Privacy and Confidentiality Issues
A Guide for Libraries and Their Lawyers

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Chapter One

WHEN DO PRIVACY AND CONFIDENTIALITY ISSUES ARISE?

It is a typical afternoon in the Main Street Public Library. A group of elementary-school-age children is enthralled by a librarian reading a book in the children’s room. A group of business people gather in the meeting room for a discussion of zoning issues. The local historical association works on an exhibit for the display case that they may utilize until the end of the month. A group of high school teenagers desperately asks a research librarian for assistance in gathering information on the American Revolutionary War for a term paper due the next day. In the periodical room, an elderly patron asks the librarian for assistance in finding an article that a friend mentioned contained useful information about arthritis. The telephone rings; a patron needs assistance tracking down a consumer magazine that rates dishwashers. These patrons are exercising their First Amendment right to receive information, speak, and associate with the assistance of library staff.

Other patrons read and peruse books, periodicals, or information on the Internet without the assistance of the library staff—exercising their First Amendment right to receive information in a quiet, personal manner. A young girl, too shy to ask for assistance, is trying to find information on the Internet about breast cancer because she was just told by her mother that a favorite aunt had been diagnosed with the disease. A young man quietly reviews a book on alcoholism, an issue that has touched his own family. A middle-aged couple searches for information on teenage pregnancy, having just learned that their daughter is pregnant. An elderly man—feeling forgetful lately and concerned about what is happening to him—selects a book on Alzheimer’s disease. The line at the desk lengthens as patrons make their book selections. The library is bustling. The community is using the library to learn, study, and enjoy books and other sources of information. Some patrons use the assistance of the library staff to find sources of interest; others use the library to gather information on sensitive topics that they prefer not to discuss with family, friends, or library staff. In each case the library serves as a critical link for patrons in the community to information they need but might otherwise not be able to access. In each case the patron exercises his or her First Amendment right to receive information.
That same afternoon, a sheriff comes to the Main Street Public Library with a subpoena. The subpoena requires the library staff to provide information about patron borrowing records. Specifically, the subpoena requires the library staff to provide the names and addresses of patrons who have borrowed books on childbearing in the last nine months. Absurd and impossible, most people would say when presented with this scenario. It is not impossible. This is a subpoena request that a librarian actually received several years ago.

The sheriff’s office was investigating a child abandonment case and believed that the person who had abandoned the child may have borrowed a book on childbearing from the library to enable her to birth the baby on her own prior to abandoning the child. The law enforcement officers had a legitimate investigation on their hands. It was, however, pure speculation that the person who abandoned the child had borrowed any books from the library to facilitate the criminal act. How did the library react? How should a library react in the same situation?

The library that received the request for information on patrons borrowing books on childbearing had a confidentiality policy that protected patron records. The librarian was appalled at the prospect that patron records would be produced and patrons then questioned about the library books they had borrowed. One can imagine the horror a patron might feel at having a sheriff’s officer show up on her doorstep asking her why she had borrowed books on childbearing. Perhaps a teenage girl learned she was pregnant and had borrowed some books on childbearing to prepare her for the pregnancy. She may have failed to inform her family of her predicament, but she certainly had committed no crime. Perhaps our middle-aged couple from the Main Street Public Library had borrowed some books on childbearing to share with their own teenage daughter about her pregnancy. When they did so, they certainly did not intend to share the knowledge of their daughter’s pregnancy with strangers. Must the library produce this information about its patrons’ reading choices? Must the patrons provide explanations for why they are borrowing certain books?

What should a librarian do when faced with such a demand? The particular librarian who received the request for the names of patrons borrowing books on childbearing immediately (and wisely) called her city attorney. She feared that if the library were put in the position of divulging the reading habits of its patrons, members of the community would be chilled in the exercise of their First Amendment rights. She was concerned that if the community learned that the library had responded to a request for patron circulation records without any objection, many patrons would decide not to borrow sensitive material from the library. Of course, for many patrons of limited financial resources, the library is the only place where they can go to secure such information. Library staff should immediately contact legal counsel if a request for patron use or circulation information is received.
What should the attorney do? Must the attorney advise the librarian to provide the patron information? Is there any recourse for the attorney to protect the First Amendment rights of the library or library patrons? What rights exactly do patrons have to preserve the confidentiality of their borrowing records? These are the questions that will be explored and discussed in the chapters ahead.

Criminal investigations are not the only instances that prompt requests to libraries for patron information. A request for patron information can be generated as a Freedom of Information Act or an Open Records Act request. Most states allow citizens to request information from a public institution such as a library. Many states, however, exempt personally identifying information, and some specifically exempt patron use information in libraries.

Several years ago, an employer learned that several employees were using Internet connections through the public library to access sites for which the employer was being charged thousands of dollars in long-distance communications. Of course, the employer also sustained the cost of many hours of lost employment caused by the workers’ using business hours for personal pursuits. There is no doubt that the employer had a legitimate interest in identifying the employees. The employer commenced an investigation and could pinpoint the time that the employees made the calls. The employer deciphered the identification numbers used by the employees to access the library system. But the employer could not discover the identities of the employees. The employer filed an Open Records Act request with the library and asked it to provide the names and addresses of the patrons whose identification numbers were supplied. The library faced with this request similarly turned to its attorney for advice, and litigation ensued when the library refused to release the names of its patrons. Once again, the issue boiled down to whether a legitimate need for information outweighed the critical First Amendment rights of patrons.

This book will explore the various issues connected with requests for patron circulation records or library use records and the First Amendment rights at stake when libraries are asked to produce those records. The book will discuss these issues with respect to both circulation records and Internet use records. Additionally, the book will analyze the role of the library as employer with respect to hostile work environment issues and the confidentiality issues that arise in that area. Finally, the book will provide practical advice to librarians and their lawyers in drafting privacy and confidentiality policies that provide the maximum First Amendment protection for library patrons.
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Because libraries are on the front lines of patron privacy and confidentiality controversies that raise First Amendment questions, it is increasingly critical that libraries and their counsel become familiar with the constitutional rights of patrons. By understanding the issues and the relevant laws, librarians can take action to protect users’ First Amendment rights.

In this clear and concise guide, set up in a frequently-asked-questions (FAQ) format, First Amendment attorney and litigation expert Chmara shares her decades of experience in easy-to-understand, jargon-free language.

Library directors and managers as well as lawyers who represent libraries will learn

- What First Amendment rights exist in libraries
- How to create a library policy to best protect patrons’ confidentiality and privacy
- The appropriate responses to requests for patron records
- How to deal with the nuances of Internet use privacy

Interspersed among the questions and answers, actual court case studies illustrate the significance of these issues. Covering circulation and Internet use records, along with the role of the library as employer, this guide is librarians’ first line of defense of the First Amendment.