Subpoenas to Libraries
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This memorandum analyzes the New Jersey Library Confidentiality Statute, N.J.S.A. 18A:73-43.2. State law prohibits public librarians from disclosing library records that identify patrons, except under certain limited circumstances. Specifically, N.J.S.A. 18A:73-43.2 provides that

> Library records which contain the names or other personally identifying details regarding the users of libraries are confidential and shall not be disclosed except in the following circumstances:
>
> a. The records are necessary for the proper operation of the library;
> b. Disclosure is requested by the user; or
> c. Disclosure is required pursuant to a subpoena issued by a court or court order.

Under state law, therefore, libraries may not disclose records that contain names, addresses or other personally identifiable information about library customers. A library record is defined under the statute as "any document ... the primary purpose of which is to provide for control of the circulation or other public use of library materials." N.J.S.A. 18A:73-43.1. This means that if the police want access to the computers to check patrons' e-mail, review borrowing records, or track websites, the police must first get a subpoena signed by a judge or a court order signed by a judge.

Legislative History

The legislative history of the library confidentiality statute reveals that the New Jersey Legislature specifically intended to limit the kinds of subpoenas that could be used to obtain customer information. The legislation, as originally introduced in 1984, permitted disclosures in response to "subpoena or court order." The bill was then

amended on November 19, 1984, to limit "the type of subpoena" to "*a* subpoena *issued by a court* or court order." As amended, the bill passed both houses of the Legislature unanimously.[1]

Subpoenas and Court Orders

Subpoenas are formal requests for testimony and/or documents. They give you advance notice that you should testify and/or produce documents by specific date. Subpoenas usually give you at least a week or 10 days to respond. Ordinarily, subpoenas are signed by attorneys.[2] An ordinary subpoena is *not* adequate to search library customer records; only a subpoena "issued by a court" will satisfy the requirements of the New Jersey library confidentiality law. For a subpoena to be "issued by a court," it must bear the signature of a judge. If the subpoena is defective, the library should file a motion to "quash" the subpoena before the due date.

A court order is a command issued by a judge. Like a "subpoena issued by a court," a court order must have a judge's signature. One kind of court order is a search warrant.

Search warrants give you no warning (in contrast to subpoenas, which give you advance notice). You must allow the police to conduct their search immediately, assuming the search warrant is valid. A search warrant must be signed by a judge. As Mary Minow notes on the LibraryLaw.com website, "Without a judge's signature, a

[1] The legislative history includes no reports, no hearings and no signing statements. The bill was pre-filed in 1984 and passed in 1985. The statement accompanying the bill noted that library confidentiality was a national concern, and that 16 states had similar statutes. Today 47 of the 50 states have library confidentiality statutes, and two states (Kentucky and Hawaii) have advisory opinions from their attorneys general, stating that library records should be confidential. See http://tinyurl.com/2bb6x

[2] The New Jersey Court Rules permit attorneys to sign subpoenas. R. 1:9. The Rules of Court apply after a lawsuit has been filed.

warrant is nothing more than a neato-toledo looking legal paper, with no power to compel anyone to do anything."[3]

Law enforcement officers can easily obtain court orders and warrants. A library can and should move to quash any subpoena or order that has not been signed by a judge.

Statutory Interpretation

The library confidentiality statute does *not* say that libraries must disclose records pursuant to a subpoena. To the contrary, it says that records must be disclosed pursuant to a subpoena "*issued by a court*." A basic principle of statutory interpretation provides that the words of a statute must be given meaning. Under this principle, the words "issued by a court" cannot be disregarded or assumed to have no meaning.

Lawyers usually sign their own subpoenas; attorneys are technically considered "officers of the court." But this does not strip the content or meaning from the words of the statute. A "subpoena issued by a court" must be different from an ordinary subpoena. It must bear a judge's signature.

The library confidentiality law has not been litigated in New Jersey. Our state courts have not yet ruled on the statute, but court decisions from other states strongly support the proposition that a judge must review and approve requests for records of library customers.

Other States

In New York State, a trial court determined that a library should not disclose circulation records. "The New York State Legislature has a strong interest in protecting

[3] See "Could you be sued for turning over an Internet user's sign-up information to law enforcement? A cautionary tale for libraries and other Internet service providers," available at www.llrx.com/features/internetsignup.htm. Sample search warrant procedures are available at http://www.llrx.com/features/draftsearch.htm.

the right to read and think of the people of this State. The library, as the unique sanctuary of the widest possible spectrum of ideas, must protect the confidentiality of its records in order to insure its readers' right to read anything they wish, free from the fear that someone might see what they read and use this as a way to intimidate them." In re Quad/Graphics, Inc. v. Southern Adirondack Library System, 664 N.Y.S.2d 225, 227 (1997) (quoting legislative history of CPLR 4509).

The Colorado State Supreme Court invalidated a search warrant, even though it had been signed by a judge. In Tattered Cover v. City of Thornton, 44 P.3d 1044 (Colo. 2002), law enforcement officials wanted to find out who purchased an instruction book on how to make methamphetamine. The Colorado Supreme Court held that special precautions must be taken before such a search could be authorized. If the police could obtain a bookstore's customer purchase records, the court reasoned, the result would be to chill people's willingness to read a full panoply of books and be exposed to diverse ideas. Law enforcement officials can obtain a warrant for such records only upon notice and after an adversarial hearing.

A federal district court in Washington D.C. determined that subpoenas directed to innocent bookstores implicated First Amendment concerns. When the Office of Independent Counsel investigated Monica Lewinsky, it subpoenaed a bookstore where she had purchased a book for President Clinton. The bookstore moved to quash the subpoena, and won. The court held that, in order to demonstrate the enforceability of the subpoena, the government must show: (1) a compelling interest in or need for the information sought; and (2) a sufficient connection between the information sought and

the criminal investigation. In re Grand Jury Subpoena to Kramerbooks & Afterwards, 26 Med. L. Rptr. 1599 (D.D.C. 1998).

Fourth Amendment Search and Seizure

The library confidentiality law places an obstacle between law enforcement officers and the evidence they are trying to obtain. This has always been a source of frustration for the police, but it is exactly what the New Jersey legislature contemplated when it enacted the statute. It is consistent with Fourth Amendment search and seizure law, which similarly frustrates law enforcement officers in their pursuit of evidence. The Fourth Amendment provides that

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by an Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

It is without question a burden to the police that they cannot freely seize evidence, intercept phone calls, or use electronic evidence for surveillance of individuals without probable cause. The framers of the Constitution, apprehensive of prosecutorial abuses, created a balance of powers that placed a judge between the authority of the state and the rights of citizens. "The basic purpose of this Amendment … is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Berger v. New York, 388 U.S. 41, 53 (1967).

There are numerous cases dealing with the interaction between the Fourth Amendment guarantee against unreasonable searches and seizures and the First Amendment freedom of expression.[4] In United States v. Rumely, 345 U.S. 41 (1953), a

[4] Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. See Marcus v. Search Warrant, 367 U.S. 717, 724 (1961).

bookseller was convicted of contempt of Congress for refusing to divulge to the House Select Committee on Lobbying Activities the names of those who made bulk purchases of political books for further distribution. The Court held, 7-0, that Congress had no authority to demand the identities of book purchasers. "If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press." Id. at 57-58 (Douglas, J., concurring).

In Stanford v. Texas, 379 U.S. 476 (1965), a search warrant authorized the search for and seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas" at a mail order bookseller. A subsequent search removed over 2,000 books from Stanford's home, and Stanford petitioned for the books' return. The Court held, 9-0, that the warrant purported to authorize an unconstitutional general search. "The constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." Stanford, 379 U.S. at 485.

The First Amendment Right to Read Privately

The First Amendment guarantees freedom of speech and of the press. It embraces an individual's right to read whatever she wants to read, without fear that the government will take steps to discover which books she buys, reads, or intends to read. Customers have a First Amendment right to receive information in public libraries. Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1252 (3d Cir. 1992). To

disclose customers' records without notice and without a court order would have a substantial chilling effect on their willingness to use public libraries. Customers would not feel at ease perusing, borrowing, reading or using other library resources, such as computers.

Libraries are places where anyone can receive information and explore ideas. When a person uses library resources, he engages in activity protected by the First Amendment because he is exercising his right to read. Any governmental action that interferes with the willingness of customers to use the library thus implicates First Amendment concerns. See, e.g., Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry . . . ."); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64-65 n.6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication."); Smith v. California, 361 U.S. 147, 150 (1959) (stating that "the free publication and dissemination of books and other forms of the printed word furnish very familiar applications" of the First Amendment); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it."); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (circulation of expressive material is constitutionally protected).

Privacy In Public Places

Inevitably, the question will arise whether patrons have a reasonable expectation of privacy in a public library. The answer is that the police still need a warrant even if they are gathering evidence from a publicly accessible place. The U.S. Supreme Court ruled in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), that law enforcement officers must obtain a warrant to take allegedly obscene publications off bookshelves in stores that are open to the public.