

FILED UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____)	
JOHN DOE; AMERICAN CIVIL LIBERTIES)	
UNION; AMERICAN CIVIL LIBERTIES)	
UNION FOUNDATION,)	
)	
Plaintiffs-Appellees,)	
)	
v.)	No. 05-4896
)	
ALBERTO GONZALES, in his official capacity)	
as Attorney General of the United States;)	
ROBERT MUELLER, in his official capacity as)	
Director of the Federal Bureau of Investigation;)	
JOHN ROE, Federal Bureau of Investigation,)	
in his official capacity,)	
)	
Defendants-Appellants.)	
)	
_____)	

MEMORANDUM IN OPPOSITION TO
EMERGENCY MOTION TO VACATE STAY

1. On September 20, this Court issued a stay pending expedited appeal to preserve the status quo, prevent significant harm to the public interest, and forestall the plaintiffs from mootng the government’s appeal by disclosing the identity of the NSL recipient in this case. Barely 48 hours later, the plaintiffs have returned to this Court to urge that the stay be vacated.

The occasion for the plaintiffs’ motion is the publication of an article in the New York Times on Wednesday, September 21, speculating that Library Connection is the recipient of the NSL. But as the plaintiffs themselves acknowledge, this is not the first newspaper article to associate Library Connection with this case. To the contrary, the New York Times published earlier articles that

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METROPOLITAN DESK

Hartford Libraries Watch as U.S. Makes Demands

By ALISON LEIGH COWAN (NYT) 805 words

Published: September 2, 2005

Librarians in Connecticut say they are closely following a federal case in a Bridgeport courthouse involving a demand for library records, both to learn more about the identity of the people at the center of the case and to underscore their concerns about such orders.

Weeks earlier, the Federal Bureau of Investigation had quietly demanded that one of their peers turn over library records under the USA Patriot Act. The case became public after the subject of the demand retained the American Civil Liberties Union to challenge the constitutionality of the request, as well as the order of silence that accompanied it.

Librarians from Stamford, Westport and Bridgeport were observers in the courtroom during an emergency hearing on Wednesday before Judge Janet C. Hall in Federal District Court in downtown Bridgeport as lawyers discussed objections to the nondisclosure order. There, Carlton Greene, a lawyer for the Justice Department in Washington, and Kevin J. O'Connor, the United States attorney for the district of Connecticut, defended the need for secrecy and other powers granted under the Patriot Act to aid in the investigation of terrorism.

Challenging every assertion was Ann Beeson, a lawyer for the civil liberties union. The judge is expected to issue her ruling on the order of silence within the next week.

Among the spectators that day was Alice Knapp, the president of the Connecticut Library Association; she is the director of public services for Stamford's Ferguson Library.

Ms. Knapp said the case provided some validation for librarians who had been complaining that the library provisions in the Patriot Act were a breach of privacy and could be invoked too easily. She said it rebutted comments by some supporters of the Patriot Act, who have said that librarians and their customers have little to fear from the act.

"Here, we have a case where it is, in fact, being used," she said, "and all of the things we were concerned about, about the right of our patrons to have privacy, are justified."

In the case being heard in the Bridgeport courtroom, authorities issued a document called a national security letter to request information, asserting that the information was needed in an investigation of terrorism. The subject of the investigation and the circumstances were not disclosed. In addition, the recipient of the letter is permanently barred from disclosing the request.

In the Bridgeport case, the civil liberties union has argued that the recipient of the letter did not even know if he had the right to consult a lawyer or others in his organization -- a concern that the lawyer for the government said was unfounded.

The recipient has remained unidentified, though it has gone into court to lift the order of silence so it can speak out against the Patriot Act before Congress, which is considering whether to extend important elements of the act after this year.

Careful reading of court records released on Wednesday in the Bridgeport case, with large sections heavily blacked

out, indicate that the recipient of the national security letter was a library consortium based in Connecticut, not a public library.

One affidavit by the recipient says that such consortiums provide back-office services to libraries as well as "staff expertise, training, consultation, troubleshooting and customization services to its customers."

The language is identical to that found in the "about us" section of the Web site of Library Connection in Windsor, Conn., a nonprofit consortium that serves 26 libraries in the Hartford area.

Other details in the court record about the recipient organization's governing structure and the executive who agreed to accept the letter also bolster the growing impression within library circles that it may be the Windsor consortium.

For instance, the affidavit relates how the executive was initially unsure whom he was allowed to consult and ultimately told the executive committee members on his board.

Of the four consortiums in Connecticut, "Library Connection is the only one that has an executive committee," said Michael Simonds, the chief executive of Bibliomation Inc. of Middlebury, Conn., the largest of the four.

The executive director of Library Connection did not answer messages left over three days on his office phone and e-mail seeking comment.

A member of the Library Connection board referred a reporter to the American Civil Liberties Union.

"I'd really discourage anyone from making guesses because obviously this whole issue is under a gag order," the board member said. Asked about Library Connection, an A.C.L.U. lawyer said she would call back. The call was not returned by deadline on Thursday.


Photo: Patrons at the Bridgeport, Conn., library discuss the federal demands for records from an undisclosed library system in Connecticut. (Photo by Douglas Healey for The New York Times)

The New York Times

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METROPOLITAN DESK

Connecticut Librarians See Lack of Oversight as Biggest Danger in Antiterror Law

By ALISON LEIGH COWAN (NYT) 1070 words

Published: September 3, 2005

Despite their concerns about the privacy of their patrons, librarians in Connecticut say they have turned over information sought by law enforcement authorities -- but usually when investigators are able to produce ample legal documentation obtained with a judge's consent.

Just two months ago, Bridgeport's main library had to produce typewriter ribbons sought by authorities investigating a woman who was later charged with sending threatening letters to the justices of the United States Supreme Court, librarians said.

That request arrived by subpoena and fell under longstanding criminal law, with plenty of judicial and legal oversight, not the rules enacted in the law known as the USA Patriot Act. That law, aimed at helping investigators in their pursuit of terrorists, gives officials broad authority to demand that libraries provide information about patrons. Supporters say it is a necessary tool in their efforts to fight terrorism and insist that it has not been abused.

Librarians say that what bothers them are the broad powers in the provisions that affect libraries.

"All of us, as law-abiding citizens, understand that when there's a subpoena, and there's judicial oversight of the process in the course of an investigation, library records may be subpoenaed," said Alice Knapp, president of the Connecticut Library Association, who is also the director of public services at the Ferguson Library in Stamford.

"But what is of the utmost concern to people," she continued, "is the lack of oversight" built into the antiterrorism law. "And that it can be used for a fishing expedition."

Librarians say their concerns over the lack of oversight are now playing out in Federal District Court in Bridgeport in a case involving a library organization that has received a demand for patron information as part of a broader, unidentified terrorism investigation.

"It's the argument that was waiting to happen," said Ann Osbon, the assistant city librarian in Bridgeport. Until the case burst into view, she said, "we were the hysterical librarians that nobody believed."

She said that if the government wins this case, library records will only become more prone to government prying and there will be "more and more demands for secrecy" surrounding those requests, a privilege that the antiterrorism law affords.

In the case being heard in Bridgeport, the Federal Bureau of Investigation used a provision of the antiterrorism law called a "national security letter" to demand that the library organization provide patron information that might be pertinent to an investigation. As is customary with such letters, it arrived without any prior judicial approval and offered no way, short of a lawsuit, to challenge the validity of the request. The recipient was also barred from speaking publicly about the matter or disclosing that it had received the request.

Because of the secrecy requirements afforded by the antiterrorism law, it is unclear how often such demands have

landed on librarians' laps. This one became public when the organization hired the American Civil Liberties Union to bring a lawsuit challenging the constitutionality of the request. The organization also pressed for an injunction that would lift the order for secrecy so that the recipient could speak about the experience while Congress was still deliberating on whether to reauthorize the Patriot Act.

On Wednesday, at an emergency court hearing, government lawyers argued against lifting it, contending that disclosure would irreparably harm an investigation that could have national security implications. The judge, Janet C. Hall, said she hoped to rule by next week and expected her decision to be appealed either way.

Though the organization's name was withheld from court records available to the public, the documents suggest that the organization at the center of the storm is Library Connection, a consortium in Windsor, Conn., that serves 26 libraries in the Hartford area. The executive director of Library Connection did not respond to repeated phone calls and e-mail messages, and a board member referred a call to the civil liberties union, which did not call back.

With its management unable to speak for itself in the matter, other Connecticut librarians have been quick to step into the breach about how loathsome they find the idea of having to violate a patron's privacy. "This goes against everything we believe in the profession," said Theresa Conley, the director of the library in Lyme, Conn.

In a survey released in June, the American Library Association said a sampling of its members reported that they had received at least 200 formal and informal requests for information from law enforcement authorities since Sept. 11, 2001. In 147 instances, the requests arrived in the form of legally executed subpoenas or other formal requests. In 119 instances, the requests were informal or voluntary in nature.

Michael Golrick, the city librarian for Bridgeport, said he recently complied with a request from the F.B.I. for the typewriter ribbons. Standing by the three typewriters, he said the two casually dressed agents who visited him on July 1 had all their paperwork in order, and even supplied replacement ribbons for the machines. So there was little he could do to protest. "We had a friendly conversation, and they got what they wanted," he said.

But three years ago, he recalled, a detective from Fairfield, Conn., who was investigating the case of a man who had taken hostages at a local university, threatening them with a bomb, called to inquire if the library could provide information about the man's reading habits.

Mr. Golrick explained that if a patron returns materials on time, no record exists beyond five days of the transaction. He noted that if a book was still out or a fine owed, some records would exist, but that he would need a properly executed request.

"So I explained," Mr. Golrick recalled, "if you really want to know, you need to get a legal subpoena. But I can't guarantee you that there would be anything there."

He said he never heard back from the detective.

Photo: Michael Golrick, the city librarian for Bridgeport, with two of the typewriters that held ribbons the F.B.I. obtained in an investigation of a woman accused of threatening United States Supreme Court justices. (Photo by Douglas Healey for The New York Times)

METROPOLITAN DESK

Plaintiffs Win Round in Patriot Act Lawsuit

By ALISON LEIGH COWAN (NYT) 952 words

Published: September 10, 2005

A federal judge ruled on Friday that the government cannot continue to bar the representatives of a nonprofit organization from speaking out about the sweeping powers that the antiterrorism law known as the USA Patriot Act gives investigators seeking library records.

In a ruling being followed by librarians, civil libertarians and others involved in the continuing debate over reauthorization of the law, Judge Janet C. Hall of United States District Court granted an emergency request by the American Civil Liberties Union for a preliminary injunction. Judge Hall found that the government fell short in meeting the heavy burden of proof needed to argue that national security interests warrant ignoring the organization's First Amendment right to free speech.

The 29-page decision, if permitted to stand, would lift the federally imposed order that is keeping the nonprofit organization from identifying itself as the recipient of a recent request for patron information from the Federal Bureau of Investigation.

The judge, however, granted a stay along with her ruling giving the United States attorney's office until Sept. 20 to persuade the federal Court of Appeals for the Second Circuit to overturn her decision. If that court fails to act quickly, she wrote, then the plaintiffs would be free to identify themselves and comment on some aspects of the case.

In siding with the organization, Judge Hall said she was convinced it had unique firsthand experience about the Patriot Act that it ought to be able to share publicly and would have greater authority in the debate if it spoke for itself, rather than had others speak for it. She said its "speech would be made more powerful by its ability to put a 'face' on the debate and by the public's awareness that the speaker was known to have received a request for library records under the antiterrorism law.

She wrote that "the statute has the practical effect of silencing those who have the most intimate knowledge of the statute's effect and a strong interest in advocating against the federal government's broad investigative powers." It creates a situation where "the very people who might have information regarding investigative abuses and overreaching are preemptorily prevented from sharing that information with the public."

This round in the case did not address larger questions raised by the same lawsuit challenging whether this portion of the Patriot Act can be invoked in future cases. Also, the identity of the library patron or patrons whose records investigators are seeking is not likely to become public as part of this case.

The case was brought in August, after the F.B.I. invoked Section 2709 of the antiterrorism law to demand library records from a Connecticut member of the American Library Association through the use of what is known as a national security letter.

The organization, whose name was blacked out from all court records and was not permitted to be mentioned in open court, is believed to be Library Connection, a library consortium in Windsor, Conn., that serves as the back office for many libraries in the Hartford area. Its officials have either declined to comment or referred questions to the civil liberties union.

According to a footnote tucked in the judge's decision, she said "responses to the court's questions" suggest that "the Federal Bureau of Investigation has issued many NSL's under Section 2709 in the past, but they have not been challenged by the recipients," with the exception of the handful of cases now before the courts.

The judge rejected the government's assertion that continuing suppression of the name of the recipient was necessary to protect the investigation, after having privately viewed classified information supplied by the government about the investigation without the plaintiff's lawyers present.

While she agreed that the government's "investigation clearly relates to national security," she concluded that government lawyers had offered more speculation than evidence that the investigation would be harmed by allowing the organization's representatives merely to confirm that they had received a national security letter.

In the meantime, she wrote, the organization's First Amendment rights were being restrained before it could make any comments at all, an infringement of the amendment that carries a heavy burden of proof.

The case has been unusual from the start. Government lawyers at first resisted having any mention of it included in the court docket. Court records had huge holes in them to keep information out of public hands, and hearings have been tortured by the need for lawyers and the judge to avoid slips of the tongue that might make the case moot.

When it became clear to the judge in an earlier hearing that she might need to take the government up on its offer to see classified information about the investigation in private, rather than accept its claim of national security on face value, she volunteered that she did not have security clearance, and discussions ensued over how it might be arranged.

In her decision, she suggested strongly that the government also find a way to share some of that classified information with the plaintiff's lead lawyer so she can "participate fully in this case," even if that means helping that lawyer gain the necessary security clearance, too.