



LIBRARY LAW

2012 Beginning Workshop
Library of Michigan

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DISCLAIMER

This outline is intended as general information only and may not be relied upon as legal advice. Libraries should always consult with their legal counsel regarding legal matters including, but not limited to, the Library Privacy Act, Freedom of Information Act, and copyright.



LIBRARY LAW

Topics

- Library Privacy Act/Patriot Act/FOIA – Records
- Library Privacy Act/CIPA Internet Access
- Copyright



LIBRARY PRIVACY ACT

- 1982 P.A. 455, MCL 397.601 *et seq.*, as amended
- Main purposes
 - Protects confidentiality of library records/patron information
 - Restricts Internet access by unaccompanied minors
- Important to understand Library Privacy Act to properly respond to requests for library records/patron information and to situations involving Internet access



LIBRARY PRIVACY ACT - RECORDS

- Library Records

- Library record: a document, record, or other method of storing information retained by a library that contains information that: (1) personally identifies a library patron, including his or her name, address, and telephone number, or (2) that identifies a patron has having requested or obtained specific materials from a library.
- Library record includes any record with a patron's information or information regarding a patron's use of library materials (circulation records, access to computers/Internets, computer history of web site visits, etc.)
- Library record does not include nonidentifying information for evaluation of circulation of library materials.
- Library record does not include personal observation/recollection.



LIBRARY PRIVACY ACT – EMERGING ISSUES

- Video
 - Is a library surveillance video a “library record” protected by the Library Privacy Act?
 - Unclear answer under the Act; no guidance in Michigan case law.
 - Conservative approach – treat surveillance videos as protected by the Act.



PROHIBITION ON DISCLOSURE

- Library Privacy Act prohibits a library or library employee/agent from disclosing a library record (as defined) without the written consent of the person who is liable for the return of the material identified in the library record.
- Example: Parent/guardian liable for return of material on child's library card may access the child's library information and may consent to disclosure to third parties. (NOTE: "liable person" not limited to parent or guardian.)
- Library Privacy Act applies to overdue/hold notices transmitted to patrons.
 - Mail/e-mail safer
 - Phone calls problematic



COURT ORDER – EXCEPTION TO CONSENT

- Exception to Consent Requirement: Court order for release of library record after hearing and opportunity to be heard by library.
- Cannot disclose patron database to ballot question committee for millage campaign or to third parties for mailing lists.
- May use patron database to conduct library business (*e.g.*, to collect overdue fines).
- If improper disclosure of “library record,” penalty = actual damages or \$250, whichever is greater, plus reasonable attorneys fees and costs.



LAW ENFORCEMENT REQUESTS – INFORMAL

- Law enforcement may make verbal request for “library record” as defined.

Response: Advise police officer of Library Privacy Act, unable to provide “library record,” and refer to Director/Branch Manager. Police officers are not different from private citizens for these types of requests.



LAW ENFORCEMENT REQUESTS – FORMAL

- Police officers may appear at library with search warrant or subpoena for “library record” of a particular person or set of persons (*e.g.*, computer access logs during certain time).
- Search warrant: Immediately executable; contact Director/Branch Manager; contact library attorney; advise officer of Library Privacy Act but comply with search warrant.
- Subpoena: Describes requested record and time for compliance; not immediately executable; contact Director/Branch Manager; contact library attorney for attorney response.



RESPONSE TO SEARCH WARRANT

- Library Privacy Act prohibits disclosure except by court order after hearing where library may be heard.
- Search warrant is a court order but no prior opportunity for library to be heard.
- After search warrant executed, library attorney may file a motion to quash the search warrant.
- If the court does not quash the search warrant, it may order limitations on how library record is used to protect patrons' privacy (especially those not the target of police investigation).



RESPONSE TO SUBPOENA

- Subpoena allows more time.
- Library attorney may file a motion to quash the subpoena and have a hearing before any disclosure.
- If court orders disclosure after the hearing, it may order limitations on how library record is used to protect patrons' privacy.
- Same process for civil subpoenas issued in civil lawsuits.



USA PATRIOT ACT

- 2001 Act in response to 9/11
- Section 215 addresses library records
- Section 215 order (national security letter) cannot be issued unless the information sought is relevant to a national security investigation
- Section 215 orders must now be signed by Director or Deputy Director of FBI
- Recipients may seek judicial review
- In May 2011, Section 215 was reauthorized for 4 years (just before it was scheduled to sunset).

USA PATRIOT ACT – CONT'D

- Section 215 orders are immediately executable (like search warrants)
- Gag order: When served a Section 215 order, there is a gag order prohibiting disclosure of the existence of the order to anyone except the person responsible for releasing information per library policy (typically Director). (Contacting library legal counsel is nevertheless permitted.)
- A library must have a specific policy identifying who is responsible for releasing the information and all library personnel must be familiar with the policy.
- If a library employee is served with Section 215 order, review policy and contact only the person authorized to release protected information. Comply with gag order!



FREEDOM OF INFORMATION ACT - FOIA

- Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, adopted in 1976.
- FOIA provides for public access to public records with some specific exemptions from disclosure.



FOIA – KEY POINTS

- FOIA requests must be in writing. If not in writing, not legally required to respond.
- All written requests for information should be treated as FOIA requests. No requirement for a request to refer expressly to FOIA in order to constitute a FOIA request.
- A library must have a designated FOIA coordinator responsible for denial of FOIA requests. A library should have a FOIA policy for reviewing and responding to FOIA requests including forms for a FOIA request.
- All FOIA requests must be responded to within 5 business days (may be extended for 10 additional business days if the requester is notified within the 5 business day time frame).



FOIA KEY POINTS – CONT'D

- FOIA contains exemptions for disclosure including:
 - Records protected from disclosure under other statutes such as Library Privacy Act.
- The FOIA coordinator should carefully review written FOIA requests to determine if any exemptions are applicable.
 - E.g., privacy exemption, exemption for social security numbers, etc.
 - Review the application of any exemptions with legal counsel before denial.



FOIA KEY POINTS – CONT'D

- Written requests (other than search warrants, subpoenas, and Section 215 orders) should be treated as FOIA requests pursuant to the library's FOIA policy.
- Denial of verbal requests does not violate FOIA.
- Denial of written FOIA requests could be challenged in court and the library will be required to pay plaintiff's attorney fees if the court determines the denial was not permitted under FOIA.
- Denials may be made only by the designated FOIA coordinator.



FOIA– EMERGING ISSUES

- Meeting Notes/Board Members
 - The Michigan Court of Appeals held last year that handwritten notes of a township board member taken for personal use, not circulated among board members, not used to create minutes, and retained or destroyed at the board member’s sole discretion are not “public records” subject to FOIA.



FOIA– EMERGING ISSUES – Cont’d.

- Personal E-Mails:

- The Michigan Court of Appeals held that personal e-mails regarding union matters by school district employees/union officials were not “public records” subject to FOIA since they were not prepared, owned, used, or in the possession of a public body in the performance of an official functions.
- The Court reached this conclusion even though the e-mails were on the school district computer system and the school district had a policy prohibiting personal e-mails by employees.
- FOIA request for e-mails or similar internal communications requires review to determine if they are “public records” or personal e-mails not subject to FOIA. Review with legal counsel.



RECOMMENDATIONS – LIBRARY RECORDS

- Adopt and keep policy up to date on FOIA and procedures for responding to law enforcement requests.
- Designate FOIA coordinator (required by FOIA).
- Be careful. Before responding to requests for information, review Library Privacy Act and FOIA. When in doubt, consult with library attorney.



LIBRARY PRIVACY ACT – INTERNET ACCESS

- The Library Privacy Act also addresses Internet access by minors in Section 6 of the Act, MCL 397.606.
- Three types of speech not protected by the First Amendment:
 - Obscenity
 - Sexual matter harmful to minors
 - Child pornography



DEFINITIONS UNDER SECTION 6

LIBRARY PRIVACY ACT

- Minor – under 18 years old.
- Obscene (defined in MCL 752.362):
 - Appeals to prurient interest
 - Lacking serious literary, artistic, political, or significant value (reasonable person standard)
 - Depicts or describes sexual conduct in a patently offensive way



DEFINITIONS UNDER SECTION 6 – CONT'D

- Sexually Explicit Matter (defined in MCL 722.673)
 - Sexually explicit visual material, verbal material, or performance
- Harmful to Minors (defined in MCL 722.674)
- Sexually explicit matter that meets all of the following:
 - Considered as a whole, appeals to prurient interests of minors
 - Patently offensive to contemporary local community standards for minors
 - Lacks serious literary, artistic, political, educational, and scientific value for minors



SECTION 6 – INTERNET ACCESS

- Requires a library to adopt and enforce a policy to restrict a minor's access to obscene matter or sexually explicit matter harmful to minors (unless accompanied by parent/guardian)
- Two options:
 - Filter computers (except at least one terminal unfiltered access for adults and minors accompanied by parent/guardian.)
 - “System or method”
 - Random staff monitoring?
 - Monitoring by complaint?
 - In policy, recite good faith effort based on limited staff time?
 - Location of computers?
 - Under either option, the library must have an acceptable use policy for Internet

COMMENTS

- Generally, filtering is constitutionally permissible under *US v ALA* as long as an adult patron may request removal of filter and removal occurs promptly. Disabling filter is required to avoid blocking material protected by First Amendment. Can require age verification.
- Monitoring by staff puts staff in position of determining whether matter is obscene or sexually explicit matter harmful to minors. This can be difficult.
 - Train staff on statutory definitions
 - Use best judgment, “minefield” between public expectations and First Amendment rights of patrons
- Privacy Act grants immunity from civil suit under state law for enforcing method of compliance under Section 6.
- No express penalty provision for a library violating Section 6.



COMMENTS – CONT'D

- No perfect system; use best efforts and reasonable approach.
- A library should have a specific policy for Internet access by adults and minors and staff should be trained in the policy and procedures for enforcing the policy.
- The policy should include a process for appeals if a patron is found to be in violation and action is taken (*e.g.*, suspension of Internet privileges).
- Section 6 does apply to wireless Internet access by minors so either there must be filters or a “system or method” for restricting access by minors as part of a library’s policy.



CIPA

- Upheld in *U.S. v ALA* (2003)
- CIPA imposes certain requirements for libraries that obtain federal funding for E-rate (Internet service or internal connections) or LSTA (Library and Service Technology Act) (computers and directs costs associated with provision of the Internet).



CIPA – REQUIREMENTS FOR FUNDING

- CIPA requires filters (Technology Protection Measure) on library computers to protect minors (under 17) from obscenity, child pornography, and sexually explicit material harmful to minors. (Note: Under CIPA, a minor is under 17; under the Library Privacy Act, a minor is under 18.)
- Filters must be disabled upon request from adult. CIPA says the disabling request must be for “bona fide research or other lawful purpose,” but to avoid “as applied” First Amendment challenge, a library should not inquire into reason for request. Age verification is OK.
- Not clear whether CIPA applies to wireless networks; informal comments from FCC suggests wireless networks not subject to filtering requirement of CIPA.
- Penalty for violating CIPA – lose funding.



N-CIPA

- N-CIPA applies to libraries receiving E-rate discounts.
- N-CIPA describes requirements for Internet safety policy
 - Access by minors to “inappropriate matter” (subject to First Amendment limitations)
 - Safety and security of minors when using e-mail, chat, etc.
 - “Hacking”/unauthorized access
 - Unauthorized disclosure of personal identification information regarding minors
 - Measures designed to restrict minors’ access to material harmful to minors
- Public hearing must be held on Internet safety policy. (No specific notice requirements, reasonable published notice is recommended.)



COPYRIGHT

- Copyrights protect creative expression.
- Patent – protects inventions.
- Trademark – protects corporate identities and patents



RIGHTS UNDER COPYRIGHT

- Right to reproduce.
- Right to distribute.
- Right to prepare derivative work.
- Right to perform work.
- Right to display work.
- Right to license any of the above rights to others



COPYRIGHT REQUIREMENTS

- Original work of authorship.
- Creativity.
- Fixed in a tangible medium of expression.



PUBLIC DOMAIN

- Works in the “public domain” are not protected by copyright due to copyright expiration and may be used without permission.
- Works published before 1923 are in the public domain.
- Some works published between 1923 and 1963 may be in the public domain but depends on specific facts (such as copyright notice). Assume works are subject to copyright and not in public domain without legal review.
- Works by U.S. Government.



TERM OF COPYRIGHT

- For works published after 1978, copyright runs 70 years from death of author or for corporate author, 95 years from publication date.
- No condition (copyright notice, registration, or renewal) is required for works published after March 1, 1989.



COPYRIGHT – SPECIFIC EXEMPTIONS

- 17 U.S.C. 18(f) protects libraries and their employees from copyright infringement for unsupervised use of reproduction equipment provided that such equipment displays a notice that making of a copy may be subject to copyright laws.
- 17 U.S.C. 18(d) allows libraries to reproduce articles or “small portions” of a copyrighted work if the copy becomes the property of the patron and the library has no notice it will not be used for study/research, the library displays a prominent copyright warning, and the reproduction includes a notice of copyright that appears in the copy that is reproduced.



COPYRIGHT – SPECIFIC EXEMPTIONS – CONT'D

- 17 U.S.C. 18(c) allows libraries to make three copies of a published work solely for replacing a copy damaged, deteriorated, lost, or stolen, but only under certain limited circumstances (existing format is obsolete, unused replacement cannot be obtained at fair price, and copy reproduced in digital format is not available to the public outside the premises).
- 17 U.S.C. 18(h) allows a library during the last 20 years of a copyrighted work to reproduce in digital form for presentation, scholarship, or research but only if certain conditions do not apply.



COPYRIGHT – FAIR USE

- Four factors for fair use of copyrighted work:
 - Purpose and character of use (including whether use is of commercial nature or for nonprofit educational purposes)
 - Nature of the work (factual, creative)
 - Amount and substantiality of the portion used in relation to the work as a whole (part of work or whole work)
 - Effect of the use on the potential market for a value of the copyrighted work
- All four factors are not necessarily of equal weight
- No objective test for fair use.
- Fair use is slippery concept.



QUESTIONS?