroad on legislative process, freedom of information, and politics.  
<tsusman@ropesgray.com>

# **Libraries and National Security**

Basics of the USA PATRIOT Act, the FBI Guidelines,  
and Homeland Security Legislation

*Thomas M. Susman  
Ropes & Gray*

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## **Key Information Policy Issues in the Post-9/11 Environment**

- USA PATRIOT Act of 2001 (P.L. 107-56)
- Removal of government information from the web, agencies, and from libraries
- Administration initiatives on homeland security
- New “sensitive but not classified” designation
- Homeland Security Legislation

## **USA PATRIOT Act**

- **Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56)**
  - Various forms of the legislation surfaced quickly after September 11
  - Signed into law October 26, 2001
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**Notes**

## **USA PATRIOT Act**

- Amends more than 15 different statutes, including wiretap, immigration and money-laundering laws
- Gives law enforcement greater authority to conduct searches

Portions impacting libraries:

- Computer trespasser exception
- “Trap and trace”
- Business records

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**Notes**

## **USA PATRIOT Act Computer trespasser exception**

New provision in ECPA\*:

- Targets person who accesses a computer “without authorization”
- Requires system owner’s consent; ISPs can invite in law enforcement
- Law enforcement must reasonably believe that the information will be relevant
- Interception does not acquire communications other than those transmitted to or from the trespasser

\*Electronic Communications Privacy Act

## **Pen register, trap & trace court orders**

New Provisions:

- Order served on any provider in the food chain
- Follows route of information
- One order good nationwide
- Can collect any “dialing, routing, addressing, or signaling” information
- FBI may install hardware or software

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**Notes**

## **USA PATRIOT Act Business records under FISA\***

Under new law, secret FISA court can issue order

- In international terrorism or clandestine intelligence investigation
- For seizure of any records, which can include library records
- Specifics of court order and institution's implementation must be kept secret

\*Foreign Intelligence Surveillance Act

## **FBI Guidelines**

- Attorney General's "Guidelines to the FBI" issued on May 30, 2002
- Lift restrictions on FBI data-gathering
- Allow FBI to go into any public setting without specific suspicions

## **Department of Homeland Security**

- Merges 22 Agencies and Governmental Functions
- Creates New Exemption to FOIA
- Lowers Threshold for ISPs to Provide Information Without Court Order
- Creates Privacy Officer position for Department of Homeland Security
- Increases Penalties for Certain Computer Trespass Crimes

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**Notes**



# Implications for Libraries

*Gary Strong, Queens Borough Public Library*

*James Neal, Columbia University Libraries*

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## Implications for Libraries

- Privacy of patrons (Confidentiality)
- Free access to information
- Freedom of speech
- Academic Freedom
- Employment of foreign individuals
- IT security

## The Library Environment

- A crime-free environment
- A safe place
- Learning and pursuit of knowledge and information on any topic
- Ask any question – discuss any topic

## The Library's Mission

The Queens Borough Public Library is a forum for all points of view and adheres to the principles of intellectual freedom as expressed in the Library Bill of Rights formulated by the American Library Association.

Mission Statement, Queens Borough Public Library

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## Notes

## **The Library Respects the Privacy of all of its Patrons**

- Adopt the confidentiality legislation of your state as Library Policy
- Establish procedures for staff to follow if they are approached by an individual
  - Law enforcement at any level of government
  - Fellow staff member
  - Patron concern

## **Create Relationships**

- With law enforcement at all levels
- Other institutions to share information
- With your professional library associations

## **Have Policies & Procedures in Place Before You are Visited**

- Review all policies and procedures
- Make necessary amendments now
- Brief your Board of Trustees, city officials, general counsel, senior management
- Orient staff in public service and IT functions to library protocol

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**Notes**

# **Policies, Protocols and Procedures per the PATRIOT Act**

*Tracy Mitrano  
Cornell University*

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## **Routing of Legal Papers**

- If anyone approaches you alleging to be a law enforcement official requesting information, do not disclose to that individual any information.
  - If they present a subpoena, direct either the person or the paper to your supervisor, who will in turn direct it immediately to legal counsel.
  - If they present a warrant, do not interfere with their search or seizure, and call your supervisor [or some other office] as soon as possible.
  - Library administration should have a pre-established and pre-published path for routing those papers to legal counsel.
  - In turn, legal counsel should be apprised of that routing path and informed of the office(s) or individual(s) delegated to make the presentation.
  - USA-PATRIOT Act:
    - Foreign Intelligence Surveillance Act 501 Business Records
    - New exception to Family Education Records Privacy Act
    - FISA/Electronic Communications Privacy Act “rubber stamped” subpoenas
  - And...keep a record of all legal requests to preserve institutional memory and to insure against any potential for abuse.
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**Notes**

## **Emergency Disclosures of IT Communications**

- Disclosures of electronic communications in the event of an immediate danger to life and limb.
- New exception to the Electronic Communications Privacy Act under the USA-PATRIOT Act.
- For example, network operator observes a message threatening danger to life and limb.
- If in the normal course of business you observe what you reasonably believe to be a threat of imminent danger to life and limb, call the [police, campus police, security] immediately. Directly following that call, contact your supervisor [or pre-determined other office or individual, such as IT Security, or Policy or legal counsel].

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**Notes**

## Computer Trespass

- Institution will suffer no liability under the Electronic Communications Privacy Act if it invites federal law enforcement to investigate a compromised computer.
- This USA-PATRIOT Act amendment of ECPA *not* specific to terrorism; no showing of terrorism required to trigger provision.
- Under the “sunset clause” provision, four year expiration without a further act of Congress.
- What is the concern?
  - Who has the authority to decide whether or not to make such a call?
  - Whom should they consult?
  - Under what guidelines or restrictions would they allow federal law enforcement to investigate?
  - How to handle a “friendly” request by law enforcement to help investigate?

## Protocol

- If anyone in the library community has a computer upon which they reasonably believe an electronic trespass has occurred and desire an investigation of it, contact [supervisor? IT specialist? IT security]. That office will, in turn, consult with the appropriate administrative and legal offices and, if necessary, make the appropriate contacts to federal law enforcement.

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## Notes

## **Conclusion**

- Carefully considered policies, procedures and protocols constructed in the context of this law can go a long way in preserving the traditional autonomy of libraries and higher education.
- As beacons of hope, it is our duty as academics, libraries, and administrators – keepers of the flame – to do so in an effort to preserve our country’s civil liberties at large.

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## **Notes**

# How Libraries Should Respond

*Tracy Mitrano*  
*James Neal*  
*Gary Strong*  
*Thomas Susman*

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**Notes**

## Issues and Concerns

Constitutional Issues: Tracy Mitrano  
Library Values: James Neal and Gary Strong  
Legislative Realities: Thomas Susman

Closing Remarks: Thomas Susman

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**Notes**



# Constitutional Challenges to the USA-PATRIOT Act

*Tracy Mitrano  
Cornell University*

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## **Family Education Rights Privacy Act and Foreign Intelligence Surveillance Act**

- FERPA
  - Not on new exception because it is narrowly tailored
    - But watch for potential conflict with Student Exchange Visitors Information Service
- FISA
  - General question about its constitutionality
    - FISA Review Board found for the government
      - “Chinese wall” separation regulations not necessary
      - Broad powers for intelligence surveillance wiretaps
  - Business Records 501: potential First Amendment violation for speech?

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**Notes**

## Electronic Communications Privacy Act

- “Rubber stamped subpoenas”
  - Allows law enforcement to obtain conversational detail of electronic communications (e.g. source and destination IP addresses, e-mail headers) with almost no showing (well below 4th A. probable cause)...
  - Rationale: not content, equivalent to low standards for phone records
  - Question: Is an IP address content...
    - When it can be resolved to content, such as a Web site?
    - E-mail headers include subject lines? Is that content?
- Computer Trespass
  - Is it constitutional?
    - Why not, you can request law enforcement investigation when your house is broken into?
    - But how about when law enforcement knows it is broken into before you do? Do they have the right to invite themselves in?
    - How to regulate the investigation?
      - remove router instead of the information
    - How does one stop an investigation once it is started?
    - Suppression consequences?
    - “Sunset” Clause...four years.

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Notes

## **Closing Remarks**

*Thomas Susman*

### **Changes for Libraries**

- Potential for increased law enforcement scrutiny
- Charged political environment
- Perceived decrease in patron confidentiality
- Increased importance of procedures for responding to judicial processes
- Reduced access to government information

### **Library Preparedness Locally**

- Cultivate local expertise
- Consult local legal counsel
- Review and revise policies
- Ask vendors tough questions
- Understand your technological capabilities
- Train staff at all levels

### **Library Preparedness Politically**

- Press elected officials for accountability
- Share your experiences — within library community and with other community leaders
- Monitor government Web sites for restricted or removed information
- Oppose expansion of government authority to intrude

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**Notes**

## **POST-BROADCAST DISCUSSION QUESTIONS**

### **Option A**

If your institution/library has a policy (or policies) for addressing issues related to law enforcement and patron privacy, invite someone from the appropriate office to discuss this policy with the group. It may be the case that there are both institutional and library policies that are relevant. Make copies of the policies available.

1. What issues do the policies address?
2. Are there issues/situations that the policies do not address? Do the policies need to be updated?
3. What steps should the library take to make sure all employees are aware of all relevant policies?
4. Have patrons been made aware of potential violations of their privacy and the institution's process for dealing with these issues?

### **Option B**

If your institution does not yet have a policy in place or you are at a site with participants from a wide variety of institutions, you may want to focus on the more generic aspects of policy development.

1. What issues/situations should a policy address?
2. What stakeholders would need to be included in order to come to a decision on the issues identified?
3. What strategies would be useful for ensuring that all appropriate offices and staff are aware of the policies?
4. Should patrons be made aware of potential violations of their privacy? If so, how?



## *Certificate of Participation*

This document is to certify that

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participated in the American Association of Law Libraries Professional Development Program

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Mary Jawgiel, AALL Education Manager



*This is to certify that*

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*has attended the continuing education course*

**Safeguarding Our Patrons' Privacy**  
**What Every Librarian Needs to Know About the**  
**USA PATRIOT Act & Related Anti-Terrorism Measures.**  
**on**

**December 11, 2002**

**approved by the Medical Library Association**  
**for 3 contact hours**

**Executive Director**

**Coordinator, Continuing Education**

*An association of health information professionals.*

## APPENDIX A:

### RESOURCES

#### LEGISLATION

"Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" (Oct. 25, 2001).  
<[http://www.eff.org/Privacy/Surveillance/Terrorism\\_militias/20011025\\_hr3162\\_usa\\_patriot\\_bill.html](http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011025_hr3162_usa_patriot_bill.html)>.

#### ARTICLES AND REPORTS ON THE INTERNET

American Library Association, "Guidelines for Librarians on the USA PATRIOT Act: What to Do Before, During, and After a 'Knock at the Door?'" (.pdf file)  
<<http://www.ala.org/washoff/patstep.pdf>>.

Congressional Research Service, Report for Congress, "Possible Impacts of Major Counter Terrorism Security Actions on Research, Development, and Higher Education" (.pdf file) <<http://www.aau.edu/research/crsterror.pdf>>.

Doyle, Charles (Congressional Research Service). "Terrorism: Section by Section Analysis of the USA PATRIOT Act" (Dec. 2001):  
<<http://www.cdt.org/security/usapatriot/011210crs.pdf>>.

Minow, Mary. "Library Records Post-PATRIOT Act." *LLRX.com* (Sept. 2002):  
<<http://www.llrx.com/features/libraryrecords.htm>>.

Minow, Mary. "The USA PATRIOT Act and Patron Privacy on Library Internet Terminals." *LLRX.com* (Feb. 2002): <<http://www.llrx.com/features/usapatriotact.htm>>.

Mitrano, Tracy. "Taking the Mystique Out of the USA PATRIOT Act: Information, Process, and Protocol." Cornell Office of Information Technology (May 2002):  
<<http://www.cit.cornell.edu/oit/PatriotAct/article.html>>.

#### OTHER INTERNET RESOURCES

American Library Association. "Libraries and the Patriot Legislation"  
<<http://www.ala.org/washoff/patriot.html>>.

American Library Association. "USA PATRIOT Act"  
<<http://www.ala.org/alaorg/oif/usapatriotact.html>>.

Association of Research Libraries. "Anti-Terrorism Legislation, Homeland Security, and Related Issues" <<http://www.arl.org/info/frn/other/ATL.html>>.

Association of Research Libraries. "The Search and Seizure of Electronic Information: The Law Before and After the USA PATRIOT Act" (.pdf file)  
<<http://www.arl.org/info/frn/other/matrix.pdf>>.

Center for Democracy and Technology. "Response to September 11, 2001, Terrorist Attack" <<http://www.cdt.org/security/010911response.shtml>>.

Electronic Privacy Information Center (EPIC). "The Attorney General's Guidelines"  
<<http://www.epic.org/privacy/fbi/>>.

NASULGC/AAU, "Post September 11 Resources for Universities"  
<<http://www.aau.edu/resources/resources.html>>.

OMB Watch. "Homeland Security Act Resource Page"  
<<http://www.ombwatch.org/article/articleview/943/1/18/>>.

U.S. Department of Justice, Office of Legal Policy. "Attorney General's Guidelines Regarding Information Sharing Under the USA PATRIOT Act"  
<<http://www.usdoj.gov/olp/>>.

#### **NEWSLETTER ARTICLES**

Neal, James. "Reaction to Terror: Gauging the Aftermath and the Impact of the USAPATRIOT Legislation." *College & Research Libraries News* (Forthcoming, Spring 2003).



## APPENDIX B:

### SAMPLE POLICY STATEMENT LIBRARY RESPONSE TO SUBPOENAS OR SEARCH WARRANTS

The following Draft Policy Statement is adapted from an e-mail message from Charles Lowry, Dean of Libraries, University of Maryland Libraries, to ARL Directors in September 2002.

University of Maryland Libraries will observe the following procedures, until we determine a more detailed procedure is needed. If a law enforcement officer presents a subpoena or search warrant at any of the libraries:

- Staff who are approached should immediately contact the Dean's and their Director's office to alert them and refer the officer to the Dean's office.
- We will immediately contact the UM Legal Office for a review of the document's legal sufficiency (and tell the law enforcement officer of this procedure).
- The Legal Office will provide assistance on site during the search. This could happen at non-standard times (though doubtful) such as weekends and late nights. We have established a phone tree for Library Executive Committee members for nights and weekend emergencies.
- Similarly, we will ask UM Legal Counsel for contacts during non-standard times. Again, we do not expect this to happen. In our experience (e.g., last year when the FBI was on campus after September 11, 2001) they came during normal work hours and (I should mention) were highly professional and courteous in our work with them.

\* \* \* \* \*

The above Draft Protocol Statement was based upon a communications between University of Maryland Legal Counsel, Anne Bowden and Dean of Libraries Charles Lowry in 2002 regarding the effect of the USA Patriot Act's amendments to the Foreign Intelligence Surveillance Act. One of those communications is included below:

First, any request anyone in the library receives for information about what library materials someone is using should be sent to the Legal Office without furnishing any information. The law allows that type of disclosure of the request.

Second, every request has to be made pursuant to a search warrant or subpoena. The standard to obtain a search warrant has been reduced from probable cause that a crime has been committed or that the information being sought relates to a crime, to a belief that the records being sought may be related to an ongoing investigation related to

terrorism or intelligence. This same lowered standard applies to requests for court orders authorizing wiretaps and electronic tracking/tracing devices.

Third, if a law enforcement officer requests circulation information without a subpoena or a search warrant, the library has no duty to furnish information. If a law enforcement officer shows up with a subpoena or a search warrant, I recommend that a) you identify one person (you or an assistant) who will receive such requests; b) call the legal office and ask someone to come and review the document for legal sufficiency. We will have time to collect information requested by a subpoena but law enforcement officers may execute a search warrant immediately. I recommend that you call the legal office to request that an attorney be present during searches.

Fourth, the USA Patriot Act supersedes the state's confidentiality law with respect to library circulation records. So, the less personally identifiable information the library collects, the less information the library will have to turn over.

Fifth, the legal office can attempt to obtain restrictions on who can access subpoenaed information and the purposes for which it can be accessed. I suspect that such efforts will not often be successful, but we could always try.