



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAR 3 1 2003

Ms. Libby Chandler, President
National Federation of Federal Employees
Local 1309
P.O. Box 710382
Herndon, VA 20171-0382

Dear Ms. Chandler:

This constitutes my decision on your March 12, 2003 appeal of the U.S. Geological Survey's (USGS) response to your challenge of its inventory of commercial activities. My review of your appeal has included a reexamination of your January 6, 2003 challenge, USGS's February 19, 2003 response to your challenge, and consideration of whether USGS's actions have been in accordance with the FAIR Act and pertinent Office of Management and Budget (OMB) Circular A-76 guidance.

Your appeal raised three issues: (1) clarifying which 2002 FAIR Act Inventory – USGS internal website or the Department's public website – is the correct inventory; (2) coding the USGS Historian as inherently governmental instead of commercial; and (3) revisiting the specific work examples of the librarians located at the USGS Reston Library for classification as inherently governmental instead of commercial. I will respond to each of these issues in turn.

(1) Which inventory is correct – the USGS internal website or the Department's public website?
The 2002 FAIR Act Inventory published on the Department's public website is the Department of the Interior's (DOI) official inventory. The Department does not preclude the USGS from posting the USGS inventory on its internal website, however, that inventory must be the same as the official inventory published on DOI's public website. We discussed this issue with USGS. USGS acknowledges that the inventory on its internal website is incorrect and will remove this inventory from its website to avoid further confusion.

(2) Coding the USGS Historian as inherently governmental instead of commercial.
As you mention in your appeal, if the official 2002 FAIR Act Inventory is the inventory published on the Department's public website, the USGS Historian would be coded inherently governmental and further appeal is unnecessary. The official inventory is the inventory posted on the Department's public website; therefore, further discussion on the issue is not required. However, based on our review of the USGS Historian's duties, it was unclear whether the duties listed were those duties of the position or were duties the incumbent had assumed due to his unique qualifications and knowledge of USGS's history and operations. The classification of this position as inherently governmental or commercial should be based on the duties of the position itself, not on the incumbent's unique qualifications. Therefore, we have asked USGS to

ensure that the duties and responsibilities of the position itself remain separate from the duties and responsibilities the incumbent has assumed.

(3) Revisiting work examples of the USGS Reston Library librarians.

You assert the librarian positions at the USGS Reston Library are inherently governmental because they:

- Interpret and execute laws of the United States;
- Perform management, procurement, and contracting functions;
- Have access to procurement or competition sensitive documentation; and
- Have access to personal information.

We reviewed the specific work examples you provided against the criteria for determining inherently governmental functions and the sample list of inherently governmental functions found at Appendix 5 of OMB Circular A-76, Revised Supplemental Handbook (March 1996). Based on our analysis, we have determined that the work of librarians at the USGS Reston Library is largely commercial. Our analysis of each work example is enclosed.

Accordingly, I am fully upholding your appeal on issues one and two, and partially upholding your appeal on issue three. I will advise USGS to review their official 2002 FAIR Act inventory, ensuring that it reflects this decision, and to forward any required changes to the inventory to the Department of the Interior, Office of Acquisitions and Property Management.

Under the FAIR Act, Section 3(e), this decision is final. We have worked diligently through the Departmental Council on Labor-Management Cooperation to ensure that union and management representatives are encouraged to facilitate a better competitive sourcing process, and to ensure that employee rights are protected. We are also mutually committed to support the goal of finding and implementing the best, most cost-effective ways to provide quality products and services to our customers.

Thank you for your interest in the programs and mission of the Department of the Interior.

Sincerely,



P. Lynn Scarlett
Assistant Secretary
Policy, Management and Budget

Enclosure

cc: Carol Aten, USGS

ANALYSIS OF SPECIFIC WORK EXAMPLES
LIBRARIANS, USGS RESTON LIBRARY

Paragraph 5 of Appendix 5, OMB Circular A-76, Revised Supplemental Handbook (March 1996), states:

“An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

- (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (c) significantly affect the life, liberty, or property of private persons;
- (d) commission, appoint, direct, or control officers or employees of the United States; or
- (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.”

National Federation of Federal Employees Argument: USGS Reston Librarians are inherently governmental because their work involves:

1. *Interpreting and executing laws of the United States.*

NFFE alleges that USGS Reston librarians interpret and execute laws of the United States and should be considered inherently governmental. The work examples cited in the NFFE challenge and listed below do not support this claim. Therefore, the work described is not inherently governmental.

- The ability to catalog in a language other than English is not an interpretation nor execution of law.
- Research done to support court cases is not an interpretation nor execution of law. Such research is done to the specifications of the requestor.
- Long-term knowledge of the research trends of the library to develop viable collections supporting potential future research is not an interpretation nor execution of law. Research trends of the library can be documented for use by any interested party.
- Supporting civilian and military agencies in their research requirements is not an interpretation nor execution of law. Such research is done to the specifications of the requestor.
- Producing information on mining exploration and production on Native American reservations is not an interpretation nor execution of law. Such research is done to the

specifications of the requestor. Although an ancillary benefit of this research is consideration by the Department of the Interior of changes in the way information requests may be handled in the future, the decision to change the way information requests will be handled does not rest with the librarians.

2. Exercising management, procurement or contracting functions.

NFFE contends that the librarians do work that binds the United States to take actions by contract, policy, regulation, authorization, and/or order. Such work is designated inherently governmental.

The work examples described in NFFE's challenge support, in part, this allegation.

- Evaluation/comparison of private collections of materials for acquisition, and determining the suitability of such materials for inclusion into the USGS Library collection are inherently governmental functions. Librarians are acquiring property.
- Acquiring books/collections through agreements with other governmental, personal and commercial organizations through the USGS Library Exchange and Gift program, mandated in the Organic Act of 1879, is an inherently governmental function. Librarians are acquiring property.
- Leadership in cataloging, storage and retrieval of scientific documents in USGS disciplines is an inherently governmental function. Librarians are establishing government-wide procedures for cataloging, storage and retrieval of scientific documents.
- The fact that a USGS Reston Librarian was recognized as the leading cataloger of online geologic maps is an attribute of the incumbent, not of the position he occupies. This point is not relevant to the discussion of exercising management, procurement or contracting functions.
- Controlling access to contracted services, such as commercial electronic journals, or monitor use of commercially licensed materials and equipment are not inherently governmental. This is analogous to physical security services to control access to government buildings. Librarians, like security guards, can be given direction on who should be provided access and what to monitor. Physical security services, e.g. access control, is commercial/contractible.
- Monitoring serials control contracts for compliance is an inherently governmental function. Developing contract specifications for such contracts is not inherently governmental.
- Purchasing materials for the library is inherently governmental.
- Managing a world class and internationally recognized map collection, e.g. the care, storage, use, and cataloging, of maps is not inherently governmental. These functions are ministerial; ministerial functions are not inherently governmental. However, the acquisition of collection items, as mentioned above, is inherently governmental.
- Exercising exchange agreements with overseas libraries for inter-library loan of books, maps and journals involving monetary transactions is inherently governmental provided that the amount to be collected is not predetermined or easily calculated, and the funds collected are

not easily controlled using standard cash management techniques. (from Paragraph 15 of Appendix A to OFPP Policy Letter 92-1, herein referenced as Appendix 5 to OMB Circular A-76, Revised Supplemental Handbook, March 1996)

3. Having access to procurement or competition sensitive documentation.

NFFE contends that USGS Reston librarians having access to competition and procurement sensitive information should be considered inherently governmental. Appendix B to OFPP Policy Letter 92-1 lists services and actions that are not considered to be inherently governmental. However, these services and actions can “approach being in that category because of the way in which the contractor performs the contract or the manner in which the Government administers contractor performance.” Access to procurement or competition sensitive documentation is addressed on the list of commercial functions at paragraph 11 of Appendix B referencing “access to confidential business information and/or any other sensitive information.”

Access to procurement or competition sensitive documentation may be commercial, depending on how the contract is administered. Typically, when confronted with a situation in which a contractor may potentially use this confidential business information for personal gain, language is inserted into the contract precluding the contractor from entering into any competitions wherein this information would provide the contractor with a competitive advantage over other firms. Thus, when such safeguards are in place, contractors may be granted access to confidential business information, including procurement or competition sensitive documentation. Hence, access to procurement or competition sensitive documentation would not be inherently governmental.

- Having knowledge of “who (what companies or individuals) are looking for what (gold, diamonds or oil) in what areas (specific locations inside the US or overseas) is not inherently governmental. Dissemination of this knowledge/information can be controlled to prevent its use to gain competitive advantage.
- Permitting access to commercially licensed materials by verifying and publishing IP addresses for work computers as needed is not inherently governmental. Access control is not inherently governmental. Verifying and publishing IP addresses is a consequent of access control.
- Collecting funds from vending machines, photocopiers, etc. is not inherently governmental. As noted under paragraph 2 above, collecting funds where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard cash management techniques is commercial/contractible.

4. Having access to personal information.

NFFE contends that USGS Reston librarians may have access to private, personnel sensitive and confidential information. Further, they allege that “preserving the sanctity of this data demands the discretionary exercise of Government authority and therefore involves the act of governing. These activities require the use of Government authority to protect the interests of its citizens as this data significantly affects the life, liberty, or property of private persons.” Therefore, these activities should be considered inherently governmental.

The argument put forth in NFFE’s challenge does not make the case that “preserving the sanctity of private, personnel sensitive and confidential information” is integral to protecting the life, liberty, or property of private persons. As stated in paragraph 3 above, having access to sensitive information

is not inherently governmental, provided that appropriate agency control is preserved. Such controls are incorporated into contracts when there is risk of sensitive information being used to gain competitive advantage or otherwise cause harm.

- Access to personal information such as name, address, telephone number, etc. is not inherently governmental, nor does access, in and of itself, constitute a threat to life, liberty or property. The use of personal information can pose such a threat, but the use of personal information can be controlled.
- Access to sensitive or classified information is not inherently governmental. Contractors are able to attain security clearances that can gain them access to such information. While the issue of whether access to sensitive or classified information poses a threat to personal, agency, or national security is subject to debate, it is the use of sensitive or classified information that poses a threat. Again the use of sensitive or classified information can be controlled.