

# Library Privacy Considerations under Michigan and Federal Law



Presented by Lance M. Werner,  
Director, Kent District Library



# NOT LEGAL ADVICE

- This presentation is intended as an informational service only.




# Overview

- **Brief history**
- **Why is it important?**
  - Policies
  - Training
  - Implementation
- **Requests for information**
- **Minors and the Internet**
  - CIPA
  - N-CIPA
  - Michigan Library Privacy Act
- **Conclusion**
  - Lets not forget about intellectual freedom
- **Contact information**



# Government actions and authority

- Governmental entities, employees and officials have legal authority to act only as empowered by law. *Hanselman v Kileen*, 419 Mich 168, 351 NW2d 544 (1984).
- Library boards, directors, employees and agents can only act as authorized by law.



# Background and history

- Public Act 455 was signed into law in 1982
  - 1982 PA 455, MCL 397.601 *et seq.*
- Addresses the confidentiality of “library records”
  - Exemption to the Freedom of Information Act (FOIA)
- Allows for selection and use of library materials, under section 5, MCL 397.605
- Restricts Internet access by unaccompanied minors under the age of 18.
  - Provides for protection of 1<sup>st</sup> Amendment rights of adult patrons



# Background and history

- Significant amendments
- **Public Act 188 of 1996, Section 3(2), MCL 397.603(2)**
  - Amended the Act to enable whomever is responsible for returning materials or paying any debts incurred on a library account to access the account if the requisite authorization (signature) has been given.
    - Translation: it enables a parent or guardian to access a minor's library account if the parent or guardian has signed an authorization enabling them to do so.
    - It is noteworthy that the law only refers to the responsible person and not to parent or legal guardian
      - Grandma and grandpa can be the responsible party
    - It also provides the authority to the parent or guardian to disclose the otherwise protected information to third parties.
    - Library determines procedure (and form) for obtaining consent.



# Background and history

## ■ Significant amendments

### ■ Public Act 212 of 2000

- Codified requirements pertaining to minors and the Internet.
- Amended section 6 of the Act
  - Section 6, MCL 397.606 = PA 212
- The mandates provided by section 6 are not the same as the mandates set forth under the Children's Internet Protection Act (CIPA).
  - LSTA & E – Rate funds
  - Different age (17 v. 18)
  - More stringent
  - CIPA only concerns visual materials v. Privacy Act covers a broader spectrum of materials
  - Federal v. state



# Why is it important to know about the Privacy Act?

- It is important for directors and trustees to know about the Privacy Act so they are able to formulate and implement policies in accordance with the Act.
- It is important for library employees and volunteers to know about the Act so they are able to respond to requests for information and situations involving the Internet in accordance with the Act.
- There are penalties for violating the Act.





# Patron privacy and requests for information

- Protecting patron privacy is one of the main reasons the Act was initially adopted.
- Although privacy protections are not explicitly mentioned in the U.S. Constitution, the Supreme Court has determined that there is implied constitutional privacy protection.
- The confidentiality of library records is explicitly granted protection under the Act.
- **Bottom line = there are both state and federal privacy protections.**
- **But...just because someone is in a library doesn't necessarily mean they are under some type of veil of secrecy**
  - Limited public forum



# Patron privacy and requests for information

- In order to have a full understanding it is important to define to whom the Act applies and identify what types of information are protected.
- Section 2 of the Act, MCL 397.602 defines these and other crucial concepts.



# Patron privacy and requests for information

- **Library** - defined as any library established by: any unit of state or local government; a community college district; or a college or university; plus any private library **open to public**.
  - All legally established public libraries in Michigan fall under the above definition
- **Library record** - means a document, record, or other method of storing information retained by a library, that contains information which: 1) **personally identifies** a library patron, including his/her **name, address and phone number**, or 2) which identifies a person as having **requested** or **obtained** specific materials from a library.
  - Any record that contains a patron's contact information or information specifically pertaining to an individual's library usage (circulation records, records containing a history of websites visited, surveillance videos, etc.)
  - Does not include non-identifying information retained to study or evaluate circulation patterns.



# Patron privacy and requests for information

- The Act prohibits the disclosure of library records (as previously defined) without the **written permission** of the person who is responsible for the return of library materials or payment of any debts incurred on a library account.
  - Section 3 - MCL 397.603
- The only other instance where this information can be released is upon **court order**.
  - Subpoenas & search warrants.
  - Even then, the library has the right to appear in court before the information is released.
  - Attorney may represent library at hearing.
    - It is a good idea to have an attorney present while law enforcement officers are carrying out a court order or warrant



# Patron privacy and requests for information

## ■ Fitting it together

- The library should have policies in place that address how library employees handle requests for information from:
  - **Private citizens** (in person, by email, by phone, and under the Freedom of Information Act, 1976 PA 442, MCL 15.231 *et seq.*)
    - Legally required to have a FOIA coordinator
  - **Law enforcement**
    - Local, State, and Federal
      - USA PATRIOT Act requests
    - Verbal requests v. court orders, search warrants, or National Security Letters
  - **In house** requests from your library's friends group or library board
    - It is a violation of the Privacy Act to use your patron database to generate voter lists or mailing lists.
    - Mailing lists can be generated if permission has been given
    - OK to use information to conduct library business



# Patron privacy and requests for information

- A couple of considerations
  - It is a wise move to designate a single person (ex.- the library director) and an alternate (ex.- the deputy or assistant director) as the only people in the library with authority to make the decision to release information.
    - Have the designation made in writing in the library's policies
    - Can have this person serve as the FOIA coordinator as well
    - Particularly important when dealing with law enforcement
    - USA PATRIOT gag order
  - One authorization = one access
    - It can get tricky when a "family card" is used



# Patron privacy and requests for information

## ■ A couple of considerations

- Make sure that the library's policies are up to date and that the library's employees and volunteers are well trained on implementing the policies
  - Reviewed by your library attorney
- There are penalties for violating section 3 of the Act
  - Found in Section 4 - MCL 397.604
    - Actual damages or \$250, whichever is greater, plus
    - Reasonable attorney fees, and
    - Costs of bringing action
- Do not release information unless permission has been given or the library has received a court order
- If someone breaks the law call the police
- Personal recollection does not equal library record



# Minors and the Internet

- There are both state and federal laws which furnish mandates that limit minors' access to certain types of information on the Internet when utilizing library computers. We will be discussing two of these laws:
  - The Children's Internet Protection Act (CIPA)
  - Neighborhood Children's Internet Protection Act (N-CIPA)
  - The Michigan Library Privacy Act





# CIPA

- Signed into law December 21, 2000, PL 106-554, Sec. 1(a)(4)[div. B, title XVII, December 21, 2000]; 114 Stat. 2763A – 335.
- CIPA was upheld by the U.S. Supreme Court in 2003.
  - *United States v. American Library Ass'n. Inc.*, 539 US 194 (2003).
- CIPA furnishes policy requirements for eligibility for federal funding for K – 12 schools and public libraries:
  - E – rate (Telecommunications Act 1996)
    - Internet service or internal connections
  - Library Services and Technology Act (LSTA)
    - Computers and direct costs associated with the provision of Internet
  - Title III of Elementary and Secondary Education Act (ESEA)
- Non-compliance = lose funding



# CIPA

- CIPA mandates should only be directed at filtering visual images that pertain to the three types of speech previously mentioned that are not protected by the Constitution.
  - **Obscene:** defined under federal law at 18 USC Sec. 1460
    - *Miller v California*, 413 US 15 (1973)
      - 3 prong test
  - **Child pornography:** defined under federal law at 18 USC Sec. 2256
    - *New York v Ferber*, 458 U.S. 747 (1982).
  - **Harmful to minors:** defined under federal law at 20 USC Sec. 9134 & 47 USC Sec. 254(h)



# Miller Test

- Three prongs:
  - whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest,
  - whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
  - whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.



# CIPA

- Again, most types of speech are protected including speech deemed as:
  - Violent
  - Hateful
  - Disgusting
  - Objectionable
  - Offensive
  - Disturbing



# CIPA

- Long story short – what’s required?
  - Requires adoption and implementation of an Internet safety policy; and
  - Public meeting on the Internet safety policy; and
  - Operation of a “technological protection measure” (translation = filter all computers); and
  - Must be disabled upon request from adult.
- It is unclear whether or not CIPA applies to wireless networks.



# N-CIPA

- N-CIPA applies to libraries which receive E-Rate discounts.
- N-CIPA furnishes additional Internet safety requirements.
  - CIPA addresses filtering requirements and the need for an Internet safety policy
  - N-CIPA focuses on what must be included in a school or library Internet safety policy.



# Michigan Library Privacy Act

- Another “core” focus of the Act pertains to protecting minors from sexually explicit materials on the Internet.
- Most speech is protected by the Constitution. There are three types of speech which are not.
  - Obscene
  - Harmful to minors
  - Child pornography
- Library board members, directors, employees, and volunteers must be cognizant that they do not have the legal authority to determine the legal status of materials, only a court has the Constitutional authority to make this type of determination.



# Michigan Library Privacy Act

## Definitions

- In order to fully understand the legal requirements of section 6 of the Privacy Act, it is necessary to define the language that is used in the Act.
- **Minor** - an individual under 18 years of age
  - CIPA is 17 years but, because the Michigan law requires 18 years library policy should follow Michigan law
    - CIPA satisfied by using 18 years instead of 17 years because the State law is more restrictive than the federal law





# Michigan Library Privacy Act

## Definitions

- **Obscene** – as defined in Michigan Penal Code, MCL 752.362
  - Obscene means any material that meets all of the following criteria:
    - Appeals to prurient (sexual) interests.
    - A reasonable person would find the material, taken as a whole, lacking in serious literary, artistic, political or scientific value.
    - The material depicts or describes sexual conduct in a patently offensive way.



# Michigan Library Privacy Act

## Definitions

- **Sexually Explicit Matter** – also defined in the Michigan Penal Code, MCL 722.673
  - Means sexually explicit visual material, sexually explicit verbal material, or sexually explicit performance.
  - Not just visual materials ...



# Michigan Library Privacy Act

## Definitions

- **Harmful to Minors** - found in Michigan Penal Code, MCL 722.674.
  - Means sexually explicit matter which meets all of the following criteria:
    - As considered as a whole,
    - Appeals to the prurient interest of minors,
    - As determined by contemporary local community standards.
  - Penalty section MCL 722.677



# Minors and the Internet,

## Section 6, MCL 397.606

- Requires the adoption and enforcement of a policy to restrict a minor's Internet access to certain harmful obscene, explicit materials If Internet access is provided, or...
- The adoption of a method designed to prevent minors from viewing obscene or sexually explicit matter harmful to them.
- **Translation:**
  - Legally required either have a policy in place to prevent minors from accessing harmful materials or filters in place on terminals utilized by minors.
    - If filters are used, at least one terminal must have unfiltered access for adults



# Minors and the Internet, Section 6, MCL 397.606

- A couple of considerations...
- Section 6 applies to public library wireless networks.
  - If your library has a wireless network, you must have either policies or filters in place to comply with the Act.
    - It is a good idea to delineate authorized v. unauthorized use.



# Minors and the Internet, Section 6, MCL 397.606

- A couple of considerations...
- The problem with “shoulder tapping” policies
  - Puts librarians in a policing role
  - Places responsibility on librarians for applying legal standards in determining what is or is not harmful
    - Librarians do not have the legal authority to make the decision
      - There have been lawsuits
      - Intellectual freedoms, due process violations & sexual harassment
    - Potential lawsuit if due process is not followed or if access to protected information has been wrongfully withheld
      - But there is shelter under the Privacy Act from civil suit for taking actions in implementing section 6 mandates
- Must respond to complaints from patrons and library employees



# Minors and the Internet,

## Section 6, MCL 397.606

- With respect to policies, obviously it is impossible to address every potential situation.
  - Best efforts
  - Do not place the library in the role of the parent
  - The First Amendment prohibits the government from infringing on intellectual freedom. It does not prevent a parent from keeping a minor from accessing harmful information.
  - First amendment does not protect materials which are considered: child pornography, obscenity, or harmful to minors
    - Still, it is up to a court to decide whether or not something falls into one of these categories
- When it comes to policy making, it is vital that the policy is in accordance with the law.
  - A policy that controls content beyond what has been provided by Michigan law is probably unconstitutional
  - Content based restrictions are always constitutionally suspect
  - Make sure there is some type of appeals process built in



# Minors and the Internet,

## Section 6, MCL 397.606

- Provision on immunity from civil liability in re: actions taken to implement Section 6
  - Refer to MCL 691.1407
  - Provides immunity from suits brought in tort
  - It is not a blanket immunity, and probably would not shield the library from a suit for infringement of Constitutional rights
  - Immunity is valid for the library board, individual board members, the library, and library employees and agents





# Wireless networks

- The Privacy Act applies to wireless networks, CIPA does not
- Libraries are required to take steps to prevent minors from accessing sexually explicit or harmful information on the Internet
- At the very least, the library should delineate authorized v unauthorized use of its network in its policies



# Conclusions

- Make sure that the library's policies are up to snuff
- Training, training, training...
- Intellectual freedom is a Constitutional right granted under the First Amendment. Librarians are professionally obliged to protect and promote intellectual freedom. Any and all decisions should be made with this obligation in mind.
- Remember, this presentation is not intended as legal advice, but rather as an informational service.



# Contact information

- Lance M. Werner, Director
  - Kent District Library
  - e-mail: [lwerner@kdl.org](mailto:lwerner@kdl.org)
- THANK YOU AND GOOD LUCK IN YOUR ENDEAVORS!