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Privacy and Library Records, a Case Study in Whatcom County

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ARTICLE

Editors: Below Daniel Lerner provides a short introduction to Joan Airoldi's case study that places the event in the historical context of the struggle for civil liberties.

INTRODUCTION TO AIROLDI CASE STUDY

Daniel Lerner

Western Washington University

The events discussed in this article by Whatcom County Library System director Joan Airoldi, describe the stand taken by Airoldi and her board of directors, defying a request, then a subpoena, for the name of a patron who checked out a particular book. This exemplary display of personal courage connects Airoldi and her colleagues to those who stood up against the Palmer raids of 1919, the Red Scare of the 1930's, the McCarthy hearings in the early 1950's, the COINTEL program of the 1960's and 1970's, the illegal wiretaps conducted after September 11, 2001, and the successful passage of the FISA amendment act to make those wiretaps legal. This struggle to preserve privacy, free speech, due process and judicial control of law enforcement is ongoing as we have seen recently in the unsuccessful struggles to defeat the Patriot Act, to allow some of its provisions to sunset, or to repeal or substantially modify the act. The original "gag rule" continues to prevent public disclosure of actions taken under the Patriot Act, which, by law, are secret and hidden from the public. If the request for information from the Deming Library, and the subsequent attempt to extract it without the library's consent, had been made under the aegis of the Patriot Act, we would have no information about it, and no ability to act against it. Fortunately, our readers will be able to read about this significant case.

Privacy and Library Records, a case study in Whatcom County

Joan Airoldi

Whatcom County Library System

This article is best framed by the emails received following the media coverage of the Whatcom County Library System's action in 2004 in refusing to turn the names of library patrons who had read one of their books to the FBI per a grand jury subpoena.

- *I wonder how a PUBLIC agency, funded by PUBLIC funds could consider their user records private....It's not free speech, its not a private transaction. It's a PUBLIC transaction paid for by money that isn't yours..."*
- *In the controversy over the FBI requesting patron information for a book, I agree that it's a violation of privacy policies that should NEVER be allowed. However, I do have to wonder: if someone had written "I molest small children" in a book, would the library's response be the same? If not, why?*
- *(from CA) Your board of trustees showed the kind of personal courage that is so lacking in our congress today, and that occasionally in our history stands out as ordinary men and women who want what is right and stand up to those who wish to do immoral acts by perverting and misusing the law. Knowing full-well that government persecution could harass their families and, in some cases, even destroy lives, your Board of Trustees showed remarkable courage.*
- *Know that there are many Senior Citizen library card holders like me with an interest in world developments as well as mutli-cultural political and social commentary including dissent, who, sadly, have not used their cards for same since the Patriot Act was passed.*
- *Thank you for valuing my privacy and protecting my unfettered ability to read what I want, where I want, and when I want. You represent exactly what is "patriotism" ... a deep love of this country and the fundamental rights it has heretofore exemplified.*
- *I recently read an article about your library's refusal to release patron/circulation records. I just wanted to let you know that even though I am not a patron of your library (from Chicago) I am extremely appreciative of your stance, and wanted to express my gratitude that you are willing to stand up for the free flow of information and your patrons' privacy.*

- *Congratulations on standing up for readers' freedoms. I am an American citizen currently living in Canada, and have been truly appalled by what I've been reading on the erosion of freedom in the US, Actions like yours remind me that most Americans do believe in freedom, and are willing to stand up for it.*
- *After reading of your library's stand in regards to the request for readers' records by the FBI, I just wanted to write and offer my thanks as an American (from Oregon). I am disheartened by recent invasions made on people's constitutional rights ... I wish more in our society would display common sense, before our freedoms are completely surrendered.*
- *Too bad the FBI wouldn't tell you where to get off and throw your sorry liberal ass in jail over your stink on the Patriot Act ... every time a terror ring is broken up in the US, the hate mongers of the ACLU bitch, gripe and complain. We haven't had any attacks since then and I'll thank the Attorney General, Mr. John Ashcroft for that ... If the country was left up to socialists like you, we'd be inviting Osama to the White House to wine and dine and strike up dialog ... I bet you'd even like to invite him to visit your home, and if President Bush should come to Seattle, you'd be there with the nose ring lesbians beating the wicked sounding drum beats of paganism. I hope the FBI puts surveillance on you. You're a danger to society along with all the rest of the mean spirited fascists in your neck of the woods.(Alaska)*
- *As an attorney, I always thought the type of people who become librarians were "sweet," You have changed my thinking because you have shown me that some librarians are tough backed rascals when it comes to privacy and freedom of expression. In this country, the little guy can sometimes win. Thank you for sharing what some of us fear from the Patriot Act.*
- *George Orwell is Rolling in His Grave; FBI Demands Library Records.*
- *(voicemail) Hi Joan. I'm calling from Anywhere USA, and I saw you on the news today as did most of America. Just to let you know, Joan, that you are either with us, or with the terrorists. And your library policy does not supersede the war on terror. So I guess it's clear where you stand, Joan. Pretty sad, but it's clear.*
- *The Deming branch attitude is the same kind of socialist mentality we have seen from many agencies that supposedly service the community as a whole, but who actually end up using money collected from the whole community to serve a very personal, narrow agenda. It's also the same kind of leftist, liberal mentality that allows our children to consume porn at local libraries on the tax payer dime.*
- *If a terrorist attacks WA State, you better pray that he was not the one who checked out the OBL bio from your library. If he did – you and your library will be in a world of trouble*
- *I'm not sure which I find more disappointing.. your actions as a public employee or your pride in your actions.*

The Facts

On June 8, 2004, an FBI agent visited the Deming branch of the Whatcom County Library System (WCLS) and asked whether the library could provide the names of persons who had borrowed the book *Bin Laden: The Man Who Declared War on America*, written by Yossef Bodansky (1999). Staff at the library told the agent that the matter would be communicated to library management per the WCLS policy.

Management consulted counsel who then called the local FBI for further information. The FBI reported that there was a handwritten note in the margin that said "If the things I'm doing is [sic] considered a crime, then let history be a witness that I am a criminal. Hostility toward America is a religious duty and we hope to be rewarded by God."

The Library District's attorney told the agent that the library would not release any information without a subpoena or court order.

The Library District's attorney, after researching the quotation, wrote a letter to the FBI agent and reported that the writing in the margin was nearly a direct quotation of a statement made by Osama Bin Laden in a 1998 interview. (The book was confiscated by the FBI, but two budget-conscious readers, one in Colorado and one at tincture.com, sent WCLS replacement copies.) A subpoena was served to the Library District's attorney. A special meeting of the WCLS Board of Trustees was posted and the Library District's attorney was asked to attend the scheduled executive session of that meeting

in order to clarify the issue and discuss the options. A resolution to proceed with a Motion to Quash Subpoena was passed based on the following rationale:

- The subpoena infringes upon constitutionally protected rights.
- A library is a cornerstone of First Amendment rights, an institution built on the concept of free expression of ideas; free exchange of information is a fundamental First Amendment right of the library, the patron, and the public
- There is no substantial connection between the information sought and the subject of the grand jury proceedings—there must be an adequate foundation for inquiry. Even assuming that the subject of the grand jury’s investigation is related to the government’s interest in preventing terrorism, the information sought does not advance or relate to that goal.
- Libraries have the right to disseminate information freely, confidentially, and without the chilling effect of disclosure
- The Supreme Court has recognized, several times, that individuals have a fundamental First Amendment right to receive information, free of the chilling effects of regulation of that right
- The State of Washington has long recognized the privacy of library records and the need to protect records indicating a person’s reading choices from public disclosure, in RCW 42.17.310(1).
- The information is not readily available to the Library District because the computer records contain only the names of the current book borrower and a maximum of one previous borrower if that borrower borrowed the book within 90 days. Production of records within the backups of the system would be a burden on the library district and, in fact, are maintained by the Bellingham Public Library. (The Library District and the Bellingham Public Library have shared a common database and circulation system for over a decade.)

The Library District’s attorney received notice that the grand jury subpoena was withdrawn, and the request was made to dismiss the motion to quash as moot without prejudice because of the fact that the circulation data are maintained on the system operated by the Bellingham Public Library. Since that time, the Bellingham Public Library and Whatcom County Library System have examined and revised their circulation records retention policy and are documenting ownership of the records and procedures, should another such incident take place.

Before that time, on September 16, 2003, the WCLS Board of Trustees passed a resolution to support amendment of the USA Patriot Act (2001) and reaffirm the role of the public library as a foundation of democracy in Whatcom County, as did many other communities, states and agencies. *It is interesting and important to note that in early 2010, the expiring sunset provisions of the Patriot Act were renewed by an overwhelming majority and without much public notice or media coverage.*

The Story is Told

During Banned Books Week in late September, 2004, a panel discussion at Village Books, an independent Bellingham book store, featured a video on Denver’s Tattered Cover Bookstore First Amendment case. WCLS Attorney, Deborra Garrett, and WCLS Director, Joan Airoidi, were part of a panel discussion on the topic of confidentiality of library records, and as part of that presentation, the WCLS subpoena issue was discussed. Mari Bergstrom (2004), a WWU journalism student who was in the audience, wrote her interpretation of the evening, which appeared in an online version of the *Western Front*. Within 24 hours, an editor from the publication *Library Journal* called from New York to ask for details. As a result of this request, the Board decided that the story should be told so that others may learn and draw their own conclusions.

While the process was under investigation, the Board and staff treated the request to not disclose the subpoena as a gag order—and it was a difficult time. Had this been a Patriot Act subpoena, the gag order would have been mandatory, and all legal protections would have been nullified. Going through this experience has reinforced for the Board and staff the unchecked power of the Patriot Act. In 2005, Deborra Garrett stated, “It’s not that privacy rights can never be invaded, but if the government seeks to invade them, the government has to show that it’s absolutely necessary to do that.”

In his book, *Refuge of a Scoundrel: The USA Patriot Act in Libraries*, Foerstel (2004) points out that there is an element of human dignity in being able to confront one's accusers. We must protect our freedom of speech not only to ensure personal self-expression, but also because it brings political stability to our society through the availability of dissent and peaceful change. Openness and accountability can produce a fuller factual record and expose faulty assumptions.

Among the ironies of this story is the fact that the *9/11 Commission Report* (2004) contains the quotation written in the margin of the book checked out in Deming. That same report also describes an agenda of opportunity with the United Nations equating "literacy as freedom" and that "the United States should rebuild the scholarship, exchange and library programs that reach out to young people and offer them knowledge and hope" (p.378).

Unanswered Questions

This case leaves many questions unanswered: What does privacy mean in 2010?

Where is the line between fighting the war on terror and protecting individual rights? How has social networking and the openness of information on the Internet changed the game? These are questions that will continue to be deliberated and debated, but this article does not and cannot attempt to answer them.

Chris Finan (2007), author of *From the Palmer Raids to the Patriot Act: A History of Free Speech in America*, quotes a 1944 statement from Judge Learned Hand: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it" (p.305).

Resources

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