

THE CITY'S NEW "WATCH LAW" PROGRAM

On March 2, 2004, the voters of San Francisco passed Proposition E, authorizing the Board of Supervisors to take responsibility for how the City responds to document and record requests under the **USA PATRIOT Act**. The Board has now adopted a specific set of procedures in response to Proposition E. A copy of Ordinance No. 51-05 is included.

The responsibilities of individual City officers and departments under the new procedures are simple:

IF YOU RECEIVE A COURT ORDER, WARRANT, OR OTHER OFFICIAL REQUEST FOR RECORDS OR DOCUMENTS FROM THE FBI, YOU MUST SEND A COPY OF THE REQUEST TO THE CLERK OF THE BOARD OF SUPERVISORS IMMEDIATELY, AND CERTAINLY NO LATER THAN 24 HOURS AFTER YOU RECEIVE IT.

If the Clerk of the Board and the City Attorney determine that the request was made under the USA PATRIOT Act, the Board of Supervisors—and not the individual City officer and department—will respond to the request on behalf of the City and you will receive further instructions on how to proceed. No officer, employee, or department may respond to such a request without the prior approval by resolution of the Board of Supervisors. If the Clerk of the Board and the City Attorney determine that the request was not made under the USA PATRIOT Act, you will be told to respond directly to the request after consulting with the deputy city attorney working with your department.

Some other things to keep in mind:

- Immediately after sending a court order, warrant, or request for records from the FBI to the Clerk of the Board, you should begin identifying and collecting the documents or records described in the request, and then send the Clerk a short explanation of the types of documents or records that you have found and an estimate of the amount of records involved. The documents or records themselves should **not** be sent to the Board of Supervisors until the Board requests the materials.
- The USA PATRIOT Act says that it is unlawful for anyone to disclose that they have received a request for documents or information under the Act. The City's new procedures do not change that rule. But because the members of the Board are now "persons necessary to produce" the documents or information under the new procedures, you may disclose the request to the Clerk of the Board without violating the law.
- These new procedures do not affect requests for records made under the Sunshine Ordinance (SF Admin. Code §§ 67.1 *et seq.*) or the Public Records Act (Cal. Govt. Code §§ 6250 *et seq.*).

San Francisco Administrative Code
Chapter 2, Article IV:
Board Response to Watch Law Requests

SEC. 2.20. DESIGNATION OF WATCH LAWS; BOARD OF SUPERVISORS TO RESPOND ON BEHALF OF CITY DEPARTMENTS.

(a) **Designation of Watch Laws; Watch Law Orders.** Under Charter Section 16.124, the Board of Supervisors may, by resolution, designate as a “watch law” any state or federal law or regulation that calls for, authorizes, or requires the production by any City officer, employee, agency, department or office of information, records, or other tangible things held by the City, where disclosure could violate the rights of any individuals under the State or Federal Constitutions. An order or request for the production of information, records or other tangible things held by the City made pursuant to a watch law designated under this subsection shall be referred to as a “watch law order.”

(b) **Board of Supervisors to Respond on Behalf of City Departments.** The Board of Supervisors shall respond on behalf of the City and County of San Francisco to all watch law orders served on the City and County. No officer, employee, agency, department, or office of the City and County shall respond to a watch law order without the prior approval by resolution of the Board of Supervisors.

(c) **Duties of City Officers, Employees, and Departments.** Any officer, employee, agency, department, or office of the City and County receiving a watch law order shall within 24 hours transmit the order to the Clerk of the Board of Supervisors, along with a specific description of the type, nature, and extent of any information, records or other tangible things held by the officer, employee, agency, department, or office which are responsive to the order. The information, records or other tangible things themselves shall not be sent to the Board of Supervisors unless and until specifically requested by the Board.

(d) **Consideration by the Board of Supervisors.** The Board of Supervisors shall consult with the City Attorney in determining whether the production sought by a watch law order would violate the constitutional rights of any individuals and in deciding on an appropriate response to the order. The records, proceedings, and decisions of the Board of Supervisors in connection with a watch law order shall be kept confidential where required by state or federal law. To the extent federal or state law would prohibit public disclosure of information that the Board of Supervisors needs to discuss in order to discharge its powers under this Section, the Board may meet in closed session for the limited purpose of discussing that information. Unless prohibited by federal or state law, the Board shall take all actions to approve or deny a watch law order in public.

(e) **Procedure.** Upon receipt of a watch law order, the Clerk of the Board of Supervisors shall immediately deliver a copy of the order to the chair of the Rules Committee. The Clerk shall at the same time also deliver a copy of the order to the deputy city attorney designated by the City Attorney for these purposes.

The Clerk shall prepare an item consisting of a resolution complying with the order and a resolution rejecting, in whole or in part, the order. The item shall be deemed introduced by the President of the Board as of the date the order is received by the Clerk.

The Clerk shall place the item on the agenda for the next Rules Committee meeting. If the order contains a deadline for compliance that would occur prior to the next regularly-scheduled Rules Committee meeting, the chair of the Rules Committee shall schedule a special meeting of the committee sufficient to meet the deadline. If the Rules Committee cannot meet in time to meet the deadline for response, the President of the Board may refer the item to another committee.

(f) **Annual Report.** The Clerk of the Board of Supervisors shall prepare an annual report on all watch law orders received by the Board during the prior fiscal year. The report shall identify: the information, records, or other tangible things sought in each such order; the law under which the order was made; the officer, employee, agency, department, or office of the City and County to whom the order was initially directed; and, the action taken by the Board of Supervisors in response to the order. The report shall be kept confidential to the extent required by state or federal law.

(g) **Responsibilities of the Clerk of the Board.** Any reference to the Clerk of the Board of Supervisors in this ordinance shall include the Clerk's designee. Notwithstanding the provisions of this section, the individual officers, departments, and agencies of the City shall continue to be responsible for maintaining their own records in compliance with all applicable public records and records retention laws. The Clerk of the Board's responsibilities shall be limited to carrying out the procedures specified in this section, based upon the information and responses provided by individual officers, departments, and agencies. (Added by Ord. 51-05, App. 3/25/05.)

EXCERPT FROM USA PATRIOT ACT:

SEC. 215. ACCESS TO RECORDS AND OTHER ITEMS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.

Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) is amended by striking sections 501 through 503 and inserting the following:

“SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.

“(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

“(2) An investigation conducted under this section shall—

“(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

“(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

“(b) Each application under this section—

“(1) shall be made to—

“(A) a judge of the court established by section 103(a);

or

“(B) a United States Magistrate Judge under chapter 43 of title 28, United States Code, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

“(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

“(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

“(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

“(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

“(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

“SEC. 502. CONGRESSIONAL OVERSIGHT.

“(a) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the production of tangible things under section 402.

“(b) On a semiannual basis, the Attorney General shall provide to the Committees on the Judiciary of the House of Representatives and the Senate a report setting forth with respect to the preceding 6-month period—

“(1) the total number of applications made for orders approving requests for the production of tangible things under section 402; and

“(2) the total number of such orders either granted, modified, or denied.”.