

Legal Q&A: Book Bans, Catalog Requests, and Patron Checkout Records

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It has been a difficult year for libraries. The concept that by eliminating the written word one can eliminate the idea has sparked a fury of activity. Libraries across the nation have seen books pulled from shelves because someone did not like them. They have faced budget cuts due to stocking books that some deem objectionable. And some have seen requests for catalog or patron records. These problems are not new. Books and their custodians have always been in danger from those whom they threaten with the demand that they question their assumptions.

Fortunately, New Hampshire has a robust set of laws that may help libraries weather this storm. First, the easiest way for someone to interfere with the free circulation of materials is to detain an item. RSA 202-A:25 anticipates this action. A library may give written notice to return it, referencing the statute, via certified mail to such person's last address or delivered by a person designated by the lawful custodian of such property. If the patron refuses to return the item within 15 days, he or she is guilty of a violation, which has a maximum penalty of \$1,000 and, of course, grants the court the ability to order the return or replacement of the item. (Damaging an item is its own offense pursuant to RSA 202-A:24.)

The next most common salvo, and the one besieging at least a few libraries in New Hampshire, is the catalog request. Catalog listings are not, by themselves, protected. In fact, RSA 202-A:3-a and the general definition under RSA 91-A:1-a clarify that libraries are public agencies whose records are subject to disclosure pursuant to the provisions of RSA chapter 91-A. It is possible, therefore, that someone could request any record possessed by the library that would show all items held in its catalog. While there is no obligation for a library to create such a record pursuant to RSA 91-A:4, VII; if one exists, it would have to be disclosed upon request.

The next logical step, of course, is for the requestor to identify which materials he or she determines are "objectionable" and attempt to obtain more information about who is requesting those materials. Again, New Hampshire law anticipates this issue. RSA 91-A:5, IV clearly bars the disclosure of "library user" records. Additionally, RSA 201-D:11 provides that library records which contain the names or other personal identifying information regarding the users of libraries shall be confidential and shall not be disclosed except to the extent necessary for the proper operation of such libraries and shall be disclosed upon request by or consent of the user or pursuant to subpoena, court order, or where otherwise required by statute. Municipal libraries have an additional protection embedded in RSA 33-A:3, LXVI. Under that statute, municipal libraries have no obligation to retain library user records; those that do exist are confidential.

The existence of these statutory provisions gives rise to serious policy considerations by libraries. Libraries still using paper checkout cards must consider whether they are taking adequate steps to anonymize patron's checkout history by, for example, collecting the cards and redistributing them at random as new users check out books. Libraries that have moved to a digital system must ensure that adequate cybersecurity and record retention provisions are in place to remove the risk of what someone checks out being released for public dissemination. These policy considerations will be library-specific and may require weighing new costs against existing practice and patron services.

The good news is that municipal libraries in New Hampshire, at least, should breathe a little easier on the funding piece. Certainly, we have seen elsewhere that when someone cannot get a book pulled that they do not like, their final effort may be to bar funding of the entire library. Thankfully, New Hampshire's statutes have again anticipated this issue. RSA 202-A:4 clearly states that "[a]ny city or town having a

public library shall annually raise and appropriate a sum of money sufficient to provide and maintain adequate public library service therein or to supplement funds otherwise provided.” While we do not yet have a case on the meaning of the word “adequate,” it is clear that New Hampshire law does not contemplate that funding for a library can be yanked at town meeting simply because someone is upset with what resides on its shelves.

Libraries will have a hard year ahead. There is no indication that the interest in checkout records has abated in the wake of the recent mid-term elections. Libraries throughout New Hampshire will have to be vigilant and be careful to follow our existing statutory scheme and the protections embedded in it. Always feel free to reach out to us at the New Hampshire Municipal Association if you have any legal questions that arise and have a wonderful holiday and budgetary season. □