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Michele Christian
Iowa State University

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Archivists and the USA PATRIOT Act: Are We Prepared?

Michele Christian

THE USA PATRIOT ACT

On October 26, 2001, only six weeks after the September 11, 2001, terrorist attacks on the United States, President George W. Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act). The quick response was prompted by a perceived need to provide government officials with the tools they believed were necessary to fight terrorism. With little debate, the Senate and the House of Representatives resoundingly voted in favor of the Act.¹ The reauthorization of the USA PATRIOT Act would not come as quickly. Several sections of the Act were set to expire on December 31, 2005; however, the deadline was moved to February 3, 2006, and again to March 10, 2006, to allow Congress time to

¹ American Library Association, "Analysis of the USA Patriot Act Related to Libraries" (April 2002) (online resource) <www.ala.org/ala/oif/ifissues/issuesrelatedlinks/usapatriotactanalysis.htm> (accessed April 23, 2005).

reach agreement.² The Act was reauthorized on March 9, 2006, but not without changes to the original Act.³

The beginning of the USA PATRIOT Act states that it is meant “to deter and punish terrorists in the United States and around the world, to enhance law enforcement investigatory tools and for other purposes.”⁴ As Peter Hirtle points out, many sections of the USA PATRIOT Act are not objectionable, especially those that limit the financial transactions of terrorists and that allow federal agents to monitor communications by terrorists.⁵ However, in addition to providing federal officials with more tools to catch suspected terrorists, the Act makes it easier for law-enforcement officials to invade the lives of private citizens.

The original USA PATRIOT Act modified several existing laws that could influence the way archives interact with their patrons, donors, and collections; these laws include the Family Education Rights and Privacy Act (FERPA) and the Foreign Intelligence Surveillance Act (FISA). These changes have the potential to impact not only freedom of speech and academic freedom, but also records management practices and security in archives.⁶

² “Congress Extends Patriot Act Another Five Weeks,” *American Libraries Online* (February 3, 2006) (online resource) <www.ala.org/al_onlineTemplate.cfm?Section=alonline&template=/ContentManagement/ContentDisplay.cfm&ContentID=115290> (accessed February 13, 2006).

³ American Library Association, “USA PATRIOT Act Reauthorization Analysis,” (online resource) <www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/usapatriotact.htm#reauth> (accessed July 27, 2006).

⁴ USA PATRIOT Act, (online resource) <<http://thomas.loc.gov/cgi-bin/query/C?c107:./temp/~c107PWj3te>> (accessed April 22, 2005).

⁵ Peter Hirtle, “The USA PATRIOT Act and Archivists” (online resource) <<http://dspace.library.cornell.edu/bitstream/1813/172/2/The+USA+PATRIOT+Act+and+Archivists.pdf>> (accessed December 12, 2006).

⁶ Paul T. Jaeger, et al., “The USA PATRIOT Act, the Foreign Intelligence Surveillance Act, and Information Policy Research in Libraries: Issues, Impacts, and Questions for Librarians and Researchers,” *Library Quarterly* 74:2, (2004): 100, 109. Lee Strickland, Mary Minow, and Thomas Lipinski, “Patriot in the Library: Management Approaches When Demands for Information are Received from Law Enforcement and Intelligence Agents,” *The Journal of College and University Law* 30:2 (2004): 365. This article offers practical advice to libraries about how to deal with the USA PATRIOT Act.

The recent changes affect the way archives conduct business and keep records, calling into question security measures that archives have long had in place. Archives often require patrons to fill out research forms as well as itemized lists of collections being used. In the event of a search under the provisions of the USA PATRIOT Act, these records could be requested.

One of the most contested aspects of the Act is Section 215, which allowed agents from the Federal Bureau of Investigation (FBI) to access such records as library and archives patron information and other items under the revised Foreign Intelligence Surveillance Act (FISA). Prior to the passage of the USA PATRIOT Act, FISA court orders could only address certain business records, such as those concerning passenger transportation and storage locker and vehicle rentals.⁷ Section 215 prohibited the disclosure to anyone, including the person being investigated, that a search had taken place. The only people privy to this information were those who had to comply with the search and legal counsel for the record holder.⁸ The revised legislation now states that the person who received the order can consult legal counsel without divulging his or her identity to the FBI. In addition the recipient can now reveal the existence of an order to another person, but only if the director of the FBI or the director's designee grants permission.⁹ The original USA PATRIOT Act made it easier for the FBI to conduct surveillance by changing the need for information to be only "significant" rather than "primary" to an investigation.¹⁰ The PATRIOT Act also permitted roving wire taps and surveillance of electronic communications without the knowledge of archives staff.¹¹

In short, these sections of the USA PATRIOT Act allowed the FBI to gain access to confidential information without hav-

⁷ Charles Doyle, "Libraries and the USA PATRIOT Act," *Congressional Research Service Report for Congress* (February 26, 2003) (online resource) <<http://www.fas.org/sgp/crs/intel/RS21441.pdf>> (accessed December 12, 2006).

⁸ USA PATRIOT Act, sec. 215.

⁹ American Library Association, "USA PATRIOT Act Reauthorization Analysis."

¹⁰ USA PATRIOT Act, sec. 218.

¹¹ *Ibid.*, sec. 206-210, 214, 216.

ing to prove that the information was necessary and without the archives' knowledge. The reauthorized Act now requires that the FBI must provide proof that the information they seek is pertinent to authorized investigations. The information sought must also be described adequately enough to be identified, thus lessening the possibility of the FBI conducting "fishing expeditions." The Act does not allow just anyone with a badge access to this information: the Foreign Intelligence Surveillance Court must approve FISA orders. The reauthorized Act also requires the director of the FBI or the FBI executive assistant director for national security to approve requests.¹²

Although forty-eight states have laws that protect patron privacy, federal law like the USA PATRIOT Act supersedes state law.¹³ The federal government does not acknowledge the existence of library-patron confidentiality and requires that libraries, and therefore archives, comply with search warrants and subpoenas.¹⁴ When questioned by the House Judiciary Committee, officials in the Justice Department said that a court order issued under Section 215 could be served to libraries, bookstores, and newspapers; however, they did not believe it likely that these institutions would have the type of records they would seek. They also said that a National Security Letter (NSL) would be the appropriate tool used to obtain these records.¹⁵

The reauthorization of Section 215 brought about other changes to the original USA PATRIOT Act. The Department of Justice is now required to provide unclassified annual reports to the House and Senate Committees on the Judiciary, the House Permanent Select Committee on Intelligence, and the Senate Select Committee on Intelligence. The reports identify the total number of applications and the number of requests granted, denied, and modified. In addition, the inspector general of the Department of Justice must complete an audit of the use and efficiency of the investigative powers authorized by FISA of 1978, as

¹² American Library Association, "USA PATRIOT Act Reauthorization Analysis."

¹³ Jaeger, "The USA PATRIOT Act," 106.

¹⁴ Doyle, "Libraries and the USA PATRIOT Act."

¹⁵ *Ibid.*

amended by the USA PATRIOT Act.¹⁶ Had this section of the USA PATRIOT Act been allowed to expire, the law would have reverted to the original FISA, in which businesses such as hotels, car rentals, and storage rental facilities would have been affected, and libraries and archives would no longer be subject to these searches.¹⁷ Section 215 is now set to expire on December 31, 2009.¹⁸

Section 505 of the USA PATRIOT Act could also impact archival repositories. Federal agents are now able to search for certain records without a court order by using the NSL.¹⁹ The type of documents subject to this section, such as financial records, can be found in many archival collections, accessible to anyone including law-enforcement officials; however, some of these records are restricted according to donor agreements or FERPA.²⁰ The reauthorized Act allows disclosure of the NSL to those necessary to comply with the order, legal counsel, and others permitted by the director of the FBI or the director's designee. The new Act also states that the director of the FBI or his/her designee must certify that disclosure of the NSL would impair the investigation or diplomatic relations, damage national security, or endanger lives. Penalties for violating this order have also changed. Instead of a one-year prison term if one is convicted of "knowingly and willfully" breaching the nondisclosure order, there is now a possibility for a person to be sentenced to up to five years in prison for doing so "knowingly and with intent to

¹⁶ American Library Association, "USA PATRIOT Act Reauthorization Analysis."

¹⁷ Charles Doyle, "USA PATRIOT Act Sunset: A Sketch," *Congressional Research Service Report for Congress* (June 10, 2004) (online resource) <www.fas.org/irp/crs/RS21704.pdf> (accessed June 7, 2005).

¹⁸ American Library Association, "USA PATRIOT Act Reauthorization Analysis."

¹⁹ USA PATRIOT Act, sec. 505.

²⁰ Hirtle, "The USA PATRIOT Act and Archivists"; Jackie Esposito, "Restoring Privacy to Student Records: A Proposal to Amend the USA PATRIOT Act," (International Council on Archives, Section on University and Research Institution Archives, East Lansing, Michigan, 2005) (online resource) <<http://archives.msu.edu/icasuv/papers/JackieEsposito.pdf>> (accessed July 28, 2006).

obstruct an investigation or judicial proceeding.”²¹

Many archivists consider patron information as the type of record most at risk under the USA PATRIOT Act. For the most part, the likelihood that archives will be visited by the FBI to obtain patron records with a FISA request is slim, given that archival materials contain historical information that would little interest terrorists (and subsequently the FBI) today.²² However, many archives contain the papers and records of individuals and groups whose activities and affiliations may interest federal officials. These documents, regardless of donor restriction, are also subject to the auspices of the USA PATRIOT Act and can be searched and/or removed with a FISA order.

Archivists, librarians, and other information professionals agree that the United States government needs tools to protect the nation from future terrorist attacks. However, professionals disagree with the idea of using the new law for invading citizens' privacy and suppressing the exchange of knowledge.

LIBRARIANS AND THE USA PATRIOT ACT

Libraries and other information centers have been affected by the federal government's national security initiatives throughout the twentieth century. In 1918, during World War I, a government order demanded the removal of certain materials from libraries and asked librarians to monitor library patrons.²³ Librarians readily complied with the order, many considering it their civic duty to conform to the wishes of the government. They removed books that could have been viewed as “disloyal,” such as German-language texts and anything that opposed war. Libraries also increased efforts to assimilate immigrants into American culture.²⁴ Again during World War II, the government

²¹ American Library Association, “USA PATRIOT Act Reauthorization Analysis.”

²² Hirtle, “The USA PATRIOT Act and Archivists.”

²³ Joan Starr, “Libraries and National Security: An Historical Review,” *First Monday* 9:12 (online resource) <http://firstmonday.org/issues/issue9_12/starr/index.html> (accessed January 11, 2005).

²⁴ Wayne A. Wiegand, “An Active Instrument for Propaganda,” *The American Public Library During World War I* (Westport, Conn.: Greenwood Press, Inc, 1989), 6.

asked librarians to censor library materials and report patrons who asked to see the banned materials. And once more librarians voluntarily complied with the government, even abandoning the American Library Association's (ALA) Code of Ethics (1939), which considered library patron information confidential, feeling that it was a peacetime luxury not to be afforded during war. During the Cold War, the ALA moved towards supporting intellectual freedom by condemning censorship, no matter the political climate, with the issuance of the Library Bill of Rights in 1948 and the Freedom to Read statement in 1953.²⁵ In the 1970s and 1980s the FBI's Library Awareness Program actively recruited librarians to monitor patrons who spoke foreign languages or searched for information on military matters and technological innovations.²⁶

With such recent history, many librarians were not surprised that their institutions were targeted after the September 11 attacks. The ALA was one of the first groups to speak out against the USA PATRIOT Act. The ALA brought together a group of librarians and university technology experts, including members of the Association of Research Libraries (ARL) and the American Association of Law Libraries (AALL), to analyze the proposed legislation as soon as the first draft became available. This group identified three areas that would affect libraries and their patrons: (1) using library systems for surveillance of patrons, (2) providing easier access to library records, and (3) the Act's definition of "terrorist" that would include any cyber criminal.²⁷

The ALA, the ARL, and the AALL issued a joint statement on October 2, 2001, that supported the United States' right to protect itself; however, it condemned the proposed limitations to

²⁵ Starr, "Libraries and National Security."

²⁶ Ibid. For a detailed account of the Library Awareness Program, see Herbert N. Foerstel's *Surveillance in the Stacks: The FBI's Library Awareness Program* (New York: Greenwood Press, 1991).

²⁷ American Library Association, "USA PATRIOT Act: A Summary of ALA Activities" (January 19, 2002) (online resource) <www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/background.pdf> (accessed June 8, 2005).

the freedoms cherished by its citizens.²⁸ Not only did the library groups form a united front, they also worked with non-library groups to oppose the proposed legislation. Representatives of the library organizations talked to members of the United States Congress they felt would be receptive to their concerns.²⁹

ALA reaffirmed its stand against the USA PATRIOT Act during the 2003 ALA Midwinter Meeting by issuing a resolution condemning the Act's disregard for civil rights. The resolution encouraged librarians and others to educate themselves about the Act and its possible impacts on libraries and library patrons. The resolution also urged libraries to establish retention policies for patron records and other policies that would ensure patron privacy. In addition, it reasserted ALA's commitment to work with other organizations to protect the freedom of intellectual pursuits and expression.³⁰

On September 15, 2003, John Ashcroft, the attorney general of the United States, derided the nation's librarians at a conference of the National Restaurant Association in Washington, D.C. Ashcroft asserted that the ALA and others were inciting "baseless hysteria" with regard to the uses of the USA PATRIOT Act to view library patron records.³¹ The Justice Department spokesperson, Mark Corallo, claimed that the attorney general did not mean to attack librarians and that his remarks were aimed at those responsible for convincing librarians to mistrust the

²⁸ American Library Association, "Library Community Statement on Proposed Anti-Terrorism Measures" (October 2, 2001) (online resource) <www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/terrorism.pdf> (accessed June 8, 2005).

²⁹ American Library Association, "USA PATRIOT Act: A Summary of ALA Activities."

³⁰ American Library Association, "Resolution on the USA Patriot Act and Related Measures That Infringe on the Rights of Library Users" (January 29, 2003) (online resource) <www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/alaresolution.htm> (accessed June 12, 2005).

³¹ "Ashcroft Says FBI Hasn't Used Patriot Act Library Provision, Mocks ALA for 'Hysteria,'" *American Libraries Online* (September 22, 2003) (online resource) <www.ala.org/al_onlineTemplate.cfm?Section=september2003&Template=/ContentManagement/ContentDisplay.cfm&ContentID=44344> (accessed July 12, 2005).

government.³² The following day, ALA President Carla Hayden responded with a synopsis of why the ALA was suspicious of the Act, distinguishing searches based on possible relevance from those generated by probable cause, and citing the federal government's history of using libraries for surveillance. Hayden asserted that she and the ALA were concerned that Ashcroft was "openly contemptuous of those who seek to defend our Constitution" and that he could alleviate these concerns by issuing data regarding the number of libraries visited using the expanded powers of the USA PATRIOT Act.³³ In the wake of this exchange the United States Department of Justice admitted that it had not used the Act to obtain library and bookstore records.³⁴

Researchers conducted two national surveys to learn about the impact of the USA PATRIOT Act on libraries. In 2002 Leigh Estabrook of the Library Research Center at the Graduate School of Library and Information Science, University of Illinois, surveyed 1,505 public libraries across the United States and received replies from 906 respondents (60 percent of those surveyed). The study asked about libraries' policies, staff awareness, requests from law-enforcement officials, and the opinions of the librarians answering the questionnaire. Dr. Estabrook found that only 7.2 percent of the respondents had changed any of their policies in response to the Act, though 14.5 percent of the respondents were in the process of doing so. Sixty percent of the libraries had educated their staffs and library boards about the Act and what to do when served with a search warrant or

³² Eric Lichtblau, "Ashcroft Mocks Librarians and Others Who Oppose Parts of the Counterterrorism Law," *New York Times*, September 16, 2003, sec. 1A, 23.

³³ Carla Hayden, "American Library Association Responds to Attorney General Remarks on Librarians and USA PATRIOT Act: A Statement by ALA President Carla Hayden" (September 16, 2003) (online resource) <www.ala.org/Template.cfm?Section=news&template=/ContentManagement/ContentDisplay.cfm&ContentID=43916> (accessed July 12, 2005).

³⁴ Eric Lichtblau, "U.S Says It Has Not Used New Library Records Law," *New York Times*, September 19, 2003, sec. 1A, 20.

subpoena. The study also found that law-enforcement officials had visited 10.7 percent of the survey respondents.³⁵

In January 2005 the ALA conducted a survey that focused on the effects of the USA PATRIOT Act on public and academic libraries. The Web-based survey examined the changes in patron attitudes, changes in library policies, and contacts made by law-enforcement officials as a result of the Act.³⁶ Of the more than 1,500 public libraries asked to participate, 33 percent responded to the survey, and of the 4,008 academic libraries that were sent the questionnaire, 22 percent responded. The early results focused on how often the libraries had been visited by law-enforcement officials. The survey found that public libraries had been visited sixteen times by federal officials and forty-seven times by state and local officials for records requests. Academic libraries had their records requested thirty-three times by federal officials and forty-one times by state and local law enforcement.³⁷ Critics of the survey contend that the data collected could pertain to various types of law-enforcement inquiries, not only those related to terrorism or intelligence investigations.³⁸

ARCHIVISTS AND THE USA PATRIOT ACT

While librarians proactively lobbied government officials, educated themselves, and made their voices heard early on, archivists remained publicly silent about the USA PATRIOT Act. Over a year after the passage of the law, the Archives and Archivists

³⁵ Leigh Estabrook, "Public Libraries and Civil Liberties—Questionnaire" (January 2003) (online resource) <<http://lrc.lis.uiuc.edu/web/PLCLnum.pdf>> (accessed December 12, 2006).

³⁶ "ALA Begins PATRIOT Study to Measure Law Enforcement Activity in Libraries," *Washington Office Newsline* 14:1 (2005) (online resource) <www.ala.org/ala/washoff/washnews/2005ab/001jan05.htm> (accessed June 22, 2005).

³⁷ American Library Association, "American Library Association (ALA) Announces Preliminary Findings of Study Measuring Law Enforcement Activity in Libraries" (June 20, 2005) (online resource) <www.ala.org/ala/washoff/oitp/pressreleasefinal.pdf> (accessed June 22, 2005).

³⁸ Eric Lichtblau, "Libraries Say Yes, Officials Do Quiz Them About Users," *New York Times* (June 20, 2005) (online resource) <www.nytimes.com/2005/06/20/politics/20patriot.html?ex=1155182400&en=68230141843fe7af&ei=5070> (accessed July 26, 2006).

Listserv saw its first discussion on the possible implications of the Act on member repositories. The exchange consisted of a few archivists discussing possible changes to the patron record retention schedules.³⁹ However, once archivists became more aware of the impact the Act had on archives, more discussions took place on the listserv focusing on the possible implications of the Act on civil liberties, the possibility of the expansion of the Act's powers, and evaluating patron information that archives collect.⁴⁰

Since these early discussions, several Society of American Archivists (SAA) sections and roundtables have focused attention on the USA PATRIOT Act. In 2003 the Manuscript Repositories Section; Reference, Access, and Outreach Section; and the Privacy and Confidentiality Roundtable drafted a joint letter to the SAA Council with language for a proposed resolution from SAA regarding the Act. The language highlighted archivists' reservations about the USA PATRIOT Act, including the protection of patron and donor privacy and confidentiality. These groups urged the SAA Council to respond to the concerns of the profession as they pertained to the USA PATRIOT Act.⁴¹

³⁹ Amy Cooper, "Privacy Rights vs. Collection Security" (December 2, 2002) (online resource) <<http://listserv.muohio.edu/scripts/wa.exe?A2=indo212A&L=ARCHIVES&P=R5839&I=-3>> (accessed June 8, 2005). Arthur Dostie, "Re: Privacy Tights [sic]" (December 4, 2002) (online resource) <<http://listserv.muohio.edu/scripts/wa.exe?A2=indo212A&L=ARCHIVES&P=R8044&D=0&I=-3>> (accessed June 8, 2005). Dean DeBolt, "Re: Privacy Rights" (December 4, 2002) (online resource) <<http://listserv.muohio.edu/scripts/wa.exe?A2=indo212A&L=ARCHIVES&T=0&F=&I=-3&S=&P=7867>> (accessed June 8, 2005). Barbara Austen, "Re: Privacy Rights" (December 4, 2002) (online resource) <<http://listserv.muohio.edu/scripts/wa.exe?A2=indo212A&L=ARCHIVES&T=0&F=&I=-3&S=&P=8509>> (accessed June 8, 2005).

⁴⁰ To see all discussions regarding the USA PATRIOT Act on the Archives and Archivists Listserv, search the following Web page: <<http://listserv.muohio.edu/scripts/wa.exe?S1=archives&I=-3>>.

⁴¹ Society of American Archivists, "Letter to SAA Council with Proposed Resolution Language concerning the USA PATRIOT Act from the Manuscript Repositories Section, RAO Section, and Privacy and Confidentiality Roundtable" (October 7, 2003) (online resource) <<http://archivists.org/saagroups/rao/04winpatact.asp>> (accessed April 23, 2005). Society of American Archivists, "Council Minutes" (August 23, 2003) (online resource) <www.archivists.org/governance/minutes/min081903.asp> (accessed July 27, 2006)

The SAA Council had been working on a resolution denouncing the Act until members realized that they would add nothing new to the statements already provided by ALA and others. At the June 6, 2004, SAA Council meeting, Tim Ericson, president of SAA, said that he would begin drafting a resolution against the renewal of the Act.⁴² Released on July 15, 2004, the resolution affirmed the necessity for the United States government to protect the nation from terrorism but did not condone the loss of civil liberties as a byproduct of these actions. It urged lawmakers to reevaluate sections of the Act that threatened privacy and confidentiality of archival patrons and donors.⁴³ When asked if he believed SAA's response to the Act was effective, Tim Ericson responded with the following statement:

I guess the best answer is "it depends." When considering what kind of response to make, I wanted to do more than simply to have the SAA say "me, too" in the wake of the very strong statement that the ALA had made in the fall. So we were kind of waiting for the issue of the USA PATRIOT Act to rear its head in the news again and that didn't happen for some months. So I do not think our statement was useful in the sense of shaping public policy. Unlike with the SAA's statement regarding the Archivist of the United States where there were many inquiries from the press and from other organizations, I can't remember receiving one call regarding the SAA's USA PATRIOT Act statement. The first time I heard it mentioned was at the opening plenary of the 2004 annual meeting in Boston when Nadine Strossen from the ACLU complimented the SAA on the statement.

I think the statement was effective only internally because (a) it satisfied the desire of the SAA membership for the organization to take a stand, and (b) it conveyed our position in a way that individual archivists could use

⁴² Society of American Archivists, "SAA Council Minutes" (June 5, 2004) (online resource) <<http://archivists.org/governance/minutes/min060504.asp>> (accessed April 23, 2005).

⁴³ Society of American Archivists, "Statement on the Renewal of the USA PATRIOT Act" (July 15, 2004) (online resource) <www.archivists.org/statements/patriotact.asp> (accessed April 23, 2005).

if they needed to cite a source in offering a position or an opinion at their own institution.⁴⁴

At the SAA annual meeting in August 2004, keynote speaker Nadine Strossen, president of the American Civil Liberties Union (ACLU), and Tim Ericson spoke about the effects of the USA PATRIOT Act on libraries and archives. Ericson focused on the increased levels of secrecy in the government, including an historical perspective of past government initiatives to modern-day measures. He characterized the USA PATRIOT Act as “only one of the latest ‘quick fix’ responses to problems, enacted without close examination or debate about the long-term cost to our civil liberties.”⁴⁵ Strossen talked about the ACLU’s efforts to combat the USA PATRIOT Act. She urged archivists to work with the ACLU and other organizations to limit the “unnecessarily broad powers the government now has under the PATRIOT Act.”⁴⁶ The 2004 meeting also featured a session entitled “The Impact of the USA PATRIOT Act on Archives and Archivists,” with speakers Gregor Trinkaus-Randall, Harvey Silverglate, and James Neal.⁴⁷

The Act seems to have increased the profession’s awareness of patron and donor privacy and confidentiality. The latest “Code of Ethics for Archivists,” which the SAA Council approved on February 5, 2005, includes sections that focus on these issues. Article VI states, “Archivists may place restrictions on access for the protection of privacy and confidentiality of information in

⁴⁴ Tim Ericson, “RE: Question,” September 2, 2006, personal email (September 2, 2006).

⁴⁵ Tim Ericson, “Building Our Own ‘Iron Curtain’: The Emergence of Secrecy in American Government” (August 5, 2005) (online resource) <<http://archivists.org/governance/presidential/ericson.asp>> (accessed April 23, 2005).

⁴⁶ Nadine Strossen, “Keynote Address” (August 5, 2004) (online resource) <<http://archivists.org/conference/boston2004/strossen.asp>> (accessed April 23, 2005).

⁴⁷ Society of American Archivists, “02. The Impact of the USA PATRIOT Act on Archives and Archivists,” *Boston 2004 Program Session* (online resource) <www.archivists.org/conference/boston2004/boston2004prog-Session.asp?event=962> (accessed June 7, 2005).

the records.”⁴⁸ Another section, Article VII, asserts the duty of archivists to protect the privacy and confidentiality of patrons and donors by protecting personal information collected in accordance with the repositories’ security measures.⁴⁹ The previous “Code of Ethics for Archivists,” passed in 1992, did not mention privacy or confidentiality, except Article IX which stated that if patrons agreed, archivists could supply their names to other researchers using the same materials.⁵⁰

This subject also has been discussed by other archival organizations, some of which have made formal statements regarding the Act. On September 30, 2004, in Pittsburgh, Pennsylvania, the Mid-Atlantic Regional Archives Conference (MARAC) steering committee passed a resolution supporting the oppositional SAA, ALA, and other archival and historical organizations to the USA PATRIOT Act’s potential to infringe upon the citizenry’s civil rights and privacy.⁵¹ The Committee on Institutional Cooperation University Archivists Group (CICUAG) discussed the USA Patriot Act and its effect on archives in their April 23, 2003, meeting in Kansas City, Missouri. The members of the group shared their concerns and the possible effect the Act could have on their own repositories.⁵²

The first mention of the USA PATRIOT Act in archival literature was Gregor Trinkaus-Randall’s article in the November/December 2003 issue of *Archival Outlook*. Trinkaus-Randall discussed how the Act could affect archives and how archivists

⁴⁸ Society of American Archivists, “Code of Ethics for Archivists” (February 5, 2005) (online resource) <www.archivists.org/governance/handbook/app_ethics.asp> (accessed June 8, 2005).

⁴⁹ *Ibid.*

⁵⁰ Gregor Trinkaus-Randall, “The USA PATRIOT Act: Archival Implications,” *Archival Outlook* (November/December 2003): 14.

⁵¹ Mid-Atlantic Regional Archives Conference, “The Mid-Atlantic Regional Archives Conference (MARAC) Statement on the Renewal of the USA PATRIOT Act” (September 30, 2004) (online resource) <<http://www.lib.umd.edu/MARAC/advocacy/1999-2004.html>> (accessed December 12, 2006).

⁵² Committee on Institutional Cooperation University Archivists Group, “CICUAG Meeting” (April 24, 2003) (online resource) <www.cic.uiuc.edu/groups/UniversityArchivistsGroup/archive/MeetingNotes/CICUAG%20Meeting%20-%202004-24-03.pdf> (accessed April 23, 2005).

could respond to the Act. He stated that the impact of the Act on archives comes down to privacy and confidentiality. Trinkaus-Randall encouraged archival repositories to work with their legal counsels and administrators to create policies and procedures to protect the privacy and confidentiality of patrons and donors. These measures should also address the kinds of patron information that should be collected and how long it would be necessary to keep this information. He urged archivists to create and follow retention policies and procedures for maintaining user information. In addition, Trinkaus-Randall suggested that archives create policies and procedures that describe how to handle requests for information by law-enforcement officials. He stressed the importance of all archival staff members' awareness of these policies and procedures. Additionally, archivists should review their repositories' collections and become aware of those that could interest law-enforcement officials in order to prepare for the possibility of a visit.⁵³ At the end of the article Trinkaus-Randall again emphasized the necessity of creating comprehensive policies and procedures, stating that:

The crux of an archival security program is its policies and procedures. Therefore, revisiting or creating strong and comprehensive policies and procedures that encompass the requirements necessitated by the USA PATRIOT Act will enhance archival security and prepare archivists for the eventuality that we will be the target of a subpoena or warrant by the FBI.⁵⁴

SURVEY OF ARCHIVAL AND MANUSCRIPT REPOSITORIES

In order to gain more specific information about the impact of the USA PATRIOT Act on archives, the author conducted a survey of archives and manuscript repositories in March 2005 to see if these institutions had made changes to their policies and procedures in response to the passage of the Act. The author chose to survey archives located in the United States associated with the Association of Research Libraries (ARL), as these types of institutions are more likely to have the kind of collections that

⁵³ Trinkaus-Randall, 13-16.

⁵⁴ *Ibid.*, 16.

would encourage a visit by the FBI.⁵⁵ Since several of the ARL institutions had more than one archival repository, the author limited the number of archives to be surveyed to no more than two per institution. One hundred ten surveys were sent via e-mail, and forty-two repositories (38 percent of the participants) responded. Of the archivists who returned the survey, 29 percent answered only one or two of the questions; 50 percent answered all of the questions.

The survey focused on the changes that archives were encouraged to make by the Trinkaus-Randall article in *Archival Outlook*.⁵⁶ The following are answers to select questions answered for this survey; for a list of these questions, please see the appendix.

The first question asked if the archives had made any changes to their policies or procedures as a result of the USA PATRIOT Act. Surprisingly, only 24 percent of the respondents had done so. For this group, there were several additional questions that explored the types of changes they made. The first of these was whether they consulted legal counsel in making these changes; 60 percent of the respondents replied that they had. The survey also asked if the repositories had created a policy to inform patrons of the possibility that law-enforcement officials might wish to see their patron information; 30 percent had created such a policy. When asked if the archives had created or adjusted retention policies or schedules for patron-related records, 50 percent said that they had made these changes. Only 20 percent had eliminated some or all patron records. No one said that they had created new patron records. Seventy percent of those who made changes to their policies created procedures for their archives to follow in the event of a law-enforcement enquiry. Sixty percent have made sure their staff members were aware of their policies and procedures.

The survey also asked if the archivists knew if they had any collections that would be of any interest to law enforcement. Thirty-nine percent of the survey respondents declined to answer this question. Of those who answered, 32 percent did not know

⁵⁵ For a list of ARL member libraries, please visit <www.arl.org/members.html>.

⁵⁶ Trinkaus-Randall, 16.

of any such collections, 7 percent were unsure, and 22 percent said they did. One respondent claimed that most collections in his archives could have something that would interest law-enforcement agents. Those who said they had collections that might be of interest were asked to list three of these collections. The respondents suggested two types: 60 percent claimed that building and personnel records for the repository's parent institution would be of interest; 20 percent said that collections pertaining to labor unions, civil libertarians, and those considered radicals would be of interest; and 20 percent mentioned both types of collections.

The survey inquired whether these archivists felt that they were prepared to handle inquiries by law-enforcement agents. Forty-eight percent of the survey respondents did not answer this question. Forty-five percent said that they believe they are prepared to deal with any request from law enforcement officials. Seven percent said that they were not prepared. One of these respondents replied that more staff training would be necessary to prepare that repository. Another explained that to prepare the archives for possible inquiries would be detrimental to his repository's security. He said that after a theft at his institution, they made the conscious decision to maintain all patron records into perpetuity.

The final question asked whether the respondent could think of any other ways the USA PATRIOT Act had affected his/her repository. Thirty-seven percent declined to answer this question. Fifty-one percent could think of no other ways the Act had affected their programs. Of the 12 percent who felt the Act affected their programs, two said that the USA PATRIOT Act had made them more aware of patron privacy and the legal issues involved. One said that the Act had encouraged his repository to make changes to its policies.

CONCLUSION

While the USA PATRIOT Act has been a source of controversy for libraries and archives, it has also fostered the debate and reexamination of libraries' and archives' policies and procedures. The passage of the Act has brought to the forefront the issue of patron privacy vs. collection security. Some repositories believe that it is in the best interests of their institution to maintain all patron-related records permanently, while others feel that it is

necessary to keep these records for only a few years. It is important for each archivist to consider all of the issues and weigh the pros and cons of each measure to ensure that his or her repository is doing what is best for both its collections and patrons.

In addition, the USA PATRIOT Act serves as a reminder that the confidential information in archives has always had the potential of being subjected to court orders. As Gregor Trinkaus-Randall advocates, in order to protect the archives, archivists must have policies and procedures in place to handle any law-enforcement request. By taking these steps, the archives will more quickly be able to resume operations if files need to be located and computers are confiscated. Ensuring that staff members are aware of the policies and procedures is essential to protecting the archives. Whether the USA PATRIOT Act remains or expires, archival repositories must be prepared for possible visits by law-enforcement personnel. Such policies and procedures are as necessary to an archives as having a disaster plan to prepare for acts of nature.

Michele Christian is the university records analyst for the University Archives at Iowa State University in Ames.

APPENDIX

Survey of ARL archives and manuscript repositories

1. Has your archives made changes to its policies and procedures regarding patron records in response to the USA PATRIOT Act?

Yes 24% (Please continue with question 2)

No 76% (Please go to question 3)

2. Please check all of the following that apply regarding the changes made to your policies and procedures:

- o Consulted legal counsel for advice: 60%
- o Created a policy to inform patrons of the possibility that law-enforcement officials might want to see their patron information: 30%
- o Created or adjusted retention policies or schedules for patron-related records: 50%
- o Eliminated some or all patron related records: 20%
- o Created new patron related records: 0%
- o Created procedures in the event of law-enforcement inquiries:

- 70%
- o Made staff aware of the policies and procedures: 60%
Please attach any written policies and procedures.

 3. Are there collections in your archives that may be of interest to the FBI or other law-enforcement agencies?
Yes: 22%
No: 32%
Unsure: 7%
Did not answer: 39%
If yes, please list up to three collections.

 4. Do you feel that your archives is well prepared to handle inquiries by law-enforcement agencies?
Yes: 45%
No: 7%
Did not answer: 48%
If no, what do you think could be done to make your archives better prepared?

 5. Can you think of any other ways that the USA PATRIOT Act has affected your program?
Yes: 51%
No: 12%
Did not answer: 37%
If yes, please explain.