

USA PATRIOT Act Reauthorization and Its Impact on Libraries

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The USA PATRIOT Act (the Act)^{*} was signed into law on October 26, 2001. The Act greatly expanded federal law enforcement surveillance and investigatory powers. The Act was set to expire or “sunset” on December 31, 2005, but was reauthorized by Congress and the President. On March 9, 2006, President George W. Bush signed the reauthorization legislation into law.

The reauthorization version contained noteworthy changes to the original Act. Among the changes was a new sunset provision whereby Section 215 of the Act, the portion that affects libraries, is now scheduled to expire on December 31, 2009. Other changes made to Section 215 of the Act include:

- Under the reauthorization, the Federal Bureau of Investigation (FBI) is now required to present facts to a secret federal court to demonstrate that there are reasonable grounds to believe that the library records being requested are relevant to an authorized investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or spying. Under the original version of the Act, the FBI was only required to assert that the library information being requested was being sought in connection with an authorized investigation.
- The reauthorization now requires personal approval for any request for records from a library by the Director of the FBI, the Deputy Director of the FBI, or the FBI Executive Assistant Director.
- It is now possible for a recipient of a Section 215 order to challenge the order. A recipient may challenge the lawfulness of a Section 215 order through a special review panel of the Foreign Intelligence and Surveillance Act (FISA) Court.
- Recipients may also challenge the gag order attached to the Section 215 order after one year. The FISA Court judge will overturn the gag order if and only if the government fails to certify and the judge does not find that allowing the disclosure might endanger United States national security, interfere with a criminal, counter terrorism or counter intelligence investigation, potentially endanger the life or physical safety of any person, or interfere with diplomatic relations.
- Finally, the reauthorization contains express language that enables a recipient of a Section 215 order to disclose the receipt of the order to their attorney to procure legal services or advice. The reauthorization differs from the original Act in that the recipient is not required to disclose the identity of their attorney to the FBI.

^{*} The acronym USA PATRIOT Act stands for: Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

Section 505 of the reauthorized Act is also of importance to public libraries. Section 505 provides that libraries, when functioning in a traditional manner, are not subject to National Security Letter searches. It is also of note that the phrase “functioning in a traditional manner” includes Internet offerings by libraries.

Section 505 also states that libraries are subject to National Security Letter searches if they offer services defined under Section 2510(15) of Title 18 of the United States Code. A National Security Letter search means a search conducted by federal law enforcement authorized by a National Security Letter that has been served at the location where the search is to take place. Section 2510(15) defines electronic communication service to include any service enabling a person to send or receive electronic communications. Based on this, if a public library offers its users email or instant messenger access, it is subject to National Security Letter searches. The FBI has affirmed this position. The FBI maintains that any library that offers Internet access is subject to National Security Letter search.

The bottom line for Michigan’s public libraries is this: the USA PATRIOT Act is alive and well. Accordingly, Michigan’s public libraries should have policies in place to address situations where federal law enforcement officials are seeking information pursuant to the Act.

Lastly, it is important to note that any policies and procedures that a public library had in place before the reauthorization of the Act are still valid and applicable today, although a library may wish to revise them. All public libraries should have established, written policies and procedures that address requests for confidential library information, including requests made pursuant to the USA PATRIOT Act; the Michigan Library Privacy Act, 1982 PA 455, MCL 397.601 *et seq.*; and the Michigan Freedom of Information Act, 1976 PA 442, MCL 15.231 *et seq.* It is vital that all library personnel become familiar with their library’s policies and are comfortable with implementing any applicable policy or procedure should the need arise.