Protecting Privacy & Intellectual Freedom in Libraries

The American Library Association (ALA) and the Association of Research Libraries (ARL) (the "Libraries") seek language in the RESTORE Act and other FISA modernization proposals that ensures judicial review of law enforcement requests for library patron records or surveillance of library users through library networks. The Libraries strongly believe that when the government seeks foreign intelligence information from libraries in the United States, it should do so only on an order authorized by the Foreign Intelligence Surveillance Court (FISC), regardless of whether the person using the library services is a US citizen or not, or located within the United States or abroad. Libraries are gateways to freedom abroad. They offer expanded services globally, provide distance learning opportunities, and serve American and foreign student communities abroad as part of their essential mission. And they rely on a global network of communications facilities and services to do so, but this should not make libraries into communications service providers as proposed under the FISA modernization efforts today.

Existing State Privacy & Confidentiality Laws Yield to FISA

Libraries have deep and longstanding principles of protecting patron privacy. Privacy is essential to the exercise of free speech, free thought, and free association. In a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized by others. Forty-eight states and the District of Columbia have patron confidentiality laws; the attorneys general in the remaining two states have issued opinions recognizing the privacy of library users' records. Ten state constitutions guarantee a right of privacy or bar unreasonable intrusions into patrons' privacy. The courts have established a First Amendment right to receive information in a publicly funded library. Further, the courts have upheld the right to privacy based on the Bill of Rights of the US Constitution.

Since the USA PATRIOT Act superceded these state laws, libraries have consistently argued for judicial supervision during the various debates on NSLs, CALEA, and the USA PATRIOT Act. Often the debate focuses on whether or not libraries are communications service providers. Libraries are not like commercial telephone and communications companies; they have a special place in our families' lives and in our Nation's history as providing special space to learn, explore, and inquire.

The Justice Department Treats Libraries as Communications Providers

The Department of Justice has consistently taken the position when libraries provide free public access to the Internet or e-mail accounts to their users that they are "communications service providers." Libraries do not seek to thwart national security efforts nor to be safe havens for those engaging in illegal activities. However, because the mission of libraries is so closely bound to our Nation's first amendment freedoms, there should be judicial review of law

enforcement demands for library records or communications. Libraries' services to users inevitably will rely on communications services, but this is incidental to providing library services as a whole just as the communications capability in Microsoft's XBox Live or Nintendo's Wii are incidental to the game play and does not render these game companies "communications service providers."

Past efforts to protect libraries from federal demands for information without court supervision failed because explicit statutory language was not included. For example, there are explicit statements in the USA PATRIOT Act Reauthorization debates detailing that libraries do "not fall under the purview of the NSL provision." Despite this clear Congressional intent, the FBI still contends that libraries remain subject to that Act's NSL provisions because the language of the statute was not explicit. Thus, legislation must expressly state that the term "communications service provider" does not include libraries, or it is unlikely to be respected by the Department of Justice.

FISA Modernization Should Clarify that Libraries Are *Not* Communications Providers

The RESTORE Act, like the PAA before it, permits the government to compel communications providers to provide assistance in the warrantless surveillance of non-US persons abroad. To the extent a library in the US provides remote communications or access to communications services to non-US users abroad, such communications still could be subject to warrantless seizure or interception from facilities in our libraries. Our position is simple—the government should not enter a library in the US or access facilities used by libraries to conduct electronic surveillance on any library user, regardless of where the user happens to be when using library services, without an order from the FISA court.

Libraries provide distance learning opportunities from facilities abroad to American and foreign student and faculty who access library services remotely in support of their educational and research activities. The library community is concerned that these opportunities and the chance to bring access to knowledge and freedom of expression abroad will be diminished if the US government may, without a FISA court order or judicial oversight, monitor the use of library facilities by non-US citizens abroad if the government believes the communication or usage concerns foreign intelligence.

This is not a hypothetical concern. US universities have numerous educational programs throughout the world, and it is possible, if not likely, that student and faculty library users at those foreign campuses of US institutions will be relying on servers or routers that reside in the stateside facilities. At the same time, the issue is not likely to arise so often that obtaining FISA court approval would impose reasonable burdens on or create obstructions to terrorism or foreign intelligence investigations.

Now as always in our history, reading and inquiry are among our greatest freedoms. Libraries, inherent to a democratic society, provide a place to exercise intellectual freedom: the free and open exchange of knowledge and information where individuals may exercise freedom of inquiry and the right to privacy and confidentiality with regards to information sought. A 2005

report released by ALA documents the ***chilling effect*** of law enforcement activity in libraries. "Impact and Analysis of Law Enforcement Activity in Academic and Public Libraries" found that library patrons are intimidated by intrusive measures such as the USA PATRIOT Act and National Security Letters (NSLs). This chilling effect can take many forms; for instance, a patron's concern about privacy of their library records may result in reluctance to checkout or view certain materials.

Any surveillance can have a chilling effect, but warrantless surveillance is particularly insidious. Libraries recognize that surveillance is a necessary tool today, but Congress must recognize that the requirement for a court order to enter a library at least would send a message of fairness and due process the world over.

Proposed Language

The following language is proposed as a means to resolve our concern, the addition of a single caveat to Section 105B:

> **For purposes of this section, the term "communications provider" does not include a library (as that term is defined in section 213(1) of the Library Services and Technology Act (20 U.S.C. 9122(1)).**

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