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National Security Letters and the Library

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What is a "library"? What services provided by a library qualify the library as an "electronic communications provider"? The Patriot Act, as amended, purportedly exempts libraries from being served with a national security letter (NSL) unless the library provides "electronic communication services." 18 U.S.C. § 2709(f). The NSL that has been in the news – the one the FBI served on San Francisco's Internet Archive – raises both of these questions, but the answers are still far from clear.

The Internet Archive challenged the NSL it had been served on the grounds that the statute was unconstitutional and that it was exempt as a library. The Internet Archive is an online repository that hosts archived web sites and digitized books, as well as television, movie, and music clips. The case was settled. The FBI withdrew its NSL, and released Brewster Kahle, the chairman, from the gag order that had prevented him from discussing his receipt of the NSL. The settlement leaves the scope of the library exemption a subject of intense debate. Because so many libraries provide internet services of one kind or another, critics of the Patriot Act amendments claim the exception for electronic communications services providers in the NSL statute defeats the entire exemption for libraries. At a minimum, the FBI's service of an NSL on a library indicates that the FBI agrees that libraries are still an appropriate recipient of an NSL. The Internet Archive's NSL is only the third that has been challenged in the courts, and on the need-to-comply front, the challengers are ahead, three to zero. On release from the gag order, the challengers are only ahead two to one.

The publicity about the Internet Archive's NSL also raises questions about the FBI's interest in what people are downloading when they visit a "library." Despite then Attorney General John Ashcroft's statement that "The Department of Justice has neither the staffing, the time nor the inclination to monitor the reading habits of Americans. No offense to the American Library Association, but we just don't care," the evidence does not bear him out. In a 2003 University of Illinois study, over 10% of libraries reported receiving both formal and informal requests for library records of books read and web sites visited. That same year the FBI admitted that it had used Patriot Act process to check library computer records about fifty times (although not apparently to see what books people had checked out). A report by the Office of the Inspector General in 2007 revealed the Patriot Act's infamous Section 215 business record order had never been used to get library records, largely as a result of the intense public outcry by librarians.

So what Patriot Act process has the FBI been using? Apparently the FBI has been using NSLs, which are a form of administrative subpoena issued by the FBI – without judicial oversight. The three cases challenging NSLs involve service on very different entities. The first case involved a still-unknown internet service provider (ISP) that refused to comply with a request for customer information, alleging that the NSL

statute was unconstitutional. *Doe v. Ashcroft*, 341 F. Supp. 2d 471, 480 (S.D.N.Y. 2004). The court agreed, but left the gag order in place during the government's appeal, which was not resolved until after the bills reauthorizing the Patriot Act had been debated and passed. The government then gave up its claim that it needed any information, but the anonymous recipient remains bound by the gag order.

The second case involved a Connecticut library consortium that provided a common computer system for telecommunications services. *Doe v. Gonzales*, 386 F. Supp. 2d 66, (D. Conn. 2005). Although the director of the consortium informed the FBI that because library computers wiped out IP addresses every few hours there was no way to tell who had used a computer six months ago, the FBI response was "We have our ways." After consulting a lawyer, the consortium decided to challenge the NSL as unconstitutional; once again, the court agreed. And, once again, the gag order provisions remained in place during the appeal process, even though the identity of the plaintiffs had been revealed in poorly redacted pleadings filed by the government, and publicized in the press. The government insisted the gag order remain in place, declaring that no one in Connecticut read the *New York Times*, and polls showed that Americans didn't believe what they read in the press, anyway. And remain the gag order did, until the Patriot Act had been reauthorized. The plaintiffs eventually prevailed, and a federal district court in New York ruled that the Patriot Act, even as amended, was unconstitutional. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

The third case is the one involving the Internet Archive. Exactly what the FBI was looking for is still subject to the nondisclosure order, but the Internet Archive has been given permission to speak about the receipt of the NSL. The questions on everyone's mind are: How many NSLs have been directed at "library" user activity? And how many people have resisted? We'll never know the answer to the second question; even if recipients refuse to turn over information they believe to be beyond the scope of an NSL (as the Internet Archive did), unless a recipient successfully sues to lift the gag order, the recipient can't talk about it.

We'll never know the answer to the first question, either, but some information about the sheer numbers of NSLs the FBI has issued illuminates the scope of the question. In 2007, the Office of the Inspector General released its first report on the use of NSLs. Because of the FBI's poor record keeping, the total number of NSLs served had been significantly underreported (by about 17%), but the number is about 50,000 a year. The report found that the FBI had violated the procedural provisions of the Patriot Act by issuing NSLs where there was no underlying active investigation, demanding information without having issued the NSL, and inappropriately issuing NSLs to get information about U.S. persons.

Based on the evidence to date, some percentage of those NSLs were sent to libraries. And, based on the evidence to date, the information requested was not urgently needed, and in the end was not needed at all. In each case, there was plenty of time to get some form of legal process based on probable cause and to protect the delicate balance between civil rights and the prevention of terrorism we would hope is the government's goal. In the reported cases, the government did not, leaving it up to the recipient to act on behalf of all of us. I hope we would all do the same.