

# Confidentiality:

## A Case Study in Progress

The Illinois General Assembly will consider revisions to the Illinois Library Records Confidentiality Act (75 Illinois Compiled Statutes 70/1) during the spring 2005 session. The following case study presents background on how the issue arose and the association's multitiered strategy in confronting this challenge. This issue is still evolving, and it is important that ILA members have the basic facts, be informed of the association's deliberations, and understand the legislative process. It is our sincere hope that this article and others, for example, the August 2002 *ILA Reporter* article "The Politics of Internet Filters," will demystify the legislative process and encourage more members to become stronger advocates for Illinois libraries.

### **Why is this issue being raised in the Illinois General Assembly?**

On the evening of May 18, 2004, a Naperville Public Library staff member—the supervisor-in-charge at the time—phoned the police in response to a complaint by three patrons that they had witnessed an alleged act of public indecency in the computer lab of Naperville's Nichols Library. (No staff member had witnessed any inappropriate activity.) The suspect had left the library by the time the police arrived. Later in the evening, police officers returned to the library asking for the name of the suspect. Since the identity of the individual using the workstation could only be determined by searching the person's circulation record, library staff refused to divulge the name to the police, citing

the Illinois Library Records Confidentiality Act. Library staff did indicate that the information would be provided if the police obtained a court order.

Police and officials from the Naperville city attorney's office contacted the library's executive director, Donna Dziedzic, and deputy director, Mark West, the following day. They sought the release of the information on the basis that the police department was not the "public" as defined by the act. Roger Ritzman, the library's attorney, reaffirmed his opinion that the police are included under the scope of the Confidentiality Act and that the information could not be released without a court order, and Dziedzic informed city officials that the information would only be released under court order.

Later that day, the police department obtained and served a search warrant. The warrant compelled the production of the suspect's name and required the library to release the computer workstation the suspect was using while in the computer lab and videotapes from the library's surveillance system. The library complied with the warrant. A week later the police department obtained a grand jury subpoena and court order compelling the library to respond to the subpoena, requiring the production of registration records identifying other patrons in the computer lab at the time of the incident. After a review of the subpoena by Ritzman, the library delivered the information requested to the grand jury.

Subsequent to these events, officials of the Naperville police department indicated their desire to obtain an opinion from the Illinois attorney general as to whether the police were covered by the act. Both the DuPage and the Will county states' attorneys declined the Naperville police department's request to obtain such an opinion. Naperville Public Library officials later learned that State Representative Joe Dunn (R-96, Naperville) had indicated his willingness to work with the Naperville police department to submit legislation amending the Confidentiality Act. The amendment would provide the police with less restrictive access to library records.

#### **When did ILA become involved?**

On August 27, Dziedzic informed ILA that Rep. Dunn was committed to sponsoring a bill on the issue of the police and confidentiality statute. ILA's legislative consultant Kip Kolkmeier immediately contacted Dunn's office to work on this issue. Kolkmeier stressed that few issues raised more concerns from our members than patron confidentiality and that it was imperative to include the association in these discussions.

Sherri Weinstein, Dunn's assistant, stressed that their intent was to make the proposal very focused on investigating incidents in the library itself and used the example of an emergency situation where a child has been abducted from the library. She said the Will County state's attorney and Naperville city legal department were working on a first draft of the language and interested parties should await its completion before convening on the issue. Weinstein agreed to inform and include the association when all parties were ready to begin discussion. She also confirmed that Rep. Dunn was looking to do this in the spring 2005 session and not the fall veto session.

ILA informed ALA's Office for Intellectual Freedom of these developments and they have promised to be very supportive. For further background information on this issue, you might want to consult the ALA Web site,

- <http://www.ala.org/ala/oif/ifissues/confidentiality.htm>;
- <http://tinyurl.com/6wft2> (contains all state laws).

#### **What were the ILA Executive Board's first actions on this issue and how has membership been involved?**

On Friday, September 17, 2004, the ILA Executive Board determined the following:

- the library community had time to consider and discuss various options and strategies of response since the proposed legislation will not be introduced until the spring 2005 legislative session;
- the membership's opinions on this issue would be solicited at the 2004 ILA Annual Conference to help determine an action plan; and
- various proposed responses, ranging from alternative draft legislation to developing coalitions and information for the public and profession about current law, will be considered as the issue develops.

#### **Naperville City Council Votes**

The November 2 *Naperville Sun* reported that police "expressed frustration and anger because library officials refused them specific registration information necessary for the prompt identification and arrest of the offender." In response, the Naperville legal director and police captain drafted a three-sentence proposal for modifying the Confidentiality Act:

"Nothing contained in this act shall be construed as a privacy violation or a breach of confidentiality when a library cooperates with and provides information to sworn law enforcement officers in the process of a criminal investigation. Furthermore, nothing contained in this act shall be construed as permitting a library to refuse to cooperate with and provide information to sworn law enforcement in the process of a criminal investigation. Such cooperation and information shall include, but not be limited to, releasing registration records and identifying information of patrons, as well as access to computer and surveillance information."

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According to the *Naperville Sun*, this proposal was passed by the Naperville City Council with the support of Will County State's Attorney Jeff Tomczak, State Representatives Joe Dunn and Jim Meyer (R-48, Bolingbrook), Senator Kirk W. Dillard (R-24, Westmont), Naperville City lobbyist J. Glenn Schneider, and DuPage County State's Attorney Joe Birkett.

### **What was the ILA Executive Board's response to this action of the Naperville City Council?**

With this action by the Naperville City Council, it was obvious there was increasing pressure to change the state law. ILA quickly contacted Representative Dunn and Senator Dillard to express our grave concerns about the Naperville City Council proposal. Dunn and Dillard agreed to work with the library community on this issue, and provided a first draft of possible legislation to the ILA Executive Board. The proposal would create a narrow exception to allow—in an emergency situation—law enforcement personnel to seek information on only the “identity” of a suspect, witness, or victim of a crime. The proposal would also make certain that libraries would not violate the Library Records Confidentiality Act if the library cooperates under this narrow exception.

At the November meeting, the board thoroughly discussed the draft legislation and determined that while this first draft addressed several of the board's concerns, it also determined that the proposal could be further narrowed and improved if several key changes were made. Those proposed changes include the following:

- 1) Make clear that it is up to the library as the provider of any information to determine whether the request is truly necessary in light of a specific emergency situation;
- 2) Narrow the emergency exception to only those cases where there is an imminent threat of death or great bodily harm;
- 3) Require the request from law enforcement personnel to be in writing, be made only after an actual request for a court order has been initiated; and be reviewable by a court after the fact to determine whether it was proper to seek the information without a court order;
- 4) Make clear that the only information actually provided would be the identity of the library patron in question, and would not include disclosure of any other registration or circulation records that would indicate materials borrowed, resources reviewed, or services used at the library; and
- 5) Affirm that the right of the library to comply with such requests would be limited to this narrow emergency exception, and thus reconfirm that confidentiality of patron registration and circulation records must be maintained.

The board directed the ILA legislative consultant to begin negotiating changes in the draft legislation to meet these detailed restrictions.

As in any negotiation, this an ongoing process with alternative amendments being drafted back and forth. In December, ILA presented its fourth draft amendment to the Library Records Confidentiality Act to Representative Dunn. Ultimately, ILA might be successful in negotiating a bill that is acceptable to the Illinois library community and other parties, or the association might just oppose any changes to the existing legislation.

### **What else is ILA doing?**

While these negotiations are occurring the association is developing a grassroots community-based coalition that will support the library community on this issue; obtaining answers to frequently asked questions (FAQ) to discuss this issue with our elected officials, the public, and the press; collecting stories of how library records can be misused; and preparing talking points.

### **What can I do?**

ILA's Public Policy Committee chair Kendi Kelley says, “It is very important that each librarian makes sure trustees, library friends, and the local community are informed about the current law and the impact of proposed changes. I spoke with our local state's attorney to learn how the law is currently implemented. That conversation gave me the opportunity to explain why the law is so important to Illinois citizens. In addition, I have talked with local attorneys and Rotary Club members. Now is the time for each ILA member to initiate a conversation with their own supportive civic groups so those community members will be prepared to speak effectively to legislators on our behalf.”

### **Library attorneys comment on confidentiality.**

*What kinds of patron activity can be/should be reported to the police without violating patron confidentiality?*

Attorney Roger Ritzman says, “Any patron activity in a public setting (inside the library or on library grounds) which is criminal in nature or potentially criminal in nature should be reported to police. Given that a library is a public place, patrons have no reasonable expectation of privacy related to activity or conduct observed by patrons or staff.

“Inappropriate patron activity covers a spectrum of behaviors which varies from relatively minor violations of library policy (e.g., cell phone use in a quiet study area) to conduct which violates both library policy and criminal law (e.g., theft, possession of illegal drugs, public indecency). Deciding when conduct constitutes more than a violation of library policy and rises to the level of a possible criminal violation is a discretionary decision/judgment call for staff. If in doubt, I encourage staff to call the police. Let the police and state’s attorney make the judgment call as to whether criminal charges are appropriate.”

*What questions can staff answer for police that will not violate patron confidentiality?*

Attorney Jerry Dempsey says, “Since the statute imposes privacy requirements only with respect to ‘registration records’ and ‘circulation records’ of the library, staff may validly answer any questions that do not require publishing or making available information contained in those records. Thus, staff can answer questions where the answers are derived exclusively from the personal knowledge of the staff member in question, and not from the staff member’s knowledge of or review of ‘registration records’ and/or ‘circulation records.’ For example, staff with personal knowledge could validly answer the following questions: ‘Have you ever seen the subject individual using the library’s Internet access?’ ‘Do you know what kind of car the subject individual drives?’ ‘Is there a particular place in the library where the subject individual usually uses the library materials?’ ‘Does the subject individual usually associate with any other library patrons or individuals at the library?’ ‘Has the library had occasion to warn or discipline the subject individual for violating library policy or regulations?’”

*If a staff member witnesses a crime, can it be reported to the police? And, what is meant by “crime”?*

Attorney Phil Lenzini says, “I believe crimes can be reported to law enforcement when they involve the library, any of its property, staff, or programs as the target or victim or when the reporting does not violate the Library Confidentiality Act (meaning it does not require the identification of an individual with particular books or materials, nor include patron registration records).

“Examples of crimes would be destruction of a library DVD or stolen library material, which could certainly be reported, just as a vandal who threw a brick through a library window. Also, if a library employee witnesses an assault or battery in or about the library facility, I believe a call or report to law enforcement is proper, even identifying the perpetrator observed, so long as it does not involve the association with registration records or use of specific library materials.”

*Does it make any difference if it is a staff member or a patron who sees the alleged offense?*

Attorney Roger Ritzman says, “It does not make a difference if staff learns of inappropriate illegal conduct or activity by personal observation or from patron reports. In either case, activity/conduct which is or may be criminal in nature (vs. a minor violation of library policy) should be reported to police.

“If information is given to staff by patrons, I do not recommend that staff conduct an investigation of the incident. Let the police interview patrons and the alleged perpetrator(s) and conduct whatever investigation the police deem appropriate. Staff should simply report to police what (s)he saw or what was reported by other patrons.”

*What about school libraries? Are they covered under the existing law or does school law take precedence? Should we be concerned about this issue?*

Attorney Jerry Dempsey says, “The statute expressly covers public libraries, together with any ‘library of an educational, historical, or eleemosynary institution, organization, or society.’ Consequently, the libraries of Illinois public schools are subject to this statute. Since this statute does not conflict with the Illinois School Code (105 ILCS 5/1-1 et seq.), Illinois public schools must comply with the Library Records Confidentiality Act. However, this statute is clearly articulated to apply to the operations of public libraries, and does not ‘fit’ public school libraries as well as it could. For example, it is not clear what public school library records, if any, would constitute ‘registration records’ since most public schools automatically grant all of their students and teachers eligibility to borrow [the school’s] books and other materials.”

*What special concerns should academic libraries have in dealing with patron confidentiality considering campus security officers who have immediate access to all the information in most library patron records except the actual list of items charged? Should academic libraries require all outside security enquiries be routed through campus security officers?*

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Attorney Phil Lenzini says, “Academic libraries should route all outside security inquiries through their campus security office, both to insure proper compliance with all pertinent laws, including federal privacy regulations relating to students and their records, as well as library confidentiality, and to best coordinate law enforcement issues. Almost all inquiries are likely addressed by the institution’s basic records, rather than the narrow information contained by the library for circulation, especially given the manner of operation of modern circulation software. Only in very limited situations will such information likely be available and properly released to authorized reviewers.”

**Letter from ILA Executive Board Member to Representative Joe Dunn**

Dear Representative Dunn,

Several years ago local police came to the library and requested the circulation records of a Downers Grove resident who they were investigating for child molestation. Initially they asked for the circulation records of the suspect and his relatives at the same address. We have always had good relations with the local police, but, as the issue of library records had never come up, they were unaware of the Confidentiality Act. I explained that under the act we must be served with a court order before we are permitted to release an individual’s records.

The officers returned with a court order demanding the circulation records of everyone at a specific address. However, the address was an apartment building with many residents, including the suspect. Upon reviewing the court order, the library’s attorney determined that it was overbroad and appealed the court order. The judge agreed and issued a new order demanding the circulation records of the specific individual, including any records under two other names he was known to use. Our attorney reviewed the court order, determined that it was appropriate, and advised us on how to comply. Of course we did comply with that court order. The result was that the police obtained the records that they needed and the suspect was ultimately prosecuted successfully. The officers’ initial request was too broad and the due process required by the Confidentiality Act protected the privacy of a number of innocent individuals.

Unfortunately, in their eagerness to do their important work, police may ask for information that they really do not need, or have a right to obtain. The checks and balances provided by the requirement for a court order help to ensure that the information provided is proper and appropriate for the particular situation. In our situation, as in Naperville’s, the investigation was after the fact; there was no urgency to justify not following the proper procedure to obtain the needed information.

In evaluating the need to amend the Library Records Confidentiality Act, I urge you to give thoughtful consideration to the balance between the need for authorities to act quickly when a crime is in progress and an individual may be in danger, and the need to require the authorities to follow proper procedures when investigating a crime that has occurred sometime in the past, when no one is in immediate danger. I do not believe that the ‘inconvenience’ to the police of obtaining a proper court order should outweigh the protection of innocent citizens’ privacy.”

Sincerely,  
Christopher Bowen  
Director, Downers Grove Public Library

**January 21 meeting in Naperville**

On Friday, January 21, ILA (ILA President Allen Lanham, ILA Legislative Consultant Kiplund Kolkmeier, and ILA Executive Director Robert P. Doyle) met with Representative Dunn, the Naperville police, the Naperville lobbyist, the Naperville city attorneys, and the Naperville Public Library attorney. The meeting’s purpose was to discuss the fifth attempt to draft legislation revising the Illinois Library Records Confidentiality Act. The Naperville city attorneys had several objections to language proposed by the Illinois library community and negotiations continue as this issue of the *ILA Reporter* goes to press.

## Talking Points

The Illinois library community is sensitive to the concerns expressed by law enforcement officials and believes that they are adequately addressed by the current law. While maintaining our professional principles, the library community wishes to be as cooperative and reasonable as possible. Confidentiality for library users, however, is a fundamental principle of library service. It is essential to the exercise of free speech and library users must be confident in the knowledge that their library records are free from unwarranted intrusion. Libraries are key institutions of democracy and must be allowed to provide resources from multiple points of view. Library users must have access to these various points of view without the concern that their library records can be used to make a fallacious equation that what a person reads is indicative of what that person believes or how that person is likely to act. This presumption threatens freedom of access to information and the fundamental right to hold dissenting views. Without the safeguard of patron confidentiality, libraries cannot carry out their fundamental mission of providing access to ideas and information.

If ILA is unsuccessful in negotiating an acceptable bill:

- The current Illinois law has worked for more than twenty years, don't change it. In the recent Naperville incident, the police obtained the warrant, got the information, and were able to proceed. The law does not prevent law enforcement from doing its job, it is only intended to ascertain that the need for information is real and limited to the proper authorities.

If ILA is successful in negotiating an acceptable bill:

- Bill ### is a narrow exception to existing law that would allow a library to divulge a patron's identity without a court order in an emergency situation where grave injury or bodily harm is imminent. This would apply only to the identity of the person, not their entire library record, and would not apply when investigating a crime that had already occurred, in which case there would be time for a court order.
- The USA PATRIOT Act expands the scope of inquiries by law enforcement into library records, but patrons' rights to privacy and confidentiality remain unchanged.
- In a library, the right to privacy assures open inquiry without having the subject of one's interest examined or scrutinized by others.

For more important information on this topic, please consult *Privacy & Confidentiality in Libraries*. Chicago: Illinois Library Association and the American Library Association, 2002. (Published in the *ILA Reporter* and available at <http://www.ila.org/advocacy/privacy.htm>.) ILA will inform the Illinois library community as soon as possible about further developments regarding any proposed confidentiality legislation and will be issuing an action request when appropriate. 