

Testimony of
Kenneth E. Nero
Chief Librarian
National Labor Relations Board
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Commercial Activities Panel

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Mr. Chairman and Members of the Commercial Activities Panel, thank you for the opportunity to talk about the implementation of the Federal Activities Inventory Reform (FAIR) Act as it relates to the process of determining whether or not the functions performed by federal librarians should be performed by government personnel. My name is Kenneth Nero. I am the Chief Librarian at the National Labor Relations Board. I am also an elected member of the FLICC Executive Board (FEB). FLICC stands for Federal Library and Information Center Committee. I am not here on behalf of the NLRB, FEB, or any professional organization where I hold membership. I am here as an interested party, as defined by Section 3(b)(3) of the FAIR Act, to join the dialogue about the outsourcing of federal librarians in particular, and the outsourcing of professional and administrative occupations in general.

Introduction

Several FAIR Act inventories submitted to OMB in 1999 and 2000 listed federal libraries as commercial activities. The work performed by federal librarians could be misinterpreted under the rubric of the FAIR Act unless the

framework for determining inherently governmental functions recognizes the in-house role of sound information resources management. As the federal government seeks to streamline departments and independent agencies, the FAIR Act inventory process should not discount the role of federal librarians who evaluate and coordinate the deployment of information resources throughout the federal organization, especially to the desktop. In addition, activities related to disseminating government information to the public constitute a public good requiring governmental oversight.

Importance of Information Resources

Federal librarians manage information resources at the enterprise-wide level in wide variety of formats. Given the discretionary role of federal librarians in evaluating the content of information resources before obligating government funds and their increasing responsibilities for enterprise-wide deployment of strategic information resources, certain functions of the federal librarian position requires governmental authority.

The definition of "information resources," codified at 44 USC 3502(6), comprises "information and related resources, such as personnel, equipment, funds, and

information technology." In the context of provisioning information resources, the "equipment" procured and managed by librarians using appropriated "funds" encompasses a wide-range of copyrighted and government resources regardless of format, such as print-based materials, electronic resources, commercial databases, taxonomy tools, content management systems, and digital libraries and archives.

Information management functions of federal librarians fall outside the scope of a commercial activity because their duties require the oversight of federal information resources. Under the umbrella of "information resources management" defined at 44 USC 3502(7), the duties of federal librarians typify "the process of managing information resources to accomplish agency missions and to improve agency performance" either at the internal, enterprise level or in public information dissemination.

As managers of the federal Agency's information resources portfolio, federal librarians ensure content management strategies are consistent with the Agency's performance plan and the Government Performance and Results Act. Federal librarians ensure that investments in content resources support the mission.

Decision-making in the Public Interest

Federal librarians participate in all phases of the life cycle of information. From the outset, librarians must choose among the expansive universe of information resources those authentic, reliable, high quality sources that meet the information needs of the Agency's personnel. They provide for ongoing access to needed resources without a break in continuity. In addition, they negotiate and establish licensing agreements with publishers and vendors of electronic information, assuring that their core user's copyrights are preserved while minimizing exposure to risk of copyright infringement. The traditional library has evolved beyond the warehouse model of a print and microform repository. As information becomes increasingly digitized and pushed to the end-user, federal librarians develop and support desktop access to commercial content by agency personnel by partnering with information technology specialists (in-house or contract) to design and maintain a central information portal suited to an Agency's mission-specific information requirements.

Many librarians participate in the dissemination of information generated by their Agency. They assure that the Agency's print and electronic resources (such as Web pages) are preserved and available for permanent public access. Librarians are involved in the federal disposal process of library materials in their agencies. They make decisions related to disposal of federal property require governmental authority.

From a strategic standpoint, they mirror the role of federal Chief Information Officers (CIOs) who oversee the information technology investments in the federal government. CIOs ensure that information technology investments support the mission. Federal librarians ensure that investments in information resources support the Agency's mission. In the vast marketplace of information technology and information resources, the government must maintain a healthy sense of caveat emptor. When librarians maintain arms-length relationships with publishers and vendors, the public interest in procurement integrity is strengthened.

In addition, federal librarians have responsibility for a significant portion of the nation's cultural heritage. They are part of the network of stewards who preserve the nation's books, historical documents, maps,

rare materials, films, music recordings, scientific data, and cultural artifacts. These activities are in the public interest and require governmental oversight and authority to function effectively within the scope of their duties and the mission of the Agency.

Inherently Government Functions in Context

Excluding the menial/clerical¹ occupations and the constitutionally-mandated functions for the Legislative, Executive, and Judicial branches, several managerial and professional occupations defy categorical assignment as commercial activities in the federal context if evaluated according to the criteria of Office of Federal Procurement Policy (OFFP) Letter 92-01. Typically, federal employees in professional and managerial positions work in their Agency's internal service units and exist to support the statutory missions. In the corporate sector, these positions are often considered overhead. Depending on the core mission of the Agency, internal service units comprise budget, human resources, finance, libraries, procurement, and other support functions. Practically all occupations

¹ Section 5(c)(ii) of the FAIR Act, Pub. L. 105-270, 112 Stat. 2382, excludes menial and clerical positions from the definition of "inherently governmental function."

within the internal services units are listed as commercial activities on the list of Function/Activity Codes, and consequently, regarded as profit opportunities for the profit sector. However, some of these occupations perform inherently governmental functions.

A framework that compels consistent interpretation of the terms "commercial activity" and "inherently governmental" must be a cornerstone of successful FAIR Act implementations. Librarians, like many other professional occupations in the federal government, perform functions that require either the exercise of discretion in applying governmental authority, or the application of value judgments in Government decision-making. In regards to the duties of federal librarians, their functions include contract oversight, collection development policy, procurement authority, and signature authority. These activities must be viewed in the context of Sections 5(2)(B)(i)² and Section (5)(2)(B)(v)³ of the FAIR Act or

²At Section 5(2)(B)(i), the definition of inherently governmental functions includes "...among other things, the interpretation and execution of the laws of the United States so as to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise."

³At Section 5(2)(B)(v), the definition of inherently governmental functions also means "to 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

risk contractors assuming the role of making decisions on behalf of the government. The concept of an inherently governmental function must be understood as a core competency and something integral to the way an Agency conducts its business.

When an Agency deems its entire federal library as a commercial activity without an analysis of who performs inherent governmental functions, the FAIR Act inventory is less than accurate and is tantamount to throwing the baby out with the bath water. Many functions of the librarian position require governmental authority to negotiate on behalf of an Agency, acquire resources, align content acquisition strategies with the Agency's strategic plan, administer internal controls, and make value judgments.

Insist on Comprehensible and Consistent Inventories

For the FAIR Act to be fair, the government needs to collect accurate information for their inventories without relying exclusively on the inventory codes that list "commercial activities." The FAIR Act cannot be fair if the inventories are conducted without an analysis of the

disbursement of appropriated and other Federal funds."

strategic relationship of the position to the core mission activity. Exclusive reliance on the inventory codes undermines the effectiveness of the FAIR Act implementation process.

My disquieting concern is that some Agencies will decide that an in-house function, such as the provision of information services, is a commercial activity if it is listed among the function codes. Consequently, an A-76 study of the federal library could ensue without determining whether the employees perform inherently governmental functions.

Importance of Subject Expertise

As a matter of law and policy, outsourcing is a strategic issue. There are occasions when an Agency will benefit from contracting for librarian services with selected skill sets to perform duties that will not compromise the security and confidentiality of classified information or the government's ability to make evaluations of and decisions for information resources. There will be instances in which specified skills, knowledge, and abilities of the librarian could be contracted out to provide project assistance, consulting services, or fill a

gap in information technology skills. Many agencies, such as the National Oceanic Atmospheric Administration, Environmental Protection Agency, Housing and Urban Development, and the Department of Energy employ contract librarians. For Agencies that contract for library services, a federal librarian is essential to oversee the contract and make decisions and judgments on behalf of the Agency. This level of management expertise ensures quality and vendor accountability. In the outsourcing scenario, the federal librarian, the Agency's in-house expertise, should oversee the overall framework and specify objectives, while contract librarians will be responsible for information service delivery. Using A-76 parlance, this arrangement would contribute to the goal of becoming a "most efficient organization." In short, the librarian as Contracting Officer on the government payroll would serve the best interests of the American people if an Agency contracts for library services.

Balance Competing Concerns

I urge this panel to help Congress develop a formula to identify federal functions regardless of occupations that retain the irreducible elements that qualify as inherently governmental positions. Certain positions provide intrinsic mission support and operational effectiveness. A strategic perspective is critical to any outsourcing initiative.

The federal government requires and performs administrative support functions: managing budgets, overseeing information resources and information technology, accounting for personnel, and other functions. Yet, according to Section (2)(C)(i), all occupations are excluded from the class of inherently governmental functions if the function includes "gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials." While most federal occupations can be found in the private sector, not every federal occupation competes with the private sector if that position performs governmental functions in the public interest. Information and advice is the currency used by federal officials to make informed decisions. If Section

(2)(C)(i) was followed to the letter, Agency heads could be cut off from a governmental source of expertise, a key level of decision-making, and institutional memory. In short, the "cookie cutter" approach to conducting FAIR Act inventories would be a disservice to the citizens of the United States and undermine sound management principles. The optimum framework for outsourcing in the federal government will balance the competing interests of all interested parties.

Conclusion

As the federal government pares down to its essential core, the challenge for this panel is to develop an objective framework to help Agency heads and federal executives recognize the essential in-house, internal support competencies and functions that strategically support the core programs and missions of the Federal government.

Federal librarians manage the information resources that support Agency missions and strengthen federal programs. They participate in the information dissemination process of government information for the American public. Moreover, because information resources are strategic

assets comprising an information infrastructure extending from the Nation's Capitol to around the world, governmental oversight of these resources is in the public interest.

This concludes my statement and I would like to express my sincere appreciation for this unprecedented opportunity to state my views. I will be happy to answer any questions.