

## In Brief - Access to Library Records by FISA Warrant Before and After the USA PATRIOT Act

50 U.S.C. § 1861	Before the PATRIOT Act	After the PATRIOT Act	After the Re-Authorization Act	Some Outstanding Issues
Records	None allowed; section 215 orders limited to the records of common carriers, public accommodation facilities, physical storage facilities or vehicle rental facilities (50 U.S.C. § 1862 (2000)).	Any tangible things (including books, records, papers, documents and other items) could be requested from "any business or entity." (50 U.S.C. § 1861 (2002 supp.)	The same, with an added "library" provision: In the case of an application for an order for library circulation records or library patron lists, only 3 high level employees are empowered to sign the application (50 U.S.C. § 1861(a)(3)). Records must be described with "sufficient particularity" to allow them to be identified.	"All sign in sheets" or "all patron checkout records" is specific, but it is still a fishing expedition.
Standard to Issue	Although not applicable to library records, the standard was that "there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." (18 U.S.C. 1862, 2000)	(50 U.S.C. § 1861(b)(2)) - An application must state that "the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) of this section to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."	50 U.S.C. § 1861(b)(2)(A) added the requirement that there be " <b>reasonable grounds to believe</b> " the records sought " <b>are relevant to an authorized investigation</b> " but that records are " <b>presumptively relevant</b> " if they that they pertain to " <b>(i)</b> a foreign power or an agent of a foreign power; <b>(ii)</b> the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or <b>(iii)</b> an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation."	It does not <b>require</b> the FBI to show individualized suspicion or that a specific individual was "strongly suspected" of terrorism. AALL was among those who advocated a return to a "specific and articulable facts."

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Gag Order & Disclosure	Yes.	Yes. Left in place forever. Only disclose to those persons necessary for compliance with the production order. An attorney did not seem to be covered by this disclosure rule. (50 U.S.C. § 1861(d). No specified penalty (contempt of court)	May disclose to those persons to whom disclosure is necessary to comply with such order, and expressly permits the disclosure to an attorney to obtain legal advice, as well as other persons "as permitted" by the FBI. Do not have to disclose the name of your attorney, but, if asked, must say who else knows of or will know of the order. See 50 U.S.C. § 1861(d)(1). No specified penalty (contempt of court)	Still too broad; it prevents any discussion of the mere fact of receipt. It also prevents the recipient from discussing the effect on libraries and civil rights of the receipt of such orders, the "fishing expedition" aspect of any orders, or the impact of the gag order on personal and professional lives
Review of the Order	No	No	Yes, after one year, in the FISA court. Added 50 U.S.C. § 1861(f). The judge may allow disclosure only if the original order to produce was "unlawful;" if the government certifies that "there is a reason to believe that disclosure may endanger the national security of the United States or interfere with diplomatic relations" the certification is conclusive, and the recipient must wait another year to file a request to lift the gag order.	The secret FISA court, not the regular federal court, hears the petition. It can only be heard after one year. It can only be lifted if the FISA court finds that the FISA court improperly issued the order. So there is no meaningful review. (NSL recipients do not have to wait one year.)
Sunset	No	Yes, on 12/31/2005, but reauthorized	Yes, 12/31/2009	