Protecting Privacy, Protecting Democracy: Government Surveillance in U.S. Libraries

Amy Enberg-Aravena

Introduction

In the first fifty days of President Trump's second term, Immigration Customs and Enforcement (ICE) made 32,809 arrests related to immigration enforcement, more than the entirety of the prior year under President Biden's administration.[1] 8 U.S.C. § 1357 gives ICE agents the power to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" without a warrant.[2] This increase in ICE activity is particularly relevant to librarians, as law enforcement may question patrons on library property or seek to access patron records. Government surveillance and law enforcement activity in libraries is not a new phenomenon; the Federal Bureau of Investigation (FBI) Library Awareness Program and the USA PATRIOT Act are two examples of ways the U.S. government has operated in libraries or sought to make patron records available to law enforcement officers. Evaluating these instances—their history and their impact—can aid librarians and information professionals in understanding how to protect patron privacy in ever-changing political climates.

The Library Awareness Program

The Library Awareness Program was a Cold War initiative of the FBI that sought to surveil the circulation activity of patrons potentially associated with countries "hostile to the United States, such as the Soviet Union."[3] *The KGB and the Library Target, 1962-Present*, an unclassified FBI study of "Soviet intelligence services (SIS) utilization of America's specialized scientific and technical libraries to further the objectives of the SIS collection effort," noted that the SIS recruited librarians and students to gain access to research databases, such as the National Technical Information Service (NTIS), which Soviet nationals were prohibited from accessing by President Carter's 1980 letter to the U.S. Secretary of Commerce, "Policy on Technology Transfer to the USSR."[4] In response, the FBI sought to develop librarians as sources to counter the KGB, notably in the greater New York area through the Library Awareness Program, according to redacted FBI documents provided to the U.S. House Committee on the Judiciary in 1988. This development included interviewing librarians and encouraging them to report suspicious activities by "Soviets who are members of professional organizations who have libraries and related access and/or those Soviets who would not have access but request access to otherwise restricted library priviledges *[sic]*." The FBI itself labeled these activities as a "library awareness program," noting that the purpose was to "resolve any concerns expressed by librarians regarding the possible use of their resources by SIS officers."[5]

A challenge in evaluating the extent of the Library Awareness Program is that there is still not an official demarcation of when it began or which specific libraries agents targeted. When the National Security Archive made a Freedom of Information Act (FOIA) request for information concerning the Library Awareness Program in 1987, the FBI excluded documents for national security purposes, leading to *National SEC. Archive v. FBI*, 759 F. Supp. 872 (D.D.C. 1991). In this case, the court judged in favor of the FBI's exclusions of content under subsection (b)(2) of FOIA, "related solely to the internal personnel rules and practices of an agency," and in favor of the National Security Archive for content under (b)(5), "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency…"; it also ordered that the FBI provide more information to justify its exclusion of materials under (b)(7), "records or information compiled for law enforcement purposes," with special focus on subsubsections (C) and (D), "could reasonably be expected to constitute an unwarranted invasion of personal privacy" and "could reasonably be expected to disclose the identity of a confidential source…and, in the case of a record or information compiled by criminal law enforcement

authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."[6] Because Library Awareness Program materials are so inherently connected to the development of individuals as sources for intelligence purposes, it is difficult to gain information about the reach of its activities and which libraries it affected due to privacy issues.

Librarians had valid concerns about the constitutionality of the FBI's surveillance of libraries, leading to a widespread condemnation of the program. The ALA Council passed a *Resolution in Opposition to FBI Library Awareness Program* in 1988 condemning the Library Awareness Program that states it "opposes any use of governmental prerogatives which leads to the intimidation of the individual or the citizenry from the exercise of free expression." It further resolved that the ALA would "use all of the appropriate resources at its command to oppose the program and all similar attempts to intimidate the library community and/or to interfere with the privacy rights of library users by the FBI."[7] While these programs did not restrict expression directly or on face value, in practice a patron might self-censor and only browse materials deemed unsuspicious, which, as seen in the prohibition of Soviet nationals accessing the NTIS, may include technical or scientific information needed by students and professionals. The Supreme Court, in *Board of Education v. Pico*, 457 U.S. 853 (1982), held that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"; the restrictions of library activity by the Library Awareness Program infringe on this "right to receive ideas."[8] Unfortunately, as seen with the USA PATRIOT Act, government agencies continue to pursue surveillance operations in libraries, regardless of potential constitutional concerns.

USA PATRIOT Act

Following the September 11, 2001, terrorist attacks, Congress passed H.R. 3162, Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, which gave intelligence agencies and law enforcement agencies expanded powers when it came to national security investigations.[9] President George W. Bush, upon signing the Act into law, stated that the bill "gives law enforcement officials better tools to put an end to financial counterfeiting, smuggling, and money laundering," allows criminal operations and intelligence operations to "share vital information so necessary to disrupt a terrorist attack before it occurs," allows "surveillance of all communications used by terrorists, including e-mails, the Internet, and cell phones," and makes warrants "valid across all districts and across all States."[10] There have been several updates to the original Act, including H.R. 3199, which repealed the sunset date for the surveillance provisions of the USA PATRIOT Act, making them permanent, with the exceptions of sections 206 and 215, which were extended for four years.[11] The Department of Justice's *Report from the Field: The USA PATRIOT Act at Work* notes that section 504 amended the Foreign Intelligence Surveillance Act of 1978 (FISA) to allow intelligence officials conducting FISA surveillance to consult with federal law enforcement, which aided in bringing down the "wall" between intelligence and law enforcement in the case of the "Lackawanna Six," members of an al Qaeda cell.[12]

Sections 214 through 216 of the USA PATRIOT Act, with their expansion of telephone monitoring laws and records access, caused major privacy concerns in libraries that still exist in the present. With most libraries providing public internet terminals, section 216's extension of the "pen register" and "trap and trace" provisions "to include routing and addressing information for all Internet traffic, including e-mail addresses, IP addresses, and URLs of Web pages" enables law enforcement officials to access patrons' library computer records, and librarians are prohibited from disclosing the monitoring of information to patrons. Under section 214 and section 215, an FBI agent needs only to claim that the records may be related to a terrorism or intelligence investigation, without needing to demonstrate probable cause; according to Foerstel, "a 'warrant' issued by a secret FISA court is sufficient to require the immediate release of library records, and no court review or adversarial hearing is available to challenge the process."[13] Section 215 added provisions allowing the Director of the FBI or a designee to "make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution."[14] This allowed law enforcement officers to access library records of patrons in relation to intelligence investigations, and as stated above, there was little recourse to question if a warrant was valid. As of March 15, 2020, section 215 has expired, though existing cases and potential offenses before the sunset date are grandfathered in, and sections 214 and 216 are still in effect.[15]

Following the passage of the USA PATRIOT Act, libraries found ways to circumvent policies that impacted patrons' privacy, without outright disobeying the law. Skokie Public Library System in Illinois and Santa Cruz public libraries posted signs next to public computers, catalog terminals, the reference desk, and the circulation desk, informing patrons of the new laws and surreptitiously letting them know if law enforcement had asked to view patron records recently. Mark Corallo of the Justice

Department noted that libraries would not be breaking laws by destroying patron records in advance of any potential subpoenas, i.e., deleting computer terminal records at the end of each day or anonymizing patron circulation activity.[16] Forty-eight states and the District of Columbia have enacted laws to protect patron privacy; one notable example is the Michigan Library Privacy Act, which states in section (2)(a) that a library employee shall not release a library record without the "written consent of the person liable for payment" unless "a court has ordered the release or disclosure after giving the affected library notice of the request and an opportunity to be heard on the request."[17]

ICE Investigations

These two cases of government surveillance in libraries are relevant in conversations regarding initiatives by agencies like ICE, both in the lack of transparency surrounding them, such as with the extent of the FBI Library Awareness Program, and the continued provisions of the USA PATRIOT Act. One tactic used by immigration enforcement officers is exploiting confusing legal frameworks, for example, the distinction between administrative and judicial warrants and subpoenas. Because ICE is an agency of the Department of Homeland Security (DHS), which was established as an executive department by the Homeland Security Act of 2002, it does not have judicial power.[18] Immigration enforcement agents have the authority to arrest individuals believed to be "an alien illegally in the United States" with an ICE-issued warrant of arrest under 8 C.F.R. pt. 287.8(c) and without a warrant of arrest if the individual is "likely to escape before a warrant can be obtained" under (c)(2)(ii); *search* warrants, however, must be issued by a judicial court and be signed by a state or federal judge, along with other requirements, to be valid and therefore require immediate compliance.[19] Subpoenas, whether requiring testimony in court or the production of records, also have administrative and judicial distinctions. According to 8 C.F.R. pt. 287.4(d), if a witness refuses to testify or produce records designated in a subpoena issued by DHS, the issuing immigration judge or officer can request the U.S. District Attorney to seek a District Court order that would require the witness to comply.[20] It is this subsequent subpoena, issued by a judicial court and signed by a state or federal judge, that is a valid judicial subpoena and must be immediately complied with to avoid legal action.[21]

Conflating administrative and judicial warrants and subpoenas can lead to confusion and pressure to hurriedly consent to searches and records access without first consulting legal representation, posing a risk to library staff who may be served with ICE orders to release patron records. This was the case at Liberty High School Academy for Newcomers in New York City. In 2010, the school received a DHS subpoena signed by an ICE agent demanding the release of student records protected under the Family and Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g).[22] Though attorney Lauren Burke advised the school not to release the records, as the subpoena was administrative, rather than judicial, the New York City Department of Education required Liberty High to comply, due to the coercive language of the subpoena.[23] ICE's use of immigration subpoenas is not new—the Liberty High instance happened under the Obama Administration—but it is particularly relevant with evolving immigration rules, i.e., the rescinding of the 2021 DHS memorandum *Guidelines for Enforcement Actions in or Near Protected Areas* with the 2025 *Enforcement Actions in or Near Protected Areas.*[24] Because of the stress that accompanies being served with a warrant or subpoena, along with the potential that any established legal frameworks could change, library administrations should be proactive in creating plans for responding to law enforcement and immigration officer presence.

ALA makes several suggestions for librarians and library staff dealing with law enforcement inquiries, including asking for officer identification and referring them to the library director or legal counsel for records requests, or, if the officer has no warrant, explaining that the library does not make information available to law enforcement agencies unless presented with a proper court order. The guidelines note, "Without a court order, neither the FBI nor local law enforcement has authority to compel cooperation with an investigation or require answers to questions, other than the name and address of the person speaking to the agent or officer."[25] The strategies adopted by the library community in response to the Library Awareness Program and the USA PATRIOT Act, including understanding patrons' constitutional rights and finding loopholes to inform patrons of new legislation that impacts their privacy, will be helpful in responding to the Trump administration's increased immigration enforcement efforts.

Amy Enberg-Aravena (AmyEnbergAravena@gmail.com), Research and Instruction Librarian, Embry-Riddle Aeronautical University. This paper was written while a student of the Department of Library and Information Science, Graduate School of Information Sciences at the University of Illinois Urbana-Champaign for IS594, Spring 2025, Government Information, Professor Dominique Hallett.

Notes

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