LEGAL OPINIONS

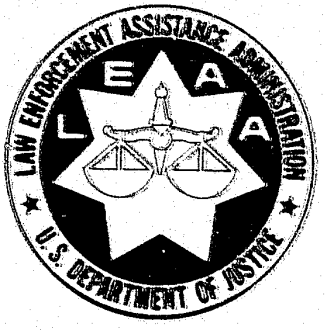
OF THE

OFFICE OF GENERAL COUNSEL

OF THE

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
UNITED STATES DEPARTMENT OF JUSTICE

JULY 1 to DECEMBER 31, 1973



WASHINGTON : 1974

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NOTE TO READER

The Legal Opinions contained in this volume have been edited for format and for syntax, but otherwise appear in all respects as they did when promulgated by the Office of General Counsel.

A Legal Opinion of the Office of General Counsel is generated by a request from within the Law Enforcement Assistance Administration (LEAA) central office, an LEAA Regional Office, a State Criminal Justice Planning Agency, or some other appropriate source. No Legal Opinions are generated by the Office of General Counsel itself, acting on its own initiative. Each of these Legal Opinions, therefore, responds to a request from a particular party and is based upon a particular and unique set of facts.

The principles and conclusions enunciated in these Legal Opinions, unless otherwise stated, are based on legislation in effect at the time that the Legal Opinion was released. All Legal Opinions issued after August 6, 1973, are based on the Crime Control Act of 1973 (Public Law 93-83). The reader is advised to cross-check the date of a particular Legal Opinion with the language of the legislation that was operative on that date.

Any person intending to rely in any way on a position adopted or an interpretation expressed in these Legal Opinions is advised to take into consideration the conditions and qualifications presented in this Note to Reader. If any such person has a question about a particular Legal Opinion or any other point, the person should communicate with the nearest LEAA Regional Office or with the Office of General Counsel, LEAA, Room 1268, 633 Indiana Avenue, N.W., Washington, D.C. 20530.

Legal Opinions in This Publication

Legislation Establishing LEAA Cited in This Volume

Note on Sectional Changes

1. The Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351) was the original legislation that established LEAA.
2. The 1970 amendments to that act were contained in the Omnibus Crime Control Act of 1970 (Public Law 91-644). The amendments redesignated Parts E and F of the 1968 act as Parts F and G and added a new Part E, entitled "Grants for Correctional Institutions and Facilities."
3. The 1973 amendments to the legislation were contained in the Crime Control Act of 1973 (Public Law 93-83). Those amendments redesignated Section 408 as Section 407 and incorporated the former Section 407 into Section 402(b)(6).

Acts of Congress Cited in This Volume

United States Code Cited in This Volume

Executive Orders Cited in This Volume

Office of Management and Budget Circulars Cited in This Volume

Code of Federal Regulations Cited in This Volume

Decisions of the Comptroller General of the United States Cited in This Volume

Legal Opinion No. 74-1—Lobbying—Special Grant Condition for Discretionary Fund Grants to Public Interest Organizations—July 13, 1973

TO: Assistant Administrator
Office of Criminal Justice Assistance, LEAA

This opinion is offered by way of advice in response to recent oral questions this office has received regarding discretionary grants to the National League of Cities/U.S. Conference of Mayors and the National Governors' Conference. In both instances, there were no problems. However, it appears that these grants and all future grants of a similar nature should be special-conditioned to avoid any possible "lobbying"-type problems involving funds expended under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644).

The rationale for this advice and a suggested condition follow.

A grant condition to restrict the use of LEAA funds for lobbying and related activities is required by the Federal statutes that govern such activity. There are three Federal provisions currently in force that are relevant to lobbying with Federal money:

1. 18 U.S.C. 1913. The criminal code makes it a misdemeanor for a Federal officer to use money appropriated by Congress for certain activities designed to influence a Member of Congress concerning legislation, either before or after the introduction of a particular bill.

2. 5 U.S.C. 3107. One of the limitations on the general authority of agencies to employ persons is that publicity experts may not be paid except from funds specifically appropriated for that purpose.

3. §608, Treasury, Postal Service, and General Appropriation Act of 1973, Public Law 92-351, July 13, 1972. This section provides that "No part of any appropriation contained in this or any other Act . . . shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

All three statutes carry sanctions against Federal officials. While the first is a criminal violation, the latter two are spending limitations enforceable through the sanctions of Title 31 of the U.S. Code. Specifically, 31 U.S.C. 82c provides that an officer certifying a voucher shall be held accountable for any payment that was "prohibited by law or which did not represent a legal obligation under the appropriation of funds involved."

In addition, under the Anti-Deficiency Act, Federal employees cannot employ personal service in excess of that authorized by law (31 U.S.C. 665(b)). While this act deals mainly with excessive or poorly scheduled spending, it can also reasonably be read to prohibit spending for an unauthorized purpose (in excess of statutory authority). The sanction imposed on an officer for such spending may be a fine of up to $5,000 and imprisonment not exceeding 2 years (31 U.S.C. 665(i)).

Although all three provisions carry sanctions against Federal officers, each has a different underlying purpose. The criminal sanction is designed to regulate the conduct of public officials and deter the abuse of position and authority. The prohibition against hiring publicity experts is a longstanding one that attempts to keep public opinion free from undue Government influence.

Only the Appropriation Act provision embodies the general philosophy that appropriations should not be used to influence legislation. Since this is a limitation on the LEAA appropriations, it follows that grant fund recipients are likewise governed. The agency responsible for the grant (LEAA) has the responsibility to see that the limitations on the appropriation are enforced. The certifying officer will be held accountable, as noted above.

The restriction on hiring publicity experts, although apparently directed only to agency hiring practices, is like the Appropriation Act in two ways. According to its language, it applies to all appropriations, and it is enforced through the fiscal procedures of Title 31. Therefore, it probably also should follow the funds and apply to a grantee.

The criminal sanction is directed to the conduct of Federal personnel and would be used only if a Federal employee were sufficiently responsible for or connected with the improper actions of a grantee so as to be held criminally liable for the acts himself. Federal employees should be made aware of this provision, but grantees technically need not be as they cannot be punished under it, and the Agency is not responsible for their compliance with it. A Federal official cannot be criminally responsible for an act of omission by a grantee. The most cautious approach, however, would be to forbid grant recipients from engaging in these activities with LEAA funds.

Thus, there is reason to include all three sanctions in a special grant condition. It should be noted that the Appropriation Act provision applied to the appropriation for the recently completed fiscal year only (*Norcross* v. *United States,* 142 Ct. Cl. 763 (1958)). However, it appeared in the previous year's act, Public Law 92-49, July 9, 1971, and is in the proposed FY 1974 act, *Budget of the United States,* Appendix, p. 71. This bill is in committee at the present time, and there is no indication of any opposition to the antilobbying section.

Therefore, a grant condition that covers all three statutes may be set out as follows:

> No part of this grant (any grant) shall be used:
> (a) for publicity or propaganda purposes designed to support or defeat legislation pending before Congress; or
> (b) to pay, directly or indirectly, for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; or
> (c) to pay a publicity expert.

This condition can be added when needed or built into the discretionary fund, Action and Planning Guide (or the Financial Guide) to cover all grants. It should be placed on the outstanding grants to the National League of Cities and the National Governors' Conference immediately.

Legal Opinion No. 74-2—Possibility of Purchasing a Motor Scooter for Congressional Liaison for Use by its Messenger—July 13, 1973

TO: Director
Office of Congressional Liaison, LEAA

This is in regard to recent discussions on the subject of maximizing the time and use of messenger service by providing quick transportation that would not encounter parking problems.

Authority to purchase passenger motor vehicles from an agency appropriation is generally conferred by 31 U.S.C. 638a:

> (c) Unless otherwise specifically provided, no appropriation available for any department shall be expended—
> (1) to purchase any passenger motor vehicle (exclusive of buses and ambulances), at a cost . . . in excess of the maximum price therefor . . . A passenger motor vehicle shall be deemed completely equipped for operation if it includes the systems and equipment which the Administrator of General Services finds are customarily incorporated into a standard passenger motor vehicle completely equipped for ordinary operation . . .
> (2) for the maintenance, operation, and repair of any Government owned passenger motor vehicle . . . not used exclusively for official purposes . . .

Although a passenger motor vehicle generally refers to an automobile and although the legislative history does not make additional reference to motor scooters, it is a reasonable inference that the latter are included.

The General Services Administration (GSA) has procured motor scooters for police personnel and for the National Park Service, for example. An official in the procurement division of GSA stated that requests for motor scooters are authorized procurements under Section 101-26.5 of the Federal Property Management Regulations (41 C.F.R. 101.26).

However, LEAA does not have similar procurement authority. Therefore, a motor scooter may not be purchased for the Office of Congressional Liaison.

Legal Opinion No. 74-3—Grant Application of the Madison Area Lutheran Council—July 16, 1973

TO: LEAA Regional Administrator
Region V - Chicago

The granting of funds to the Madison (Wis.) Area Lutheran Council for the purpose of providing a chaplain for the Dane County jail is unacceptable. The general conditions included in any grant require compliance with the Civil Rights Act of 1964 and Department of Justice regulations (28 C.F.R. 42).

These provide that there shall be no employment discrimination on the grounds of race, color, creed, sex, or national origin in a federally assisted program. The proposed chaplain program, however, clearly discriminates in favor of Lutherans; in fact, the personnel standards require "ecclesiastical endorsement from his own Lutheran Church body" for the position of chaplain. LEAA cannot provide funds to a particular religious group to be used, even partially, for religious purposes under provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644).

LEAA is able to fund programs to provide social service counseling to prisoners, because such programs assist law enforcement by improving correctional programs and practices (42 U.S.C. 3750b(1), Public Law 90-351, Title I, 453). Under this section, counseling can be provided by chaplains, as long as the chaplains are selected on a nondiscriminatory basis, and as long as prisoners are provided with a reasonable choice, given their religious preferences. If these conditions are met (as they are in the armed services and in Federal prisons), there is no constitutional problem with Federal funding.

Legal Opinion No. 74-4—Eligibility of State Wildlife Enforcement Agencies to Receive LEAA Funds—July 17, 1973

TO: President
Association of Midwest Fish & Game Law Enforcement Officers

LEAA is authorized by the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644) to provide funds for the improvement of "law enforcement" activities. Law enforcement agencies are eligible for funding for general purposes under Part C of the act. However, "law enforcement agency" is interpreted to include only those agencies primarily engaged in the enforcement of criminal laws in general, and to exclude agencies primarily engaged in the enforcement or implementation of specialized areas of law, such as civil, regulatory, or administrative law. Thus, campus police, game wardens, or food and drug inspectors, whose primary duties are regulatory, are generally excluded from receiving general LEAA grants. Such agencies and personnel are excluded even though they may have limited arrest powers or other incidental law enforcement authority.

State wildlife enforcement agencies are engaged primarily in the protection of wildlife resources and the enforcement of regulations; criminal law enforcement activities are not a sufficiently significant part of the agencies' overall functions for State wildlife enforcement agencies to be classified as "law enforcement agencies." Consequently, such agencies do not qualify for general assistance under the act.

However, funds may be available to State wildlife enforcement agencies for particular projects or programs that do qualify under the act. Eligibility for such funds is based upon the program or project rather than upon the nature and functions of the agency or its employees. Participation by a State wildlife enforcement agency in such a law enforcement project would make the agency eligible for LEAA funds.

Legal Opinion No. 74-5—Payment of Legal Expenses for the Prosecution of Claims Against Federally Funded Agencies—July 18, 1973

TO: Fiscal Officer
Wisconsin Council on Criminal Justice

This office has reviewed the legality of whether a subgrantee may use LEAA block grant funds under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644) to pay for attorney fees in a suit against a State Criminal Justice Planning Agency (SPA).

All block grant and discretionary fund expenditures must be made for a purpose that will improve and strengthen law enforcement as enumerated in Public Law 90-351, 301(b), 42 U.S.C. 3731(b). Payment of attorney fees in the above situation is not one of the enumerated purposes. In addition, Office of Management and Budget Circular A-87 specifically prohibits the payment of legal expenses for the prosecution of claims against federally funded agencies.

The payment of any legal fees by the subgrantees in connection with this action will result in a recovery-of-funds action by LEAA against the subgrantee.

Legal Opinion No. 74-6—(Superseded by subsequent legislative action.)

Legal Opinion No. 74-7—Returning Student Loan Applications and Notes to the Borrower—July 26, 1973

TO: Assistant Administrator
Office of Educational Manpower Assistance, LEAA

A June 26, 1973, request for a legal opinion on the above subject raises two issues. First, what do governmental regulations require in regard to retaining the canceled notes and applications for recordkeeping purposes? Second, is LEAA obligated under Federal law to return the canceled note to the borrower

upon repayment of the loan? Both questions arise in regard to administration of the Law Enforcement Education Program (LEEP), under provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644).

As to the first issue, record retention requirements on LEAA are promulgated in the General Accounting Office (GAO) Manual for Guidance of Federal Agencies, Title 8, Chapter 3, 12: "All unaudited records of *financial transactions* will be retained at the agency accounting station or office for audit by the GAO for *three full years* from the period of the account." (Emphasis added.) Supplementing the above 3-year retention requirement is a provision that allows LEAA to transfer any unneeded records after the 3-year period to the Federal Records Center.

These records retention procedures clearly apply to student applications and notes, which are part of "financial transactions."

On the second issue of whether LEAA is obligated under Federal law to return the canceled note to the student borrower upon repayment of the loan, there are two sources of relevant Federal law. First, the Uniform Commercial Code (U.C.C.) increasingly is being used as a source of the Federal law of contracts. (Gusman, *Article 2 of the U.C.C. and Government Procurement, 9 B.C. Ind. & Com. L. Rev.* 1 (1967).)

Second, the rights and duties of the United States on commercial paper it issues are governed by Federal law (*Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943)). Federal law is applied whenever an essential interest of the United States is involved (*United States* v. *93,970 Acres,* 360 U.S. 328 (1959)). It follows from these two cases that Federal law applies to LEAA as both obligee and obliger of commercial paper, including promissory notes.

To determine the substance of the Federal law, a court has the duty, in the absence of a controlling statute, to fashion the governing rule of law. (*United States* v. *Standard Oil,* 332 U.S. 301 (1947).) As there is no controlling Federal statute applicable to promissory notes, the governing rule of law would likely be contained in the U.C.C.

The U.C.C. indicates that LEAA may discharge a note of a student borrower by marking the note "paid" or by returning a signed computer printout indicating the loan has been repaid or by returning the note itself. (U.C.C. 3-605.) The cases are consistent with the U.C.C. in holding that marking a note "canceled" is sufficient to discharge the note (*Washington Loan & Trust Co.* v. *Colby,* 108 F.2d 743 (D.C. Cir. 1939)).

Thus, LEAA is not obligated to return student notes to the borrower in order to discharge the note, under both sources of law cited above.

In summary, LEAA is required by GAO to retain the student applications and notes for 3 years from the period of the account—in this case from the date of cancellation or full payment. After 3 years the records can be sent to the Federal Records Center. There is no obligation to return notes to borrowers provided the note is discharged by one of the methods set out above.

Legal Opinion No. 74-8—(Superseded by subsequent legislative action.)

Legal Opinion No. 74-9—The Attorney General's Report on Federal Law Enforcement Assistance—July 30, 1973

TO: Director
Office of Public Information, LEAA

This is in response to a request for an opinion as to the date of submission of the next *Attorney General's Report on Federal Law Enforcement and Criminal Justice Assistance Activities.*

The relevant language of the proposed Crime Control Act of 1973 states:

> The Attorney General . . . within 90 days of the end of each second fiscal year shall submit . . . A Report of Federal Law Enforcement and Criminal Justice Assistance Activities . . .

The changes to the Omnibus Crime Control and Safe Streets Act of 1968, as amended, are to be effective as of July 1, 1973, except for provisions relating to the Administrator and the Deputy Administrators, which become effective upon enactment.

Therefore, the referenced report should be submitted within 90 days of the end of FY 1975.

Legal Opinion No. 74-10—Representative Character of Proposed California Council on Criminal Justice—July 30, 1973

TO: LEAA Regional Administrator
Region IX - San Francisco

This office has reviewed Senate Bill No. 1152 from the State of California, as requested. This bill contemplates the reorganization of the supervisory board of the California Council on Criminal Justice, which is the State Criminal Justice Planning Agency (SPA) for that State, established in accordance with the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644).

The relevant proposed legislation, contemplating a nine-member board, reads:

> The eight members other than the chairman shall be appointed by the Governor for a term of four years. Such eight members shall include one representative of the courts or administrative office of the courts; the Director of Correctional Services; the Attorney General or his designee; a chief of police; a county sheriff; a district attorney; and two public members.

This office agrees with the reservation regarding the geographic representation. It would seem that the statutory language should be revised to assure adequate geographic representation. This may require a supervisory board of more than nine members.

It should be noted that currently there is no SPA supervisory board with fewer than 10 members. The two SPA boards that have 10 members are Alaska and Texas.

Legal Opinion No. 74-11—Discretionary Grant Application Disapproval—Youth Courtesy Patrol District of Columbia, #0006-03-DF-73—August 22, 1973

TO: LEAA Regional Administrator
Region III - Philadelphia

This is in response to a request for an interpretation of the provision of Section 301(b)(7), relating to community service officers, of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

This section states that community service officers are to:

> . . . *serve with* and *assist* local and state law enforcement agencies . . . through such activities as . . . Community Patrol . . . (Emphasis added.)

The definitions of "serve with" and "assist" do not appear to be legal questions, but rather factual questions. It appears that a factual determination that the Youth Courtesy Patrol does not in fact "serve with" the local law enforcement agency has been made.

It is also understood that the requestor has initiated an administrative investigation pursuant to Section 510(b) of the act. It is recommended that that person make a finding of fact in regard to all relevant reasons (including those related to a nonspecified Discretionary Funds Guide program and LEAA policy on picking up terminated block subgrants out of discretionary sources) for his action and notify the applicant of such a determination. The letter of July 3, 1973, does not provide sufficient detail as to the basis of the denial. If the applicant still insists on a hearing, one should be scheduled in Philadelphia and this office notified of the date.

Legal Opinion No. 74-12—Labor-Management Relations—July 2, 1973

TO: All LEAA Regional Administrators

This opinion is in response to a memorandum from the Office of Criminal Justice Assistance (OCJA) for Region VI, in Dallas, Tex., but the subject matter is applicable to all OCJA Regional Administrators under provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

The facts involved are as follows: The national representative of the American Federation of Government Employees (A.F.G.E.), Henry Champion, has requested permission to hold an organizational meeting at the Dallas Regional Office of LEAA at noon on July 18, 1973. Mr. Champion requested that space be made available for this meeting. The meeting is to consist of an oral presentation and the passing out of leaflets and flyers that will describe the A.F.G.E. organization and its accomplishments to any LEAA employees who wish to attend. These leaflet materials are to be furnished to the Dallas office prior to the meeting.

This request by Mr. Champion raises questions as to what the proper LEAA policy should be in this area of labor-management relations.

Two sections of Executive Order No. 11,491, 3 C.F.R. 262 (1973), are the applicable law on the proposal. The first applicable section is Section 20, which requires that:

> Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned.

Thus, the organizational meeting can be held only during the lunch hour or after hours in order to comply with the Executive order.

The second applicable section is Section 19(3), which prohibits Federal agencies from any actions that serve to:

> . . . sponsor, control or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities . . . and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status.

Thus, to comply with this section, the Dallas Regional Office has the authority to allow the use of LEAA facilities by the A.F.G.E. labor organization for their meeting. However, care must be taken to avoid "sponsoring" this meeting in any way and to make similar facilities available to other labor organizations in the future.

The Executive order referred to above is contained in the Code of Federal Regulations (1973). Included in the order are all administrative rules applicable to LEAA's recognition of, negotiations with, and general conduct toward labor organizations.

Legal Opinion No. 74-13—State Criminal Justice Planning Agency Organization Change Proposed in Mississippi Legislation—July 2, 1973

TO: LEAA Regional Administrator
Region IV - Atlanta

This office has reviewed Mississippi Senate Bill No. 2387 authorizing expenditure of Federal and State funds, under provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644) through the Office of Coordinator of Federal-State Programs. Section 4 of the bill states:

> The funds appropriated, authorized and approved for the programs covered herein shall be expended solely under the direction, control and signature of the Coordinator of Federal-State Programs, who shall have full supervision of the programs, their personnel, and work.

As long as the Coordinator is under the jurisdiction of the Governor and such "control" is limited to management control, with policy control still vested in the supervisory board, this provision would not be inconsistent with Section 203 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. However, if the "control" exercised by the Coordinator was interpreted to include policy direction through the establishment of priorities or revision of State plans after approval by the supervisory board, then such activity would be in conflict with the act and LEAA would be unable to continue funding the Mississippi State Criminal Justice Planning Agency (SPA).

Legal Opinion No. 74-14—LEAA Funding for Training Conducted by the FBI—July 3, 1973

TO: Assistant Administrator
Office of Criminal Justice Assistance, LEAA

This is in response to a request for an opinion on whether LEAA can fund the Federal Bureau of Investigation (FBI) under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644), for purposes of training State and local law enforcement personnel in areas not covered by the FBI appropriations.

Under Section 404 of the act, the Director of the FBI is authorized to develop new approaches to improve and strengthen law enforcement and, at the request of a State or unit of local government, assist in conducting local and regional training programs for State and local personnel. Expenditures for such services are taken from congressionally appropriated funds to the FBI.

In a similar provision, Section 407, LEAA is authorized to develop and support regional and national training programs to instruct State and local law

enforcement personnel in improved methods of crime prevention and reduction and enforcement of the criminal law.

Most agreements between Federal agencies are entered into under the terms of the Economy Act, 31 U.S.C. 686, which is limited generally to the obtaining of "available" services from agencies that could not otherwise be "economically" obtained.

This act applies to LEAA. In addition, LEAA differs from other Government agencies in that one of its functions under Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, is to serve as the focal point for the Federal Government's efforts in assisting States and units of local government to improve and strengthen law enforcement. In establishing LEAA to perform a coordination role within the Federal system, Congress gave it broad authority to enter into intragovernmental agreements beyond the scope and limitations of the Economy Act. This authority is contained in Sections 508, 513, and 514 of Title I of the act.

Section 508 is particularly significant because it is couched in the terms of the Economy Act but does not contain that act's narrow restrictions on the transfer and obligation of funds. This section provides:

> The Administration is authorized on a *reimbursable basis when appropriate,* to use the available services, equipment, personnel, and *facilities of the Department of Justice* and of other civilian or military agencies and instrumentalities of the Federal Government . . . (Emphasis added.)

Section 513 provides:

> To insure that all Federal assistance to State and local programs under this title is carried out in a coordinated manner, the *Administration is authorized to request any Federal department or agency to supply* such statistics, data, program reports, and other *material as the Administration deems necessary to carry out its functions under this title.* Each such department or agency is authorized to cooperate with the Administration and, to the extent permitted by law, to furnish such materials to the Administration. Any Federal department or agency engaged in administering programs related to this title shall, to the maximum extent practicable, consult with and seek advice from the Administration to insure fully coordinated efforts, and the Administration shall undertake to coordinate such efforts. (Emphasis added.)

Finally, Section 514 provides:

> The Administration may arrange with and *reimburse* the heads of other Federal departments and agencies *for the performance of any of its functions under this title.* (Emphasis added.)

In the situation at hand, because it is clear that LEAA could request and fund an agency other than the FBI to perform a similar service, it would be against the policy behind the Economy Act to seek a nongovernmental agency to carry out a program that can be more economically carried out by the FBI. Such transfer of services would be even more wasteful, inefficient, and impracticable, given the extended character of Sections 508, 513, and 514.

This office therefore is of the opinion that ample statutory authorization exists for LEAA under Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the Economy Act to obtain training services

from the FBI for State and local law enforcement agencies. The FBI should be funded on a reimbursable basis for performance of LEAA's training functions under Section 407 by force of Section 514.

Given this background, LEAA should advise its congressional Appropriations Committees of any funding it undertakes with the FBI, as these Appropriations Committees have responsibility for both the FBI and LEAA budgets. In allocating funds to the FBI and to LEAA, it must be assumed that the Appropriations Committees are aware of the FBI's authority under Section 404 of the Safe Streets Act, and the Appropriations Committees must be assumed to have appropriated funds to the FBI and LEAA for training under the provisions of Sections 404 and 407. In light of the small amount of funds involved, this notice could be given when LEAA makes its presentation to the Appropriations Committees in the upcoming fiscal year.

Legal Opinion No. 74-15—Use of Technical Assistance Funds for Employment of Consultants to Civil Rights Compliance Reviews—July 9, 1973

TO: Director
Office of Civil Rights Compliance, LEAA

This is in response to a request for an interpretation of Section 515(c) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644), regulating the use of technical assistance funds.

The act does not define technical assistance, and there is no pertinent legislative history to assist in determining what Congress meant by the term. However, the term is found in the enabling legislation of other Government agencies that carry out technical assistance programs; and it is a well-settled principle of statutory construction that the interpretation of the term in the act should be guided by reference to these laws.

In recent years, the term has been employed in the language of many of the statutes that authorize programs of Federal domestic assistance. While an examination of the legislative and administrative materials relating to these programs reveals no comprehensive definition of "technical assistance," a comprehensive definition can be gleaned from the proliferation of social science literature relating to the subject of international and domestic assistance. These materials generally describe technical assistance as the communication of knowledge, skills, and know-how. The means of communication are said to include the provision of expert advisory personnel, the conduct of training activities and conferences, and the preparation and dissemination of technical publications.

Generally, technical assistance programs that would fall within the definition and the limitations of Section 515(c) of the act include: conferences, lectures, seminars, workshops, demonstrations and on-site assistance,

training, and publications that assist planning and operating agencies in developing and implementing comprehensive criminal justice planning and management techniques.

It is the understanding of this office that two of the individuals in question here are specialists in personnel matters relating to equal opportunity and that a third is a specialist in the area of police entrance examinations. These men, as members of the compliance review team, will help State agencies improve their civil rights status by disseminating equal employment technical information.

As long as the activities contemplated in this area of assistance relate to the organization, administration, and general operating efficiency of law enforcement agencies, technical assistance funds may be used to fund the participation of these experts as part of the compliance review team. However, their functions should not include performance of duties that could be construed as fulfilling LEAA's administrative responsibility in the area of civil rights.

Legal Opinion No. 74-16—American Bar Association Grant Printing—July 10, 1973

TO: Assistant Administrator
Office of Criminal Justice Assistance, LEAA

This is in response to a request for an opinion regarding the authority of LEAA, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644) to make a grant to the American Bar Association (ABA) solely for printing and packaging of the ABA Standards for Criminal Justice.

The controlling Federal regulation on the matter is the Government Printing and Binding Regulation, December 1972, No. 22, published by the Joint Committee on Printing pursuant to the authority of Sections 103, 501, and 502, Title 44, United States Code. Section 36 of that regulation states:

> 36-1. Printing Requirements Resulting From Grants.—The Joint Committee on Printing does not intend that grantees shall become *prime or substantial sources* of printing *for the use* of departments and agencies. Therefore, the inclusion of printing, as defined in paragraph 1, within grants is prohibited unless authorized by the Joint Committee on Printing.
>
> 36-2. This regulation does not preclude—(a) The issuance of grants by any department or agency for the support of *nongovernment publications, provided* such grants were issued *pursuant to an authorization of law and were not made primarily or substantially for the use* of any department or agency. (Emphasis added.)

The issue is whether the proposed grant is for material printed "for the use" of LEAA. This is a question of fact on which this office, on the basis of available information, is unable to make a final decision. However, since the criminal justice agencies and personnel that are LEAA grantees would receive the document, it might appear that the printing could be viewed as being for the use of LEAA.

Legal Opinion No. 74-17—Legality of an SPA Requiring a Surcharge for Administering Discretionary Grants—July 11, 1973

TO: LEAA Regional Administrator
Region III - Philadelphia

It is illegal generally for LEAA, in making a discretionary grant under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644) to award funds to be used by a State Criminal Justice Planning Agency (SPA) to administer that grant. Part B of Title I of the act provides for LEAA grants to establish and operate SPA's. The operation of an SPA involves monitoring the progress and expenditures of recipients of LEAA grant funds. (Guideline Manual M 4100.1, "State Planning Agency Grants," August 22, 1972, page 4.) Thus, administering a discretionary grant is a normal function of an SPA and should be financed from the general allocation of funds to State planning agencies under Part B of Title I (42 U.S.C. 3725).

Moreover, discretionary grants are made under Part C of Title I, and grants under Part C can be used only for the purposes enumerated in Section 301 (42 U.S.C. 3731(b)). This section does not mention the costs of SPA administration of grants, and consequently discretionary grant funds could not be used for that purpose.

LEAA has previously determined that Part E funds (Sections 451-455 of Title I) cannot be used by an SPA to cover the expenses of administering a discretionary grant under Part E. This determination would seem to be equally applicable to discretionary grants under Part C, and is necessary to maintain the separation of planning grants from action grants that is established by the act.

In certain exceptional situations, funds may be provided to an SPA to cover unusual administrative expenses. An example of such a situation is the administration of a National Scope project, in which the administrative services of the particular SPA monitoring the project benefits many States. In such a case, it could be unfair to require that administrative expenses for the entire project come out of one State's allocation of Part B funds, and additional planning funds may be granted. However, this exception is narrowly limited to projects that have a national impact.

Legal Opinion No. 74-18—U.S. Park Police—July 13, 1973

TO: Chief of Police
United States Park Police

This is in response to a letter of July 6, 1973, that asks whether the U.S. Park Police, because it has the same responsibilities and duties of the local Washington, D.C., police force, would qualify as a unit of local government for the purpose of receiving LEAA grants under the Omnibus Crime Control and

Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644).

The letter points to Title 42 U.S.C. 3781(d), which, it states, "defines a unit of general local government, for the purpose of assistance eligibility, as 'any agency of the District of Columbia Government or the United States Government performing law enforcement functions in and for the District of Columbia and funds appropriated by the Congress for the activities of such agencies may be used to provide the non-Federal share of the cost of programs or projects funded under this chapter.' "

However, the letter does not point to the additional language found thereafter, which states:

> . . .provided, however, that such assistance eligibility of any agency of the United States Government shall be for the sole purpose of facilitating the transfer of criminal jurisdiction from the United States District Court for the District of Columbia to the Superior Court of the District of Columbia pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970.

Thus, a complete reading of the definition would preclude the U.S. Park Police from receiving funds under the act.

Legal Opinion No. 74-19—Internship—August 15, 1973

TO: Assistant Administrator
Office of Educational Manpower Assistance, LEAA

This opinion is in response to a request concerning the meaning of the phrase "on leave from the degree program" in Section 406(f) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). The specific question presented is whether the phrase precludes students engaged in law enforcement internships from taking any academic courses during the period of the internship.

Since the legislative history is silent as to any intent of Congress regarding this phrase, its common definition and usage govern.

While "on leave" sometimes means a total absence from a duty or activity, the essential element in the definition of leave is not absence, but permission. It is permission that distinguishes leave from mere absence.

The phrase "on leave from the degree program" means that the student is involved in the internship with the knowledge, cooperation, and permission of the institution. It is probable that the phrase was added to make it abundantly clear that the internship funds would not be available to a person who simply leaves school for a term (or indefinitely) and happens to work for a law enforcement agency. The internship is intended to be part of the student's continuing educational experience, and is to be coordinated with the rest of his program. The student must coordinate his internship with the institution, and he should be returning to school as soon as it is completed. Thus he is to be

"on leave," as opposed to separated completely from the institution. Taking a light course load during the internship is quite consistent with such a purpose.

A contrary view, that the phrase is intended to preclude the taking of any courses, would be inconsistent with the purpose of the internship program. Moreover, the only purpose for such a provision would be to ensure that the student devote sufficient energies to the internship, but this is already accomplished by the requirement that students "serve in full-time internships."

In conclusion, the intent of Congress in adding the phrase in question seems to have been to require the student to coordinate his internship with the institution. There is no indication that the student is precluded from taking courses during the internship, so long as he serves full-time with the law enforcement agency.

Legal Opinion No. 74-20—Pass-through to Units of Local Government—September 7, 1973

TO: President Judge
Court of Common Pleas
Pittsburgh, Pennsylvania

LEAA has before it a proposal to give specific authorization to the judiciary and the highest trial courts to apply for and receive block grant funds to improve the criminal justice system.

Paragraph 2 of Section 303(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) provides that a State Criminal Justice Planning Agency (SPA) must make available to units of general local government that percentage of Federal funds that corresponds to local law enforcement expenditures funded in the previous year. To meet this requirement, subgrant funds must be granted to local units of government.

The definition of a "unit of general local government" can be found in Section 601(d) of the act. The definition specifically mentions only those governmental units that exercise a variety of jurisdictional powers, including taxing power, lawmaking power, and law enforcement authority. Although it is recognized that certain State, municipal, and county governmental agencies possess some of these powers, it is necessary to possess a full range of such powers to be within the definition. Any other interpretation of "unit of general local government" would be inconsistent with the statutory intent as it would cause an involuntary bypass of these governmental units by allowing locally available funds to be channeled between State planners and ultimate users.

LEAA believes funding of court programs to be of primary importance. The problems of the courts and their solution are basic to the improvement of all criminal justice functions. However, it would not be possible administratively to effect the change proposed.

This is not to say, however, that the judiciary cannot directly receive State subgrant funds. There is nothing that would prohibit a State from directly funding court projects from the State share of block funds.

Legal Opinion No. 74-21—(Number not used.)

Legal Opinion No. 74-22—Use of Part C Funds for Planning Purposes and Technical Assistance Functions—August 22, 1973

TO: LEAA Regional Administrator
Region V - Chicago

This is in response to a memorandum of July 31, 1973, requesting an opinion on the Indiana State Criminal Justice Planning Agency (SPA) proposal to create an SPA technical assistance division using funds allocated under Part C of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

This office has reviewed that memorandum; a letter on the subject, dated July 19, 1973; and the application to establish the technical assistance unit within the SPA from Part C fund sources.

In summary, various portions of this program are fundable from Part C sources and certain functions may not be funded. LEAA cannot estimate the dollar value of either portion because it is not apparent from the budget which resources are going to what specific function. For this reason, this opinion must be applied to a restructuring of the application and implementation of the program to make it conform to statutory standards.

The program application appears to provide for three major activities—planning, grant administration, and technical assistance. Planning and grant administration activities must be funded from Part B sources and true technical assistance activities from Part C sources in accordance with the standards set out below.[1]

1. As a general rule, an appropriation made available for a specific purpose may not be supplemented by other appropriations. Part B, Section 203(a) of the act states:

> A grant made under this part to a State shall be utilized by the State to establish and maintain a State planning agency.

LEAA always has taken the position that only Part B funds may be used for the operation of the SPA. On that ground it has previously denied requests by several SPA's to use a percentage of Part C funds for planning and administration. This is consistent with Congress' understanding of the use of Parts B and C funds based on the appropriation acts and budget submissions.

[1] This opinion does not include Part E funds, which are governed by separate provisions.

2. Part C, Section 303(a)(10) provides that a State comprehensive plan must "demonstrate the willingness of the State to contribute technical assistance or services for programs and projects contemplated by the statewide comprehensive plan and the programs and projects contemplated by units of general local government or combinations of such units."

This provision requires that the State provide technical assistance services or funds to local governments. The technical services (or funds for those services) are of a "program" or "project" nature related to functions contemplated by the State plan. Examples include advice or assistance to police departments in police operations; assistance to courts in the management, performance, or upgrading of their activity; or aid to correctional institutions in the performance of their functional activities. If funds are to be used for these purposes, the source may be the block fund allocation of Part C.

The only Part C funds that may be used for planning purposes are those authorized by Part C, Section 301(b)(8) for Criminal Justice Coordinating Councils. LEAA sees no application of this section in the proposed program.

Legal Opinion No. 74-23—Retroactivity of Matching Requirements—August 30, 1973

TO: Executive Director
Kansas Governor's Committee on Criminal Administration

This opinion is in response to a letter, dated August 9, 1973, requesting an interpretation of Section 523 of the Crime Control Act of 1973 (Public Law 93-83), which amended the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351, as amended by Public Law 91-644). The letter asked whether the provisions of Section 523 are mandatory, and for guidance on the meaning of the term "obligation" as used in Section 523.

Section 523 states:

> Any funds made available under Parts B, C, and E prior to July 1, 1973, which are not obligated by a State or unit of general local government *may* be used to provide up to 90 percent of the cost of any program or project. The non-Federal share of the cost of any such program or project shall be of money appropriated in the aggregate by the State or units of general local government. (Emphasis added.)

The clear meaning of the word "may" is permissive rather than mandatory. Therefore, at the option of the State Criminal Justice Planning Agency (SPA), funds not obligated may be used as provided for in the prior legislation controlling such year's funds or in the retroactive provision of Section 523. However, the SPA may not impose, without acceptance by the local unit of government, a requirement not in the prior legislation for such year; i.e., "hard match" may not be required for fiscal year 1973 Part E funds or fiscal year 1973 Part C funds.

With regard to the definition of "obligated," the drawdown of funds is not controlling. The term "obligated" has a variety of meanings. The meaning intended by this House-passed provision was explained on the House floor by

Representative Edward Hutchinson, the floor manager of the bill, as follows (Cong. Rec. H. 4745, June 14, 1973):

> So desirable did it seem to eliminate soft match and transfer to a hard match requirement that H.R. 8152 would make this change with regard to unobligated funds made available prior to July 1, 1973. It should be made clear that funds 'not obligated' are those not awarded or committed by the State or local governments. If the State or local government has contracted for a project or has effectively *awarded* the funds to one of its agencies, the funds are, for purposes of Section 523, considered as 'obligated.'
>
> If a program or project is in operation but not completed, it is not intended that the new matching requirements be applied to the remainder, even though under accounting practices the governmental unit may not be as yet obligated to pay. Likewise, it should be clear that if a State has awarded funds to a unit of local government and the unit has not, in turn, further obligated the funds by award or contract, the funds are not obligated and the new matching requirements would apply. In other words, the fact that the funds in the hands of a unit of local government came through the State does not of itself change the result that would otherwise obtain. (Emphasis added.)

In summary, a single subgrant award by the State, made prior to the effective date of the amendments, is governed by the terms of that award. If the State has made a multiple grant award, the retroactive provision may be used to amend any subgrant that would be made by the region or city that has not received an award or other authorization to start its grant activities.

Legal Opinion No. 74-24—Reallocation of Part C Block Grant Funds—September 25, 1973

TO: Administrator, LEAA

Pursuant to its authority under Section 501 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) to establish rules, regulations, and procedures necessary to the exercise of its functions, LEAA promulgated guidelines that placed a 2-year limitation on the use of funds. This procedure is designed to require the earliest possible obligation of subgrant funds by the State and to "clean-up" the older fund sources. At this point in time, the obligation date of 1971 funds has expired. Unobligated funds in the hands of each State Criminal Justice Planning Agency (SPA) must be returned to the appropriate LEAA regional office (LEAA Notice N 7110.2). The question presented is what is the proper reallocation procedure to be utilized. For the following reasons the Office of General Counsel believes that statutory language requires that Part C block funds be made available for reallocation as block grants to the States on a population basis.

Discussion

The 1971 amendments to the Omnibus Crime Control and Safe Streets Act of 1968 provide in Section 306(b) that funds allocated to a State that will not

be required by the State or that the State will be unable to qualify to receive will be available for reallocation as block grants. The House bill had contained a provision permitting block grant funds to be distributed as discretionary grants if: (1) a State failed to have a plan approved either because it submitted no plan or because the plan submitted was unacceptable; (2) a State submitted an acceptable plan but failed to comply with the assurances given in the plan, the provisions of the act, or administrative regulations; or (3) a State submitted an acceptable plan and was in compliance but failed to use or claim a portion of the funds.

The Senate in considering this House amendment felt that this could serve to undermine seriously the block grant mechanism. The Senate committee felt that a possible effect of the provision to redistribute such funds as discretionary funds might be to provide an incentive for cities to forego applying for allocated block grant funds in order that such funds might revert to the discretionary fund and become available as direct discretionary grants. The Senate committee report at p. 35 states: "The result could be a widespread defection from block grant participation and a substantial increase in LEAA's direct categorical grant program. The Committee amendments preclude this undesirable development by providing that unused block grant funds shall revert to LEAA for distribution as block grant funds to other States, instead of as discretionary funds." (Senate Report No. 91-1253 at 35.)

The Conference substitute provided that funds would be available for reallocation as discretionary funds where a State plan has not been approved (Section 305) or where funds have reverted because of the application of Section 509 (Section 306(a)(2)). However, where a State did submit an acceptable plan and was in compliance but failed to use or claim a portion of the funds, the Conference amendment provided that such funds must be reallocated as block grant funds (Section 306(b)).

The Comptroller General, in an opinion dealing with the deposit of unearned conservation payments that are refunded to the Government, has held that such funds are for the credit to the appropriation from which they came and are available for the purposes of the program. In that opinion, the Comptroller General held that to refund such money to the Treasury would decrease the amount appropriated by Congress for the specific program so as to defeat its purpose (39 Comp. Gen. 647). In the present case, although there is no question that the intent of Congress was that this "no-year" money remain as part of the appropriation, the legislative history is clear that the reverted Part C block grant funds must be reallocated to the States on a population basis.

Legal Opinion No. 74-25—Waiver of Match for Other Than Part C Funds to Indian Tribes—September 12, 1973

TO: Assistant Administrator
Office of Educational Manpower Assistance, LEAA

This is in response to a memorandum of August 23, 1973, in which an opinion was requested on whether there has been a statutory violation of the Omnibus Crime Control and Safe Streets Act, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), by the waiver of match to Indian tribes for other than Part C grants.

LEAA has no authority to waive match requirements for Indian tribes other than for Part C block and discretionary grants. There is nothing in the legislative history that could in any way support such a waiver for Part B or Part E grants.

The memorandum from Region X states that "The cause of this problem is based on explicit permission in the Discretionary Guide to fund total amount of Indian Reservation Grants." The Discretionary Funds Guide, page 66, states:

> 5. Special Requirements.
> a. *Matching Contributions.* The Administration determined that Indian reservations and communities are poverty areas eligible for maximum funding of LEAA programs. For details see Financial Guide.

Financial Guide M 7100.1A, Chapter 4, paragraph 15 (April 1973) refers to waiver only in the case of a block grant (301(c)) or a discretionary fund grant (306(a)(2)).

The maximum Federal funding allowed under Part E is 90 percent (75 percent under the old act) and 90 percent under Part B. There is no authority for 100 percent funding except under Part B for regional planning units.

A January 4, 1973, memorandum from you to the Administrator shows that where Part B funds are used for Indian planning, the 10 percent match would be required.

All grants that have been awarded to Indians under Part B and Part E must meet the match requirements. Because prior to FY 1974 such match could be soft, it would appear that those grants awarded prior to FY 1974 would have no problem coming up with the match.

To correct this administrative error, those grants that have been awarded under Part E and Part B prior to FY 1974 must include the appropriate soft match. Where soft match cannot be obtained for the Part E grants, those grants should be canceled and Part C funding utilized.

Legal Opinion No. 74-26—Washington State Legislation to Establish a Criminal Justice Education and Training Commission—September 12, 1973

TO: LEAA Regional Administrator
Region X - Seattle

This is in reference to a request for an opinion on proposed Washington State legislation that would authorize funds available to the State under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), to be utilized for the establishment and operation of the Criminal Justice Education Training Commission. The question is whether those funds may be charged against the required pass-through to units of local government as proposed in Senate Bill 2132, Section 24, Subsection 3.

State-provided services and outlays for or on behalf of local units of government may be charged only against funds made "available" to local units of government with specific approval of the State Criminal Justice Planning Agency's (SPA) supervisory board and the local units to which the services will be made available. The consent of the majority of local governmental units involved would be sufficient. Although a reading of the financial management guidelines (M 7100.1A, Chapter 2, paragraph 8b.(2)(b)) appears to allow legislative mandate in lieu of such consent, that section of the financial guide deals with both Part B and Part C. Insofar as Part C is concerned, such a legislative mandate in lieu of consent would not be legally sufficient. The financial guide will be amended to clarify this point.

Legal Opinion No. 74-27—Scope of the Freedom of Information Act and its Applicability to the Office of Civil Rights Compliance—September 25, 1973

TO: Director
Office of Civil Rights Compliance, LEAA

The following material represents a discussion of the Freedom of Information Act (5 U.S.C. 552) and particularly its relationship to the Office of Civil Rights Compliance (OCRC). It should be noted that the new Freedom of Information guidelines being promulgated by this office should clarify much of the confusion relating to Freedom of Information.

The Freedom of Information Act (FOIA) presents some rather difficult problems in such areas as voluntary civil rights compliance activities, answering of reporters' requests, the release of special reports, and confidentiality of certain files. A determination of whether a particular item should be withheld from the public is a complex question best answered by those who use the particular information or document requested. This opinion will first discuss

the FOIA and its exemptions and then particular items of information requested from OCRC, offering some suggestions as to whether and on what conditions certain items can be withheld.

In theory, the FOIA is quite straightforward. Its purpose is to increase greatly public access to Government records[1] and to make the withholding of information by an agency a rare exception rather than the rule. Certain types of records must be published and made readily available to the public.[2] Any other identifiable agency record must be released on request unless it falls within an enumerated exception.[3] This applies to all requests made by anyone for any records. Records must be made promptly available when requested in accordance with the agency's published rules stating the time, place, fees, and procedures to be followed.[4]

The FOIA has potential application to any request for information received by an agency. An informal request may be handled informally, but any time requested records are denied, the FOIA gives the requester a right of action in court to compel disclosure.[5] The terms "identifiable"and "record" also have been construed in a manner that is consistent with the intent manifested in the FOIA. A record need not be identified by name or number. A request sufficiently identifies the record whenever the agency knows, on the basis of the request, what information is sought.[6]

A single record that contains the desired information need not even exist; the data may be scattered throughout many files.[7] In short, a request may identify the information rather than the "record."

This interpretation is symbolic of the fact that "the courts have resolved almost all legal doubts in favor of disclosure."[8] For an agency or office implementing the FOIA, carrying out the spirit and intent of the act also means resolving doubts in favor of disclosure. The exemptions do not require withholding, they merely allow it. When disclosure is in the public interest, the information should be released even though it is within an exemption.[9] However, the converse is not true—where the public interest favors withholding, the records cannot be withheld unless they fall within an exemption.

The FOIA imposes on agencies "an affirmative obligation to provide access to official information that previously was long shielded from public view."

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[1] *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935 (D.C. Cir. 1970).
[2] 5 U.S.C. 552(a) (1) & (2).
[3] 5 U.S.C. 552(a) (3).
[4] Ibid.
[5] While it has been held that in an FOIA suit the court sits in equity and must balance the competing equitable interests *(Consumers' Union of the U.S., Inc.* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969)), the more commonly accepted view now is that Congress exercised its power to remove the common law barriers to relief, leaving the courts with power to deny relief, leaving relief only when the record falls within one of the exemptions in the act *(Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971)).
[6] *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935 (D.C. Cir. 1970).
[7] *Wellford* v. *Hardin*, 315 F.Supp. 175 (D. Md. 1970).
[8] Statement of Attorney General Elliott L. Richardson before the Senate Judiciary and Government Operations Committees, June 26, 1973, 5.
[9] 28 C.F.R. 16.1(a)

This obligation required a major overhaul of administrative practice, which has not yet been effected.[10] To bring agency policy into line with congressional intent and court interpretation, the Attorney General said recently:

> I will immediately remind all Federal agencies of this Department's standing request that they consult our Freedom of Information Committee before issuing final denials of requests under the Act. In this connection I will order our litigating divisions not to defend freedom of information law suits against the agencies unless the Committee has been consulted.[11]

Congress, the courts, and the Attorney General notwithstanding, in those cases where LEAA decides that it wishes to withhold information, the focus shifts to a question of whether the record falls within an exemption. Here the law under the FOIA is less clear; the only certainty is that the exemptions are to be construed narrowly.[12]

Some exemptions are likely to be inapplicable to all documents involved in the PIO functions such as the first (national defense), third (statutorily exempt), eighth (information on financial institutions),[13] and ninth (information concerning oil wells).[14]

Exemption 2 is for "internal personnel rules and practices." According to the House Report, this exemption includes operating rules and manuals for Government investigators and examiners, staff manuals, policies, office procedures, etc.[15] The Senate Report gives as examples only such matters as sick leave, lunch hours, and parking facilities.[16] At least one court has resolved this difference in favor of the Senate Report, in a comprehensive and carefully reasoned opinion.[17] The Attorney General's memorandum, on the other hand, gives weight to both.[18]

Thus the answer to whether staff instructions on sensitive matters can be withheld legally depends on which court hears the case. It is safe to say,

[10] Statement of Attorney General, *supra*, 4.

[11] Statement of Attorney General, *supra*, 7-8.

[12] *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935 (D.C. Cir. 1970).

[13] This exemption is not applicable in terms but supplies an analogy for arguing that certain civil rights report forms should be withheld, as will be discussed later.

[14] 5 U.S.C. 552(b) (8) & (9).

[15] U.S. Code Cong. & Admin. News, 89th Cong., 2nd Sess., 2427, 1966.

[16] Senate Report No. 813, 89th Cong., 1st Sess., 8, 1965.

[17] *Hawkes* v. *Internal Revenue Service*, 467 F.2d 787, 794 (6th Cir. 1972). The court reasoned that because the publication portion of the FOIA requires publication of "administrative staff manuals and instructions to staff that affect a member of the public," 5 U.S.C. 552(a) (2) (c), and because instructions for investigative action, standards for evaluating performance, etc., affect the public, such instructions must be released. The only exceptions are matters that are strictly internal (Exemption 2) or that relate to law enforcement (Exemption 7). It follows then, that the Senate explanation of Exemption 2 governs. To the extent that the House Report on (a) (2) (c) or Exemption 2 differs, it is incorrect. Because the Senate Report accompanied the bill through both houses, some courts and commentators have said the Senate commentary should govern, especially where it is narrower and closer to the statutory language. *Getman* v. *N.L.R.B.*, 450 F.2d 670 (D.C. Cir. 1971).

[18] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), 31.

however, that the exemption does not apply to raw data or instructions for which the agency cannot make a strong showing that disclosures will result in substantial harm to agency operations.[19] Until the House Report is completely overruled by the courts, records that meet those criteria can be withheld.

Exemption 4 applies to "trade secrets and commercial or financial information from a person and privileged or confidential" data. Although the House Report on the FOIA suggests that a promise that information will not be released is enough to bring such information within the scope of Exemption 4, this potentially would defeat the purpose of the FOIA, since an agency could promise confidentiality at will and thereby exempt large amounts of data. Such an interpretation was also rejected in court in *Getman* v. *N.L.R.B.*, 450 F.2d 670 (D.C. Cir. 1971), where it was held that information must be commercial or financial as well as privileged or confidential in order to fall within the exemption.

Also, the Senate and House reports indicate that the information should be data not ordinarily released by the party who provides it to the agency. Thus the exemption is generally not applicable to data from governmental bodies, which are accountable to the public for their policies and practices.

The exemption is applicable to financial information that a private contractor or individual provides to LEAA, and that the person ordinarily would not release. It also could apply to information received from a governmental agency if it were commercial or financial and if there were some indication of confidentiality or privilege, such as a State statute allowing the agency to withhold the information.

Exemption 5 allows the withholding of "inter-agency or intra-agency memorandums which would not be available by law to a private party in litigation with the agency." Because the definition of "agency" in the FOIA does not include non-Federal bodies,[20] only communications between LEAA and other Federal agencies or within LEAA fall within the exemptions. The purpose of the exemption also is to encourage frankness and thereby facilitate efficient decisionmaking. Therefore, documents fall within the exemption if their disclosure would be "injurious to the consultative functions of government."[21] The distinction between "factual data" and "recommendations" is not always clear;[22] but, in general, facts may not be withheld simply because they were contained in a deliberative memorandum, unless disclosure would reveal too much about the agency's decisionmaking process.[23]

Finally, under Exemption 5 the public is entitled to all memorandums and letters that a private party could discover in litigation with the agency.[24] This qualification does not normally remove a document from the scope of the

[19] Ibid.

[20] 5 U.S.C. 551(1).

[21] *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827 (1973).

[22] Statement of A. Scalia before the Committee on Government Operations of the House of Representatives, April 19, 1973, 12.

[23] Ibid.

[24] *EPA* v. *Mink*, *supra*, note 21, at 835.

exemption because a communication that is clearly within the exemption is usually not discoverable.[25] In summary, Exemption 5 is likely to apply to only a small number of communications, most likely at rather high levels within LEAA, that involve frankness in basic policy formulation. It does not apply to communications with persons or groups outside the Federal Government, such as grant recipients.

Exemption 6 applies to records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Generally, the information disclosed must be personal, such as medical records, etc., and disclosure must be potentially harmful to the individual involved. This exemption normally calls for deletion of references that would reveal an individual's identity, allowing disclosure only of the Government action involved. Unidentified statistical information should be released, but not detailed personal information.[26] "For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public."[27] The Freedom of Information Committee of the Department of Justice considers disclosure of one's race to be a harmful release of personal information. Thus, for example, details in the Biennial Civil Rights Compliance report that facilitate identification of an individual where race is disclosed may be deleted on the basis of this exemption.

Exemption 7 allows the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Again the House and Senate reports carry different interpretations of the scope of the exemption. According to the Senate, the files must be prepared to prosecute law violators, and their disclosure could harm the Government's case in court.[28] According to the House, the exemption includes files "prepared in connection with . . . litigation and adjudicative proceedings."[29]

It has been held that the purpose of the exemption is to prevent premature discovery by a defendant in an enforcement proceeding.[30] Thus there must be a concrete prospect of such proceedings.[31]

The Circuit Court of the United States for the District of Columbia Circuit has expressed a preference for the narrower Senate report,[32] although cases in that circuit to date have not been close enough to test the limits of the exemption.[33] In a recent decision the court found no "concrete prospect of serious harm to law enforcement efficiency either in a named case or otherwise."[34] The Circuit Court of the United States for the Fourth Circuit,

[25] *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318(1966), *aff'd. per curiam*, 384 F.2d 979 (D.C. Cir.) *cert. denied* 389 U.S. 952 (1967).

[26] See Wright & Miller, *Federal Practice and Procedure* 8, 2019. U.S. Code Cong. & Admin. News, 89th Cong. 2nd Sess., 2428, 1966.

[27] Senate Report No. 813, 89th Cong., 1st Sess., 9, 1965.

[28] Senate Report, Note 27, *supra*, at 9.

[29] House Report, Note 26, *supra*, at 2428.

[30] *Wellford* v. *Hardin*, 444 F.2d 21 (4th Cir. 1971).

[31] *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970).

[32] *Getman* v. *N.L.R.B.* 450 F.2d 670, 673 (D.C. Cir. 1971).

[33] Notes 31 and 32, *supra*.

[34] *Weisberg* v. *U.S. Department of Justice*, 101 Wash. Law Review 621, (D.C. Cir. 1973).

on the other hand, has specifically rejected the argument that interference with voluntary compliance efforts of an agency is a ground for withholding on the basis of this exemption.[35]

Until harm to general law enforcement efficiency is rejected more completely as a part of Exemption 7, records may be withheld where it is shown that the questioned material is a legitimate and integral part of the agency's law enforcement responsibility and where it can be shown that harm to the law enforcement function is likely to result if the records are disclosed.

With this general background on the FOIA, general activities of OCRC can be discussed. Although a final decision on withholding any particular record cannot be made without examining the document itself and its use in the agency, some generalizations can be made.

The argument that voluntary compliance documents are within Exemption 7 is reasonably strong in the civil rights context. The potential harm from disclosure was recognized by Congress in Title VII of the Civil Rights Act of 1964, which prohibits the Equal Employment Opportunity Commission from releasing the compliance information it obtains in its proceedings.[36]

Under the narrower interpretation of Exemption 7, such as the Senate version (harm to the Government's case in court), harm to voluntary compliance would not be sufficient to invoke the exemption. This harm is mainly to the voluntary compliance effort rather than to a prosecution of a case in court. The harmful result of disclosure is largely that a litigative or adjudicatory proceeding will have to be initiated, not that the proceedings will be hindered in some way. The harm is not to a particular proceeding, but to general administrative efficiency.

However, a feasible argument can be constructed for withholding on the basis of the broader view of the exemption, which includes harm to general law enforcement efficiency. The argument would run along the following lines: Title VI of the Civil Rights Act has been interpreted to require that further steps be taken to enforce the law if voluntary compliance fails.[37] Thus, voluntary compliance is not simply an ordinary agency function, but an integral part of the agency's law enforcement responsibility. Interference with voluntary compliance efforts is interference with overall law enforcement efficiency, which may be held to be within Exemption 7.

Civil rights compliance data collected by the Treasury Department were held not to be exempt from disclosure under Exemption 7 because an insufficient showing of the likelihood of enforcement proceedings was made.[38] The argument for withholding such data should make it clear that the records sought were compiled to enforce the law either through voluntary compliance or other proceedings, and that interference with voluntary compliance is as detrimental as premature discovery or other harm to the Government's case in court would be to the overall objective of enforcing the law.

[35] *Wellford* v. *Hardin*, 444 F.2d 21 (4th Cir. 1971).

[36] 42 U.S.C. 2000(e) - **(8)(e)**. This provision is not a statutory exemption under Exemption 5 for any other agencies. *Legal Aid Society of Alameda Co.* v. *Shultz*, 349 F.Supp. 771 (N.D. Cal. 1972).

[37] *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

[38] *Legal Aid Society of Alameda County* v. *Shultz*, 349 F.Supp. 771 (N.D. Cal. 1972).

If this argument succeeds, the Biennial Report Form, the names of agencies refusing to file the form, and the data gathered in onsite reviews will be exempt from disclosure until the enforcement process is completed. This is true also of surveys of the racial composition of State Criminal Justice Planning Agency (SPA) supervisory boards and Regional Councils if the enforcement responsibility concerning these groups is the same as that for law enforcement agencies in general.

Assuming the argument is accepted, records must still be "investigatory files" compiled for the purpose of law enforcement. The identity of recipients on which preaward reviews were conducted, for example, is probably a mere record of agency activity, while the review data might constitute an investigatory file. The same is true of a mere listing of agencies about which complaints have been received and of a list of agencies aided by the Marquette Center for Criminal Justice Agency Organization and Minority Employment Opportunity. The investigatory element is probably lacking, though in practice the deficiency might be overcome by a strong showing of need for confidentiality.

This would probably be the situation with respect to correspondence and negotiations related to compliance, such as a letter to a local police chief. Such letters also are not within Exemption 5 because they are not correspondence within the Federal Government. They would probably not be considered investigatory files except by a court sympathetic to the need for withholding.

Obviously, most of the civil rights problems present close questions under the FOIA. In such situations, where there is a strong need to withhold, the Freedom of Information Committee recommends that LEAA withhold the information initially and leave a further determination to the Attorney General if the requester exercises his right to appeal to that office. This should only be done where the enforcement process is in progress and a strong showing of harm from disclosure can be made. While a final decision would require more study, it would seem that disclosure is required for all complete preaward and postaward reviews (unless OCRC has concrete plans for further proceedings against the parties involved), and probably for the names of agencies aided by the Marquette Center.

Biennial Report Forms cannot be withheld unless attempts at securing voluntary compliance will be made or have failed. Where compliance is satisfactory, the prospect of further proceedings is not concrete enough to invoke the exemption. This is also true of the surveys of the composition of SPA boards and Regional Councils.

In addition, OCRC should adopt the general policy of releasing information unless there is a strong need to withhold. The liberal interpretation of "identifiable record" should be kept in mind, as well as the narrow construction of the examples. It should be remembered, for example, that "record" includes all memorandums, letters, etc., of the agency, and even information not contained in any particular document.

There is some flexibility if the agency does not want to release information. For example, the agency does not have to answer a request for 10 working days. It can defer to the Department Freedom of Information Committee for a ruling in the instance where there is compelling reason not to disclose.

Legal Opinion No. 74-28—Discretionary Grant Awards Directly to State Agencies—September 25, 1973

TO: LEAA Regional Administrator
Region I - Boston

This is in response to a request for an opinion on the question of whether LEAA may make a discretionary grant award directly to a State Attorney General's Office. This question was raised in a letter dated September 21, 1973, from Attorney General Richard J. Israel of Rhode Island.

Section 306(a)(2) of the Crime Control Act of 1973 (Public Law 93-83) controls. The 1973 legislation amended the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644). The section reads as follows:

> (2) Fifteen per centum of such funds, plus any additional amounts made available by virtue of the application of the provisions of Sections 305 and 509 of this title to the grant of any State, may, in the discretion of the Administration, be allocated among the States for grants to State planning agencies, units of general local government, combinations of such units, or private nonprofit organizations, according to the criteria and on the terms and conditions the Administration determines consistent with this title.

It is clear that LEAA is obligated to award all discretionary grants to either a State Criminal Justice Planning Agency (SPA), a unit of general local government, or, under the provisions of new language in the 1973 amendments, nonprofit organizations.

The State Office of the Attorney General is not the State agency designated pursuant to Section 203(a) of the above cited act. In addition, the subgrantee unit of government referred to in Section 306(a)(2) specifically has reference to general purpose political subdivisions of a State, such as a city, county, township, town, borough, parish, or village (see Section 601(d)).

In summary, it is necessary for a Part C discretionary grant to be awarded to, and with the concurrence of, the SPA when the applicant is an agency of State government.

Legal Opinion No. 74-29—(Superseded by administrative action.)

Legal Opinion No. 74-30—Part E Funds for Juvenile Delinquency Diversionary Projects—September 26, 1973

TO: LEAA Regional Administrator
Region VI - Dallas

This is in response to a memorandum dated September 18, 1973, regarding funding of two juvenile delinquency diversionary projects to be implemented by the Dallas Police Department, under Part E of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

This office has reviewed Section 52.03 of the new Texas Family Code, which permits disposition of a juvenile taken into custody without referral to court. It has also reviewed the Juvenile Policies and Procedures Plan issued pursuant to this provision, and the Order of the Court accepting the plan.

It is the opinion of this office that this court order, which has authorized certain determinations and dispositions by the police department for referral prior to a formal court procedure, is in fact a stage of the court process and therefore a program for such youths would be eligible for Part E funding as part of a preadjudication referral of delinquents.

Legal Opinion No. 74-31—Forgiveness of LEEP Loans and Grants for Military Service—September 26, 1973

TO: Assistant Administrator
Office of Educational Manpower Assistance, LEAA

This is in response to a request for an opinion concerning the cancellation of Law Enforcement Education Program (LEEP) loans and grants for military police service. In LEAA's view, loan cancellation benefits do not extend to personnel engaged in military police service.

The resolution of this issue is predicated upon an examination of the legislative history and basic policy considerations underlying the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). The Senate Report (S. Rep. No. 1097, 90th Cong., 2d Sess. 197 (1968)) on the purpose of the act states that it was enacted in response to recommendations resulting from the President's Commission on Law Enforcement and Administration of Justice. This Commission stressed that there was a critical need for the Federal Government to begin immediately a financial and technological assistance program to aid State and local governments in combating the rising incidence of crime.

The emphasis is clearly reflected in the Declaration and Purpose clause of Title I, which asserts the congressional finding "that crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively" and, to that end, states that "the declared policy of the Congress (is) to assist State and local governments in strengthening and improving law enforcement and criminal justice at every level by national assistance."

The Law Enforcement Education Program is consistent with the predominantly local focus of the act and is intended to upgrade the criminal justice system at the State and local levels by encouraging studies in the criminal justice field and the application of this knowledge within a suitable law enforcement agency.

Section 406(b) of the act cannot be construed expansively to include loan cancellation benefits for personnel engaged in criminal justice activities within the military establishment. Such an inclusion not only would contravene expressed policy considerations but also would jeopardize fundamental statutory goals, and those originally intended in the coverage might be deprived of the limited funds available.

Finally, it should be pointed out that under the LEEP program guidelines, individuals who enter military service are allowed to defer their LEEP payments up to 4 years. If they resume civilian employment with a public criminal justice agency, they are still entitled to receive 25 percent cancellation per year of their loan in accordance with the statute.

Legal Opinion No. 74-32—Clarification of Planning Grant Matching Share—September 27, 1973

TO: LEAA Deputy Regional Administrator
Region II - New York

This is in reference to a memorandum of September 18, 1973, in which a request is made for clarification of whether the matching share of grants made to the State and units of general local government must be increased and/or the Federal share correspondingly decreased to compensate for the funding "up to 100 percent for regional planning units," under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

It was not the intention of Congress to require State or local units of government to absorb the difference where a Regional Planning Unit was given a 100 percent planning grant. The meaning of the provision is simply that there would be no match required for such grants. The State Criminal Justice Planning Agency (SPA) must document the funds provided to Regional Planning Units and the 10-percent non-Federal share should be calculated on the remaining planning funds utilized by the State and local planning units.

Legal Opinion No. 74-33—LEAA Authority Over Ongoing State Subgrants—September 28, 1973

TO: LEAA Regional Administrator
Region VIII - Denver

Background

This is in response to a request of August 28, 1973. In this request, a number of documents relating to an ongoing State subgrant for a Freedom House Job Placement Center were enclosed. It was noted that this subgrant has been approved by the State Criminal Justice Planning Agency (SPA)

supervisory board for re-funding in spite of deficiencies noted in a monitoring report and an audit report of the State agency.

In summary, this subgrant involves serious problems in programmatic, procedural, and financial areas. In the program area, it appears that less than 10 percent of the project resources are going to ex-offenders as programed. Procedurally, evaluation reports are lacking, files are missing, progress reports are not on file, and SPA involvement is nonexistent. In addition, financial records are incomplete and inadequate, do not reflect true costs, and are lacking in supporting data. In short, this office feels these reports raise serious doubts as to the legality of the entire project as well as the itemized efforts.

The Issue in Relation to the Block Grant Concept

Funding under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) was designed to insure local control of police and law enforcement activities. In *Ely* v. *Velde*, 451 F. 2d 1130 at 1136 (1971), the United States Circuit Court for the Fourth Circuit, in commenting on the Safe Streets Act, found:

> The genesis of the 'hands-off' approach lies in considerations more subtle than a simple desire to give the states more latitude in the spending of federal money. The dominant concern of Congress apparently was to guard against any tendency towards federalization of local police and law enforcement agencies. Such a result, it was felt, would be less efficient than allowing local law enforcement officials to coordinate their state's overall efforts to meet unique local problems and conditions. Even more important than Congress' search for efficiency and expertise was its fear that overbroad federal control of state law enforcement would result in the creation of an Orwellian 'federal police force.'
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> [Section 518(a)], which forbids federal control over local policy and law enforcement agencies, was the congressional solution for these problems. The legislative history reflects the congressional purpose to shield the routine operations of local police forces from ongoing control by the LEAA--a control which conceivably could turn the local police into an arm of the federal government.

There is extensive legislative history to support this decision. Senator Roman L. Hruska stated at *114 Cong. Rec. 12824*, May 10, 1968, that the block grant system was designed to prevent Federal domination and control of State and local law enforcement. Representative Emanuel Celler felt that Section 518(a) "should dispel those qualms" about the bill's having any tendency to set up a Federal police force.[1] Representative Edward Hutchinson expressed the belief that the American people did not want "a Federal policeman patrolling their streets."[2] The Senate Report on the Safe Streets Act[3] stated that the purpose of the block grant system is "to insure that Federal assistance to State and local law enforcement does not bring with it Federal domination and control nor provide the machinery or potential for the establishment of a Federal police force."

[1] 113 Cong. Rec. 21083, August 2, 1967.
[2] 113 Cong. Rec. 21188, August 3, 1967.
[3] Senate Report No. 90-1097, 90th Cong., 2d Sess. 227 (1968).

Another consideration frequently expressed was coordination and efficient administration of Federal funds. According to the Senate Report:[4]

> Most direct grants that bypass the states are projected-oriented stop-gap measures, which never approach the level of comprehensive program orientation and fail to provide measurable evidence that problems are actually being solved. With $100 million in federal funds for law enforcement and criminal justice programs, about 350 project grants are proposed. The House very wisely foresaw the fruitlessness of scattering these funds among such a minute number of uncoordinated separate projects. Consequently, the House required that a coordinated action plan be submitted by each state before the funds are released.

Congress coupled these concerns with a clear mandate that LEAA assure that funds granted under the Safe Streets Act are properly spent. An interpretation of the block grant concept that would prevent action by LEAA to prevent improper expenditure of funds would render Sections 303(a)(12), 509, and 521(a) meaningless and frustrate the intent of Congress in passing the act. In the issues that have been raised, programmatic content of the State's plan, which is the factor most relevant to the comments on the block grant concept, is not at issue. At issue is the disbursement of funds approved by the State for a corrections program. In the record presented to this office, the funds appear to be set aside for noncorrectional purposes and records required by the act as safeguards to insure proper use of the taxpayers' money have not been kept at any level.

Possible Courses of Action

1. Administrative Remedies: Under LEAA regulations set out at 28 C.F.R. 18.1 *et seq.*, an investigation is mandatory upon information that a grantee has not complied with the act, with regulations promulgated under the act by LEAA, or with the State plan approved by LEAA. Apparently an investigation has been conducted in this case and indicates noncompliance in all three areas by the State (the "grantee"), the unit of local government (the "subgrantee") that received the funds in question from the State, and the Freedom House Job Placement Center.

Informal means should be used to resolve the problems.[5] If this fails, a compliance hearing is required by the regulations. These hearings are designed to address the problem by holding the "grantee" responsible for noncompliance.

Formal notice of noncompliance must be served upon the grantee by registered mail, if the Regional Administrator determines that there has been "a substantial failure to comply" with regulations or with a plan or application. If there is no request for a hearing within 10 days, or after a compliance hearing on the merits of the case, LEAA may withhold payments in whole or in part; disclose publicly the failure to comply; seek injunctive action in the Federal courts; disallow nonconforming expenditures; impose additional

[4] Senate Report No. 90-1097, supra, at 228.
[5] 28 C.F.R. 18.31(b).

requirements by special condition; transfer the grant to another grantee; or take "other appropriate action."

In the view of this office, there appears to be a substantial failure to comply with the act, the regulations, and the State plan as there has not been actual compliance with reasonable objectives under the statute, e.g., disbursing funds to strengthen and improve local law enforcement and criminal justice, and maintaining adequate fiscal management to insure proper disbursement of public money (Sections 301(a), 303(a)(12), and 521(a)).

From the record, there also appears to be a failure to comply and require compliance with the Financial Guide. LEAA grant conditions, as further explained and amplified in the Financial Guide,[6] establish accountability for the proper use and disposition of funds as a basic responsibility of the grantee. This is of such importance that LEAA will not grant funds if it has foreknowledge that a grantee is incapable of discharging this responsibility. In order to be approved, the State plan must show that it carries out the requirements of the act. If the allegations of the monitoring team are found to be correct, there has been a material misrepresentation.

2. Approval of the Comprehensive Plan or Planning Grant: The State comprehensive plan or planning grant for FY 1974 has not been approved yet and approval could be withheld until satisfactory procedures are developed for accounting, auditing, monitoring, and evaluation "to assure fiscal control, proper management, and disbursement of funds." This is a requirement of each plan under Section 303(a)(12), and each recipient of assistance is under an express mandate "to keep such records as the Administration shall provide" under Section 521(a), applied by Section 521(d) to all parties involved. Consequently, this would be a reasonable, fair, and necessary measure in view of the facts enumerated in the SPA audit and the Regional Office's monitoring report on the Freedom House Job Placement Center, especially if the problem is symptomatic of operations throughout the State's subgrant activities.

A refusal to deal with deficiencies that have been documented could be the basis for a finding by LEAA that the State plan does not "reflect a determined effort to improve the quality of law enforcement and criminal justice throughout the State." Section 303(b) requires LEAA to withhold approval until the "determined effort" standard is met. As expressed in House Report No. 93-249 from the House Committee on the Judiciary:

> No plan is to be approved unless and until LEAA finds a determined effort by the plan to improve law enforcement and criminal justice throughout the State. Such effort must be more than a good faith effort to distribute funds widely either geographically or institutionally throughout a State . . . The 'determined effort' standard will require more of a plan than its failure to transgress a provision of the Act or LEAA regulation . . . Not until the threat of non-funding becomes real can the citizenry expect the quality of anticrime efforts to improve. The Committee feels that LEAA has in the past not exercised the leverage provided to it by law to induce the States to improve the quality of law enforcement and criminal justice . . . .

LEAA is held accountable for requiring more than lack of failure and it should require safeguards sufficient to insure that past failures do not recur.

[6] Financial Management for Planning and Action Grants, April 1973.

States are responsible not only for their own compliance, but also for compliance of the subgrantees and contractors to their plans, regulations, and the act. The guideline manual, Financial Management for Planning and Action Grants, April 1973, provides in Chapter 2, page 2:

> The State Planning Agency has primary responsibility for assuring proper administration of planning and action funds awarded under Title I. This includes responsibility for the proper conduct of the financial affairs of any subgrantee or contractor insofar as they relate to programs or projects for which Title I funds have been made available—and for default in which the State Planning Agency may be held accountable for improper use of grant funds.

Stated in the broadest terms, there has been failure in the past to maintain complete files on the Freedom House, to investigate the lack of financial reports that should have been received for the past 3 years, and to require the Freedom House to maintain adequate documentation for monitoring and evaluation, with the result that most of its records and documents appear to be fabricated or estimated if they exist at all.

At a cost of $40,802, only 32 ex-inmates were claimed to have been placed (and only two out of a spot check of 12 could be confirmed) in this project over almost a year's time, according to the Regional Office's monitor. In addition, the project director stated that no priority would be given to ex-offenders. This record could in no way be construed to show a "determined effort," or any kind of an effort, to improve law enforcement and criminal justice. In addition, serious questions are raised as to the legality of whatever it is that the funds are being spent on. This could be noncompliance with the act and the State comprehensive plan in that the State has failed to ensure compliance by failing to attach any substantive requirements or special condition requirements to this grant to assure conformity with the State plan, the act, and State plan grant conditions.

It should be emphasized that these criticisms, and any action taken in response to them, are not attempts to tamper with the State's priorities or to control its programmatic content, but are addressed to the disparities between the purposes and requirements of the act and the State plan and the compliance therewith.

LEAA could prescribe more elaborate methods of recordkeeping as to amounts and disposition to deal with abuses of the type discussed on a statewide level and/or triggered by a finding of deficiency. The State could do the same. For instance, more frequent and detailed financial achievement reports to the SPA under Section 303(a)(12), (13) could be required, as well as immediate investigations by the SPA in the event of nonreceipt. In addition, under Section 303(a)(9), plans for eventual phaseout of the Federal assistance could be required, or some kind of demonstration by the State and city of willingness to support the project on their own. In previous situations related to State grants to nonprofit organizations that displayed poor financial

management or a lack of organizational structure or had undemonstrated capabilities to handle Federal funds, this office recommended the following procedure:

> (1) Upon receipt of applications and some indication from the Supervisory Board that such applications are to be funded, the SPA (and Regional Office in the case of a discretionary fund grant) should hold a "Financial Accountability Conference." This conference will examine all management and operating procedures of the organization. It will delve into its capabilities to handle Federal funds. It will review, on a cost-item-by-cost-item basis, the project director's and financial officer's understanding of Federal grant rules.
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> (2) Upon successful completion of this review, mandatory monitoring efforts must take place within 1 month of the initial award. This review must verify that the procedures have been put into effect. Scheduled monitoring efforts should continue after the initial effort.
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> (3) Any project that cannot provide 100 percent assurance to the SPA and/or Regional Office must be funded through a governmental structure and put on a voucher or reimbursement basis for all its activities. This procedure can be mandated by a special condition and the plan can still be funded.

In all of these efforts, it is important to note that if the State plan complies *prima facie* with the act's requirements, funding appears to be mandatory under Section 303(a). In other words, the facts must exist that will support any action contrary or supplemental to complete approval of a plan that, on its face, meets the requirements of the act.

3. Consider Injunctive Relief in Federal Court: In very select situations, LEAA may want to take immediate action to avoid irreparable injury if a State has shown a definite inclination to proceed with an illegal action following LEAA attempts to handle the issue through the normal legal remedies. This does not appear to be the case here, but the general criteria have been spelled out to give a complete view of the options.

The act does not contain a statutory injunction provision. However, where it is apparent that a State is going to proceed to spend a portion of an LEAA grant on an illegal activity, after notice that such proposed action would be in violation of the act as not sufficiently related to the primary function to improve and strengthen law enforcement, a request for an injunction should be considered.

Reliance must be sought under the traditional rules that govern equitable injunctions. The agency, therefore, must show irreparable injury and inadequate legal remedy.

Irreparable injury may be demonstrated in the context of the public interest involved. It was recognized in *United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, at 389-390 (1966) that the protection of the public interest should be a paramount consideration in determining the propriety of an injunction. On similar broad policy grounds, the court in *Walling* v. *Brooklyn Braid Co., Inc.*, 152 F. 2d 938 at 940 (1945), said:

> Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violation either when they are about to occur or prevent their continuance after they have begun.

If the State spends LEAA funds for an illegal activity, to the extent that that portion of the grant is misappropriated, other legitimate State programs whose primary functions are related to "law enforcement" as defined under the act are jeopardized from receiving maximum financial support. This would circumvent the intent of Congress in establishing a funding system for increasing the effectiveness of law enforcement. The court in *Walling* v. *Brooklyn Braid Co., Inc., supra*, recognized the importance of facilitating congressional intent:

> The trial court is not bound by the strict requirements of traditional equity as developed in private litigation but in deciding whether or not to grant an injuction in this type of case should also consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that its congressional purposes underlying its enactment shall not be thwarted. (See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944).)

Where LEAA already has disbursed the State's block grant for the current year, LEAA may not be able to invoke Section 509 of the act in an effective and timely fashion and withhold payment for noncompliance with certain requirements. Under circumstances where it appears that the State is going to proceed with an illegal action despite notice from LEAA that such action is improper and where it is apparent that there is not enough time to invoke Section 510(b) of the act to conduct an administrative hearing or for the grantee to petition for judicial review pursuant to Section 511, obtaining a preliminary injunction is crucial.

The agency's decision to withhold payment in the future is an empty action when irreparable injury would occur and would compound the detriment to the public interest in assurance that future legitimate law enforcement projects receive the maximum allowable funding. It is likely that there exists an inadequate remedy at law under the administrative provisions designed to deal with ordinary noncompliance situations. This would fulfill the second requirement of proof under the traditional approach for equitable injunctive relief.

Another factor to be considered in an injunction is the balancing of the various equities. Note the following cases:

> On motion for preliminary injunction, the Court must exercise discretion on basis of relative importance of rights asserted and acts sought to be enjoined, irreparable nature of injury allegedly flowing from denial of preliminary relief, probability of ultimate success or failure of the suit, and balancing of damages and convenience generally. (*Federal Maritime Commission* v. *Atlantic & Gulf/Panama Canal Zone*, 241 F. Supp. 766 (1965).)
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> The Court must weigh the equities which favor or militate against the respective parties in terms of who is likely to suffer the greater injury if the injunction is granted or denied pending a trial of the issues. (*Blaich* v. *National Football League*, 212 F. Supp. 319 at 322-323 (S.D.N.Y. 1962).)
>
> Whether irreparable harm is likely to result to plaintiff if *pendente lite* (i.e., 'immediately') the injunction is denied and against the harm he must balance the harm to defendant likely to result if the relief is granted. (*Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738 (2d Cir. 1953).)

The relative importance of rights is the public interest in insuring proper expenditure of funds authorized by Congress to LEAA on the one hand and the State's right to act in areas significantly unrelated to the act on the other. The inconvenience of having the State wait for an administrative hearing and determination and/or a court determination on the merits is not great where delay poses no emergency. Compared to the irreparable harm to the public interest that would ensue from money misspent and the unlikelihood of getting it back for proper use, it is difficult to see what harm the State could show that delay in time would cause.

Insofar as ultimate success or failure from a trial on the merits is a consideration in whether or not to seek an injunction in a specific situation, it is difficult to advise in a general way on when the remedy may best be used. However, it is noteworthy that a presumption lies in favor of an administrative interpretation. In *Hammond* v. *Hull,* 76 U.S. App. D.C. 301, 303, 131 F. 2d 23, 25 (1942), Judge Justin Miller made the following statement:

> When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interferred with, certainly, unless it is clearly wrong and the official action arbitrary and capricious.

Conclusion

A State-funded subgrant that is in noncompliance with the act or with LEAA regulations or conditions may be acted upon by the responsible LEAA program office through the hearing and appeal mechanism; the plan approval function; or, in rare instances, by asking this office to present a court injunctive remedy.

Legal Opinion No. 74-34—Sufficiency of Supplanting Documentation Provided by Subgrantees to the Virginia State Criminal Justice Planning Agency—October 10, 1973

TO: LEAA Regional Administrator
Region III - Philadelphia

On pages 12 and 13 of the final Virginia State audit report, the LEAA auditors question the sufficiency of Virginia's procedures to assure that Federal funds will not be used to supplant or replace subgrantee's funds for law enforcement. The State of Virginia has denied this and stated that its present procedures for requesting nonsupplanting certificates at the time of actual submission of the grant are sufficient. The primary question that must be answered is whether the Virginia procedure meets the legislative requirements of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

It is the position of the State of Virginia that no certification will ever prove whether there has been supplanting. Supplanting will show up only upon auditing. Therefore, to require certification requirements apart from the statement regarding supplanting in the grant application is duplicative and performs no useful purpose.

It is the position of the auditors that if the requirement is to be met, the State must provide affidavits and, wherever possible, data to show that the nonsupplanting requirements were met. The Virginia procedure now in existence does not meet the requirement as outlined in the LEAA Financial Guide M 7100.1A, Chapter 2, page 6.

The nonsupplanting requirements were placed in the Safe Streets Act to ensure that Federal funds would be a supplement to and not a substitute for funds normally spent by States and localities for criminal justice purposes. Accounting and documentation of a nonsupplanting requirement are difficult. The State Criminal Justice Planning Agency (SPA) should at a minimum adhere to the LEAA Financial Guideline on the subject. Failure to meet this requirement suggests a general disregard for the intent of Section 303(a)(10) and places the Virginia SPA in violation of the act. This office cannot accept the SPA's argument that certification is a worthless effort. If nothing else, certification brings to the attention of subgrantees the existence of the requirement, and it could make a subgrantee less likely to violate the requirement.

It therefore is recommended that the auditor's finding regarding supplanting be upheld and that all future grant awards be required to meet the financial guideline on the subject. Regarding past grants, it is the opinion of this office that it would be impractical to make the requirement applicable to the subgrantees for their past grants through the SPA.

Legal Opinion No. 74-35—The Liability of the State of North Dakota Toward the Administration and Management of LEAA Funds Earmarked for Indians—November 19, 1973

TO: LEAA Regional Administrator
Region VIII - Denver

Background

This is in response to a request from the North Dakota Combined Law Enforcement Council and the Denver Regional Office on the capability of Indian tribes to contract lawfully with the Council, which is the State Criminal Justice Planning Agency (SPA) in North Dakota; the potential liability of the SPA for the violation of Indian contractual obligations; the permissibility of entering into triparty agreements with the Indians; and the available remedies to the State upon a determination of misuse of funds by the Indians.

Each of these issues must be considered separately, balancing the interest of the SPA with the overall policy considerations of the Omnibus Crime Control

and Safe Streets Act of 1968, at amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

Issues

1. What is the capability of Indians to contract with SPA's?

The SPA contends that it would be inequitable to affix liability for the misspending of Indian grants as the State lacks jurisdiction over reservation affairs and would be unable to enforce compliance with LEAA or SPA grants to the Indians. It bases this conclusion on an interpretation of Section 203 of the North Dakota Constitution and the passage of an amendment to Section 24 of the North Dakota Constitution, which amounts to a complete disclaimer of jurisdiction over causes of action arising on an Indian reservation. Subsequently, the State did indicate a willingness to assume jurisdiction upon acceptance by the Indians of State jurisdiction as provided for in the North Dakota Century Code, 27-19-02. This was further confirmed in a North Dakota Supreme Court case, *Gourneau* v. *Smith*, 207 N.W. 2d 256 (1973), where it was stated: "the Courts of this state are not at liberty to exercise jurisdiction over civil actions against an Indian when the cause of action arises on the reservation . . . Until the Indians on the reservation *act to consent to the State jurisdiction.*" (Emphasis added.) This office agrees with the State's interpretation of the statutory problem but believes that the problem can be resolved.

It would appear that the solution would be to request the Indian tribes specifically to consent to the State courts' jurisdiction prior to entering into a grant agreement with the State. Analogous to this, a cogent legal argument bestowing jurisdiction on the State courts would be that the actual contract with the State for a benefit should be considered a consent to jurisdiction for the administration of grant funds. (*Hess* v. *Palowski*, 274 U.S. 352, 47 S. Ct. 632 (1927).)

2. What is the potential liability of the SPA for the violation of Indian contractual obligations?

The State of North Dakota has questioned its liability under the act for subgrants made to Indian tribes. It is the opinion of this office that the North Dakota Combined Law Enforcement Council would have the same liability that it would have under any other action or discretionary grant. Both in the acceptance of the action grant funds and in administration of the discretionary grants, the State agrees to provide for supervision and monitoring of the grants. The privity of contracts expressed by the grant instrument will make the State potentially liable for misspent Federal funds. For example, in its application for an action grant, the State attests that, under the general conditions applicable to administration of grants under Part C and Part E of Title I:

> 10. *Responsibility of State Agency.* The State Agency must establish fiscal control and fund accounting procedures which assure proper disbursement of, and accounting for grant funds and required non-federal expenditures. This requirement applies to funds disbursed by units of local government as well as to funds disbursed in direct operations of the State planning agency. (M 4300.1, Appendix 4-1, number 10.)

Also, a discretionary grant, if administered through an SPA, makes the State liable for administering the fiscal regulations and provisions of the act. (See discretionary grant application, page 5, provisions 5 through 17.)

The discretionary grants, although awarded by LEAA, are awarded to and through the State. To deviate from this established LEAA procedure would appear to be contrary to the statutory requirement of comprehensiveness as outlined in Section 203(b) of the act. In any event, since the State can hold the Indian tribes liable for the grant through changes in the grant language, there is no reason for the State not to administer the grants as it does all block subgrants.

3. What are the available remedies to the State upon the misuse of LEAA funds awarded through the State?

If the State does have privity of contract with the Indians, the State will have recourse to State courts. If, however, it was unable to bring an action in State courts, it could bring an action in Federal courts if the contractual obligation was more than $10,000. The act likely would be construed as an essential element in potential litigation involving the grant of funds under the act, thereby conferring jurisdiction under the Federal courts. If the amount in question was less than $10,000, the State would have access to the tribal courts. It is understood, however, that an action in the tribal courts might be uncertain because the ordinances of the Indian tribes would be controlling as to whether an action could be properly maintained. Thus it would appear that the State has access to at least two forums to pursue an action, and possibly three, therefore minimizing the contention that it would be unable to pursue a legal action.

4. Would LEAA consider entering into a triparty agreement with the Indians?

As to this question, the North Dakota Combined Law Enforcement Council can lawfully contract with Indian tribes. There is no need for a triparty agreement, and funds to Indians should be administered by the SPA in the same way as any other grant. The contention that the inability to enforce the contract or compel compliance due to absence of State jurisdiction does not adequately take into account the availability of alternate competent forums to adjudicate the issue.

Legal Opinion No. 74-36—State Match Requirement for Salary Supplements to Tribal Policemen—October 24, 1973

TO: Assistant Administrator
Office of Educational Manpower Assistance, LEAA

This is in response to a September 24, 1973, request for a legal opinion on the requirements of Sections 301(d) and 306(a)(2) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) for State or local funds to match the expenditure of Federal funds utilized to supplement the salaries of Indian tribal policemen.

The Administration policy of classifying all Indian programs as training or developmental relieves the obligation of one-half match as well as the one-third limitation imposed on personnel compensation.

The resolution of this issue is largely predicated upon an examination and understanding of the special sensitive treatment afforded the Indians by LEAA. The Indian Civil Rights Act (Public Law 90-284), passed by Congress in 1968, completely altered the posture of Indian criminal justice within the United States. Old Indian customs and procedures are to be discarded in favor of non-Indian concepts of criminal justice. All of these required changes must be made by non-legally-trained personnel working within the tribal law and order system. The successful adaptation of the Indian criminal justice system faces a long period of intensive training and development.

The recognition of the difficulties and problems that confront the Indians in this transitional stage has prompted the formulation of an LEAA policy that is reflected in the classification of all Indian grants as developmental, demonstrative, or training efforts.

Section 301(d) of the act, as amended, stipulates:

> Not more than one-third of any grant made under this section may be expended for the compensation of police and other regular law enforcement personnel. The amount of any such grant expended for the compensation of such personnel shall not exceed the amount of State or local funds made available to increase such compensation. The limitations contained in this subsection shall not apply to the compensation of personnel for time engaged in conducting or undergoing training programs or to the compensation of personnel engaged in research, development, demonstration, or other short-term programs.

Section 306(a)(2) makes the same limitations applicable to discretionary grants. In view of the fact that the Indian criminal justice system will be undergoing reform and development in the upcoming years, it is the present policy of LEAA to classify all Indian programs as training or developmental. This policy determination will be reevaluated on an annual basis.

Therefore, the Indians are exempted from the one-third limitation and the Federal expenditure for such salary supplement does not have to be matched equally by State or local funds since the same rationale applies to this comparable provision.

Legal Opinion No. 74-37—Charges Against Part C Action Grant Funds for State Criminal Justice Planning Agency Administered Projects—October 16, 1973

TO: LEAA Regional Administrator
Region IX - San Francisco

Summary

In response to a request of September 12, 1973, this is to advise that a State Criminal Justice Planning Agency (SPA) may not charge itself for the accounting services it provides for block and discretionary grant programs or projects from the Part C funds granted for such projects solely within the State. Accounting and related services that the SPA provides must be funded from Part B planning monies.

Discussion

Grants made from Part C funds may be used only for those purposes enumerated in Section 301(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). Accounting and administrative expenses are not listed as an eligible purpose, i.e., as a program or project to improve and strengthen law enforcement and criminal justice.

Furthermore, the LEAA budget submission for FY 1974 contained the following statement:

> As no planning process is complete without the related functions of fund distribution and *administration*, program development, monitoring, evaluation and audit, planning funds also support activities in these areas. (Emphasis added.)

Prior-year budget submissions also contain this language. These budget submissions, which were transmitted to Congress, constitute statements by LEAA of how funds are to be expended. It would not be in accordance with these congressional submissions to permit administrative expenses to be provided from block or discretionary funds when there is no provision in Section 301(b) to permit such costs.

This opinion does not affect the allowability of Part C action funds for specific program or project evaluation. These functions have a basis for funding in both Parts B and C and this office is issuing a separate opinion on that question. The opinion also does not affect the allowability of such administration expenses under National Scope or other interstate projects in which such costs are not a responsibility of the SPA that agrees to undertake these additional responsibilities. [See Legal Opinion 74-43. Ed.]

Legal Opinion No. 74-38—Colorado Facilities Proposed for Demolition Involving Costs That Were Partially Funded by LEAA Funds—October 26, 1973

TO: Comptroller, LEAA

This is in response to the subject memo of August 29, 1973. In the opinion of this office, the Office of Management and Budget (OMB) Circulars A-87 and A-102 clearly require that when real property funded in whole or in part by the Federal Government is no longer used for its intended purpose, either it must be returned to the Federal Government, or the Government must be compensated for its share of the original project expense as determined by applying the percentage of the original project cost funded by the Federal Government to the current fair market value of the property.

The State of Colorado received LEAA action grants under provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) totaling $242,980 during fiscal year 1972 to finance the remodeling of a recently acquired building at 1370 Broadway Avenue, Denver, to make it suitable for occupancy by the Colorado Bureau of Investigation (CBI) and by the Division of Criminal Justice (the State Criminal Justice Planning Agency (SPA)). These grant monies paid a large part of the project expense.

The remodeling project included the installation of laboratory fixtures, some of which may be removable. Presumably, however, the bulk of the LEAA grant funds were used to make permanent changes to the building.

The expenditure of Federal grant funds to purchase or repair capital assets, e.g., facilities or equipment, is allowable when specifically approved, as here, by the Federal grantor agency. However, when the assets so acquired either are no longer available for use in a federally sponsored program or are used for purposes not authorized by the Federal grantor agency, the:

> Federal grantor agency's equity in the asset will be refunded *in the same proportion* as Federal participation in its cost. (OMB Circular A-87, Attachment B, paragraph C. 3., May 9, 1968.) (Emphasis added.)

The Federal grantor agency's equity is taken from the current fair market value of the property in the same proportion as the Federal participation in the remodeling project.

Therefore, if the LEAA grant monies paid, e.g., 60 percent of the remodeling expense in 1971-72, the State of Colorado would be obligated to return to LEAA an amount equal to 60 percent of the fair market value of the improvement of the building on the date it is no longer used.

The State may apply a use allowance of depreciation to the facilities remodeled as prescribed by paragraph B.11. However, because this allowance can be calculated only on 1 year or less, the dollar amount involved would be small.

The minimum requirements that Federal grantor agencies must prescribe concerning use by grantees of real property funded in whole or in part by the Federal Government are provided in OMB Circular A-102, Attachment N, paragraph 3.C., September 8, 1972.

When real property, acquired in part with Federal grant funds, is no longer used for authorized purposes, the grantees may be permitted to take title to the Federal interest by compensating the Federal Government for its share of the property, which is determined, as in Circular A-87, by multiplying the percentage of Federal participation in the original project (remodeling) by the current fair market value of the property.

Real property as defined by paragraph 2.a. includes: "land, land improvements, structures and appurtenances thereto, excluding movable machinery and equipment."

It would appear to be consistent with both Circulars A-87 and A-102 for the movable laboratory fixtures to be relocated to other premises. And, so long as they remained in the use of the CBI, no repayment would have to be made to LEAA.

There is the possibility that the State of Colorado could, in lieu of a cash repayment to LEAA, relocate the CBI, and the Division of Criminal Justice offices in another building. However, if this were done, the facilities must have a fair market value equal to the amount determined by application of the formula in Circular A-102.

Legal Opinion No. 74-39—Funding for Indian Referendum Concerned with Determination of Jurisdiction—October 24, 1973

TO: LEAA Regional Administrator
Region IX - San Francisco

This is in response to an October 15, 1973, request for a legal opinion on the use of LEAA dollars to fund an Indian referendum election to determine whether an area of Indian country shall remain under State jurisdiction or revert to Federal jurisdiction. The inability to discern a direct nexus between the goals and policies of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), and the requested funding precludes a grant for such purposes.

Nevada Revised Statute, Chapter 601, provides for the assumption and retrocession of jurisdiction of the State of Nevada over areas of Indian country in the State with the consent of the Indians occupying such areas. Jurisdiction referred to in this provision is not limited to criminal justice activities but appears to extend jurisdiction to a wide range of matters on the Indian lands including all civil causes of action. Section 301(a) of the Safe Streets Act, as amended, states that "It is the purpose of this part to encourage States and units of general local government to carry out programs and projects to improve and strengthen law enforcement and criminal justice." To effect this purpose, it was intended that grants should bear a direct, readily determinable relation to the improvement of the criminal justice system. The request for funding of the Indian referendum is concerned with jurisdiction of all matters and not just criminal activity. It demonstrates at best only an ancillary or peripheral relation to the goals of the Safe Streets Act. With only limited funds available, LEAA does not feel that it can assume responsibility for a matter that resides with either the State or the Bureau of Indian Affairs of the Department of the Interior.

If the State can determine adequately what portion of the required funds will benefit the criminal justice system, it may be possible to make a pro rata grant consistent with the goals of the act.

Legal Opinion No. 74-40—Allowability of Part C Funds for A Court-Related Traffic Citation System—October 3, 1973

TO: LEAA Regional Administrator
Region X - Seattle

This is in response to a request for an opinion on the allowability of LEAA funds for a traffic citation system, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). Funding for this program is allowable. LEAA has held that general court improvement projects that improve both the criminal and civil court may be funded in their entirety because the improvement of the courts system will facilitate criminal court activities and release court personnel and resources to improve the criminal courts. In addition, the law enforcement aspects of the proposed grant, i.e., police assistance in the areas of stolen cars, suspect location, and "wants and warrants" on suspicious vehicles and drivers, are significant.

It is important to distinguish this project from a simple traffic-related equipment purchase or other non-court-related activity.

Congress has specified the outside limits on the use of resources available to LEAA and its granting agencies. Funds are to be used in accordance with the provisions of §301(b), which set out the categories of programs and projects that may be funded. The import of the §301(b) provisions goes to the strengthening of law enforcement through "methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and *reduce crime in public and private places*" (emphasis added). The entire tenor of the act and its legislative history make clear that Part C funds are not to be used for programs dealing with enforcement of traffic laws.

However, this project appears only incidentally to relate to enforcement of traffic laws. It appears to be a court improvement program with significant law enforcement aspects and therefore, in the opinion of this office, is fundable.

Legal Opinion No. 74-41—Arizona Alcohol Abuse Funding—November 13, 1973

TO: LEAA Regional Administrator
Region IX - San Francisco

This is in response to a memorandum of November 5, 1973, requesting an opinion as to the eligibility for funding of alcohol abuse programs under Part C of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), in view of the decriminalization of public drunkenness by the Arizona State Legislature. There is no question that it would be proper for LEAA funds to be utilized to implement programs to treat individuals who have committed criminal offenses and are also alcoholics. It would also be proper to fund

programs for those who are diverted by a law enforcement agency into an alcohol abuse prevention program.

The more difficult issue is whether, once alcohol abuse has been decriminalized, alcohol abuse programs are eligible for funding. It is the opinion of this office that it would be proper to fund programs that will facilitate the transfer of alcohol abuse from the criminal to the noncriminal status. This will require certain programs to be established and supported for a reasonable period of time consistent with the assumption of cost provision in Section 303(a)(9) of the act and relevant guidelines. It appears that the Arizona State Legislature intended that there be a period of law enforcement involvement in this area since it appropriated $100,000 as matching funds for programs under the Safe Streets Act.

By funding programs that will implement the decriminalization of "public drunkenness," the law enforcement community—police, courts and corrections—will benefit by being relieved of a time-consuming and expensive process.

Legal Opinion No. 74-42—Elements of the Grants Management Information System Exempt from the Public Under the Freedom of Information Act—November 16, 1973

TO: Executive Secretariat, LEAA

This office has examined a listing of the informational elements from the Grants Management Information System (GMIS) on LEAA grants. It appears from this examination that all of the information now available regarding individual grants under provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) should be available for release under the auspices of the Freedom of Information Act (FOIA). The only items that could possibly raise any question of exemption are the equipment, personnel, and consultant cost elements. Examination of these generalized classifications leads us to conclude that, by generic title, these items would not now qualify for an exemption.

It is possible, however, that later additions to the GMIS system, specific confidential information, or inadvertent entries could bring some of the material within the scope of one of the exemptions to the FOIA.

It is noted, however, that many of the information requests made of the GMIS system are quite burdensome and do not meet a test of specificity. It would not be at all unreasonable for LEAA to require the requesting party to make the request more specific. It appears that many of the requests are fishing expeditions to develop marketing data, and because of this, LEAA should develop specific procedures for handling GMIS requests by outside parties.

Furthermore, GMIS should request the Comptroller's Office to develop procedures for the receipt of funds from answering these requests. It is part of both the LEAA FOIA Guideline I 1600.4 3(e) and the Department of Justice

regulations that a fee should be charged for providing information except when the release of the data is in the public interest. To date, GMIS has not been charging any fees for providing information.

Legal Opinion No. 74-43—Use of Parts B and C Funds for Evaluation—November 19, 1973

TO: LEAA Regional Administrators

In response to a number of recent requests, this opinion is provided to give guidance to LEAA program offices and State Criminal Justice Planning Agencies (SPA) on the issue of fund sources for evaluation activities, as provided under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

Statement of Issues

Both Parts B and C fund sources can be used to support various activities that come under the general classification of evaluation. Evaluation is defined in Federal Evaluation Policy:[1]

> Evaluation (1) assesses the *effectiveness* of an *ongoing* program in achieving its objectives, (2) relies on the principles of research design to distinguish a program's effects from those of other forces working in a situation, and (3) aims at program improvement through a modification of current operations.

The basic issue is whether and to what extent Part C funds can support these activities. Additional questions go to the use of Part B funds for the activities embodied in the definition as well as activities that can best be described as administration of an evaluation program. Supplemental issues are inherent in each request for opinion. These include:

- Issues relating to "pass-through" requirements.
- Issues on the location of the performers of evaluations.
- Issues relating to legitimate cost elements of evaluation activities.
- Issues arising from activities that may be defined as evaluation under a specific State's own criteria, e.g., monitoring, research, or statistics projects.
- Issues relating to other LEAA fund sources, e.g., technical assistance, National Institute, Part E, or discretionary funds.

General Approach to Issue Resolution

This opinion is offered as a general guide to resolution of these questions. Specific evaluation activities have not been submitted to this office for review or advisory opinion. However, it appears that individual projects can readily be judged against the general criteria below.

[1] J. Wholey, *Federal Evaluation Policy* (1970) at 23.

Authority for Use of Part B (Planning) Funds

Insofar as evaluation is considered an element of the planning and administration activities of SPA's under the generally stated elements of the planning process, Congress has provided for such activities in Part B, Sections 201, 202 and 203 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. For example, it is textbook knowledge to define a planning process to include elements of goals, priorities, alternatives, decision, implementation, and appraisal or evaluation.

There is additional authority and an understanding on the part of Congress that "evaluation" activities are to use Part B funds. For example, in the LEAA budget submission for fiscal year 1972, LEAA partially justified requested Part B increases for such purposes. In hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives, it was stated:

> Fiscal Year 1971 is the first year that the States have been faced with this significant grant administration and evaluation burden. As additional funding of action grants takes place, this burden will continue to increase.[2]

In fiscal year 1973, LEAA again requested increases in Part B planning funds. The budget submission acted upon by Congress contained the following language as part of the supporting rationale for increased Part B appropriations:

> An increase is requested to develop to the maximum degree of efficiency and effectiveness the States' ability to coordinate, develop, and implement the comprehensive State plans and to assist, counsel, and monitor their sub-grantees. The increase in planning and implementation grants to State planning agencies (SPA's) is necessary in part to permit these agencies to administer the workload generated by Part C grants and the work arising from the addition of Part E to the Omnibus Crime Control and Safe Streets Act.
>
> . . . There is not enough funding to meet the additional requirements of monitoring grants, evaluating the success of programs, maintaining fiscal control and documentation, or supporting an audit staff.[3]

From the understanding that exists in Congress relating to LEAA use of Part B funds in the area of evaluation, it is clear that these funds can be used to support some evaluation activities. To apply that rather general understanding to specific activities requires consideration with what is expected of the States by Part C of the act.

[2] Hearings on H.R. 9272 Before the Subcommittee of the Committee on Appropriations, House of Representatives, 92d Cong., 1st Sess., at 901 (1971).

[3] Hearings on H.R. 14989 Before the Committee on Appropriations, U.S. Senate, 92d Cong., 2d Sess., at 994 (1972).

Authority for Use of Part C (Action) Funds

Ample authority and, indeed, an expectation exists for funding of evaluation activities from Part C fund sources.

Section 301(b)(1) of the act provides:

> (b) The Administration is authorized to make grants to States having comprehensive State plans approved by it under this part, for:
>
> (1) Public protection, including the development, demonstration, *evaluation*, implementation, and purchase of methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and criminal justice and reduce crime in public and private places. (Emphasis added.)

In addition, Section 303(a)(12) requires the State to:

> (12) provide for such fund accounting, audit, monitoring, and *evaluation* procedures as may be necessary to assure fiscal control, proper management, and disbursement of funds received under this title. (Emphasis added.)

Although the legislative history does not further expand on these provisions as they relate to evaluation, it is clear that Part C action programs and projects may have evaluation components. As far as the evaluation relates to improving or strengthening law enforcement and criminal justice or reducing crime, the evaluation activities can utilize Part C funds. In effect, a goal to "strengthen and improve" implies a need to know what works, what will yield better results, and what process adjustments or issues must be acted upon. This can be done in the context of an "action" program. Congress gave clear recognition to this by including the term "evaluation" in both Section 301(b), which defines the areas for fund expenditure, and Section 303(a), which sets out general elements of necessary activity.

General Rules on Fund Source for Evaluation Activities

From the discussion above, it is clear that both Part B and Part C funds can be used to fund activities that come under the generic heading of Evaluation. However, evaluation activities can vary considerably. Because Part B and Part C contemplate different types of activities, there is a basis to develop a tie-in for any specific activity that will give the congressional intent of Part C and the congressional intent and understanding of Part B the full measure of meaning.

Therefore, as a general guide, Part B fund sources should be used for activities relating to development and administration of a State evaluation plan including the evaluation components of the State plan.

Evaluation of overall program effectiveness—that is, evaluation of the net effect of all planning functions and Part C action grant evaluation activities—is a function of Part B funds. Development of overall evaluation strategies and work plans is a function of Part B funds.

Normal monitoring of the financial management or progress of State subgrants can be classified as an evaluation activity and should be funded from Part B. Reporting systems should be similarly treated.

Administration of the evaluation program would include such activity as development of evaluation requests for proposal and contract monitoring.

In relating to Part C fund sources, the actual costs of all program and project evaluation may be funded from Part C action funds.

It is immaterial where the activity is performed so long as the pass-through requirements of Section 303(a)(2) are met or waivers obtained if "local available" funds are used. Consequently, the evaluations may be performed at the SPA and funded from State-level "available" funds, waived local "available" funds, or set-off funds from local awards where retention by the State has been agreed to by the local grantee. When the evaluation activity is otherwise allowable, i.e., related to criminal justice or crime reduction programs or projects, it is immaterial whether the State plan provides the funds in each individual program or project or sets up a separate action evaluation program to meet the requirements of Guideline Manual M 4100.1A, Chapter 3, Section 85.

Any cost element, if allowable under the principles of Office of Management and Budget Circular A-87, is allowable for support if it is related to the funded program or project. Miscellaneous factors related to evaluation programs—such as cost elements, location of the expending organization, or method for funding (contract or direct hiring at SPA or subgrant level)—do not govern the allowability of the cost of program efforts if they are otherwise allowable and in accord with State law, LEAA guidelines, and the general rules set out in this opinion.

There remain some elements of evaluation activities that may be at issue as separate proposed funding activities. These activities do not clearly come under the above general guides. Such activities may include study design, statistics development projects, sampling techniques, feasibility tests, or definition of rating criteria. In each situation, the specific activity should be judged as to whether it is to be done in the context of an administration (Part B) or an action (Part C) effort.

Other LEAA Fund Sources

Separate authority for evaluation exists in other LEAA fund sources. These may be acted upon as follows:

- All Part E Funds—Section 453(10) incorporates the provisions of Section 303(a)(12). In general it is governed by the same rules that govern Part C funds but it is limited to corrections-related evaluation. Additional authority exists for use of Part E funds for correctional system monitoring (Section 453(11)).
- Part C Discretionary Funds—Section 301(b)(1) of Part C also governs LEAA discretionary funds.
- Technical Assistance—Section 515(a) and (b) authorizes LEAA to conduct "evaluation studies" and activities. However, without express agreement with an SPA, this authority does not extend to the SPA's.
- National Institute—Section 402(b) provides the Institute with authority to carry out evaluation programs. This authority does not automatically extend to the SPA's.

Conclusion

This opinion addresses the majority of the legal issues that arise under the Safe Streets Act, as amended, relating to evaluation funding activities. This office is available to render assistance on the application of this opinion to specific projects or programs.

Legal Opinion No. 74-44—Definition of Criminal Law as Aid in Determining Appropriateness of Funding Certain Projects—November 25, 1973

TO: LEAA Regional Administrator
Region VIII - Denver

A memo of October 25, 1973, forwarding correspondence from Kenneth J. Dawes, Director, North Dakota Combined Law Enforcement Council, which is the State Criminal Justice Planning Agency (SPA) in that State, suggests that a definition of the term "criminal law" as used in the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) would be desirable. Robert Holte, the SPA attorney, had suggested a definition to encompass "activities regarding crimes for which the punishment includes possible imprisonment in the penitentiary or a jail or confinement in a juvenile facility."

Such a definition could serve the SPA supervisory board as a device by which it could select projects. LEAA, however, prefers not to limit the term "criminal law" by imposing such a narrow definition on the States. Rigid definition of "law enforcement" was specifically avoided when Section 601(a) of the act was amended to include "nonexhaustive examples of 'law enforcement' activities" (S. Rep. No. 91-1253, 91st Cong., 2d Sess. 51 (1970)). Furthermore, Section 601(a) includes crime prevention activities within the scope of "law enforcement and criminal justice activities."

Since the act recognizes that and since "crime is essentially a local problem," the criminal law is, as Mr. Holte points out, a matter of statute that varies with each State and local lawmaking body. LEAA prefers not to impose its own national definition of "criminal law."

Without an LEAA-sanctioned definition of criminal law, it is still possible to determine the appropriateness of LEAA funding for certain projects by a careful reading of the declaration and purpose clause and the funding eligibility provisions of Sections 301(b), 303 and 601(a) of the act. In an attempt to address this question, this opinion will deal with the three projects mentioned in Mr. Dawes' letter of October 22, 1973.

Alcohol-Related Programs

LEAA, as Mr. Dawes points out, has had a policy of not funding projects that are primarily traffic-related rather than crime-related. Congress has specified the outside limits on the use of resources available to LEAA and its granting agencies. Funds are to be used in accordance with the provisions of Section 301(b), which set out the categories of programs and projects that may be funded. The import of the Section 301(b) provisions goes to the strengthening of law enforcement through "methods, devices, facilities, and equipment designated to improve and strengthen law enforcement and *reduce crime in public and private places*" (emphasis added). The entire tenor of the act and its legislative history make clear that Part C funds are not to be used for programs dealing with enforcement of traffic laws.

However, there is no question that it would be proper for LEAA funds to be utilized to implement programs that treat individuals who have committed criminal offenses and are also alcoholics. It would be proper to fund programs for those who are diverted by a law enforcement agency into an alcohol abuse prevention program.

It is the opinion of this office that it also would be proper to fund programs to facilitate the transfer of alcohol abuse from the criminal to the noncriminal status. This would require certain programs to be established and supported for a reasonable period of time consistent with the assumption-of-cost provision of Section 303(a)(9) of the act and relevant guidelines. By funding programs that will implement the decriminalization of "public drunkenness," the law enforcement community—police, courts, and corrections—will benefit by being relieved of a time-consuming and expensive process.

Any application for a grant for correctional institutions and facilities must provide necessary arrangements for the development and operation of alcoholism treatment programs as required by Section 453(9) of the act. Such an application would be part of the comprehensive State plan required by Section 302. Finally, it should be noted that specific traffic offenses such as driving while intoxicated may (as they do in North Dakota) provide for imprisonment along with fines or license suspension. This factor would make a program related to such an offense fundable.

Probation Officer for Municipal Court

LEAA frequently has funded projects in comprehensive State plans that include a person such as the suggested probation officer. Authority for this funding can be found in Sections 301(b)(9) and 523 of the Safe Streets Act.

Revision of Municipal Code

Just as Part C funds are not to be used for programs dealing primarily with enforcement of traffic laws, so also are they not to be used for projects dealing exclusively with revision of the civil law. The revision mentioned in the memo seems to deal primarily with the civil law. As Mr. Holte points out, the codes to be revised ordinarily would deal only in small part with matters of criminal violation. This portion would be eligible for pro rata funding. Furthermore, funding for the development of a model criminal law section for municipal codes as suggested by Mr. Holte would be appropriate.

Generally, LEAA, as a matter of policy, funds only revisions of those elements of a code that deal with the kind of law enforcement and criminal justice described in the act.

Legal Opinion No. 74-45—Application of New LEEP Grant Cancellation Conditions—December 4, 1973

TO: Acting Director
Office of National Scope Program, LEAA

This is in response to a memorandum from the Office of Educational Manpower Assistance in regard to the application of certain changes made in the Law Enforcement Education Program (LEEP) by the 1973 legislation.

It is the opinion of this office that the change in the cancellation requirement made by the Crime Control Act of 1973 (1973 act), Public Law 93-83, Section 406(c), may be given limited retroactive application. LEAA may apply this provision to those grant recipients who signed a Student Application and Note (SAN) in the weeks preceding July 1, 1973, for a course that terminated after the date. This is reasonably related to the purposes of LEEP.

A student in this category will not have to remain in the employ of the same law enforcement or criminal justice agency that employed him at the start of his LEEP studies for 2 years after the termination of his studies to earn cancellation of the grant. He may now be employed by a different law enforcement or criminal justice agency after his studies and still earn cancellation.

This opinion does not apply to those recipients who completed their studies prior to the effective date of the 1973 act, and who then became employed by a different law enforcement or criminal justice agency. A ruling as to those students will have to be sought from the Comptroller General.

This office, then, would have to know, before requesting such a ruling, the following information: The number of students in such category who have not made payment, the number in that category who have made payment, the amount of money owed by these students, and the total number of grant recipients preceding the effective date of the 1973 act.

The most complete explanation of the purposes of LEEP is found in the legislative history accompanying the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351).

The goal of that act was to raise the status of law enforcement officers and to improve the quality of law enforcement. An education standard of 2 years of college for police officers and a bachelor degree for administrative and supervisory personnel was recommended as a means of achieving this goal. (S. Rep. No. 1097, 90th Cong., 2d Sess., 36 (1968).)

LEEP was established to help officers meet this standard by providing grants for the payment of tuition and fees for law-enforcement-related college courses. If the officer agreed to remain in the employ of the same law enforcement agency for 2 years following the completion of his course, and if in fact he did so remain, he did not have to repay the amount of the grant.

The LEEP grant program was amended by the Omnibus Crime Control Act of 1970 (Public Law 91-644) to encourage increased participation. The

amendment authorized grant money to be used to purchase books, in addition to the original authorized expenses. This change was made to:

> . . . permit participation in the grant program by students in States which provide free tuition and fees in State supported colleges and universities. (S. Rep. No. 1253, 91st Cong., 2d Sess. 47 (1970).)

Congress, in enacting the 1973 act, again sought to modify LEEP to make it possible for more law enforcement officers to use grant funds to meet the education standards recommended by the 1968 act.

Senator John L. McClellan, chairman of the Subcommittee on Criminal Laws and Procedure of the Senate Judiciary Committee, explained in floor debate the purpose of the Senate amendments to the House bill. The change in the cancellation condition was made so that:

> . . . a recipient of these funds need not remain in the same law enforcement agency to retain eligibility for [the] benefits. (119 Cong. Rec. S. 12414 (daily ed. June 28, 1973).)

The term "benefits" refers to the grant that is canceled if the recipient works for a law enforcement and criminal justice agency for 2 years following the completion of his studies.

The Senate Conference Report further explained that the Senate amendment would remove:

> . . . the requirement that a LEEP recipient remain with the law enforcement agency where he was employed during his LEEP studies in order to be eligible for cancellation of certain LEEP obligations . . . The conference substitute adopted the Senate provision which will permit a recipient to earn cancellation so long as he remains in a law enforcement agency. (S. Conf. Rep. No. 349, 93rd Cong., 1st Sess. 29-30 (1973).)

LEAA has the authority to implement the new cancellation conditions under Section 501 of the 1973 act, which provides that:

> . . . the Administration is authorized . . . to establish such rules, regulations, and procedures as are necessary to the exercise of its functions, and are consistent with the stated purposes of this title.

Rules, regulations, or procedures established by an agency are consistent with the "stated purposes" of a law if they are "reasonably related to the purposes of the enabling legislation" under which they are made. (*Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969).)

An LEAA procedure that provides cancellation for those recipients who signed a SAN in the weeks preceding July 1, 1973, for a course terminating after that date would be reasonably related to the purposes of LEEP. It would allow LEEP benefits to help more law enforcement officers remain in the criminal justice system and meet the recommended education standards.

Legal Opinion No. 74-46—Definitions and Clarification of Guidelines to Determine Authorized Use of Funds—November 28, 1973

TO: LEAA Chief of Operations
Region I - Boston

A memorandum of November 5, 1973, requests a comprehensive opinion listing eligible activities and/or agencies as well as the common ineligible activities and/or agencies and suggests that the General Counsel define and reconcile terms that appear in the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) and in opinions dated April 10 and March 20, 1973.

1. Lists of Eligible or Ineligible Activities: From time to time the General Counsel does give an opinion that an activity is ineligible, as in the case of the Montana radar equipment. However, it would not be consistent with the declaration and purpose clause of the act for LEAA to issue a comprehensive opinion listing eligible activities and/or agencies as well as the common ineligible activities and/or agencies. Such lists would not "encourage States and units of general local government to develop and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement and criminal justice." (Declaration and Purpose clause, Crime Control Act of 1973, Public Law 93-83 (Aug. 6, 1973), 87 Stat. 197, amending Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701-95.)

2. Clarification of Terms.

a. Guideline G 7370.2 in paragraph 4, called "Mandatory Provisions," directs that LEAA grant funds "not be used for non-law enforcement purposes." According to the memorandum, paragraph 6.b. "confuses the issue by an apparent extension of the bounds, allowing LEAA-funded helicopters to be used for the 'entire police responsibility,' " and suggests that LEAA-funded helicopters "could be used for traffic control, enforcement of fish and game laws, transportation, etc."

The meaning of paragraph 6.b. becomes clearer when read in its entirety: *"Although these guides address the patrol function* primarily, agencies are encouraged *to consider the application* of helicopters and ancillary equipment to their entire police responsibility." (Emphasis added.) An LEAA-funded helicopter may be used only for law enforcement purposes; the guidelines address only the question of patrol functions; the agencies should *consider* what other areas of the entire police responsibility might be eligible to use an LEAA-funded helicopter. The guidelines do not say that every activity within the "entire police responsibility" will be eligible to use the helicopter.

b. The memorandum indicates that the definition of High Crime/Law Enforcement Activity Areas in Guideline Manual M 4100.1A, the use of the word "principal" in Guideline Manual M 5200, and the use of the word "primary" in a General Counsel opinion are "contradictory and . . . confusing."

Guideline Manual M 4100.1A does not say, as that memorandum suggests it does, that only index crimes may be used in determining what is a High Crime/Law Enforcement Activity Area. It says:

> It must be demonstrated in the plan that an adequate level of Part C and Part E block grant assistance from State, county, and municipal resources is being allocated for the direct benefit of law enforcement operations and citizens *in these jurisdictions:*
> (a) Any city, county, or urban area where crime incidence and activities constitute 20 percent or more of major crime incidence and total law enforcement expenditures, whether or not crime rates are comparable or excessive in relation to other communities, *or*
> (b) Any city or county with:
> 1 A population in excess of 150,000, and
> 2 An annual 'index' rate for serious crime Part I offenses, as indicated in the most recent FBI Uniform Crime Report) of at least 2,500 offenses per 100,000 population, and
> 3 Annual per capita law enforcement expenditures (police, courts, and corrections combined) of at least $25. (Emphasis added.)

The memorandum expresses dissatisfaction with the use of the word "principal" in Guideline Manual M 5200.1. It finds such a use inconsistent with the word "primary" in General Counsel opinion of April 10, 1973, "Use of LEAA Funds for Consumer Fraud and Antitrust Programs." It cannot reconcile these documents with General Counsel opinion of March 20, 1973, which declares that the Montana Board would be acting illegally if it used LEAA funds to purchase traffic enforcement radar equipment. The memorandum finds it illogical that radar equipment may not be purchased with LEAA funds but that money may be allocated for consumer-fraud programs.

Consumer fraud is a nonviolent criminal activity, which affects the lives of many and which is deserving of consideration by a State Criminal Justice Planning Agency (SPA) as part of its comprehensive plan. However, no SPA has been told it must allocate funds for this purpose. Radar equipment for traffic enforcement would, on the other hand, run afoul of LEAA's policy of not funding projects that are primarily traffic-related rather than crime-related. Congress has specified the outside limits on the use of resources available to LEAA and its granting agencies. Funds are to be used in accordance with the provisions of Section 301(b), which set out the categories of programs and projects that may be funded. The import of the Section 301(b) provisions goes to the strengthening of law enforcement through "methods, devices, facilities, and equipment designated to improve and strengthen law enforcement and *reduce crime in public and private places."* (Emphasis added.) The entire tenor of the act and its legislative history make clear that Part C funds are not to be used for programs dealing with enforcement of traffic laws.

The memorandum correctly points out that "principal" and "primary" are virtually synonymous. A consideration of the purpose of the act will clarify any ambiguity in any particular context.

c. The memorandum specifically asks that the April 3 letter from the General Counsel be clarified as to:

> . . . the words (1) 'all types of criminal activity' (fourth paragraph) and the phrase (2) 'enforcement of criminal law' (fifth paragraph) as they appear in the April 10, 1973, opinion. These phrases seem to be too broad in light of the March 20, 1973, opinion that had the result of excluding traffic offenses, for example, from the area of criminal activity.
>
> Further, if a comprehensive response cannot be forthcoming, the phrase (3) 'primary function' (fifth paragraph) as it is used in the April opinion must be clarified precisely.
>
> Also, what does (4) 'consistent (another key word) with the act' mean (fifth paragraph)?

LEAA prefers not to impose its definition of criminal activity or criminal law on the States. Rigid definition of "law enforcement" was specifically avoided when Section 601(a) of the act was amended to include "nonexhaustive examples of 'law enforcement' activities," (S. Rep. No. 91-1253, 91st Cong. 2d Sess. 51 (1970)). The "criminal law" is a matter of statute that varies with each State and local lawmaking body.

"Primary function" and "consistent with the act" refer to methods of determining eligibility without LEAA-sanctioned definitions of criminal activity or criminal law. It is still possible to determine the appropriateness of LEAA funding for certain projects by a careful reading of the declaration and purpose clause and the funding eligibility provisions of the act.

The act requires that programs and projects be carried out to improve and strengthen law enforcement and criminal justice. General guidance has been given by this office with regard to the type of law enforcement agencies that would be eligible for funding because they exercise general law enforcement authority. As was noted in a letter dated April 26, 1971, which denied eligibility to a State Marine Conservation Commission, Paul Woodard, then General Counsel, stated:

> Thus, we generally exclude campus police, game wardens, port authorities or waterfront police departments which are not organizational parts of a local police department, food and drug inspectors whose primary duties are regulatory, and fire marshals and arson investigators who are not part of an organizational component of a local police department.

This is not to say, however, that these agencies may not have occasional projects that are fundable from Part C sources.

This office's interpretation of the act in this area is simply that agencies that are not primarily engaged in the general enforcement of criminal law, but rather have as their primary purpose and function the implementation and enforcement of specialized areas of the law, such as civil, regulatory, or administrative law, are not "law enforcement and criminal justice" agencies for general funding eligibility purposes.

With regard to such agencies, it would be necessary to determine the specific purpose of a grant prior to making a funding decision. Such agencies, however, would not automatically be precluded as applicants. Their applications would be considered in the same way that a nonprofit or profitmaking

organization's application is considered: that is, does the project for which funds are being requested accomplish a clear law enforcement and criminal justice purpose? For example, a campus police project that specifically deals with security measures to be instituted to reduce the incidence of rape on the campus would be a fundable project even though the campus police's normal operating activities would not be eligible for funding.

Legal Opinion No. 74-47—State Buy-In for Construction Projects — December 14, 1973

TO: LEAA Regional Administrator
Region X - Seattle

This is in response to a request of November 23, 1973, for an opinion as to whether a State Criminal Justice Planning Agency (SPA) that has allocated the entire required pass-through for nonconstruction projects may award a construction grant out of the State's share of funds before awarding all the grants included in the required pass-through allocation, under the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

LEAA has stated previously that a State may elect to fund nonconstruction projects in an amount sufficient to meet the variable pass-through requirement and award construction projects out of the State's share of funds. The State buy-in provision under Part C applies only to the amount required to be made available to units of general local government (the variable pass-through). Therefore, where a State funds a construction project out of its share of funds, the State can require the local government to provide the entire match.

Where a State elects to utilize such a procedure, it must provide details indicating the list of projects or programs to be funded out of the variable pass-through money. Having done this, the State has no legal constraints upon it that would prohibit the award of a construction grant out of the State's share of funds prior to the award of subgrants under the variable pass-through formula.

Legal Opinion No. 74-48—(Number not used.)

Legal Opinion No. 74-49—Utah's Request for Supplemental Part B Funds--December 28, 1973

TO: Deputy Administrator for Policy Development, LEAA

Issues

Under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83):

1. Can reversionary Part B monies be allocated to the States on a nonpopulation or an "as needed" basis?
2. Can Part B funds be utilized for a State Standards and Goals Task Force?

Discussion

This office previously has held that statutory language requires that where Part C block grant funds are to be reallocated, they must be reallocated to the States as block grants in accordance with Section 306(a)(1).

Legal Opinion No. 74-24 discusses this issue. That opinion noted that the Senate Judiciary Committee, in refusing to accept a House amendment to the effect that the unused portion of a State's allocated share of block grant funds revert to LEAA's discretionary fund program, stated:

> A possible effect of this provision might be to provide an incentive for cities to forego applying for allocated block grant funds in order that such funds might revert to the discretionary fund and become available as direct discretionary grants. The result could be a widespread defection from block grant participation and a substantial increase in LEAA's direct categorical grant program. (S. Rep. No. 91-1253 at 35.)

There is no similar legislative history or rationale with regard to Part B funds. Section 203(c) contemplates that:

> Any portion of such 40 per centum in any State for any fiscal year not required for the purpose set forth in this subsection shall be available for expenditure by such State agency . . . for the development by it of the State plan required under this part.

The act is silent with regard to allocation of unused Part B funds by a State agency. However, Congress was aware that all States did not have the same planning needs. The 1973 budget estimate included a change in appropriation language to provide that $15 million of the funds available for planning grants be allocated without regard to the population formula. LEAA stated in its budget request the following justification for a nonpopulation distribution:

> . . . to assist the smaller States and to assist States with peculiar problems or deficiencies LEAA will utilize in fiscal year 1973 the requested increase of $15,000,000 to increase the level of planning funds for these States.

The Appropriations Committee approved this nonpopulation distribution of $15 million in planning funds.

It is the opinion of this office that LEAA therefore may administratively determine to reallocate reversionary Part B monies on an "as needed" basis for specific planning projects of a State. It would not be in the best interest of the government to reallocate funds to all States when some of the larger States would not need the extra funds and when, in fact, some of the States already may have excess balances that contributed to the fund of returned Part B money. The application should take into consideration both local and State needs. However, the pass-through provision need not be applied since the funds will be utilized in specified areas of need.

This office contacted the Office of General Counsel of the Comptroller General for advice on the issue of whether, absent a statutory clause or legislative history, a statutory allocation formula is met once the funds have been allocated. This office was advised that there are no formal or informal Comptroller General rulings on this issue. The rationale given in this opinion was satisfactory in their informal opinion. It was also noted that the Comptroller General, when there is an absence of precedent or Comptroller General authority either way, will defer to administrative construction by the agency involved.

With regard to the second issue, use of Part B funds for a Standards and Goals Task Force is proper in that standard and goal setting activities are an integral part of the planning process. (See Standards 1.1, 1.2 and 1.3, *Report on the Criminal Justice System,* National Advisory Commission on Criminal Justice Standards and Goals, Government Printing Office, 1973.)

The Utah request for supplemental Part B money may be approved. Furthermore, the retroactive hard match provision of Section 523 should be applied since the funds would be granted in fiscal year 1974 and since it would be consistent with the match requirements on new funds.

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