Since September 11, federal, state, and local agencies have been grappling with issues relating to access to government information. The delicate balance between responding to concerns relating to homeland security while ensuring public access to government information presents new challenges to many libraries. What limitations, if any, should be on access to selected government information resources? Are there criteria to consider as to whether information resources should be publicly available? Similarly, many libraries that participate in the Federal Depository Library Program (FDLP) are concerned that changes may be forthcoming in the information access and dissemination policies of federal agencies.

The following memo, prepared by Thomas Susman of Ropes & Gray, responds to questions raised by a number of ARL directors. It addresses important questions concerning the removal and/or destruction of federal depository library documents, including factors that libraries might consider concerning public access to copies of withdrawn FDLP materials. The memo reviews the legal responsibilities of both the federal depository libraries and the Government Printing Office while highlighting a number of key policy considerations. Although we are also witnessing the removal of information from a number of state agencies, this memo only addresses these issues at the federal level.

March 13, 2002

MEMORANDUM

TO: Prudence Adler, Association of Research Libraries

FROM: Thomas M. Susman

SUBJECT: Removal or Destruction of Federal Depository Library Documents

Introduction

In October 2001, the U.S. Geological Survey requested that the Government Printing Office instruct Federal Depository Libraries that received a CD-ROM on characteristics of large surface-water supplies in the United States to destroy their copies. Shortly thereafter, the Superintendent of Documents ordered those libraries participating in the Federal Depository Library Program to withdraw this item and immediately destroy it. Subsequently, the Federal Bureau of Investigation visited several Federal Depository Libraries to determine whether that order had been carried out. This occurred without consultation with the GPO or the Geological Survey (U.S.G.S.).

This series of events, and the prospect that in the wake of the September 11, 2001, terrorist attack there may be additional requests for removal or destruction of federal materials by Federal Depository Libraries (FDLs), raises a number of questions of interest and importance to librarians. This memorandum sets forth below, in a question-and-answer format, the answers to many of those questions.

Questions & Answers
1. *Under what authority can the Government Printing Office (GPO) order FDLs to withdraw from public access or to destroy a depository item?*

Under the Federal Depository Library Program (FDLP), as specifically stated by the GPO:

Government publications received through the Federal Depository Library Program are not the property of the receiving library. The Government distributes the publications in an effort to inform the public but has not given them to the libraries.


All Government publications supplied to depository libraries under the FDLP remain the property of the United States Government . . . . Depository libraries are entrusted with the maintenance of these materials while they are in the custody of the library.

Hence, any depository publication may lawfully be ordered withdrawn, returned, or destroyed by Superintendent of Documents (SuDocs) under the regulations governing the FDLP. *Instructions* at 20. This includes publications in all formats – print, microfiche, and electronic resources.

2. *What is the procedure for GPO’s determining to order a withdrawal, return, or destruction of a depository item?*

GPO’s *Instructions* (p. 20) states that –

From time to time, the Superintendent of Documents will ask depositories to return a specific publication to GPO, or destroy it, because it is defective, or for other reasons. A letter from the Superintendent of Documents will be placed in shipment boxes and will also appear in Administrative Notes. Libraries must comply with such requests before the GPO deadline.

Recently, Superintendent of Documents Francis Buckley set out his Office’s procedures governing withdrawals in 22 *Administrative Notes* #16, 2-3 (11/15/01); these include:

1. Verify that the title was distributed through the FDLP.
2. Discuss the reasons for the recall with the agency’s official contact.
3. Inform the agency of recall options (destruction, withdrawal, return).
4. Inform the agency that GPO must receive an official request in writing.

3. *Are there standards or criteria defining or limiting an agency’s right to request withdrawal or destruction of an FDLP item?*

The criteria defining government publications that must be made available to the FDLP provide the only guidance on what might be removed from the program. 44 U.S.C. 1902 provides:

Government publications, except those determined by their issuing components to be required for official use only or for strictly administrative or operational purposes which have no public interest or educational value and publications classified for reasons of national security shall be made available to depository libraries . . . .

Therefore, should an agency make a determination that a publication – even after distributed to FDLs – is required for "official use only," it could in theory conclude that such publication should be removed from those libraries. Since there is no legal definition of "official use only" in the statutes, agencies are effectively unfettered in their ability to request that a depository item be withdrawn from public access. This may include publications that the agency deems to include sensitive information. The recent request
by the U.S.G.S. to the Superintendent of Documents to remove and destroy a CD-ROM ("Source-Area Characteristics of Large Public Surface-Water Supplies in Conterminous United States") is one example. This request to remove the CD-ROM is consistent with the criteria set forth in the U.S.G.S.’ "U.S. Product Access and Distribution Guidance" and "Guidelines for Determination of Potential Sensitivity and Harmful Use" (November 7, 2001). These "Guidelines" set forth criteria to consider in evaluating potentially sensitive materials at time of publication.

4. Can an agency decision to have a depository item withdrawn or destroyed be appealed by a library or public user?

There is no formal procedure available, either at the agencies or at GPO, for challenging or appealing an agency withdrawal decision. As indicated above (Q&A 2), SuDocs ordinarily will engage in a discussion with the responsible agency official before notifying libraries of the withdrawal. Should the library or a library user question withdrawal, one mechanism for obtaining a formal agency review would entail making a Freedom of Information Act request for the withdrawn document, thence placing the burden on the agency to justify nondisclosure in a process that could lead to a judicial proceeding.

The recent memorandum on FOIA issued by the Attorney General could reinforce the obstacles faced by a requester. Under current guidance to agencies, when FOIA requests are considered and decisions are made to withhold records, the agencies will be "assured" that the Department of Justice will defend their decision. As a consequence, it seems unlikely that a FOIA request for a withdrawn document would succeed.

5. What is the status of any nondepository copies of government publications – specifically documents (including fiche and CDs) purchased by the library – as well as copies of the original government publication made by the library or others?

Government publications that are purchased by FDLs are not depository materials; thus they are neither owned by nor subject to the control of the U.S. government. Agencies, therefore, have no authority to request, and the GPO has no ability to order, withdrawal or destruction of this form of library property. This would also apply to any copies made of depository publications.

While it may be possible (for archival, back-up purposes for example) for a FDL to copy a depository item, retention of and provision of public access to that copy may not be advisable if the Superintendent of Documents or an agency has requested removal of that item. In evaluating access to copies of FDLP documents or those purchased outside of the Program, there are a number of factors that FDLs should consider, such as issues relating to liability, other legal concerns, and possible policy ramifications of failing to comply with a removal request from the SuDocs.

First, there may be a host of reasons for an agency to determine that a government publication should not be publicly available. The publication could include erroneous information or could be superseded. As in the most recent case, an agency may determine that there is sensitive information that should not be publicly available through the FDLP. Historical statistics provide a useful context: 20 tangible items have been pulled from the FDLP since 1995, out of a total of 230,000 titles disseminated.

Second, in addition to the legal authority of the SuDocs to remove publications from the Program, participating libraries may risk their depository status if they do not comply with a withdrawal request by the SuDocs. As noted above (Q&A 1), depository materials remain government property. "Failure to conform to proper discard procedures can result in loss of depository status and/or legal action against the responsible parties." Instructions 20. While a copy of a withdrawn publication may not fall within this authority, libraries may want to consider the implications of providing continued access.

Third, there may be liability issues that attach to the library if a library knowingly provides access to a publication that has been recalled by a federal agency. There may be a possibility that, should harm be inflicted through use of information in a government publication by a patron after the depository copy of
that item was ordered removed, the library could be found responsible for negligence. The argument is that the library could reasonably have foreseen injury through its allowing public access. (An example might be a personal injury inflicted through poisoning of a water supply that had been facilitated by the perpetrator’s access to a library’s nondepository copy of the U.S.G.S. water supply CD, following GPO’s order to destroy that publication.)

Finally, there is an important policy dimension to these issues. The FDLP is a long-standing and successful partnership between federal agencies, GPO, and participating libraries. If FDLs do not comply with an agency and SuDocs request to remove selected information resources, there could be significant ramifications on the overall health and robustness of the FDLP. If there is a sense that libraries will not comply with the "rules of the road" of the FDLP, agencies may in turn not comply with requirements to place resources in the Program.

6. Are GPO bibliographic resources affected by withdrawal or destruction of an FDLP item?

GPO’s authority and responsibility relating to cataloging is separate and distinct (under 44 U.S. Code ch. 17) from its responsibility to disseminate government documents through the FDLP (under chapter 19). Thus, an agency cannot, in theory, require GPO to remove the listing of an item from the GPO’s catalog or index. To attempt to do so, moreover, would likely prove fruitless, since there is no way to effect removal of a listing from printed or online vendor material.

7. How does agency removal of Web-based resources affect FDLs, and how is GPO responding to agency removal of information?

Agencies are removing web-based resources – in some instances in response to security concerns, other times for unrelated reasons. For example, the Department of Energy has removed 5,836 titles from three national laboratories that were included in the Information Bridge, and these resources are a part of the FDLP electronic collection. In addition, the Defense Technical Information Center and the National Technical Information Service have pulled both publications and bibliographic information from the Web. Since these resources are not within the purview of the FDLP, the GPO Instructions to Depository Libraries do not apply. Libraries that provide access to these resources may want to consider those factors highlighted in Q&A 5.

Currently, if GPO discovers that a link (PURL) to an agency resource is inactive, GPO will explore whether the file has been pulled or if the PURL needs to be redirected. To date, approximately 40-50 titles are under review by issuing agencies. GPO is redirecting PURLs to agency notices that acknowledge the removal (either temporary or permanent) of the file, or GPO puts up a notice to inform the public of the status of the publication.

Conclusion

Libraries now face new and increasingly complex issues relating to access to government information in the post-9/11 environment. The delicate balance between responding to concerns relating to homeland security while ensuring public access to government information – a fundamental tenet of our democratic system of government – presents new challenges to many FDLs. As participants in the FDLP, depository libraries have committed to providing effective access to these public resources and to the legal requirements set forth by the Government Printing Office. There may be additional legal and policy considerations implicating access to these public resources that should be taken into account as well. These considerations are likely to become more acute – and complex – as the removal of, and imposition of restrictions on access to, government information escalates.