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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Archives and Records Administration—Damage to Revolving Fund Records Caused by Building Failure

File: B-308822

Date: May 2, 2007

DIGEST

The Federal Property and Administrative Services Act of 1949, as amended, governs the interagency occupancy agreement between the General Services Administration (GSA) and the National Archives and Records Administration (NARA) for the Washington National Records Center building. Consistent with the Act and our past decisions involving GSA and the Federal Buildings Fund, we find that the interdepartmental waiver rule applies and GSA is not required to reimburse NARA for property damage. 57 Comp. Gen. 130 (1977). Operating reserves in NARA's records center revolving fund are available to cover the costs of repairing water damage to records that NARA stores for its federal agency customers caused by a building failure.

DECISION

The General Counsel of the National Archives and Records Administration (NARA) has requested an advance decision under 31 U.S.C. § 3529 on whether the General Services Administration (GSA) should bear the cost of repairing damage caused by a GSA building failure to records and property maintained by the NARA Federal Records Center Program. Letter from Gary M. Stern, General Counsel, NARA, to Susan Poling, Managing Associate General Counsel, GAO, Jan. 3, 2007 (Stern Letter). As we explain below, the Federal Property and Administrative Services Act of 1949, as amended, governs the interagency occupancy agreement between GSA and NARA for the Washington National Records Center building. Consistent with the Act and our past decisions involving GSA and the Federal Buildings Fund, we find that the interdepartmental waiver rule applies and GSA is not required to reimburse NARA for property damage. Operating reserves in NARA's records center revolving fund are available to cover the costs of repairing water damage to records that the NARA

Federal Records Center Program stores for its federal agency customers in a GSA-owned building.

Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/d061064sp-web.pdf. In this case, we received NARA's legal position in its request letter. *See* Stern Letter. We also solicited GSA's legal position on whether it should bear the cost of repairing the damages in question. Letter from Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, to Lennard S. Loewentritt, Acting General Counsel, GSA, Jan. 16, 2007. We received GSA's response on February 16, 2007. Letter from Sharon A. Roach, Regional Counsel, GSA, to Pedro E. Briones, Senior Staff Attorney, GAO, Feb. 16, 2007 (Roach Letter). We obtained further factual information from NARA in response to facts raised in GSA's letter. Telephone Conversation between Jeffrey Landou, Assistant General Counsel, GSA; Pedro E. Briones, Senior Staff Attorney and Thomas H. Armstrong, Assistant General Counsel, GAO, Mar. 8, 2007 (Landou Teleconference).

BACKGROUND

NARA operates federal records centers across the country that house temporary and pre-archival records belonging to other federal agencies. Stern Letter. NARA records centers provide storage services to federal agencies on a standard price, reimbursable basis. *Id.* Records center operations are financed through the "Records Center Revolving Fund" established by Congress to cover expenses and necessary equipment without the need for further appropriations. Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, title IV, 113 Stat. 430, 460-61 (Sept. 29, 1999). *See also* B-302962, June 10, 2005 (discussing NARA's Records Center Program and the legislative history of the Records Center Revolving Fund). NARA's Washington National Records Center (WNRC), located in Suitland, Maryland, provides records storage services to federal agencies located in and around Washington, D.C. *See* www.archives.gov/dc-metro/suitland/ (last visited May 1, 2007).

On Sunday, July 2, 2006, at approximately 1:00 p.m., an 8-inch water pipe connected to the WNRC building's fire alarm system ruptured, activating the fire alarm. Roach Letter. According to GSA, GSA staff arrived at 1:05 p.m. to investigate the alarm, followed by Prince George's County, Maryland, firefighters at approximately 1:11 p.m.¹ Roach Letter. A GSA Supervisor Engineer arrived at 2:07 p.m., followed by a

¹ Like most NARA records centers, the WNRC is housed in a federal building owned and maintained by GSA. Stern Letter; *Occupancy Agreement between Washington National Records Center and General Services Administration*, No. OA023502, July 1, 2003 (Occupancy Agreement).

second engineer at 2:47 p.m. *Id.* Neither GSA staff nor the county firefighters, however, could gain access to “Vault 6,” the records storage bay where the pipe had ruptured. Because it houses classified records, Vault 6 is a locked, restricted area of the WNRC to which GSA has no independent access. *Id.*; Landou Teleconference. Although GSA personnel and the firefighters could observe water seeping out from under the vault door, they did not want to shut off water to the fire alarm system in case there was an actual fire inside the vault. Roach Letter. At 3:05 p.m., a NARA employee arrived to unlock Vault 6. Roach Letter; Landou Teleconference. Once they learned that there was no actual fire in the vault, GSA personnel and the fire fighters turned off the water. Roach Letter. In the 2 hours between the pipe rupture and the arrival of the NARA employee, Vault 6 flooded and over 18,000 boxes of records belonging to 22 federal agencies were damaged. Stern Letter. *See also* Fax from Jeffrey Landou, Assistant General Counsel, NARA to Pedro E. Briones, Senior Staff Attorney, GAO, Feb. 28, 2007.

Immediately following the pipe rupture, GSA procured emergency services to remove the waterlogged records, to repair the broken water pipe, and to specially clean Vault 6.² Roach Letter. Also, B.M.S. Catastrophe (BMS), a disaster recovery company, provided recovery and freeze-drying services to salvage the waterlogged records. Stern Letter; Roach Letter. NARA and GSA dispute which agency actually obtained, directed, and supervised the services provided by BMS and which agency should pay the vendor. Stern Letter; Roach Letter. The total cost for BMS’s document recovery services is estimated to be \$650,000. Stern Letter; Roach Letter. NARA believes that GSA should bear the cost. Stern Letter.

DISCUSSION

At issue here is the application of the so-called interdepartmental waiver rule and its statutory exception. The interdepartmental waiver rule—the general rule governing interagency property damage claims—is that where one federal agency damages property of another federal agency, funds available to the former may not be used to pay claims for damages to the latter. 65 Comp. Gen. 910, 911 (1986); 46 Comp. Gen. 586, 587 (1966). The rule is based on the concept that property of the various agencies is not the property of separate entities but rather of the government as a single entity, and there can be no reimbursement by the government for damages to or loss of its own property. 46 Comp. Gen. at 586–87.

A major exception to the interdepartmental waiver rule is where reimbursement for damages has been provided for in an interagency agreement under the Economy Act (31 U.S.C. § 1535) or similar statutory authority, such as a reimbursable or revolving

² Under the Federal Property and Administrative Services Act of 1949, discussed *infra*, GSA is responsible for repairing, and did repair, the WNRC building. *See* 40 U.S.C. § 582(a).

fund. 65 Comp. Gen. at 911. The rule may not apply, for example, where the agency suffering damages is operated out of a revolving fund. *See, e.g.*, B-302962, June 10, 2005 (NARA should collect amounts sufficient to repair damages to facilities financed by the Records Center Revolving Fund, whether that damage is caused by NARA's federal agency customer, the customer's contractor, or NARA's own contractors, and should deposit those amounts into the revolving fund); 65 Comp. Gen. 910 (1986) (Soil Conservation Service may pay for repairs to a boat borrowed from the Bureau of Land Management under an Economy Act agreement which provided that the Service return the boat in as good condition as when received); 3 Comp. Gen. 74 (1923) (agency borrowing equipment from the Reclamation Fund may pay depreciation costs). With most revolving fund activities, Congress intends that the activity operate like a self-sufficient business, charging rates to recover its costs of operations. B-302962, June 10, 2005. This exception to the interdepartmental waiver rule recognizes that to require the revolving fund to cover damages for which the activity was not responsible would impose on the fund's customers a cost unrelated to the service they received from the fund. *Id.* Application of the rule and its exception is complicated here, however, by the fact that GSA's management of federal buildings, like NARA records centers, operates out of a revolving fund.

When considering exceptions to the interdepartmental waiver rule, we look to the statute that establishes and governs the interagency relationship. *See, e.g.*, 9 Comp. Gen. 263 (1930) (Panama Canal and U.S. Navy). *See also* 71 Comp. Gen. 1 (1991) (Bonneville Power Administration and National Weather Service). Here, the Federal Property and Administrative Services Act of 1949, as amended, governs the relationship between GSA and its federal agency customers who occupy GSA-owned and -operated buildings. 40 U.S.C. §§ 581–593. *See generally* 41 C.F.R. pt. 102-85. GSA's use of its revolving fund is also subject to limitations imposed by that Act. *Id.*

The Federal Property and Administrative Services Act authorizes GSA to “operate, maintain, and protect” federal buildings, 40 U.S.C. § 582(a), and to assign space to executive agencies, 40 U.S.C. § 584(a). Like most federal agencies, NARA has an occupancy agreement for building space. Both the occupancy agreement and the statute are silent with regard to which party should be responsible for these kinds of expenses. *See* Occupancy Agreement.

Under the Act, GSA imposes a charge on NARA and other federal agencies for furnishing building space and related services. 40 U.S.C. § 586(b). The rates are required to approximate commercial charges for comparable space and services. *Id.* User charges are deposited into the Federal Buildings Fund, a revolving fund. 40 U.S.C. § 592(b). Deposits in the Federal Buildings Fund are available for real property management and related activities in the amounts specified in annual appropriations laws. 40 U.S.C. § 592(c)(1). For fiscal year 2006, Congress appropriated amounts for, among other things—

“necessary expenses of real property management and related activities not otherwise provided for, including operation, maintenance, and protection of federally owned and leased buildings; . . . contractual services incident to cleaning or servicing buildings, and moving; repair and alteration of federally owned buildings . . . maintenance, preservation . . .”

Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, 119 Stat. 2396, 2479–82 (Nov. 30, 2005).

Notwithstanding that GSA activities here operate out of a revolving fund, which suggests a business-like operation, and that its charges are to “approximate commercial charges,” neither those charges nor GSA’s responsibilities are identical to those of a commercial landlord.³ Some of the expenditures that go into a commercial rental charge for space that are not applicable to GSA are taxes, depreciation, interest on a long-term debt, and profit, as well as liability insurance. 57 Comp. Gen. 130 (1977). In circumstances similar to the case at issue, we recognized that the Federal Property and Administrative Services Act did not impose on GSA all of the responsibilities of a commercial landlord, and on that basis we held that GSA was not required to reimburse the Department of Defense (DOD) for damage to furniture, furnishings, or equipment caused by a building failure. *Id.*

The purpose behind requiring rental rates to approximate commercial charges was twofold: the first, not relevant here, was to encourage agencies to consolidate or reduce space requirements. The second was to generate extra funds to be used by GSA to finance construction of new buildings. 57 Comp. Gen. at 132, and references cited therein. Requiring GSA to reimburse another agency for damages it incurred or reduce the rental charges to cover the damages would reduce amounts available to finance new construction, undermining one of the purposes of the Act. *Id.* See also 59 Comp. Gen. 515 (1980) (GPO may not reduce its payment to GSA to pay for damages suffered by GPO when its paper supplies were damaged by a roof leak at a GSA building).

The circumstances of this case are very similar. Here, another federal agency—NARA—housed in a GSA building has suffered water damage from a building failure and is seeking recovery from the Federal Buildings Fund to repair the personal property damage. Consistent with our past decisions involving GSA and the Federal Buildings Fund, we find that the interdepartmental waiver rule, not its exception, applies and that GSA is not required to reimburse NARA for recovery of the damaged records. 57 Comp. Gen. 130 (1977); 59 Comp. Gen. 515 (1980).

³ We do not address whether in fact NARA could recover from a commercial landlord under the facts of this case.

NARA is permitted to retain an operating reserve in the Records Center Revolving Fund not to exceed 4 percent of the total annual income from the federal Records Center Program. Pub. L. No. 106-58, title IV, § (d)(1), 113 Stat. 461. The operating reserve is available to pay the costs of BMS's document recovery services arising from the building failure. *Cf.* B-301714, Jan. 30, 2004 (administrative fees collected by the Library of Congress's Federal Library and Information Network revolving fund are available to cover losses from a defaulting contractor).

CONCLUSION

The Federal Property and Administrative Services Act of 1949, as amended, governs the interagency occupancy agreements between GSA and NARA for the Washington National Records Center building. Consistent with the Act and our past decisions involving GSA and the Federal Buildings Fund, we find that the interdepartmental waiver rule applies and GSA is not required to reimburse NARA for property damage. Operating reserves in NARA's record center revolving fund are available to cover the costs of repairing water damage to records that the NARA Federal Records Center Program stores for its federal agency customers caused by a building failure.

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