

In Brief - Access to Library Records by NSLs Before and After the USA PATRIOT Act

18 U.S.C. § 2709	Before the PATRIOT Act	After the PATRIOT Act	After the Re-Authorization Act	Some Outstanding Issues
Records	Subscriber information, toll billing records, electronic communications transactional records. By its terms, the statute covers "identified customer's name, address, length of service, and billing information."	The same	The same	No judicial evaluation. Although the language seems limited, NSLs have been used to request subscriber information and access logs of library Internet users. (see NSL in handout) Unlike billing information, access logs may reveal content.
Standard to Issue	Specific and articulable facts that the person or entity to whom information sought pertains is a foreign power or an agent of a foreign power	Certify the records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment.	The same	It does not require the FBI to show individualized suspicion or that a specific individual was "strongly suspected" of terrorism. This section expanded the reach of NSLs and expanded the number of FBI personnel who could issue NSLs.

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Gag Order & Disclosure	Yes (no specific penalty/contempt of court)	Yes (no specific penalty/contempt of court)	Yes; penalty under 18 U.S.C. § 1510(e) of up to 5 years and fine of \$25,000 for an individual and \$500,000 for an organization; may consult attorney.	Complete gag orders can be left in place and subject to ongoing litigation even when the information is no longer needed.
Review of the Order	No	No	Yes; 18 U.S.C. § 3511. Judicial review (in federal court) of the order for production and the nondisclosure order available immediately (unlike 1 year waiting period for section 215 orders); can only re-challenge non-disclosure after 1 year; see also <i>Doe v. Gonzales</i> , 449 F.3d 415 (2006).	Certification that disclosure will affect, <i>inter alia</i> , criminal investigations, requires the court to keep nondisclosure order in place. Too much deference to broad certifications. Review not sufficiently meaningful.
Library Section	No	No	Yes. Libraries functioning in traditional roles exempt unless they are "electronic communication service providers" defined as providing services listed in 18 U.S.C.A. § 2510(15).	Exception too broad. Libraries that are part of institutions that host internet services (see 18 U.S.C. § 2510(15)) are clearly not exempt under this section (academic, firm law libraries). Public library exemption still subject to dispute, since all provide the "services listed in 18 U.S.C.A. § 2510(15)." Legislative history does not resolve the issue.
Sunset	No	No	No	