

ACLU LETTER RE: THE USA PATRIOT ACT

Re: Section 215 of the Patriot Act

Thanks for your inquiry about the effect on therapists of Section 215 of the Patriot Act. While at first blush the language of the statute does not appear to be much different from existing law, the statute actually expands the power of the federal government to obtain confidential records in several quite disturbing ways.

For example, although the FBI must obtain a court order before demanding access to a therapist's confidential records, the showing that the government needs to make is very minimal. Unlike the showing needed to obtain a search warrant, under Section 215 the FBI need not convince the court that it has probable cause to believe that the patient has committed a crime. In fact it does not even have to demonstrate that it has reasonable suspicion to believe that the patient is involved in terrorist activities. All the FBI needs to do is "specify" that the records are "sought for" an investigation to protect against international terrorism and the court must issue the order. It thus allows the FBI to obtain records about a particular patient as part of a larger investigation, even though the FBI is quite sure that the patient has engaged in no wrong-doing. Indeed, Section 215 is so broad that the FBI could ask for a therapist's records of all patients from a particular country or who practice a particular religion. In essence the Act opens up these very sensitive records to a fishing expedition by the FBI.

Second, Section 215 has a built-in gag order that prevents the therapist from telling anyone that he or she has been required to turn over a patient's records. Even if the therapist suspects that the government is seeking the records for an improper purpose, for example to silence a critic of the government's actions, the therapist is prohibited from telling anyone that the government has come after these records, even though the patient is a U.S. citizen. If the patient is neither a citizen nor a resident alien, the order can be based entirely on the patient's First Amendment activities. Thus a leader of a protest against U.S. policy in Iraq could find herself the subject of a Section 215 order. Indeed, simply being a member of the wrong mosque could be enough.

I hope this information explains why so many professionals like yourself are concerned about Section 215 of the Patriot Act. Any professional concerned about the privacy of the third party confidential records he or she maintains should be wary of Section 215.

Sincerely,
Ann Brick
Staff Counsel ACLU 415-621-2493