LEGAL OPINIONS

OF THE

OFFICE OF GENERAL COUNSEL

OF THE

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

UNITED STATES DEPARTMENT OF JUSTICE

JANUARY 1 TO JUNE 30, 1975

WITH CUMULATIVE INDEX FROM JULY 1, 1973

WASHINGTON : 1976

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NOTE TO READER

Each year the Office of General Counsel issues hundreds of opinions. Only those opinions of general interest and applicability are printed in this volume. These opinions are printed for the benefit of the public and the criminal justice community. The printing of these opinions conforms not only with the letter of the Freedom of Information Act, which requires that in certain instances opinions affecting governmental agency actions be made available to the public, but also with the spirit of that law, which calls for a more open Government and greater access of the public to information affecting actions of Government agencies.

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 (SPA), 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 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 in this volume are based on the Crime Control Act of 1973 (Public Law 93-83), as amended by the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415).

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

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. 20531.

Legal Opinions in This Volume

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).
4. The Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415) provided LEAA with expanded authority to fund juvenile delinquency programs. This act made conforming amendments to the Crime Control Act of 1973.

Crime Control Act of 1973, as amended

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

Legal Opinion No. 75-24—Eligibility of California Tribes for Discretionary Fund Grants—January 23, 1975

TO: LEAA Regional Administrators
Region IX - San Francisco

Region X - Seattle

This is in response to a request regarding the eligibility of Indian tribes in California for LEAA discretionary fund (DF) grants.

Discretionary grants are authorized 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, Public Law 93-83, and Public Law 93-415), and can be made only to:

1. States or combinations of States;
2. Local units of government or combinations of local units of government; or
3. Nonprofit organizations.

Discretionary grants are also authorized under Part E of the Omnibus Crime Control and Safe Streets Act, as amended, and can be made only to:

1. States; or
2. Local units of government or combinations of local units of government.

Indian tribes have been conferred a special status by Congress under the Crime Control Act. Under Section 601(d) of the act, an Indian tribe that performs law enforcement functions as determined by the Secretary of the Interior is considered a unit of general local government and automatically is eligible for LEAA discretionary grants. More than 30 different Indian tribes in California have been determined by the Secretary of the Interior to be units of general local government for the purpose of undertaking programs aimed at preventing adult and juvenile delinquency and establishing adult and juvenile rehabilitation programs. California Indian tribes, designated in 38 F.R. 101 of May 25, 1973, are eligible units of general local government for discretionary funding in the areas of crime prevention and rehabilitation. These California Indian tribes would not be eligible as units of general local government in programs for the employment of tribal police, in the courts, or in correctional functional areas because the Secretary of the Interior has determined that they have no criminal justice authority in these areas.

There is an administrative requirement in LEAA Guideline Manual M 4500.1B that:

> [C]rime prevention operations and activities on reservations are to be carried out by a duly authorized arm of the tribal criminal justice system. (Chapter 8, paragraph 97b.)

and

> [R]ehabilitation of offenders must be carried out by a duly authorized arm of the tribal criminal justice system. (Chapter 8, paragraph 101c(3).)

These criteria have been established by the Administrator under his authority in Section 501 of the act. The question then becomes whether this administrative requirement that the program must be carried out by a duly authorized arm of the tribal criminal justice system precludes DF funding for crime prevention and rehabilitation programs if the California tribes are not considered duly authorized arms of the tribal criminal justice system. In fact, if the State, rather than the tribal entity, has jurisdiction for criminal justice activities, there probably is no duly authorized tribal criminal justice system.

There appear to be sound policy reasons for modifying this guideline for Indian tribes and your office may want to have the cited portions of the DF guideline reevaluated to determine the necessity for a requirement that prevention programs must be carried out "by a duly authorized arm of the tribal criminal justice system." It would appear to be sufficient that the Indian tribe have the ability to carry out the program objectives for which funding is requested. In the case at hand, it would appear that the Secretary of the Interior recognized the designated California Indian tribes as being able to undertake crime prevention and rehabilitation programs. Whether or not they are duly authorized arms of a tribal criminal justice system seems immaterial.

Please note that although it is true that, in order to receive DF funds directly from LEAA, the recipient must qualify as a governmental unit or under Part C as a governmental unit or as a nonprofit organization; Indian tribes that may not have received the designation as a unit of local government nevertheless could be eligible to receive Part C discretionary grants directly from LEAA if they are nonprofit organizations. Many tribes are nonprofit organizations under various State laws. Indian tribes that are neither nonprofit organizations nor designated units of local government may still be eligible for DF grants if their applications are made on their behalf by and through the cognizant State Criminal Justice Planning Agency (SPA). SPA's must certify their willingness to accept such grants (LEAA Guideline Manual M 4500.1B, paragraph 8b).

Legal Opinion No. 75-25—Eligibility of Nongovernmental Organizations to Receive Part C Block Grant Funds—January 30, 1975

TO: LEAA Regional Administrator
Region X - Seattle

This is in response to your request for a legal opinion as to whether a nongovernmental unit, the Washington State Association of County Officials, may be a grant applicant/recipient of LEAA block subgrant funds.

Section 303(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, Public Law 93-83, and Public Law 93-415), requires that a percentage of the Part C block funds must be passed through to units of local governments. Except for this provision, the act imposes no limits on the possible range of organizations to whom the State Criminal Justice Planning Agency (SPA) may

disburse the State's share of Part C block funds. This issue was resolved early in the history of the administration of the LEAA program. On March 27, 1969, Justice William H. Rehnquist of the U.S. Supreme Court, who was then an Assistant Attorney General in charge of the Department of Justice Office of Legal Counsel, wrote a memorandum holding that LEAA funds could be provided by the States to nongovernmental agencies.

This memorandum was addressed to the Administrator of LEAA and provided in its entirety as follows:

> In your memorandum of February 18, you request our opinion as to whether a State planning agency may grant Part C funds (1) to State owned and operated educational institutions; (2) to other types of educational institutions; (3) to non-profit organizations; and (4) to profit-making organizations.
>
> The answers to all four questions are in the affirmative, assuming that the grants are for purposes enumerated in section 301(b), and are consistent with the guidelines for comprehensive State plans prescribed in section 303.
>
> Section 303(a)(2) provides that a State planning agency must make available to local governments at least 75% of all Federal funds granted to it under Part C. But the Act imposes no limits on the possible range of persons or organizations to whom the agency may disburse the remaining 25% of its Part C funds. Nor does the Act limit the forms of arrangement or agreement under which these funds may be disbursed. They may be paid out under contracts for goods or services or awarded as grants for activities in furtherance of the comprehensive plan.
>
> For example, a State planning agency may make a grant to a public or private educational institution to facilitate the preparation of a report on 'Public education relating to crime prevention' (section 301(b)(3)). Or the agency may make a grant to a non-profit organization to support 'research and development' (section 303(a)(7)) for purposes of improving crime-fighting methods and equipment (section 301(b)(1)). There may be practical reasons for preferring a contract to a grant in such cases, but the Act does not foreclose a choice between these alternatives.
>
> On the other hand, it will rarely be appropriate, as a matter of policy if not of law, to make grants to profit-making organizations. If it is decided to employ the resources of such an organization in furthering some of the goals of a comprehensive plan, the more appropriate method of making funds available to it for that purpose will be a contract which establishes a clear and enforceable quid pro quo.

The conference report that was adopted by Congress in 1973, which is legislative history in interpreting the act, included this memorandum as an exhibit. Senator John L. McClellan stated in submitting the memorandum that "nothing that the conference did was designed to change these present practices." (Cong. Rec. S 15557 (daily ed. July 26, 1973).)

A second question raised by your office is whether the funds should be attributed to the State or local share of the block grant. If it is determined that the services being provided are for the benefit of the units of local government, then such funding may be charged against the passthrough funds with the specific approval of the local units to which the services will be made available. See LEAA Guideline Manual M 7100.1A, chapter 2, paragraph 8, for specific documentation requirements. If consent is not obtained, then the SPA must award the grants from the State portion of the block grant.

Legal Opinion No. 75-26—Drug Enforcement Administration Enforcement Project—January 23, 1975

TO: Assistant Administrator
Office of Operations Support, LEAA

This is in response to your memorandum of October 4, 1974, in which you requested an opinion on the Drug Enforcement Administration (DEA) proposal to establish Narcotics Enforcement Units along the United States-Mexico border.

Funding is sought from LEAA and will be used exclusively by non-United States members of the Narcotics Investigative Enforcement Units to investigate and interdict the flow of illicit narcotics to the United States.

LEAA has the authority to fund international agencies for specific limited purposes. The Crime Control Act of 1973 (Public Law 93-83) authorizes funding in the international area in three sections of the act: 402(c), 515(b), and 515(c). Section 402(c) provides that the National Institute of Law Enforcement and Criminal Justice shall serve as a national and international clearinghouse for the exchange of law enforcement information. Section 515(b) authorizes LEAA to collect, evaluate, publish, and disseminate statistics and other information on the condition and progress of law enforcement within and without the United States. Section 515(c) extends LEAA's technical assistance authority to international agencies. The House/Senate Conference Report on the Crime Control Act of 1973 states:

> In recognition of the international scope of many law enforcement and criminal justice problems the conferees agreed to give LEAA authority to provide technical assistance in such areas as narcotics interdiction, skyjacking, and terrorism. The conferees felt that LEAA's international operations should be limited to providing technical assistance in cases of this character. (S. Rep. No. 93-349 at 31.)[1]

Neither Section 402(c) funds nor Section 515(b) funds can be used for the project in question because such funds are to be used specifically for clearinghouse-type functions (Section 402(c)) and information gathering and dissemination on the condition and progress of law enforcement (Section 515(b)).

There is no question that under Section 515(c) narcotics interdiction is an approved purpose. The issue is whether Section 515(c) technical assistance funds can be used to fund operational police investigative activities such as those contemplated in this narcotics interdiction project.

The Omnibus Crime Control and Safe Streets Act of 1968, as amended, does not define technical assistance, and there is no legislative history to assist in determining what Congress meant by the term. The term is found, however, 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

[1] For a detailed discussion of LEAA international authority, see LEAA Office of General Counsel Legal Opinion No. 75-2, Sept. 17, 1974.

many of the statutes that authorize programs of Federal domestic assistance. Although 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.[2]

As can be seen from the above, operational police investigative activities would not come within the ambit of technical assistance. Therefore, LEAA does not have the statutory authority to fund the proposed project.

Legal Opinion No. 75-27—Funding of 4-H Juvenile Justice Program—April 11, 1975

TO: Acting Assistant Administrator
Juvenile Justice and Delinquency Prevention
Operations Task Group, LEAA

This is in response to your request of December 18, 1974, for a legal opinion on questions raised pertaining to the grant application of Utah State University for the "Utah State University Multi-County Juvenile Justice Program." Your request raises the following questions:

1. What are the possibilities of a transfer of LEAA funds to the U.S. Department of Agriculture (USDA)?
2. Will LEAA be liable for any injuries incurred by juveniles participating in the program at the Utah State University Juvenile Justice Center?
3. Is the Utah State University Program eligible for Part E funding?
4. Can Utah State University be the grantee of a Part E discretionary grant?

Summary of Program Proposal

The Utah State University project application, as well as several others, grew out of discussions held between members of the National Urban 4-H Program Staff, USDA, and the Juvenile Justice Division (LEAA) to determine the feasibility of developing urban 4-H juvenile justice programs.

The overall objective of the Utah State University project is to provide an alternative to the traditional institutionalization of delinquent youth by diverting them into individualized treatment-oriented programs based on 4-H methodology, Milieu Therapy, and career counseling.

The prospective program participants will be identified in cooperation with the administrative offices of the Utah Juvenile Court. The first year the

[2] LEAA Office of General Counsel Legal Memorandum, Dec. 8, 1970.

program will provide services to 200 delinquent teenage boys for 2 weeks of intensive activity at Utah State University and additional followup experience in their local communities.

The program is arranged in three phases. Phase I involves the Local Community Behavioral Council in the selection and enrollment of delinquent youth, identified by the court, in the program. Phase II involves therapeutic counseling and activities for program participants at the Utah State University Juvenile Justice Center. Activities include a 4-day camping experience utilizing field and center staff plus a community volunteer. Phase III involves the youth's return to the community including planning for use of community resources, involvement of youth in 4-H club activities, and meeting with youth to evaluate their individual program and progress.

Question 1

A transfer of funds to USDA for the purpose of utilizing their expertise with regard to similar types of programs, utilizing the 4-H organization in solving the problems of delinquent youth, must be done within statutory authority.

Applicable statutory authority outside of the Ombinus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415), is found in the Economy Act (Public Law 85-726) which authorizes purchase of services from other Federal organizations. Also, the Joint Funding Simplification Act (Public Law 93-510), enacted December 5, 1974, authorizes a more extensive use of procedures, which have been applied under the Integrated Grant Administration program. These procedures involve the "packaging" of grants and the application of uniform standards and procedures under a single designated "lead agency." The use of the mechanism supplied by this act must await the promulgation of Executive regulations.

The Omnibus Crime Control and Safe Streets Act of 1968, as amended, also contains provisions that form the basis for cooperative ventures between LEAA and other Federal agencies. Sections 508, 513, and 514 provide the basis for interagency cooperation under the act. Section 508 is couched in terms of the Economy Act but does not contain that act's narrow restrictions on the transfer and obligation of funds. The Comptroller General has clearly recognized that authority for intragovernmental agreements exists outside the Economy Act (34 Comp. Gen. 418, 1955). Section 508 is clear on its face that the Administrator may make reimbursable agreements with other agencies.

An interagency agreement could be entered into between LEAA and USDA for the funding of 4-H related juvenile delinquency prevention programs utilizing the joint resources of both agencies. Such an agreement should state the purpose, background, tasks to be performed, reports, period of performance, fund obligations, technical representation, etc. Use of LEAA funds would, of course, remain subject to the statutory provisions of the act. Only technical guideline requirements are subject to waiver.

Question 2

LEAA's liability for injuries incurred during the camping phase is governed by the Federal Tort Claims Act (28 U.S.C. 2671 *et seq.*). Under this act, the United States is liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. Liability is premised on an agency or master-servant relationship.

An "employee of the government" as defined in Section 2671 of the Federal Tort Claims Act includes "officers or employees of any Federal agency . . . and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." Under this definition, Utah State University and its employees and agents would not be employees of the United States. The mere provision of grant funds does not establish a master-servant relationship between the granting agency and the recipient of such funds. The courts require a strong showing of overt government control of the activities of the grantee in order to establish such a relationship. The Court of Claims has held that grants made by the Federal Government to States, municipalities, schools, colleges, and other public organizations and agencies are in reality gifts or gratuities and impose no liability on the government for the acts and omissions of the grantee (*D. R. Smalley & Sons, Inc.* v. *United States*, 372 F. 2d 505 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 835 (1968).).

In *Orleans* v. *United States*, 509 F.2d 197 (6th Cir. 1975), the court held that a Government-funded and supervised Community Action Council (council) formed pursuant to the Economic Opportunity Act (Public Law 88-452) and operated within statutory and regulatory guidelines of the Office of Economic Opportunity (OEO) is a "Federal agency" within the meaning of the Federal Tort Claims Act. The United States can thus be sued by a participant in an activity sponsored by the council who was injured as a result of the negligence of an employee of a council-sponsored group.

The basis for the court's decision in this case was a finding that the relationship between OEO and the council was that of principal and agent rather than principal and independent contractor.

LEAA does not exercise direct control over the composition of SPA's or other grantees or subgrantees of its funds. Although the grant to Utah State University is distinguishable on this basis from the factual situation in *Orleans*, the case does indicate that the trend is to broaden the scope of Federal liability under the Federal Tort Claims Act.

In a letter dated October 24, 1974, the USDA representative stated that "the State 4-H program will provide liability insurance for all participants (in the camping phase)." In light of this assurance it would be feasible for LEAA to special-condition the grant to require that such liability insurance be provided for participants in the camping phase.

Question 3

Utah State University's eligibility for Part E funding must be viewed both from program eligibility and grantee eligibility aspects.

It is clear that the Utah State University program is eligible for a Part C discretionary grant under the authority of Section 301(b)(9) of the act, which permits grants for:

> (9) The development and operation of community-based delinquent prevention and correctional programs, emphasizing halfway houses and other community-based rehabilitation centers for initial preconviction or post-conviction referral of offenders; expanded probationary programs, including paraprofessional and volunteer participation; and community service centers for the guidance and supervision of potential repeat youthful offenders.

In the Utah State University program, the youths to be served are referred by the juvenile court based on nonstatus offender contacts for purposes of a community-based prevention program.

The scope of a program's eligibility for Part E funds, however, is not determined by Part C criteria, but rather by its character as a correctional system program. Section 451 authorizes programs and projects "for the improvement of correctional programs and practices." Section 453(4) specifically requires that the State plan application:

> provide[s] satisfactory emphasis on the development and operation of community-based correctional facilities, and programs, including diagnostic services, halfway houses, probation, and other supervisory release programs for preadjudication and postadjudication referral of delinquents, youthful offenders, and first offenders, and community-oriented programs for the supervision of parolees.

The language of Part E reflects two basic areas of concern. The first is the correctional facility physical plant, i.e., construction, acquisition, and renovation. The second, relevant in this instance, is the area of correctional programs and practices. In order to discern the intended scope of correctional programs and practices, it is instructive to look at the legislative history of Part E and at the required areas of emphasis set out in Section 453(4).

In the House debates, Representative Lucien N. Nedzi stressed the need to remove dangerous young offenders from the streets, especially young offenders, and the further need to "... upgrade the people, the techniques, the facilities which make up the corrections system." (117 Cong. Rec. H 6207 (daily ed. June 30, 1970).)

In the Senate debates on the same Part E amendments with a newly added community corrections orientation, Senator Roman L. Hruska expressed his view of the breadth of the corrections authority:

> Under the proposed amendments to the Safe Streets Act corrections programs of all types will be eligible for funding under both Part C and the new authorization for Part E. (117 Cong. Rec. S 17536 (daily ed. Oct. 8, 1970).)

These statements are the only clue as to the types of programs contemplated. It appears, then, that the authority is broad, limited only by the language of the act.

In Section 453(4), Congress speaks of community-based correctional facilities and programs. Congress then proceeds to give examples "... including diagnostic services, halfway houses, probation, and *other supervisory release programs* for preadjudication and postadjudication referral[s] ..." [emphasis added]. These examples, although not all-inclusive, indicate that the correctional programs envisioned are of a supervisory nature, are in response to court referral, and are primarily for those individuals who are within the cognizance of the system, i.e., pre- or postadjudicated, at the time of referral to the program. Under this interpretation, programs aimed at helping past offenders who are no longer within the system, i.e., whose sentence and parole or probation are completed, would not be of the type envisioned for Part E funding. This is true even though the program might prevent recidivism. Once an individual has left the system (or having never entered it), all other crime prevention oriented program efforts would come under the heading of prevention, fundable if at all under Part C rather than Part E. In sum, Part E was intended to be limited to improvements of correctional physical facilities and programs for individuals within the corrections system at the time of entrance into the program.

Within the context of the above discussion, it is the opinion of this office that the Utah State University program qualifies for Part E funding. The grant application, Appendix B, contains letters of endorsement from the Administrative Office of the Utah Juvenile Court and the Second District Juvenile Court indicating the willingness of the court to cooperate and participate in the program. Program participants are to be selected cooperatively from 600 referrals by the juvenile court of "high risk" youth between the ages of 12 and 14. Two hundred will be assigned to the experimental group (program participants) and the balance to a control group that will be returned to the community. The program, therefore, is of a supervisory nature, is in response to court referral, and is for youth who are within the cognizance of the system (preadjudicated).

Constitutional Considerations

In the initial draft of this opinion a constitutional issue was raised regarding the selection/evaluation methodology proposed by the applicant. This issue involved possible violation of the 14th Amendment right to equal protection of law through the use of an arbitrary and unreasonable selection procedure to determine experimental and control groups.

Subsequently, the selection procedure was modified to eliminate the possibility of coercive participation or arbitrary and unreasonable selection. Therefore, although the question is moot with regard to the instant project application, program personnel should be sensitive to this issue in the application review process.

Question 4

On the question of eligibility of Utah State University to be the grantee of discretionary funds, the act is clear. Section 455(a)(2) states as follows:

> (2) The remaining 50 per centum of the funds may be made available, as the Administration may determine to *State Planning Agencies, units of general local government, or combinations of such units,* according to the criteria and on the terms and conditions the Administration determines consistent with this part. [Emphasis added.]

This provision is consistent with the purpose clause of Section 451: ". . . to encourage States and units of general local government to develop and implement programs and projects . . . ." LEAA does not have authority to award a Part E discretionary fund grant directly to Utah State University. Utah State University may be awarded a subgrant by either the Utah State Planning Agency or a unit of general local government or a combination thereof in the State of Utah to whom the grant award is made by LEAA, however.

Summary

Funds can be transferred to USDA under authority of Section 508 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, utilizing an interagency agreement. The Joint Funding Simplification Act will provide further means to effectuate cooperative efforts.

LEAA will not be liable under the Federal Tort Claims Act for injuries incurred during the camping phase. A special condition to insure coverage of participants, however, promised by USDA, is advised.

The Utah State University program will be eligible for Part E funding. LEAA may not award a Part E discretionary grant directly to Utah State University, however. Utah State University may be the subgrantee of a grant awarded by LEAA to the SPA or a unit of general local government or combination thereof that agrees to subgrant to the University.

Legal Opinion No. 75-28—Proposed Colorado State Legislation—February 13, 1975

TO: LEAA Regional Administrator
Region VIII - Denver

I have reviewed the proposed House bills HB 1028 and HB 1034 in accordance with your request.

HB 1028 provides that the executive director of the office of State planning and budgeting shall compile and forward to the legislature reports showing all executive department projects for which State funding is a requirement. HB 1028 prohibits State funding for such projects without specific approval by the General Assembly.

HB 1034 requires the director of the division of criminal justice to report to the General Assembly concerning new programs that may require State funds, and requires General Assembly approval of such new programs in a separate appropriation bill.

These provisions in the House bills on their face are not inconsistent with Section 203 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415). The legislature does not seek to substitute its judgment for that of the State Criminal Justice Planning Agency (SPA) in determining programs and priorities for the expenditure of LEAA funds. The

legislature seeks to review the purposes for which State matching funds will be spent prior to appropriating the funds. The legislature may grant or withhold State funds to provide the non-Federal share of the costs of programs and projects. It must not substitute its own judgment for that of the SPA with respect to the distribution of the LEAA grant funds however. The legislative proposals reviewed do not appear to do this.

If this legislation were later used to change priorities and the comprehensiveness of the plan by withholding sufficient match or buy-in, then we would have to consider the legislation inconsistent with the act.

It should be noted that with regard to section 2(3) of HB 1028, LEAA funds cannot be used to reimburse the State for administrative overhead costs.

Legal Opinion No. 75-29—Buy-In As It Relates to Indian Grants—February 20, 1975

TO: Comptroller
Office of the Comptroller, LEAA

This is in response to an inquiry from the New Mexico State Criminal Justice Planning Agency (SPA) regarding an interpretation of the buy-in provision contained in Section 303(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, Public Law 93-83, and Public Law 93-415).

Under Section 303(a)(2), the State must provide one-half of the required non-Federal share of local programs. The issue presented is whether the buy-in required of the State can be based upon the applicable passthrough percentage less the funds awarded to Indian tribes, where Indian tribes receive grants as units of local government and such Indian programs are funded 100 percent with Federal funds (see Section 301(c)).

This office held, in Legal Opinion No. 74-70, that the buy-in dollar amount that the State is required to provide to local units of government is calculated on the required passthrough of funds statutorily mandated in the variable passthrough provision of Section 303(a)(2). LEAA Guideline Manual M 7100.1A, Financial Management for Planning and Action Grants, contains the appropriate implementation of the legislative intent behind the buy-in requirement:

> This provision is applied to the total aggregate dollar figure . . . which the State is required to passthrough to local units of government. (Chapter 4, paragraph 18.)

Therefore, because the buy-in figure is based upon the aggregate required passthrough fixed figure, it may not be reduced because individual projects are funded at 100 percent Federal funds. This is consistent with the determination that a State is not mandated to increase buy-in where projects are funded at less than 90 percent of the cost of the program or project. It is also consistent with the aggregate nature of the buy-in requirement, which does not require a State to provide buy-in funds to every locally funded project.

Legal Opinion No. 75-30—Use of Part C Block Grant Funds to Support Civil Rights Compliance Programing Needed to Establish or Continue Eligibility for LEAA Funding—March 4, 1975

TO: LEAA Acting Regional Administrator
Region II - New York

This is in response to your request for an opinion as to whether or not Part C funds can be used to support Civil Rights Compliance programing needed to establish or continue eligibility for LEAA funding of Criminal Justice Agencies.

Background

Program G-5 of the New York State Plan, Civil Rights Compliance, authorizes $1,050,000 in Part C funds to be utilized: (1) to refine existing Equal Employment Opportunity (EEO) programs; and (2) to assist in the implementation of affirmative action plans that cross geographical and/or functional boundaries of criminal justice agencies.

Under Program G-5, EEO refinement grants would be awarded only when an applicant has met the basic compliance requirements set forth in the statewide program, and has demonstrated the impossibility of further necessary EEO program refinement without additional funds. These compliance requirements include Title VI and Title VII of the Civil Rights Act of 1964 (Public Law 88-352) and the development and implementation of an EEO program by grant recipients required to do so by 28 C.F.R. 42.301 *et seq.*, subpart E. Accordingly, grants to be authorized for refinement efforts would be available only to those grant recipients whose EEO programs are incomplete but whose noncompliance is due to an "exceptional circumstance" that would permit special-condition treatment under LEAA Instruction I 7400.3 (2/13/74). This instruction authorizes State Criminal Justice Planning Agencies (SPA's) to release grants to a covered agency that has not complied fully with the subpart E requirements due to specified "exceptional circumstances" provided that the EEO program is completed within a maximum of 1 year.

Implementation grants under Program G-5 are limited to special affirmative action projects to be addressed on a statewide, multiagency, or regional basis. Individual affirmative action projects addressed to an agency's specific employment practices would continue to be funded under Programs A through F of the New York State Plan.

Issues

The answer to the question must consider the legal basis for the accepted practice of funding from Part C funds the implementation of individual affirmative action projects addressed to a criminal justice agency's specific employment practices. Is this legal basis applicable to the provision of technical assistance and/or of Part C action funds for the purpose of (1) refining (completing) a partial EEO plan when a grant has been special conditioned under LEAA Instruction I 7400.3 or (2) obtaining an approved EEO plan prior to funding of a Part C action project or activity?

Discussion

The Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415), states in Part C, Section 301(a) 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.* [Emphasis added.]

Section 301(b) of the act enumerates the types of programs and projects for which Part C funds may be utilized. Those of particular relevance to the funding of affirmative action programs are 301(b)(1), (2), and (7):

> The administration is authorized to make grants to States . . . 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;
> (2) The recruiting of law enforcement and criminal justice personnel and the training of personnel in law enforcement and criminal justice; . . .
> (7) The recruiting, organization, training, and education of community service officers to serve with and assist local and State law enforcement and criminal justice agencies in the discharge of their duties through such activities as recruiting.

It is readily apparent that minority and female recruitment programs, job analysis, promotion studies, test validation, and similar affirmative action program techniques are within the scope of activities contemplated to achieve the statutory purposes underlying the uses of Part C funds authorized by these subsections. There can be no doubt, for example, that intensive recruitment of minorities for the police force in a jurisdiction where minorities are underrepresented on the police force is a method that will contribute to the public protection and serve to improve and strengthen law enforcement and criminal justice. Recruitment activities in connection with affirmative action plans are directly within the purview of Sections 301(b)(2) and (7). Such activities would logically include analysis and planning activity to insure that the most effective recruiting methods are utilized, and to insure that those who are recruited will have an equal opportunity for advancement.

The National Advisory Commission on Criminal Justice Standards and Goals recommends that criminal justice agencies address themselves to the need to increase the number of women and minority-group members through the adoption of special recruitment and similar programs (see Standards and Goals: *Police:* 13.2, 13.3; *Corrections*: 14.2, 14.3). In the volume entitled *Police*, Standard 13.3, Minority Recruiting, for example, the Commission recommends five minority recruiting activities for police agencies. One basis for the recommendations is the recognition that ". . . a minority community with only white police officers can be misinterpreted as an attempt to maintain an unpopular status quo rather than to maintain the civil peace" (*Police, supra,* at 330). Clearly, community respect for, and cooperation with, its criminal justice agencies will accomplish the purposes of Sections 301(b)(1), (2), and (7).

The above discussion provides a firm legal base for the funding of affirmative action projects of criminal justice agencies. Generally, such projects flow from the formulation of an affirmative action plan in an EEO program.

An EEO program, then, is more than a legal requirement that is a condition of eligibility for the receipt of LEAA funds. It also defines the problem areas around which effective affirmative action, such as minority recruitment programs, can be taken by a criminal justice agency. This being the case, it follows that it is permissible to provide Part C funded technical assistance under Section 303(a)(10)[1] and/or a Part C action grant for the purpose of completing a partial EEO program when a grant has been special-conditioned under LEAA Instruction I 7400.3.

An approved EEO program should be viewed as the primary responsibility of the applicant/recipient of funds. It is, for most criminal justice agencies, a condition for the receipt of funds. Although written EEO programs, based on objective analysis, are important means of improving and strengthening law enforcement and criminal justice, this use of Part C funds should be judicious, utilizing the existing facilities and personnel of the particular criminal justice agencies insofar as possible. If the recipient criminal justice agency is within the requirements of 28 C.F.R. 42.301 *et seq.*, subpart E, the EEO program must be completed or the grant special-conditioned under LEAA Instruction I 7400.3 when the application is approved. This would prohibit a grant being made for EEO program formulation in circumstances other than when a special condition has been granted.

Technical assistance may be provided to an applicant or grantee in the initial formulation or refinement of an EEO program. Section 303(a)(10) of the act requires that the State plan:

> (10) 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.

Technical assistance has been broadly stated to include "... the communication of knowledge, skills, and know-how ... (by means of) ... expert advisory personnel, the conduct of training activities and conferences, and the preparation and dissemination of technical publications."[2] The provision of technical assistance by the New York civil rights compliance officer to criminal justice agencies as contemplated by Program G-5 is well within the type of technical assistance or services intended to be provided under Section 303(a)(10) of the act.

There are no legal barriers to the Program G-5 component to assist in the implementation of affirmative action plans to be addressed on a statewide, multiagency, or regional basis.

[1] See LEAA Office of General Counsel Legal Opinion No. 74-22, Aug. 22, 1973, on this question generally.

[2] LEAA Office of General Counsel Legal Opinion No. 74-15, July 9, 1973.

Conclusion

It is the opinion of this office that the New York State Plan Program G-5 meets the legal requirements for the use of Part C funds under the act.

Part C action program funds may be used for the refinement of a partial EEO program of a criminal justice agency that qualifies for special-condition treatment under LEAA Instruction I 7400.3 (2/13/74).

Technical assistance may be provided to an applicant/recipient of Part C funds for the purpose of formulating or refining an EEO program required under 28 C.F.R. 42.301 *et seq.*, subpart E.

Legal Opinion No. 75-31—Use of LEAA Funds for the Purchase of a Police Logging Recording System for Radio and Telephone Communications—April 9, 1975

TO: LEAA Regional Administrator
Region IX - San Francisco

This is in response to your memorandum of January 15, 1975, requesting an opinion concerning the legality, under Federal statutes, of a program in Hawaii that provides for police departments to record incoming telephone calls and all radio communications transmissions.

The initial implementation of this project will involve the purchase and installation of a complete communications monitoring system within the police communications section. The major objectives of this logging recorder system are to provide a means of permanent and official recording of all radio transmissions and telephone calls, to provide a means of instant recheck of hurriedly given requests for police service, and to provide a sequentially timed record of call receipts and dispatch instructions.

The program, if implemented as described in your submission, does not appear to violate existing Federal wiretap law. The appropriate Federal code section, 18 U.S.C. 2511(2)(c), provides that:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Thus, all that is required under Federal law is that one party consent to record a communication. Consequently, a local police department violates no Federal law by recording its incoming telephone calls.

Also, it appears that a law enforcement agency is not required to install a periodic tone sound to alert the caller to the fact that the call is being recorded. See 47 U.S.C. 605, 47 C.F.R. 15.11, and 64.501. We suggest, however, that this question be referred to the Federal Communications Commission (FCC) for a determination of whether or not any FCC regulations do require a periodic tone sound during a recorded telephone conversation.

Therefore, it is the conclusion of this office that it is permissible to fund a Police Logging Recording System through the use of LEAA block action funds as authorized under Part C, Section 301(b)(1) of the Omnibus Crime Control and Safe Streets Act, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415).

LEAA grant funds must, of course, be used in accord with State as well as Federal law. This office defers to the Attorney General of the State of Hawaii on the question of the legality of the system under any applicable State wiretap law.

Legal Opinion No. 75-32—Access to Student Records of Law Enforcement Education Programs Applicants or Recipients—February 28, 1975

TO: LEAA Regional Administrator
Region X - Seattle

This is in response to your memorandum of January 6, 1975, concerning the letter received from Mrs. Susan Shackette of Eastern Washington State College dated December 11, 1974. Mrs. Shackette referred to the recently enacted "Buckley Amendment" to the Education Amendments of 1974 (Public Law 93-380), which was approved on August 21, 1974. Under this amendment, personally identifiable records or files of students may not be released by a school without the written consent of the student or parents. One of the statutory exceptions of this current requirement is Section 438(b)(1)(D) of this act, which excludes data:

> (D) in connection with a student's application for, or receipt of, financial aid.

Eastern Washington State regulations issued on this subject expressly exempt LEAA from the consent requirement (WAC 172-08-040(1)(d)). The regulations, however, require that certain procedures be followed by an agency in order to obtain access. The agency must submit a written request and must specify the type of information sought and the reason the agency has in seeking the information. This conforms with Section 438(b)(4)(A) of Public Law 93-380, which states that agencies desiring access to the records of students are required to sign a written form that must be kept permanently with the file of the student indicating specifically the legitimate educational or other interest the agency has in seeking this information.

On December 31, 1974, however, paragraph (4)(A) of Section 438(b) of Public Law 93-380 was amended by Public Law 93-568. The amended language of paragraph (4)(A) no longer requires agencies seeking information to sign a written form. The new language merely requires that educational institutions maintain a record that indicates all agencies requesting or obtaining access to a student's educational records.

The proposed rules published by the Department of Health, Education, and Welfare (HEW) on January 6, 1975, 40 F.R. 1207, implement this new amended provision (see 45 C.F.R. 99.38).

The Eastern Washington State College regulations were prepared prior to the amended Section 438(b)(4)(A) and the HEW proposed rules. The WAC regulation 172-08-040(d)(2), therefore, no longer has a statutory basis behind it, and I am certain that the Eastern Washington State College regulations will be amended once the college is aware of the amended provision.

Accordingly, it is the opinion of this office that LEAA should not be required to submit written requests for student files in connection with the Law Enforcement Education Program.

Legal Opinion No. 75-33—Report Requirements Under the Juvenile Justice and Delinquency Prevention Act of 1974—February 28, 1975

TO: Director
Office of Public Information, LEAA

This is in response to your request for a legal opinion on what reports are required by the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415).

The report requirements are contained in Sections 204(b)(5), 204(b)(6), 204(d)(1), 204(d)(2), 204(e), 204("1"), 206(d), and 246 of the act. Section 263 controls the effective dates of the various sections of the act.

Major Reports

Two major annual reports to be developed by the Administrator and submitted to the President and the Congress are required by Sections 204(b)(5) and (6). These sections provide as follows:

> (5) *develop annually* with the assistance of the Advisory Committee and *submit* to the President and the Congress, *after the first year the legislation is enacted, prior to September 30,* an analysis and evaluation of Federal juvenile delinquency programs conducted and assisted by Federal departments and agencies, the expenditures made, the results achieved, the plans developed, and problems in the operations and coordination of such programs. The report shall include recommendations for modifications in organization, management, personnel, standards, budget requests, and implementation plans necessary to increase the effectiveness of these programs;
>
> (6) *develop annually* with the assistance of the Advisory Committee and submit to the President and Congress, *after the first year the legislation is enacted, prior to March 1,* a comprehensive plan for Federal juvenile delinquency programs, with particular emphasis on the prevention of juvenile delinquency and the development of programs and services which will encourage increased diversion of juveniles from the traditional juvenile justice system. [Emphasis added.]

As can be seen from the following material, the legislative design in the Juvenile Justice Act is to have all supplemental reports flowing into the two major reports.

Supplemental Reports

In addition to the above annual reports three supplemental reports for inclusion in a major report are required. Sections 204(d)(1) and (2) require that additional reports in each of the first and second report years be included in the annual report required by Section 204(b)(5). Section 204(e) requires an additional report to be included in the third annual report required by Section 204(b)(6). These sections are as follows:

> (d)(1) The first annual report submitted to the President and the Congress by the Administrator under subsection (b)(5) shall contain, in addition to information required by subsection (b)(5), a detailed statement of criteria developed by the Administrator for identifying the characteristics of juvenile delinquency, juvenile delinquency prevention, diversion of youths from the juvenile justice system, and the training, treatment, and rehabilitation of juvenile delinquents.
>
> (2) The second such annual report shall contain, in addition to information required by subsection (b)(5), an identification of Federal programs which are related to juvenile delinquency prevention or treatment, together with a statement of the moneys expended for each such program during the most recent complete fiscal year. Such identification shall be made by the Administrator through the use of criteria developed under paragraph (1).
>
> (e) The third such annual report submitted to the President and the Congress by the Administrator under subsection (b)(6) shall contain, in addition to the comprehensive plan required by subsection (b)(6), a detailed statement of procedures to be used with respect to the submission of juvenile delinquency development statements to the Administrator by Federal agencies under subsection ("l"). Such statement submitted by the Administrator shall include a description of information, data, and analyses which shall be contained in each such development statement.

The three additional reports are designed as a process to establish criteria to identify aspects of juvenile delinquency, to identify relevant Federal juvenile delinquency programs through the use of such criteria, and finally to establish procedures through which the identified Federal agencies will submit annual juvenile delinquency development statements required by Section 204("l").

Other Federal Agency Reports

Supplementing LEAA report requirements are provisions set out in Section 204 that require all other Federal agencies to prepare "juvenile delinquency development statements," as follows:

> ("l")(1) The Administrator shall require through appropriate authority each Federal agency which administers a Federal juvenile delinquency program which meets any criterion developed by the Administrator under Section 204(d)(1) to submit annually to the Council a juvenile delinquency development statement. Such statement shall be in addition to any information, report, study, or survey which the Administrator may require under Section 204(f).
>
> (2) Each juvenile delinquency development statement submitted to the Administrator under subsection ("l") shall be submitted in accordance with procedures established by the Administrator under Section 204(e) and shall contain such information, data, and analyses as the Administrator may require under Section 204(e). Such analyses shall include an analysis of the extent to which the juvenile delinquency program of the Federal agency submitting such development statement conforms with and furthers Federal juvenile delinquency prevention and treatment goals and policies.

> (3) The Administrator shall review and comment upon each juvenile delinquency development statement transmitted to him under subsection ("l"). Such development statement, together with the comments of the Administrator, shall be included by the Federal agency involved in every recommendation or request made by such agency for Federal legislation which significantly affects juvenile delinquency prevention and treatment.

The results of this process would be likely to end up in the appropriate major report.

Coordinating Council Report

Section 206(d), as follows, requires that the annual report of the Coordinating Council be a part of one of the LEAA annual reports described earlier in this memorandum:

> . . . a description of the activities of the Council shall be included in the annual report required by Section 204(b)(5) of this title.

National Institute Report

Section 246, as follows, requires that the annual report of the Institute also be included in the annual report required by Section 204(b)(5):

> Section 246. The Deputy Assistant Administrator for the National Institute for Juvenile Justice and Delinquency Prevention shall *develop annually* and *submit* to the Administrator *after the first year the legislation is enacted*, prior to June 30, a report on research, demonstration, training, and evaluation programs funded under this title, including a review of the results of such programs, an assessment of the application of such results to existing and to new juvenile delinquency programs, and detailed recommendations for future research, demonstration, training, and evaluation programs. The Administrator shall include a summary of these results and recommendations in his report to the President and Congress required by Section 204(b)(5). [Emphasis added.]

Effective Dates for Reports—Legislative History

Several of these report requirements are influenced by Section 263, the "effective clause" of the act. This section reads as follows:

> Section 263. (a) Except as provided by subsection (b), the foregoing provisions of this Act shall take effect on the date of enactment of this Act.
>
> (b) Section 204(b)(5) and 204(b)(6) shall become effective at the close of the thirty-first day of the twelfth calendar month of 1974. Section 204("l") shall become effective at the close of the thirty-first day of the eighth calendar month of 1976.

The meaning of Section 263(b) and its effect on the report requirements of Sections 204(b)(5) and (6), and on the juvenile delinquency development statements required by Section 204("l") is unclear. The original provisions of S. 821, as passed by the Senate and as amended by the House, must be examined in order to determine congressional intent.

The Senate bill contained the exact language in Sections 474(b)(5) and (6) that was adopted by the Conference Committee as Sections 204(b)(5) and (6). The Senate bill made no provision for additional reports (Sections 204(d)(1) and (2), 204(e)), however, and no provision for the submission of juvenile delinquency development statements (Section 204("l")). The annual report of the Coordinating Council is required by Section 476(d), this section being identical to Section 206(d) of the act. Finally, the annual report of the Institute is required by Section 408, this provision being identical to Section 246 of the act. There is no "effective clause" in the Senate bill.

The House amendment required the same two annual reports required by the act and by the Senate bill. The language of the House amendment, Sections 104(b)(5) and (6), is somewhat different, however. It provides as follows:

> (5) develop annually, submit to the Council for review, and thereafter submit to the President and the Congress, no later than September 30, a report which shall include an analysis and evaluation of Federal juvenile delinquency programs conducted and assisted by Federal agencies, the expenditures made, the results achieved, the plans developed, and problems in the operations and coordination of such programs, and recommendations for modifications in organization, management, personnel, standards, budget requests, and implementation plans necessary to increase the effectiveness of such programs;
>
> (6) develop annually, submit to the Council for review, and thereafter submit to the President and the Congress, no later than March 1, a comprehensive plan for juvenile delinquency programs administered by any Federal agency, with particular emphasis on the prevention of juvenile delinquency and the development of programs and services which will encourage increased diversion of juveniles from the traditional juvenile justice system.

A key phrase in the Senate bill and the act itself, "after the first year the legislation is enacted," was not in this version.

The additional reporting requirements of Sections 204(d)(1) and (2) and Section 204(e) of the act were incorporated substantially verbatim from Sections 104(d)(1) and (2) and Section 104(e) of the House amendment:

> (d)(1) The first report submitted to the President and the Congress by the Secretary under subsection (b)(5) shall contain, in addition to information required by subsection (b)(5), a detailed statement of criteria developed by the Secretary for identifying the characteristics of juvenile delinquency, juvenile delinquency prevention, diversion of youths from the juvenile justice system, and the training, treatment, and rehabilitation of juvenile delinquents.
>
> (2) The second such report shall contain, in addition to information required by subsection (b)(5), an identification of Federal programs which are related to juvenile delinquency prevention or treatment, together with a statement of the moneys expended for each such program during the most recent complete fiscal year. Such identification shall be made by the Secretary through the use of criteria developed under paragraph (1).
>
> (e) The third report submitted to the President and the Congress by the Secretary under subsection (b)(6) shall contain, in addition to the comprehensive plan required by subsection (b)(6), a detailed statement of procedures to be used with respect to the submission of juvenile delinquency development statements to the Secretary by Federal agencies under Section 105. Such statement submitted by the Secretary shall include a description of information, data, and analyses which shall be contained in each such development statement.

The following requirement for submission of juvenile delinquency development statements, Section 105 of the House amendment, was carried over with the same substantive requirements, as Section 204("l") of the act:

> (a) The Secretary shall require each Federal agency which administers a Federal juvenile delinquency program which meets any criterion developed by the Secretary under Section 104(d)(1) to submit to the Secretary a juvenile delinquency development statement. Such statement shall be in addition to any information, report, study, or survey which the Secretary may require under Section 104(f).
>
> (b) Each juvenile delinquency development statement submitted to the Secretary under subsection (a) shall be submitted in accordance with procedures established by the Secretary under Section 104(c) and shall contain such information, data, and analyses as the Secretary may require under Section 104(e). Such analyses shall include an analysis of the extent to which the juvenile delinquency program of the Federal agency submitting such development statement conforms with and furthers Federal juvenile delinquency prevention and treatment goals and policies.
>
> (c) The Secretary shall review and comment upon each juvenile delinquency development statement transmitted to him under subsection (a). Such development statement, together with the comments of the Secretary, shall be included by the Federal agency involved in every recommendation or request made by such agency for Federal legislation which significantly affects juvenile delinquency prevention and treatment.

Section 502(g) of the House amendment had a Coordinating Council report provision similar to that of the Senate bill and of the act: "A description of the activities of the Council shall be included in the annual report required by Section 104(b)(5)."

Section 308 of the House amendment required that an Institute annual report be submitted prior to June 30, as follows:

> Section 308. The Administrator shall develop annually and submit to the President and each House of the Congress, prior to June 30, a report on the activities of the Institute and on research, demonstration, training, and evaluation programs funded under this title, including a review of the results of such programs, an assessment of the application of such results to existing and new juvenile delinquency programs, and detailed recommendations for future research, demonstration, training, and evaluation programs.

Finally, the House amendment provided for effective dates in Section 603. The provisions of Section 603(b) were intended to control the effective dates for the report requirements of Sections 104(b)(5), 104(b)(6), and Section 105:

> (Section 603)
>
> (a) Except as provided by subsection (b), the foregoing provisions of this Act shall take effect on the date of enactment of this Act.
>
> (b) Section 104(b)(5), Section 104(b)(6), and Section 310 shall take effect at the close of December 31, 1974. Section 105 shall take effect at the close of August 31, 1977.

A comparison of the act and the legislation passed by the House and Senate indicates that the conferees selected provisions of each bill to insert in the conference committee bill. Some provisions of the act were selected from the Senate bill: Sections 204(b)(5), 204(b)(6), 206(d), 246, and 408. Other provisions were incorporated, as modified, from the House bill: Sections 204(c), 204(d)(1), 204(d)(2), 204(e), 204("l"), and 263.

The conference report (S. Rept. 93-1103, Aug. 16, 1974) on S. 821 did not clarify the questions related to specific due dates of reports. The "Joint Explanatory Statement of the Committee on Conference" states that: "The Senate bill required annual evaluation and analyses of all Federal juvenile delinquency programs one year after enactment of this bill. The House amendment required that the first annual report be submitted by September 30. The conference substitute adopts the Senate provision." (Ibid., p. 40.)

The Senate bill clearly did not require that the annual report be submitted 1 year after enactment of the bill. Rather, Section 474(b)(5) required that the report be submitted ". . . after the first year the legislation is enacted, prior to September 30. . . ." This clearly means September 30, 1975, more than 1 year after the September 7, 1974, enactment date. The House amendment did not require that the first annual report be submitted by September 30, 1974. The conferees apparently failed to take into account the effect of Section 603(b) of the House amendment, which provided that Section 104(b)(5) would not take effect until December 31, 1974. The result is that under the House amendment the report would be due before September 30, 1975, the same date that the report would be due under the Senate bill. What the conferees did do was to adopt the Senate bill's language to establish the due date and then go on to adopt the House amendment's Section 603(b) provision relating to the effective dates of Sections 104(b)(5) and (6):

> The House amendment provided for effective dates of this Act. There was no comparable Senate provision. The conference substitute adopts the House provision. (Ibid., p. 45.)

Thus, the conferees adopted both the Senate bill and the House amendment methodology used to establish the exact same due dates for the annual reports required by Section 204(b)(5) and (6). The result is an ambiguity in the act that raises the question as to whether the effect of the two provisions, construed together, requires submission of the initial annual reports in 1975 or in 1976.

It is apparent from the legislative history that the intent of the Senate bill and the House amendment prior to conference was that the first annual reports would be due in 1975. Had the conferees intended to change the due dates of the initial annual reports they could easily have done so either in Sections 204(b)(5) and (6) or in Section 263(b), first sentence. Their failure to do so and the lack of any indicia of an intent to postpone the reports for an additional year in the conference report suggests that no change in the annual report dates was intended. That no change was intended is also indicated by the fact that if the first annual report required by Section 204(b)(6) was not required until March 1, 1976, then the third additional report required by Section 204(e) would be due in the annual report due prior to March 1, 1978. The authorization of the act, however, expires on June 30, 1977. There would be no March 1, 1978, annual report.

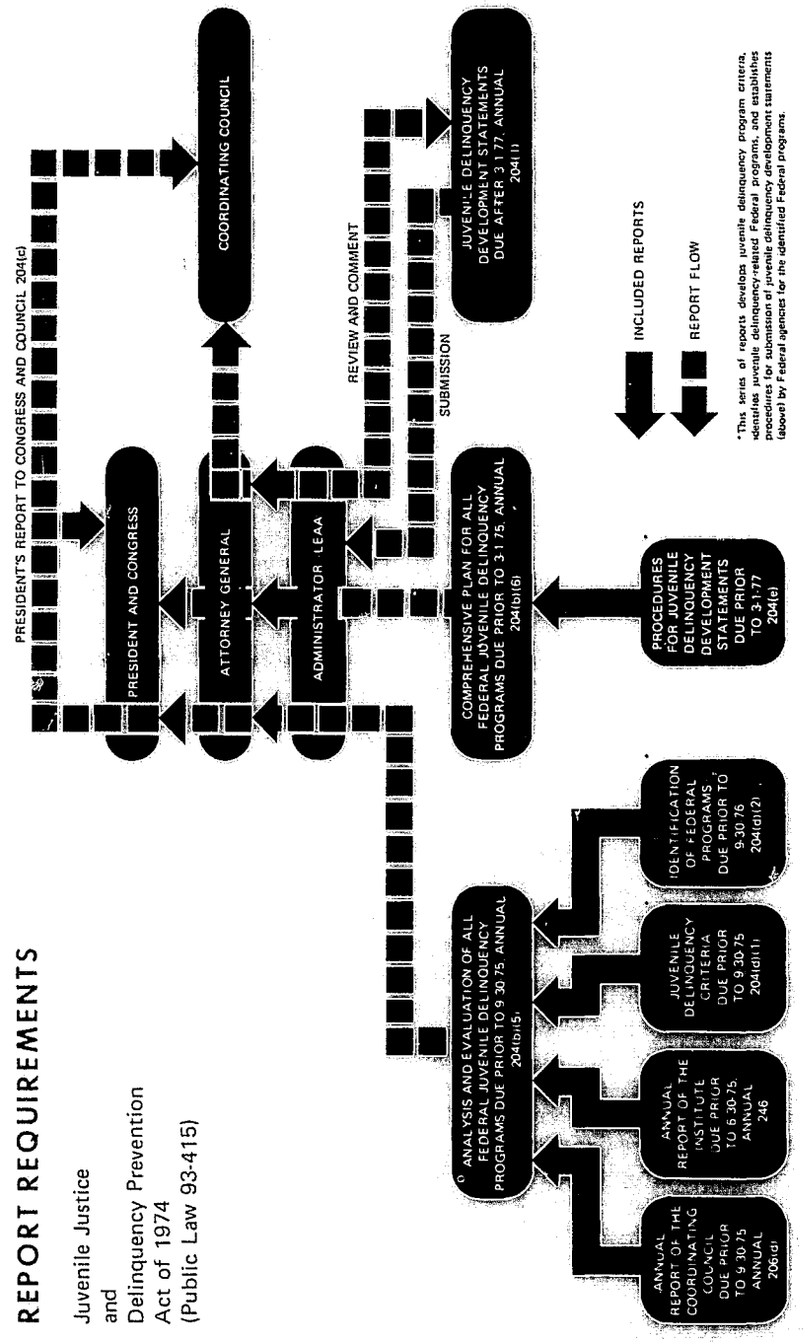
In *Hattaway* v. *United States*, 304 F. 2d 5, 9-10 (5th Cir. 1962) the court quotes with approval Mr. Justice Story's statement from *United States* v. *Winn*, 3 Sumn. 209, 211, Fed. Case No. 16, 740:

> In short, it appears to me, that the proper course in all these cases [interpretation of words of a statute], is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature.

It is the conclusion of this office that Congress intended the annual reports required by Sections 204(b)(5) and (6) to be due prior to September 30, 1975, and March 1, 1975, respectively. The interpretation of the words of Sections 204(b)(5) and (6) and Section 263(b), first sentence, which promotes this intent of the legislation, is as follows: Either Sections 204(b)(5) and (6) or Section 263(b), first sentence, read alone would require the annual reports to be submitted prior to September 30, 1975, and March 1, 1975, respectively. Reading the two together provides no different result. Sections 204(b)(5) and (6) become effective on December 31, 1974, under Section 263(b) first sentence. On January 1, 1975, Sections 204(b)(5) and (6) would still require that the annual reports be due "after the first year the legislation is enacted, prior to September 30, (March 1) . . . ." Because the legislation was enacted on September 7, 1974, the first year thereafter is 1975. It follows that the three additional reports are due prior to September 30, 1975 (204(d)(1)), September 30, 1976 (204(d)(2)), and March 1, 1977 (204(e)), respectively. The initial Coordinating Council report is due prior to September 30, 1975, and the initial annual report of the Institute is due prior to June 30, 1975.

The March 1, 1975, due date for the annual report required by Section 204(b)(6) presents some practical difficulties. As of the date of this opinion there has been no appropriation by the Congress for the purposes of Title II, the members of the Advisory Committee have not yet been appointed by the President, and the Office of Juvenile Justice and Delinquency Prevention has not been formally established. In addition, it is clear that a comprehensive plan for Federal juvenile delinquency programs must be based, at least in part, upon the annual analysis and evaluation of Federal juvenile delinquency programs required by Section 204(b)(5). This latter report is not due until September 30, 1975. It is clearly impossible, under these circumstances, for a truly comprehensive plan to be developed by March 1, 1975. Therefore, it is the opinion of this office that the plan required by Section 204(b)(6) could take the form of a plan for or outline of the steps to be taken by the office and the Advisory Committee in order to develop a truly comprehensive plan for Federal juvenile programs prior to March 1, 1976.

Juvenile delinquency development statements are the product of the additional report process. Under the House amendment, Section 603(b), Section 105 would take effect at the close of August 31, 1977. The act, Section 263(b), provides that the parallel section, Section 204("l"), is to become effective at the close of August 31, 1976. The probable rationale for this change was the fact that the House amendment had a 4-year authorization, while the act provides a 3-year authorization. Had the August 31, 1977, date



been retained it would have gone beyond the June 30, 1977, date on which the authority of the act expires.

Because Section 204("l") takes effect September 1, 1976, submission of juvenile delinquency development statements could be required on or after that date. Because, the third report, establishing procedures for submission, will not be due until March 1, 1977, however, it would be acting outside of the statutory design of Section 204(d) to require submission of development statements prior to the establishment of procedures for submission. This difficulty could be overcome by issuing the third additional report in the annual report due prior to March 1, 1976, and requiring that development statements be submitted on or after September 1, 1976. Otherwise, development statements could not be due until March 1, 1977, when the procedures for submission are established pursuant to Section 204(e).

Conclusion

It is the opinion of this office that the initial annual reports and development statements required under the act are due as follows:

–Section 204(b)(5) – Prior to September 30, 1975
–Section 204(b)(6) – Prior to March 1, 1975
–Section 204(d)(1) – Prior to September 30, 1975
–Section 204(d)(2) – Prior to September 30, 1976
–Section 204(e) – Prior to March 1, 1977
–Section 204("l") – After March 1, 1977
–Section 206(d) – Prior to September 30, 1975
–Section 246 – Prior to June 30, 1975

These due dates and the relationships of the reports to one another are illustrated in the chart on page 174[1].

Legal Opinion No. 75-34—Community Development Act Funds as Match for LEAA Programs—April 18, 1975

TO: Inspector General
Office of Inspector General, LEAA

This is in response to your request for an opinion regarding the utilization of community development funds as eligible match for LEAA grants.

Housing and Community Development Act

The primary objective of the Housing and Community Development Act of 1974 (Public Law 93-383) is the development of viable living communities through the provision of decent housing, suitable living environments, and

[1]The Fiscal Year Adjustment Act (Public Law 94-273, April 21, 1976) adjusts the Juvenile Justice Act reporting dates to comport with the new Federal fiscal year (October 1 to September 30). The due dates set forth in this opinion should be read, for reports due after April 21, 1976, as follows: March 1 as June 1, June 30 as September 30, and September 30 as December 31.

expanded economic opportunities principally for persons of low and moderate income. Crime prevention activities are included within the act's comprehensive coverage, and methods of funding such activities are delineated in the act and more fully explained in the accompanying regulations.

The new act does not define the crime prevention activities that are eligible for funding, but does provide that funds from the act can be used for crime prevention purposes to pay the cost of such activities either directly or indirectly by paying the non-Federal share of other grant-in-aid programs that prevent crime or have an impact on crime prevention activities.

Limitations

Section 105(a)(9) of the act provides for the "payment of the non-Federal share required in connection with a Federal grant-in-aid program undertaken as part of the Community Development Program."

Section 570.200(a)(9) of the promulgated regulations, entitled "Community Development Block Grants," 24 C.F.R. 570.200(a)(9) (1975), provides the limitation that community development block-grant funds can be used to pay the non-Federal share required in connection with a Federal grant-in-aid program undertaken as part of the community development program only where such payment is limited to activities otherwise eligible under the act. The foregoing necessarily limits the extent to which public services and public facilities can be matched with community development block-grant funds. Furthermore, this payment is subject to the requirement in Section 570.303 of the regulations that the additional programs that are to provide resources for the community must be identified and included in the complete Community Development Plan and in the application for grants. Additionally, HUD officials indicate that payment of the non-Federal share is applicable only to programs that began after January 1, 1975.

Section 105(a)(8) of the act specifies that assistance can be given for:

> [P]rovision of public services not otherwise available in areas where other activities assisted under this title are being carried out in a concentrated manner, if such services are determined to be necessary or appropriate to support such other activities and *if assistance in providing or securing such services under other applicable Federal laws or programs has been applied for and denied or not made available within a reasonable period of time*, and if such services are directed toward (a) improving the community's public services and facilities, including those concerned with the employment, economic development, *crime prevention*, child care, health, drug abuse, education, welfare, or recreation needs of persons residing in such areas and (b) coordinating public and private development programs. [Emphasis added.]

Community development funds, according to the act, can be used directly for crime prevention activities when the request for other Federal program assistance in that area has either been denied or not made available within a reasonable period of time. Section 570.607(b) of the promulgated regulations defines a "reasonable period of time" in the following manner:

> The recipient has received . . . (2) a written statement that funds cannot be made available for at least 90 days after the request; or, (3) no response from the Federal, State, or local agency within a 90 day period from the date of application or inquiry; . . .

Grant assistance for a community development program is not dependent only on the unavailability of other program assistance. Other considerations as set forth in Section 105(a)(8) of the act and Section 570.200(a)(8) of the regulations also apply. These other requirements include unavailability of such service in areas, or serving residents of areas, in which the recipient is undertaking, or will undertake, other block-grant-assisted activities and the determination that such services are necessary or appropriate to support these other block-grant activities.

The use of community development funds for crime prevention activities is further limited by Section 570.201(a)(1) of the regulations which identifies activities that cannot be funded. Included in the list of ineligible activities are:

> Buildings and facilities for the general conduct of government, such as city halls and other headquarters of government (where the governing body meets regularly), of the recipient and which are predominantly used for municipal purposes, courthouses, police stations, and other municipal office buildings.

HUD officials suggest the intent is not to use community development funds to construct the principal facilities listed. Although a central or primary police station would be an ineligible expenditure, it was thought that it might be possible to build or help build a substation for police in a neighborhood area. Correspondence with the Office of General Counsel of HUD, however, indicates that such a substation does not appear to meet the proposed regulatory definition of neighborhood facility, which is patterned after the neighborhood facilities grant program (Section 703(c) of the Housing and Urban Development Act of 1965, Public Law 89-117), and that includes, among other things, the provision of health, recreational, social, or similar community services.

Summary and Conclusion

Community development funds may be used as eligible match for LEAA grants. The use is subject to the following limitations: (1) Community development block-grant funds may be used only where such payment is limited to activities otherwise eligible under the act; (2) funds must be identified and included in the Community Development Plan and application for grant; (3) payment is applicable only to programs that began after January 1, 1975; and (4) funds may not be used for buildings and facilities used to conduct the business of government including courthouses, police stations, and, in all likelihood, neighborhood police substations.

Legal Opinion No. 75-35—Use of Part C Funds for Enforcing Texas Cigarette Tax Laws—August 21, 1975

TO: LEAA Regional Administrator
Region VI - Dallas

This is in response to a letter of May 16, 1975, from the Texas Criminal Justice Division (SPA) asking whether a proposed cigarette tax enforcement program may be funded by 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, Public Law 93-83, and Public Law 93-415). It is the opinion of this office that LEAA does not have the authority to fund this program as it does not serve a criminal justice purpose.

The project proposed by the Comptroller of Texas involves two phases. In the first, a "Pilot Tax Enforcement Program" at four key border crossings would be established. In addition the Comptroller's Office would make a "complete study . . . of the scope of tax enforcement problems related to all commodities" and would "examine all problems related to the collection of taxes by various tax programs." (Comptroller's Proposal, p. 13.) The second phase entails implementation of "a total tax enforcement program" that "would encompass cigarette tax enforcement efforts, plus other defined tax enforcement problems." (*Ibid.*, pp. 14, 15.) It is noted that the latter are not, in fact, defined in the proposal.

Under Section 301 of the act, LEAA is authorized to make grants to States "to carry out programs and projects to improve and strengthen law enforcement and criminal justice." That term is defined in Section 601(a) of the act to mean:

> . . . any activity pertaining to crime prevention, control or reduction or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control or reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies (including prosecutorial and defender services) activities of corrections, probation, or parole authorities, and programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction.

In interpreting the above sections, LEAA has determined 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. Such agencies are not, however, totally precluded from participating in or receiving Federal grant fund assistance from LEAA. They are eligible to receive LEAA grant assistance for specific programs that will accomplish a clear "law enforcement and criminal justice" purpose in accord with the funding provisions of Section 301(b) of the act.

It should be noted that an agency that is engaged primarily in the general enforcement of criminal law is eligible to receive grants although not every activity performed relates to criminal law enforcement. For example, police

departments enforce not only criminal laws but many civil and regulatory ones, too, such as traffic laws and building codes. An agency that is not primarily engaged in the general enforcement of criminal law may receive grants only by establishing that particular programs will serve a specified purpose under the act. LEAA will scrutinize proposed programs of this type much more closely than those proposed by general law enforcement agencies.

The (Texas) Office of the Comptroller of Public Accounts serves as the central accounting office and principal tax administration office of the State. (*Ibid.*, p. 2.) No claim is made that it is a criminal justice agency and this office does not believe that it is. The sole question presented, therefore, is whether the proposed project serves a purpose for which LEAA funds may be used.

It is the opinion of this office that tax enforcement laws are not primarily criminal but rather civil or regulatory. The fact that criminal sanctions may arise out of the violation of these laws does not change their nature.

In general usage a lawbreaker is synonymous with a criminal. In actuality criminal laws constitute but a small portion of the vast body of Federal and State law. Criminal laws are specifically designated as such; usually they are labeled felonies or misdemeanors and the penalties for violations are set forth. Often they are listed in separate chapters or volumes of a jurisdiction's codification (see, e.g., 18 U.S.C.). Civil laws, on the other hand, pertain to almost every aspect of modern living, ranging from traffic violations to banking regulations. The distinction between civil and criminal laws is not always a very clear one; often the same act may be subject to both criminal and civil sanctions. An analogy may be drawn to one who assaults another. The assaulter is liable for civil damages to his victim regardless of any possible criminal assault charges. Similarly, one who violates a civil law may be liable to the government for civil damages regardless of any possible criminal charges.

The Supreme Court has considered this distinction in a number of cases. In *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), the Court upheld a civil penalty for fraudulent failure to pay taxes even though the taxpayer had been acquitted on criminal charges of willful failure to pay. In a later case, the Court explained the difference between civil and criminal laws (*United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), Frankfurter, J., concurring). Civil laws are remedial (they provide the relief the government would be entitled to were it a person) while criminal laws punish. It is true that "punishment, in a certain and very limited sense may be the result of the statute before us so far as the wrongdoer is concerned," but this is not enough to label it as a criminal statute. (*Brady* v. *Daly*, 175 U.S. 148,158 (1899))

The Cigarette Tax Law of Texas, like the Internal Revenue Code, contains two different penalties for violations. Section 7.33 permits the Comptroller to waive seizure of unstamped cigarettes provided the offender obtains stamps and pays their value again as a penalty. Sections 7.36 and 7.37 make certain acts misdemeanors and felonies, respectively, and set forth the parameters of the applicable fines and prison sentences.

In light of the Supreme Court rulings on this subject, it is clear that the entire set of Texas cigarette tax laws cannot be considered criminal law. Sections 7.27 and 7.31 set forth the basic tax provisions and are civil or regulatory in nature. Section 7.33, which provides for civil penalties for

violations, is also clearly civil. Only Sections 7.36 and 7.37, which deal with misdemeanors and felonies, constitute criminal law.

A program designed to promote general enforcement of these cigarette taxes cannot be funded by LEAA as it does not primarily serve a criminal law enforcement purpose. The main thrust of the proposed project appears to be to set up border stations and collect taxes from the average law-abiding individual who would pay the tax if he knew it existed. Appendix F of the Comptroller's Proposal supports this view of the program. Of 25 cigarette tax violators who were confronted some time after crossing the border (generally a day or two) most expressed surprise at the necessity to pay taxes and apparently only three criminal charges resulted.

Programs similar to the one proposed here may be funded by LEAA if the emphasis is upon the criminal law enforcement aspects (that is, the apprehension and prosecution of willful violators) rather than the civil aspects (collection, education, and civil penalties). Obviously, a project that primarily serves a criminal law enforcement purpose indirectly will promote civil law enforcement also. The critical question in determining eligibility for LEAA funding is whether the program primarily serves criminal law enforcement. This determination is to some extent subjective and must be made on a case-by-case basis.

There is one additional factor that is relevant in considering programs of this type. Cigarette smuggling is often carried out by organized crime on a large scale. It has been estimated that 75 percent of the 130 million cartons annually smuggled north from two southern States are brought up by organized crime (see Wayne, "Cracking Down on Bootleg Cigarettes," *The National Observer*, June 21, 1975, p. 13, col. 2). One of the permissible uses of LEAA funds is for "[t]he organization, education and training of special law enforcement and criminal justice units to combat organized crime." (Section 301(b)(5).) Thus, a program designed to halt cigarette smuggling by organized crime would meet the requirements of Section 301 and the "primarily criminal" test may be unnecessary.

By applying the above criteria to the plan proposed by the Comptroller of Texas, it is the opinion of this office that LEAA funding is not available. The program does not appear to serve primarily criminal law enforcement purposes, but rather seeks aid in general tax collections with the criminal aspects merely incidental. Nor does the project as described include an attack on organized crime's role in cigarette smuggling.

Appendix B of the Comptroller's Proposal contains summaries of five other tax laws: Motor Fuel Tax, Sales Tax, Finance Tax, Inheritance Tax, and Hotel Occupancy Tax. Presumably these laws would be studied in the first phase of the project and possibly included in the second phase as "other defined tax enforcement problems." The same tests should be applied to these areas as that set forth above. LEAA funding cannot be used to aid the enforcement of civil or regulatory laws, which these tax laws generally are. Programs designed primarily to enforce the criminal aspects of these laws, however, are eligible for LEAA funding. Based on the outline set forth in the proposal, it is the opinion of this office that LEAA funds may not be used. Should a more concrete plan

be submitted, its eligibility for LEAA funding will be determined using the tests set forth above.

In conclusion, the project proposed by the Comptroller of Texas to enforce cigarette tax laws is not eligible to receive LEAA funding as it does not serve a purpose for which LEAA funds may be used under Section 301(b).

Legal Opinion No. 75-36—(Number not used.)

Legal Opinion No. 75-37—Use of Part C Funds to Train Montana Department of Revenue Investigators—May 20, 1975

TO: LEAA Regional Administrator
Region VIII - Denver

This is in response to a memorandum dated Dec. 10, 1974, asking whether the Montana Department of Revenue is eligible to participate in and receive Federal funds from the Law Enforcement Assistance Administration (LEAA) for the purpose of training liquor and tobacco tax investigators. It is the opinion of this office that the Montana Department of Revenue is not eligible for funding of general purpose activities from LEAA fund sources. It is also the opinion of this office that the proposed project to train Bureau of Investigation personnel at the Consolidated Law Enforcement Training Center is sufficiently related to a law enforcement purpose to qualify for LEAA fund assistance.

The following provisions of the Revised Code of Montana have been cited to us as evidence of the law enforcement duties of the liquor and tobacco tax investigators:

> 84-5606.26. BOARD DUTIES AND POWERS—ARREST, ENTRY OF COMPLAINT AND LAWFUL SEARCH AND SEIZURE AUTHORIZED. The board is charged with the duty of administering and enforcing the provisions of this act, and the board, its members and agents, are hereby given the powers of peace officers, and are authorized and empowered to arrest any person violating any provision of this act, and to enter complaint before any court of competent jurisdiction, and to lawfully search and seize and use as evidence, any unlawful or unlawfully possessed license, stamp or insignia found in the possession of any person or place.
>
> 4-158. (2815.112) Liquor container must have been sealed with official seal—powers and duties of peace officers . . .
>
> (2) Any inspector or peace officer who finds liquor, which he has reasonable cause to believe is had or kept by any person in violation of the provisions of this act, may, without warrant, forthwith seize and remove the same and the packages in which the liquor is kept, and upon conviction of the person for a violation of any provision of this section the liquor and all packages containing the same shall, in addition to any other penalty prescribed by this act, ipso facto be forfeited to the state of Montana.

To hold that these provisions make the Montana Department of Revenue eligible to participate in and receive Federal fund grant assistance from LEAA is inconsistent with prior LEAA interpretations of eligibility requirements. Under Section 301 of the Omnibus Crime Control and Safe Streets Act of

1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415), LEAA is authorized to make grants to States ". . . to carry out programs and projects to improve and strengthen law enforcement and criminal justice." The term "law enforcement and criminal justice" is defined at Section 601(a) of the act to mean:

> . . . any activity pertaining to crime prevention, control, or reduction or the enforcement of the criminal law, including, but not limited to police efforts to prevent, control or reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies (including prosecutorial and defender services), activities of corrections, probation, or parole authorities, and programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction.

In interpreting the above sections, LEAA has determined 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.

The Montana Department of Revenue is not primarily engaged in the general enforcement of criminal law. Rather, the Montana Department of Revenue is primarily engaged in the enforcement of a specialized area of law: the regulation and the administration of the Montana alcohol and tobacco tax statutes. As a result, it does not qualify for eligibility for general funding assistance.

This does not necessarily mean, however, that the Montana Department of Revenue can never qualify for any LEAA assistance. Funds may be available to the Bureau of Investigation in the Montana Department of Revenue 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.

The project for which the Department of Revenue is seeking assistance is the proposed training of Bureau of Investigation employees at the U.S. Department of Treasury Consolidated Law Enforcement Training Center. The purpose of the program is to enable the alcohol and tobacco tax investigators to receive law enforcement training so that they may be able to carry out effectively the law enforcement powers and duties granted to them in R.C.M. 84-5606 and R.C.M. 4-158, *supra*. Consequently, it is the opinion of this office that this project will accomplish a clear "law enforcement and criminal justice" purpose in accord with the requirements for funding eligibility under Section 301(b) of the act.

In summary, it is the opinion of this office that the Montana Department of Revenue is not eligible to receive general grant assistance from LEAA. The department is eligible to receive specific grant assistance from LEAA only upon a showing that a proposed project will accomplish a clear "law enforcement and criminal justice" purpose. The proposed project to train alcohol and tobacco tax investigators at the Consolidated Law Enforcement Training Center does meet the objectives and consequently is eligible for LEAA fund assistance.

Legal Opinion No. 75-38—Subgranting Part E Funds to Private or Nonprofit Agencies—April 9, 1975

TO: Acting Assistant Administrator
Office of Regional Operations, LEAA

This is in response to your request for a legal opinion as to the allowability of subgranting Section 455, Part E funds to private or nonprofit agencies.

The identical question with respect to Part C funds was resolved in 1969. On March 27 of that year, Justice William H. Rehnquist of the U.S. Supreme Court who was then Assistant Attorney General in charge of the Department of Justice Office of Legal Counsel, wrote a memorandum holding that LEAA funds could be provided by the States to nongovernmental agencies. The memorandum was addressed to the Administrator of LEAA and stated in part as follows (sections referred to are of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351)):

> In your memorandum of February 18, you request our opinion as to whether a State planning agency may grant Part C funds (1) to State owned and operated educational institutions; (2) to other types of educational institutions; (3) to non-profit organizations; and (4) to profit-making organizations. The answers to all four questions are in the affirmative, assuming that the grants are for purposes enumerated in section 301(b), and are consistent with the guidelines for comprehensive State plans prescribed in section 303 . . . . On the other hand, it will rarely be appropriate, as a matter of policy if not of law, to make grants to profit-making organizations. If it is decided to employ the resources of such organization in furthering some of the goals of a comprehensive plan, the more appropriate method of making funds available to it for that purpose will be a contract which establishes a clear and enforceable quid pro quo.

This memorandum was included as an exhibit in the conference report on Law Enforcement Assistance amendments adopted by Congress in 1973. In submitting the memorandum, Senator John L. McClellan stated that, "Nothing that the conference did was designed to change these present practices." (Cong. Rec. S 15557 (July 26, 1973).)

There are no prohibitions under Part E on making subgrants to private organizations, and there is no basis, in the absence of such an express provision, for assuming that Congress intended such a prohibition. LEAA is authorized to make grants to State planning agencies (SPA's) that have filed a comprehensive State plan as required in Section 452 of the act, provided that the requirements of Section 453 are met. Of special significance is Section 453(4), which requires:

> [s]atisfactory emphasis on the development and operation of community-based correctional facilities and programs, including diagnostic services, halfway houses, probation, and other supervisory release programs for preadjudication and post-adjudication referral of delinquents, youthful offenders, and first offenders, and community-oriented programs for the supervision of parolees.

Such programs are often operated by church-related and other private community organizations, and it is proper that LEAA funds be used to foster such worthy programs regardless of their affiliation with governmental units.

Congress acknowledged the importance of work of private, nonprofit organizations by its amendment to Section 306(a)(2) in the Crime Control Act of 1973 (Public Law 93-83) which allows direct Part C discretionary grants by LEAA to such groups. In the floor debate on this act, Senator Roman L. Hruska, one of the floor managers of the bill, listed several of the "[m]any examples of national achievements by the LEAA program," among them the YMCA Youth Service Bureau, and two private drug rehabilitation programs (Cong. Rec. S 12418 (July 28, 1973)).

In light of these actions and the acceptance by Congress of the practice of subgranting Part C funds to private organizations, and in the absence of any express prohibition, it is our opinion that Part E funds properly may be subgranted by the SPA's to private, nonprofit organizations.

It should be noted that Section 453(2) requires that control of Part E funds and title to property derived from such funds must be in a public agency. Where a subgrant is made to a nongovernmental agency, the SPA must take special care to assure compliance with this requirement.

Legal Opinion No. 75-39—Effect of the Privacy Act of 1974 on the Law Enforcement Education Program—April 9, 1975

TO: Acting Assistant Administrator
Office of Regional Operations, LEAA

The recently enacted Privacy Act of 1974 (Public Law 93-579) provides under Section 7(a)(1) the following:

> It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

Exempt from the application of this subsection under paragraph (2)(B) are social security numbers required for a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

Subsection 7(b) requires that the Federal, State, or local government agency:

> . . . inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

LEAA Guideline Manual M 5200.1A sets forth the policies and procedures for the administration of the Law Enforcement Education Program (LEEP). Chapter 4 describes general conditions of student eligibility and states that an application for LEEP funds will not be accepted by LEAA without the social security number of the applicant (Section 1, paragraph 37, p. 11).

The issue addressed in this memorandum is the application of Section 7 of the Privacy Act to the Law Enforcement Education Program.

Because the requirement regarding social security numbers was in effect prior to January 1, 1975 by regulation (LEAA Guideline Manual M 5200.1A, Feb. 15, 1974), and because it is used to verify the identity of the students both within the LEEP program and within other Federal grant programs, LEEP may continue to require disclosure of the social security numbers of its applicants.

To comply with Section 7(b), however, the application form must include the following information:

> Disclosure of applicant's social security number is required under LEAA Guideline Manual M5200.1A, promulgated pursuant to the authority in Sections 406(b)(c) and 501 of the Omnibus Crime Control and Safe Streets Act, as amended. Such disclosure is mandatory; refusal to disclose may result in denial of a grant. Applicant's social security number will be used to identify the student's account, to verify the student's identity during the period of billing and collection, and to ascertain that there is no improper simultaneous funding under other Federal grant programs.

Immediate compliance is required. All regional offices should be instructed to insert the above as an attachment to all application forms now in use.

Additional concerns raised by the Privacy Act will be addressed in separate memoranda.

Legal Opinion No. 75-40—Administration of Juvenile-Related Programs Within the State of Nevada—May 20, 1975

TO: LEAA Regional Administrator
Region IX - San Francisco

This is in response to a request from the Nevada Commission on Crimes, Delinquency, and Corrections (the Nevada State Criminal Justice Planning Agency (SPA)) and the San Francisco Regional Office dated January 27, 1975, for a clarification of responsibility for administration of juvenile-related programs utilizing LEAA funds within the State of Nevada.

The need for clarification results from a disagreement between the Nevada Commission on Crimes, Delinquency, and Corrections and the Nevada Department of Human Resources (DHR), a State agency.

The DHR has submitted a position paper in support of the concept of separate planning and administration functions for programs within the juvenile justice system and those within the criminal justice system. The major factors underlying this position, as stated in the DHR position paper, are as follows:

1. A philosophical and legal separation in the State of Nevada of the juvenile justice system and the criminal justice system.

2. The Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415) created a new administrative unit at the Federal level—the Office of Juvenile Justice and Delinquency Prevention (OJJDP)—to administer all LEAA juvenile programs, thereby splitting juvenile and adult programs at the Federal level.

3. If all juvenile justice system programs were planned and administered by the Commission, the result would be a duplication of DHR's efforts in the field of juvenile justice and delinquency prevention program planning and funding.

As a result of these factors DHR's position is that:

1. DHR should be responsible for providing services to youth in need of residential care or treatment.

2. DHR should have primary responsibility for development of delinquency prevention and diversion programs.

3. DHR should be the sole State agency for the establishment of standards for the receipt of Federal funds in the field of juvenile development and delinquency prevention programs.

4. DHR, the Commission, and LEAA should enter into a cooperative agreement to include, at minimum, the following points:

a. All planning, program development, and implementation for youth development and delinquency prevention will be the responsibility of DHR.

b. The State plan will be reviewed by the Commission to ensure compliance with Federal rules and regulations.

c. The advisory group mandated by the act will be a part of the State Youth Services Agency function (an instrumentality of DHR) and report its findings and recommendations to the Commission. Membership will, insofar as possible, include those persons currently serving on youth agency advisory boards.

d. All Federal funding for juvenile programs coming to the Commission through OJJDP will be made available to DHR for disbursement in accordance with Federal regulations and the approved State plan.

The DHR paper assumes that the State's comprehensive juvenile justice and delinquency prevention plan will encompass both Juvenile Justice Act funds and funds earmarked for juvenile programs under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415) (hereinafter Crime Control Act), and that the funding for such plan will be through OJJDP. Consequently, the implications of the DHR paper extend to Crime Control Act funds, currently administered by the Commission, as well as to anticipated future funding under the Juvenile Justice Act.

Issues

1. What are the legally mandated functions of a State planning agency?

2. To what extent can these functions be delegated to another State agency, particularly as proposed by the Nevada Department of Human Resources?

In order to address the issues raised, it is necessary to examine the legally prescribed functions of an SPA under the Crime Control Act and its functions under the Juvenile Justice Act. The latter functions can be brought into clearer perspective by viewing the policy rationale behind the passage of the Juvenile Justice Act. The legal and policy examinations taken together provide the framework within which the Commission and DHR can come to an agreement that will be in harmony with the philosophy and law of the State of Nevada.

Crime Control Act

The provisions of the Crime Control Act related to the functions, powers, and responsibilities of SPA's have remained virtually unchanged since initial passage of that act in 1968.

Planning grants are provided for in Part B of the Crime Control Act. Planning grants are to be used for the development and adoption of comprehensive law enforcement and criminal justice plans based on an evaluation of State and local law enforcement and criminal justice problems. The purpose and use of planning grants is set forth in Sections 202 and 203(a) as follows:

> Section 202. The Administration shall make grants to the States for the establishment and operation of State law enforcement and criminal justice planning agencies (hereinafter referred to in the title as 'State planning agencies') for the preparation, development, and revision of the State plan required under section 303 of this title. . . .
>
> Section 203(a). A grant made under this part to a State shall be utilized by the State to establish and maintain a State planning agency. Such agency shall be created or designated by the chief executive of the State and shall be subject to his jurisdiction. . . .

Any use of planning grant funds that is inconsistent with these sections is not legally permissible.

Section 203(b) establishes the major functions of the created or designated SPA:

> (b) The State planning agency shall–
>
> (1) develop, in accordance with Part C, a comprehensive statewide plan for the improvement of law enforcement and criminal justice throughout the State;
>
> (2) define, develop, and correlate programs and projects for the State and the units of general local government in the State or combinations of States or units for improvement in law enforcement and criminal justice; and
>
> (3) establish priorities for the improvement in law enforcement and criminal justice throughout the State.

Although the creation or designation of the SPA by the Governor is a matter of his or her discretion, the Crime Control Act clearly establishes both additional requirements applicable to the SPA and the major functions it is to perform. These additional requirements include representation on SPA boards (and on any Regional Planning Unit) (Section 203(a)), mandatory passthrough of planning (Section 203(c)) and action funds (Section 303(a)(2)), and provisions related to conduct of the business of the SPA (Section 203(d)).

Congress established the SPA concept in order to promote comprehensive statewide law enforcement and criminal justice planning. An agency with a distinct systemwide planning function, representative of all elements of the law enforcement and criminal justice system, was the goal. Although an existent operating agency could be designated as the SPA, its planning function was required to be distinct and the additional requirements, outlined above, to be implemented fully. The major functions of the SPA were to be accomplished as a result of its ability to look at the whole system, plan comprehensively for the improvement of that system, take the lead role in implementing the plan in the

State, and establish priorities that would guide the allocation of scarce resources among competing operational interests of the system. Senator Roman L. Hruska, in debate on the Crime Control Act of 1968, clearly recognized the crucial role of the SPA in the establishment of priorities:

> Of critical importance is the requirement that the State planning agencies establish priorities for the improvement of law enforcement in their respective States. It is felt that the State agency, with its close proximity to the activities and problems of State and local law enforcement and yet free from day to day operating burdens, is best suited to make these fundamental determinations. (114 Cong. Rec. S 5350 (daily ed. May 10, 1968).)

The definition of "law enforcement and criminal justice" activity in Section 601(a) of the Crime Control Act defines the parameters of the SPA function:

> (a) "Law enforcement and criminal justice" means any activity pertaining to crime prevention, control or reduction or the enforcement of the criminal law, including, but not limited to police efforts to prevent, control, or reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies (including prosecutorial and defender services), activities of corrections, probation, or parole authorities, and *programs relating to the prevention, control, or reduction of juvenile delinquency* or narcotic addiction. [Emphasis added.]

This broad definition touches upon every facet of the law enforcement and criminal justice system. It clearly includes a broad range of juvenile-related programs. The concept of comprehensive planning is related directly to the expenditure of LEAA funds only in the sense that the result of the planning process determines the funding priorities of the State plan.

Block grants for law enforcement and criminal justice purposes, the result of the Part B planning process, are provided in Part C of the Crime Control Act. Section 302 requires each State desiring to participate in the grant program to "establish a State planning agency as described in Part B" and to "submit to the Administration through such State planning agency a comprehensive State plan developed pursuant to Part B." Section 303(a), in turn, requires the Administration to make block grants to the SPA if it has on file an approved comprehensive plan "which conforms with the purposes and requirements of this title."

There are 15 State plan requirements in Section 303(a) which must be met in the State plan. Those of significance to the SPA function include the requirement that each plan:

> (1) provide for the administration of such grants by the State planning agency; . . .
> (4) provide for procedures under which plans may be submitted to the State planning agency for approval or disapproval, in whole or in part, annually from units of general local government or combinations thereof having a population of at least two hundred and fifty thousand persons to use funds received under this part to carry out a comprehensive plan consistent with the State comprehensive plan for the improvement of law enforcement and criminal justice in the jurisdiction covered by the plan; . . .
> (8) provide for appropriate review of procedures of actions taken by the State planning agency disapproving an application for which funds are available or terminating or refusing to continue financial assistance to units of general local government or combinations of such units; . . .

> (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.

In carrying out the responsibilities under Section 303(a)(4) above, Section 304 provides as follows:

> Section 304. State planning agencies shall receive applications for financial assistance from units of general local government and combinations of such units. When a State planning agency determines that such an application is in accordance with the purposes stated in section 301 and is in conformance with any existing statewide comprehensive law enforcement plan, the State planning agency is authorized to disburse funds to the applicant.

Administration of grants by the SPA means, in the first instance, that the SPA is responsible for the proper expenditure of the funds that it disburses. It would be impossible for the SPA to administer grant funds if it were not able to exercise control over funds in the hands of subgrantees and contractors. LEAA Guideline Manual M 7100.1A, Financial Management for Planning and Action Grants, addresses the question of administration of planning and action grants in chapter 2, page 2, paragraph 3:

> *STATE PLANNING AGENCY SUPERVISION AND MONITORING RESPONSIBILITY.* 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 subgrantees 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.
>
> a. *Delegation of Responsibility.* Grantees may delegate to another organization all or a significant portion of the responsibility for carrying out a program or project component. In such cases, the agreement between the grantee and its subgrantee or contractor should indicate the agreed scope of work to be performed by the latter.
>
> b. *Grantee Responsibilities for Accounting by Delegate Agencies.* Where the conduct of a program or program component is so delegated, the grantee is, nevertheless, responsible for performance of all aspects of the program, including proper accounting for expenditure of funds by the delegate agencies . . . .

This guideline clearly permits delegation of administrative responsibility for carrying out a program or project component pursuant to an agreement with ultimate responsibility, however, remaining in the SPA.

Sections 303(a)(4) and (8) provide for submission of local plans to the SPA for approval or disapproval, with appropriate review procedures where the SPA acts negatively on the application for funds. Section 304 then provides that when the SPA approves the application that is in accord with Section 301 and the State plan, the SPA is authorized to disburse funds to the applicant. The responsibility for acting on local plans and disbursing funds is not made delegable either in the provisions of the act or by guideline. The act authorizes only the SPA, which has been legally authorized and approved by LEAA as meeting all statutory requirements, to disburse funds to units of general local government or combinations thereof. Delegations of such authority may be permissible with prior LEAA approval. The implications on statutory

adherence and intent (e.g., would representative character requirement be avoided by a proposed mechanism) would be a consideration by LEAA in reviewing a requested delegation of authority.

Action funds that are not passed through to units or combinations of local government are not explicitly addressed in terms of the SPA role by the Crime Control Act. It would be inconsistent with the concept of the functions and responsibility of the SPA, however, if primary authority and responsibility for the receipt, control, disbursement, and administration of funds not passed through to local governments were to be vested in some other State agency or entity. LEAA Guideline Manual M 4100.1C, State Planning Agency Grants, lists the following SPA functions and responsibilities related to plan implementation (chapter 1, paragraph 10):

> f. Encouraging project proposals from State law enforcement and criminal justice agencies; . . .
>
> h. Monitoring progress and expenditures under grants to State law enforcement and criminal justice agencies, local units of government, and other recipients of LEAA grant funds; . . .
>
> k. Oversight and evaluation of the total State effort in plan implementation and law enforcement and criminal justice improvements.

These responsibilities of the SPA do not preclude important roles by other State agencies. In chapter 1, paragraph 11 of the guidelines just quoted, appropriate roles of other State agencies, as well as local agencies, are explicitly recognized:

> While responsibilities for State plan development, implementation, and correlation must ultimately reside in the State Planning Agency, subject to the jurisdiction of the State chief executive, this does not preclude important roles by State law enforcement, correctional, judicial and prosecutive agencies in plan development relating to their respective areas of competence, nor by local units of government and their law enforcement agencies, nor by public agencies maintaining programs to reduce and control crime, nor utilization of staff of other State agencies to assist with State Planning Agency functions.

It is important to recognize that these roles relate to plan development, not implementation, and that an application requirement exists for describing "the intended role of other agencies of State government . . . utilized to carry out major planning functions." (See LEAA Guideline Manual M 4100.1C, chapter 1, paragraph 18.)

The role must be set forth in an approved State plan before it can be exercised. The role can take a number of forms. Planning services can be contracted for in a particular area of expertise. Agency personnel can be designated to serve as staff of the SPA. The role definition should be a matter of negotiation and agreement.

A further limitation on the role of other State agencies is established by LEAA Office of General Counsel Legal Opinion No. 74-13 (July 2, 1973). That opinion concerned a proposed State law that would have provided that Crime Control Act funds be expended solely under the direction and control of a

Coordinator of Federal-State programs who would have full supervision of the programs, their personnel, and work. This office held that:

> 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 . . . [the Act]. 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 . . .[SPA].

Although this opinion only answered the question of management or administration of grants, it clearly established that policy direction and control must remain in the SPA supervisory board.

Juvenile Justice Act

The Juvenile Justice and Delinquency Prevention Act of 1974 represents a definite shift by the Congress in its philosophy of separating juvenile delinquency prevention programing, which focuses outside the law enforcement and criminal justice system, from programing for adults and juveniles that occurs within the law enforcement and criminal justice system. This shift has been an evolving one. The Omnibus Crime Control and Safe Streets Act of 1968 did not focus on juvenile delinquency. The 1971 and 1973 amendments to the act, however, formalized LEAA responsibility in the juvenile delinquency prevention and rehabilitation areas to include all juvenile-related activity that involved the law enforcement and criminal justice system. The Juvenile Justice Act both complements this existing authority and establishes authority under that act to fund a broad range of juvenile delinquency prevention programs outside the law enforcement and criminal justice system.

The U.S. Senate played the lead role in bringing about this shift in philosophy and its embodiment in Federal law. The Senate Committee Report (S. Rept. 93-1011, July 16, 1974) and the floor debate on the Senate bill are replete with concern over the need for comprehensive program coordination on the Federal, State, and local levels. The Senate Judiciary Committee quoted testimony in support of placing the new program in LEAA in order to: "[a]void duplication of effort, not only at the Federal level but at the State level as well. Many States have developed very sophisticated criminal justice planning capabilities. New funds should not be brought into those States in such a manner that might allow duplication and conflict at the State level." (S. Rept. 93-1011, p. 32.)

Finally, in summarizing its amendment to place the program in LEAA, the committee report states: ". . . the planning input and administrative process already exists from the local to the State level and through the Federal level. Moreover, it is ideally suited to the supplemental effort in the juvenile delinquency area because, with little modification, the existing structure can go into action immediately. LEAA has a local planning structure. Each State has a substantial State planning and administrative structure. All of these organizations are already doing work in the juvenile delinquency area. Coordination . . .

becomes automatic under the Committee Amendment." (S. Rept. 93-1011, p. 3.)

In order to assure this coordination, the Juvenile Justice amended Section 303(a) of the Crime Control Act to require that:

> In order to receive formula grants under the Juvenile Justice and Delinquency Prevention Act of 1974 a State shall submit a plan for carrying out the purposes of that Act in accordance with this section and section 223 of that Act.

Section 223 of the Juvenile Justice Act, in turn, sets out the requirements for the State plan under that act. The first two requirements of Section 223(a) assure the coordination of programing desired by Congress:

> . . . such plan must–
>
> (1) designate the State planning agency established by the State under Section 203 of such Title I as the *sole agency for supervising the preparation and administration of the plan;*
>
> (2) contain satisfactory evidence that the State agency designated in accordance with paragraph (1) (hereafter referred to in this part as the "State planning agency") has or will have *authority,* by legislation if necessary, to *implement such plan in conformity with this part:* [Emphasis added.]

These two subsections leave no doubt of congressional intent. The existing SPA must have the same authority and responsibility to implement the Juvenile Justice Act component of the State plan as it has to implement the Crime Control Act.

Congress was well aware that the Juvenile Justice Act would impact on States' current operations and would increase the scope of SPA coordination and planning roles. In order to assure the ability of the SPA to take into account a wider system responsibility, Congress took several important steps:

1. Congress expanded the declaration and purpose section of the Crime Control Act to emphasize the increased role in juvenile justice and delinquency prevention.

2. Congress amended the representation requirements for State and regional planning boards to include representation of agencies and organizations directly related to the prevention and control of delinquency.

3. Congress required that the State juvenile justice plan provide for an advisory group, broadly representative of all aspects of juvenile justice and delinquency prevention, to advise the SPA and its supervisory board.

These steps seek to assure that SPA's will be responsive to and representative of the entire law enforcement and criminal justice system, adult and juvenile. The end result, of course, is to have coordinated, systemwide planning.

The Office of Juvenile Justice and Delinquency Prevention (OJJDP), established by Section 201(a) of the Juvenile Justice Act, does not represent an effort to split adult and juvenile programs on the Federal level. Rather, OJJDP as a new administrative office within LEAA, represents an effort by the Congress to coordinate LEAA's juvenile justice programs, establish policy direction on the Federal level, and place increased emphasis on juvenile justice programing. Crime Control Act funds will not be separated into adult and juvenile funds nor will OJJDP control or direct the States' allocations of such

funds between adult and juvenile programs. These determinations will remain within the planning control of the SPA, subject only to the maintenance of effort requirement of Section 261(b) of the Juvenile Justice Act and Section 520(b) of the Crime Control Act.

The analogy between DHR's suggested role and the role of OJJDP at the Federal level is invalid and, in fact, compels an opposite conclusion. Coordination of systemwide planning by a single body is the key concept, not a further separation of adult and juvenile programs.

Nevada Law and Philosophy

The DHR position paper states that:

> Historically, the juvenile justice system has operated separate and apart from the criminal justice system . . . . It has been, and remains so, the philosophy of those working in the juvenile field, as well as those in executive and legislative positions, that the juvenile must be given the fullest opportunity to attain adulthood without the stigma and restraints attributed to involvement in the criminal justice system.

This philosophical statement is valid. However, provision of coordinated planning does not in any way conflict with a statement that the two systems, adult and juvenile, should operate as separate systems. The Juvenile Justice Act mandates separation of adult and juvenile offenders (Section 223(a)(12)-(14)). Its whole tenor demands enlightened, innovative treatment of juveniles in order to give them the fullest opportunity to attain adulthood without the stigma of any system. What is undeniable is the failure of social service agencies and law enforcement and criminal justice agencies to coordinate their efforts so that the juvenile can grow to adulthood with every opportunity available to become a productive citizen.

The Nevada Revised Statutes (N.R.S.) do not conflict with the need for coordinated planning.

N.R.S. Section 216.085 creates the Commission on Crimes, Delinquency, and Corrections with its stated purposes being:

> (a) To develop a comprehensive statewide plan for the improvement of law enforcement throughout the State;
>
> (b) To define, develop, correlate and administer programs and projects for the State and units of general local government in the State or for any combination of the State and units of general local government for improvement in law enforcement.

The statute gives the Commission responsibility for developing the comprehensive law enforcement plan and gives it the very functions mandated in Section 203(b) of the Crime Control Act related to programing. N.R.S. Section 216.105 further provides that the Commission has power to contract as necessary to "develop and implement a statewide law enforcement and delinquency control plan." As this section recognizes, and as discussed earlier, juvenile programing is an integral part of statewide law enforcement and criminal justice planning. Thus, juvenile planning has been and remains, by statute, a proper function of the Commission.

Through its Youth Services Agency, DHR also has statutory purposes, duties, and powers. N.R.S. Section 232.40 provides that: "The purpose of the youth services agency . . . is to provide services for youth who are in need of residential care or in need of treatment or both." This purpose is operational in nature. The section goes on to provide, however, that "The agency, through the department of human resources, shall be the sole State agency for the establishment of standards for the receipt of Federal funds in the field of juvenile development and delinquency prevention programs. The agency shall develop standards for implementation of programs aimed toward the prevention of delinquent acts of children and programs for the treatment of those brought to its attention. It shall assist in the development of programs for the predelinquent children whose behavior tends to lead them into contact with law enforcement agencies."

This office has no authority to construe State statutes. It appears, however, that the quoted statutory provisions overlap to some extent and could be construed as providing complementary and nonconflicting powers. Insofar as the quoted provisions of N.R.S. might be construed to conflict with the Crime Control Act or the Juvenile Justice Act, the Federal statute must prevail under the Supremacy Clause of the U.S. Constitution (see *King* v. *Smith*, 392 U.S. 309 (1968)).

Conclusion

The above discussion provides the basis upon which the following conclusions are drawn with regard to the DHR position paper:

1. DHR may be designated as the proper agency to provide services to youth in need of residential care or treatment. The proper role, if any, of other State agencies and private agencies to provide such services is within the discretion of the State.

2. Primary responsibility for development of delinquency prevention and diversion programs, insofar as LEAA funds are concerned, must remain in the Commission. DHR, as outlined, may play a substantial role in the development of such programs. This role could be achieved through contracting of planning services or utilization of DHR in a "staff" capacity to the Commission.

3. Standards for the receipt of LEAA funds are established by Federal statute in the first instance, and by the SPA through the approved State plan. Such plans are the responsibility of the designated SPA. Insofar as DHR sets standards contrary to Federal statute, such standards as far as the Federal funds are concerned, must yield to the Federal standards under the Supremacy Clause of the Constitution. Any such standards established for inclusion in the State plan must be subject to the approval of the Commission.

4. A cooperative agreement between DHR and the Commission is permissible, subject to the provisions of the applicable Federal statutes. LEAA has no authority nor any need to be a party to such an agreement.

As to the points of agreement suggested in the DHR position paper, the following conclusions are drawn:

1. All planning, program development, and implementation for youth development and delinquency prevention pursuant to the Crime Control Act and the Juvenile Justice Act must remain the primary responsibility of the Commission. Any delegation of authority by the Commission in these areas must be guided by the principles set forth in this opinion and be contained in an approved planning grant application and/or State plan.

2. The Commission must retain final authority and responsibility for the State plan both as to planning and program decisions and as to compliance with Federal rules and regulations. Otherwise, it would not be functioning in its statutory role as an SPA and would be ineligible for LEAA funding.

3. The advisory group is to be appointed by the chief executive of the State and is to serve in an advisory capacity to the SPA and its supervisory board. As long as the representation requirements of Section 223(a)(3) are met, it is permissible for the advisory group to be a part of the Youth Services Agency function and to utilize persons currently serving on youth agency advisory boards.

4. Both the Crime Control Act and the Juvenile Justice Act require that the administration of grants be the responsibility of the SPA. The SPA may delegate its supervision and monitoring responsibilities as provided by LEAA guidelines. However, aspects of the receipt and control of funds, final programmatic funding decisions, and disbursement of funds that concerns policy direction and control are responsibilities that may not be delegated to or placed in another State agency. This is implicit in the provisions of both acts as discussed above and settled by prior legal opinion of this office.

The Crime Control Act and the Juvenile Justice Act, taken together, provide Federal, State, and local governments with a comprehensive vehicle for coordination of the efforts of the law enforcement and criminal justice system at all levels of government. Congress has provided the statutory framework within which comprehensive planning and programing can occur on all levels of government. If the SPA is given the opportunity to carry out its statutory role in the spirit of cooperation with the agencies, institutions, and organizations that it serves, then a system may evolve that can meet the challenge of reducing crime in our Nation.

One final consideration of Federal law is relevant to the issues presented. The Intergovernmental Cooperation Act (Public Law 90-577) provides at 42 U.S.C. Section 4214 as follows:

> 4214. Eligible State Agency
>
> Notwithstanding any other Federal law which provides that a single State agency or multimember board or commission must be established or designated to administer or supervise the administration of any grant-in-aid program, the head of any Federal department or agency administering such program may, upon request of the Governor or other appropriate executive or legislative authority of the State responsible for determining or revising the organizational structure of State government, waive the single State agency or multimember board or commission provision upon adequate showing that such provision prevents the establishment of the most effective and efficient organizational arrangements within the State government and approve other State administrative structure or arrangements: Provided, That the head of the Federal department or agency determines that the objectives of the Federal statute authorizing the grant-in-aid program will not be endangered by the use of such other State structure or arrangements.

This provision would permit the Governor of Nevada to request the Administrator of LEAA to waive the applicable statutory provisions that establish the authority and responsibility of the designated SPA. It must be noted, however, that the House Report on the Intergovernmental Cooperation Act (H. Rept. 90-1845, Aug. 2, 1968) makes the following comment with regard to 42 U.S.C. Section 4214:

> The intent of this section is to allow States to reorganize their structure of government in order to permit integration of State agencies and functions; the goal is greater flexibility, to permit more efficient and practical State Governmental administration. *It is not the intent of this Act to permit State reorganizations that would fragment the administration of any federally aided program.* [Emphasis added.]

In light of the prior discussion indicating a clear congressional intent that the Crime Control Act and the Juvenile Justice Act be administered by a single SPA in order to achieve a coordinated effort, and the above comment in the House Report, such a waiver request would need to demonstrate that:

1. An indepth analysis of organizational structure or arrangements with the State of Nevada has been made;
2. The proposed structure or arrangements would permit establishment of the most effective and efficient organizational arrangements to carry out the purposes of the LEAA legislation; and
3. The benefits of the proposed structure or arrangements would outweigh any resultant fragmentation of the administration of the LEAA program.

Legal Opinion No. 75-41—District Judges as Local Elected Officials—May 20, 1975

TO: LEAA Regional Administrator
Region VIII - Denver

This is in response to your request for a legal opinion as to whether Colorado District Judges may be considered "local elected officials" for the purposes of Section 203(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, Public Law 93-83, and Public Law 93-415).

Colorado District Judges are appointed to the bench by the Governor from a list of three names provided by a nominating commission of attorneys and laypersons from within the district. Judges serve for at least 2 years and then must go before the electorate during the next general election on a retention ballot. Similar retention ballots are taken every 6 years thereafter.

In its strict sense, the word "elect" means a selection by an appropriate body of qualified voters among two or more objects. In ordinary usage, however, an election implies a popular vote.

It is the opinion of this office that judges who go before the electorate on a retention ballot are local elected officials and may be considered for the purposes of complying with Section 203(a). Prior to such ballot, newly appointed judges are not local elected officials and may not be so considered.

Legal Opinion No. 75-42—Members of County Conventions as Local Elected Officials—April 11, 1975

TO: LEAA Regional Administrator
Region I - Boston

This is in response to your request for a legal opinion as to whether members of New Hampshire County Conventions may be considered "local elected officials" for the purposes of Section 203(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, Public Law 93-83, and Public Law 93-415).

The statutes of New Hampshire divide the State into 10 counties; provide for the election of county officers, viz., Sheriff, County Attorney, County Treasurer, Register of Deeds, Register of Probate, and three County Commissioners; and provide for a County Convention consisting of State representatives (the elected representatives to the State legislature) of the representative districts of the county. The County Commissioners function as the executives of the county. Their duties include hiring and firing employees and generally running the affairs of the county. The powers of the convention are "to raise county taxes, to make appropriations for the use of the county and to authorize the purchase of real estate for its use, the sale and conveyance of its real estate, the erection, enlargement or repair of its building exceeding an expense of one thousand dollars, and the issuing of bonds for its debts."

Section 203(a) requires, inter alia., that "regional planning units within the State shall be comprised of a majority of local elected officials." Upon examination of this section's legislative history, it is the opinion of this office that the above-mentioned officials may be considered "local elected officials" for the purpose of complying with this requirement.

As originally reported out of the Senate Subcommittee on Criminal Laws and Procedures, the proposed Section 203(a) required that regional planning units be composed of a "majority of local elected *executive* officials." (119 Cong. Rec. S 12408 (daily ed. June 28, 1973).) [Emphasis added.] The purpose of this requirement as stated by Senator John L. McClellan was to ". . . [increase] local participation and responsibility on such planning boards." (Ibid., S. 1246.)

An amendment to this subcommittee language was offered by Senator Hugh Scott for the purpose of ". . . clarifying that the composition of regional planning units under Section 203(a) of the bill as amended, be composed of a majority of elected officials *representing general purpose local government.*" (Ibid., S 12447.) [Emphasis added.] The Scott amendment required any regional planning unit to be "comprised of a majority of local elected executive and legislative officials . . ." and it was with this language that the proposed Section 203(a) passed in the Senate.

The present language of Section 203(a) was proposed by the conference committee, with the words "executive and legislative" deleted (S. Conf. Rept. on H.R. 8152, 93d Cong., 1st sess., page 2.) No reason was given in the Conference Report for the deletion. The Joint Explanatory Statement of the Committee of Conference, however, indicates that it was the intention of the conferees to adopt, essentially as proposed by the Senate, the requirement that local elected officials predominate on regional planning units. The conferees stated that:

> [t]he House bill provided that State planning agencies and regional planning units may include citizen, community, and professional organization representatives. The Senate amendment did not so provide, but provided that the majority of the members of any regional planning unit must be elected executive and legislative officials. The conference substitute adopts both the House and Senate approaches and provides permission for representation of citizen, community, and professional organizations, and provides that the majority of the members of any regional planning unit must be elected officials. (Ibid., p. 26.)

Viewing the Senate discussion of this requirement, particularly the remarks of Senator McClellan and Senator Scott, it seems evident that the intent of Congress in enacting the "majority of local elected officials" language was to ensure that localities, especially through the participation of elected members of their "general purpose local governments," exercise input into the planning process.

It is the opinion of this office that in determining whether a particular officer qualifies as a "local elected official," the language of this requirement must be read in conjunction with the immediately preceding sentence of Section 203(a). This sentence provides in part that:

> The State planning agency and any regional planning units within the State shall, within their respective jurisdictions, be representative of the law enforcement and criminal justice agencies, units of general local government, and public agencies maintaining programs to reduce and control crime. . . .

Under this interpretation, a "local elected official" is defined as an elected officer of any one of the types of organizations set out in the preceding sentence, provided that the particular organization of which the official in question is a member is an element within a general purpose political subdivision of a State. Thus, any elected official of a local law enforcement or criminal justice agency, unit of general local government, or local public agency maintaining programs to reduce and control crime may qualify as a "local elected official."

The legislative history makes it clear and this office has consistently so held that the Section 203(a) requirement is not satisfied by including as part of the required majority officials who merely happen to be elected by the voters of a limited geographic area as, for example, a congressional or State legislative district, and who do not serve as representatives to such "general purpose local government."

The New Hampshire State legislators *qua* State legislators clearly cannot be "local elected officials." (In this regard, see LEAA Office of General Counsel Legal Opinions 75-10 and 75-14, Sept. 10, 1974.) In their second function,

however, as members of county conventions, they do represent units of general local government. Although County Commissioners function as the "executives" of the county, the County Convention has substantial general purpose local responsibilities relating to raising taxes and to making appropriations and authorizations related to real estate and building construction. Consequently, they may be considered "local elected officials" for the purpose of meeting the requirement imposed in section 203(a).

Legal Opinion No. 75-43—Travel and Subsistence Expenses of State and Local Officers Attending Federal Training—May 19, 1975

TO: Acting Assistant Administrator
Office of Regional Operations, LEAA

This is in response to your memorandum of February 26, 1975, enclosing a memorandum from David A. Melocik of the Drug Enforcement Administration (DEA), asking whether there is any specific authority in the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415), for the Federal Bureau of Investigation (FBI) to compensate State and local personnel for expenses incurred while attending FBI training sessions.

The specific provision of the act that authorizes the FBI to compensate State and local personnel for such expenses is Section 404(a)(1), which provides that:

> The Director of the Federal Bureau of Investigation is authorized to—
> (1) establish and conduct training programs at the Federal Bureau of Investigation National Academy at Quantico, Virginia, to provide, at the request of a State or unit of local government, training for State and local law enforcement and criminal justice personnel.

There is nothing in this provision that specifically states that the FBI may compensate State and local personnel for their travel and per diem expenses incurred in connection with the training programs. The phrase "conduct training programs," however, ordinarily is construed to authorize the expenditure of funds for any expenses that are incurred necessarily in the conducting of such programs. Examples of such expenses would include classroom supplies and materials, teaching aids, instructors' salaries and expenses, and travel and per diem expenses of the State and local law enforcement personnel attending the programs. Any other interpretation of this phrase would emasculate the statute and render it impossible for the FBI to comply with their congressional mandate to train law enforcement personnel.

Consequently, it is the opinion of this office that Section 404(a)(1) of the act specifically authorizes the FBI to compensate State and local law enforcement personnel for their travel and per diem expenses incurred while attending FBI training programs. This authority applies only to the FBI under the terms of the act and may not be used as authority by DEA, or any other

agency, to support the payment of similar expenses incurred by State and local personnel attending DEA training programs.

Legal Opinion No. 75-44—Relationship Between the Law Enforcement Education Program and State-Maintained Higher Education and Veterans' Assistance Programs—May 20, 1975

TO: LEAA Regional Administrators
Region III - Philadelphia
Region V - Chicago
Region VIII - Denver

This is in response to requests from Regions III, V, and VIII for an opinion as to whether applicants for Law Enforcement Education Program (LEEP) assistance must first apply for and exhaust benefits they are eligible for under a State-maintained veterans' assistance program. As stated in our Nov. 4, 1974, memorandum to Region VIII (Denver), such benefits must be applied for and utilized prior to the application for and award of LEEP assistance. This opinion will explain the rationale behind the position announced in that memorandum.

The Colorado legislature enacted legislation establishing a veterans' tuition assistance program during the 1974 session. The program, which went into effect July 1, 1974, provides for the waiver of tuition for resident veterans of military service who attend State institutions of postsecondary education as defined by Colo. Rev. Stat. Ann. Section 124-22-26(1). A full-time student may receive a maximum waiver of 50 percent of tuition expense for 198 quarter credit-hours or 132 semester credit-hours. This normally will cover a full 4 years of education toward a bachelor's degree.

The present issue arises in the construction of this Colorado State law with LEAA regulations promulgated for the LEEP program. LEAA Guideline Manual M 5200.1A, Law Enforcement Education Program, chapter 4, paragraph 42b, states that:

> *Support From Other Resources.* LEEP loans or grants shall not be assigned to a student whose educational costs are being fully paid through a private scholarship program or from public resources EXCEPT for Veterans Administration benefits. If the applicant is a resident of a state which administers a state scholarship or incentive program, the applicant must apply for those state benefits. If the costs of education are only partially covered by sources other than LEEP, then LEEP funds may be used to cover those costs not covered by outside funds. The institution must apprise applicants of this guideline and should make known to students the existence of state scholarship programs.

The Colorado Commission on Higher Education, which administers the tuition waiver program, reportedly has advised college student financial officers to utilize other sources of financial aid before awarding tuition waiver benefits under Colo. Rev. Stat. Ann. Section 124-22-26. This position is directly opposed to LEAA policy as stated in paragraph 42b.

Programs similar to this Colorado tuition waiver program are being operated by other States for their veterans, and requests for advice have been received concerning those in Illinois, Ohio, and Pennsylvania. Although the analysis of the Colorado program generally applies to these other States, each State will be discussed separately in this opinion.

In 1968, in response to the Report of the President's Commission on Law Enforcement and Administration of Justice, the Congress enacted the Omnibus Crime Control and Safe Streets Act (Public Law 90-351). Title I of the act established a grant-in-aid program to be administered by LEAA, for the purpose of improving and strengthening local and State law enforcement agencies and activities. Congress was concerned that the funds made available under the act would be used in such a way as to add to the effort already being made by local and State governments to combat crime.

One of the programs established by the act is LEEP which provides for loans (Section 406(b)) and grants (Section 406(c)) to be made to persons for college-level study. The specific purpose of LEEP is to assist police officers and correctional personnel throughout the Nation to improve their knowledge and skills and to enable them to attain the educational goals set by the Congress in enacting this program. This recommended goal is a bachelor's degree for major administrative and supervisory personnel and 2 years of college for law enforcement officers (S. Rept. 90-1097, 90th Cong., 2d sess., p. 36). Consistent with this purpose, certain statutory restrictions were placed upon the receipt of LEEP grants and loans.

Students who receive loans must repay the principal plus interest unless they enter and remain employed by a law enforcement or criminal justice agency for a period of 4 years following the completion of their studies (Section 406(b)). A similar provision in Section 406(c) of the act provides that grant recipients must enter into an agreement to remain employed by a publicly funded law enforcement or criminal justice agency for a period of 2 years immediately following the completion of studies. Other Federal educational assistance programs by comparison do not limit participation to students who are studying particular subjects or preparing for selected careers (Veterans Educational Assistance Program, 38 U.S.C. §1651 *et seq.*). The express language of the act as well as the accompanying legislative history indicate that the Congress intended LEEP to function as a manpower development program and not as a source of general educational assistance.

Operation of the LEEP program is further limited by the statutory requirement that assistance may be given only to students studying in an academic area that is either related to or suitable for persons employed in law enforcement and criminal justice. A third limitation to the LEEP program is imposed by the amount of the annual appropriation that is allocated for LEEP loans and grants. For the 3 consecutive fiscal years ending June 30, 1975, the annual appropriation has been approximately $40 million, while each year the requests from participating schools have been approximately $80 million. Although the appropriation for fiscal year 1976 probably will not be determined for several months, early indications are that the funds available for LEEP assistance will be decreased next year.

LEAA has been given authority by Sections 406(c) and 501 of the act to establish rules and regulations to ensure that the annual LEEP appropriation will be expended so as to best accomplish its purpose. It must be understood that because of the restricted purpose of LEEP and the severely limited funds available, neither an inservice LEEP applicant (loan or grant) nor a preservice applicant (loan) has any claim or right to receive LEEP assistance. The award of LEEP assistance is made at the discretion of LEAA consistent with established rules, regulations, and procedures.

In contrast to LEEP, the Colorado veteran tuition waiver program established by Colo. Rev. Stat. Ann. Sections 124-22-26 provides general undifferentiated educational assistance. Unlike LEEP recipients, participants in the Colorado program are free to select their course of study, and they incur no employment obligation as a result of participation in the program. Of crucial importance to the legal issue raised here is the provision in Colo. Rev. Stat. Ann. Section 124-22-26(4) which provides that:

> Each eligible veteran shall be *entitled* to tuition assistance for eleven quarter credit hours or equivalent as defined by the Commission . . . . [Emphasis added.]

The word "entitle" has a legal significance that indicates a legislative intent quite different than the intent behind LEEP. The words "entitle" or "entitled to" consistently have been held to give a claim, right, or title to property, or to vest in a person the right to receive or to demand a service or property *(Feltor* v. *McClare*, 135 Wash. 410, 237 P. 1010, 1011 (1925), *Norton* v. *State*, 104 Wash. 248, 176 P. 347, 348-349 (1918), *Application of Fredericks*, 211 Ore. 312, 315 P.2d 1010, 1015 (1957), *Schmidt* v. *Gibbons*, 101 Ariz. 222, 418 P.2d 378, 380 (1966)).

This difference in the statutory language and legislative intent in the two educational assistance programs means that the LEEP regulation contained in paragraph 42b above, presents no real conflict with the Colorado statute and the tuition waiver program that it establishes. There is a conceptual difference between LEEP and the Colorado veteran's tuition program that necessitates the regulation contained in paragraph 42b.

LEEP is intended to provide only supplemental assistance to enable a limited class of persons to attend a limited class of college-level courses. The assistance is not available to those persons who are eligible for, or entitled to, gratuitous State-financed educational assistance that provides for the applicant's total educational expenses. LEEP funds, however, can be granted to supplement the assistance available to those applicants who are entitled to partial gratuitous education assistance, and LEEP assistance is also available to those who have exhausted their entitlement. The Colorado State program of tuition waiver for resident veterans, however, is intended to be made available to all veterans without regard to their economic resources or course of study. Thus, in this situation, it is clear that the intent of both programs is best served by a regulation requiring the use of the State program benefits to which an applicant is entitled prior to any award of the supplemental LEEP assistance.

The relevant statutes in Illinois (Ill. Ann. Stat. Ch. 122, §30-5) and Ohio (Ohio Rev. Code Ann. §129.45) have been examined, and our office has determined that the educational assistance programs established by these statutes

are of the same legal character as the Colorado program. In both programs, the veteran is "entitled" to educational assistance. The veteran may also choose his own course of study, and he incurs no obligations or restrictions by virtue of his participation in the programs. Therefore, to the extent that there are no significant differences between these programs and the Colorado program, it is clear that the requirements imposed by LEAA Guideline M 5200.1A, paragraph 42b are quite proper and should be followed in these States as well as in Colorado.

Under the Ohio veteran's bonus program, however, an eligible veteran can elect between accepting a cash bonus payment or an education assistance bonus equal to twice the amount of the cash bonus to which he is entitled (Ohio Rev. Code Ann. §129.45(B)). If a LEEP applicant has accepted an Ohio Vietnam Veterans' Bonus in cash, that amount does not have to be accounted for in determining the amount of LEEP loan or grant to award to the applicant. If the applicant has accepted an educational assistance bonus, however, the amount of the bonus must be subtracted from the total tuition, books, and fees expense for the school term for which LEEP assistance is requested in order to arrive at the maximum amount of a loan or grant that can be awarded (see Section 406(c) of the act and LEAA Guideline Manual M 5200.1A, paragraph 83).

In this second situation, the Ohio program would not differ significantly from the Colorado program and consequently the procedures for determining LEEP assistance under the LEEP guidelines should not differ. It should also be noted that until such time as the veteran has elected to receive either form of benefits under the Ohio statute, LEAA will consider him to be entitled to State-supported educational assistance, and he will not be eligible to receive LEEP funds. Thus, the veteran in Ohio must elect to receive his benefits under Ohio Rev. Code Ann. Section 129.45(B) before he can receive any LEEP funds.

The State of Pennsylvania educational assistance is in the form of scholarships administered by the Pennsylvania Higher Education Assistance Agency (PHEAA) (Pa. Stat. Ann. tit. 24 §5101 *et seq.*). All State residents are eligible for this assistance which is based on a combination of financial need and academic ability. The State grant is made after a student's financial raw need has been determined. Raw need is defined as the student's total educational expenses minus the student's income and the amount of contribution expected from his parents. At present, owing to budget restraints, the maximum PHEAA grant a student can expect to receive is an amount equal to 50 percent of the raw need. After the PHEAA grant is subtracted from raw need, the other financial assistance the student receives--nonrepayable or gift aid and loans--is subtracted to arrive at unmet need. This latter figure represents the maximum amount of additional funds the student can earn or receive before an adjustment will be required to the PHEAA grant. Any LEEP assistance a student will receive is included in the category of other financial assistance that is accounted for after the PHEAA grant is made.

In conversations that our office has had with Mr. Fielder, Director of Research and Plans of PHEAA, it was agreed that there is no policy objection for financial assistance to be computed in the sequence outlined above. Therefore, there should be no difficulty for LEEP applicants who are also

eligible for assistance from PHEAA to comply with the requirement of paragraph 42b.

In summary, LEAA has been granted authority under Section 501 of the act to "establish such rules, regulations, and procedures as are necessary to the exercise of its functions, and are consistent with the stated purpose" of the act. It is the opinion of this office that, due to the limited amount of LEEP funds available and due to the congressional intent and purpose in establishing LEEP, it became necessary for LEAA to exercise the authority granted in Section 501 by promulgating the regulation contained in LEAA Guideline Manual M 5200.1A, chapter 4, paragraph 42b. Consequently, it is the opinion of this office that any applicant for LEEP assistance must comply with this regulation by first applying for and exhausting any benefits to which he is entitled under a State-maintained educational assistance program prior to any application for and award of LEEP assistance.

Legal Opinion No. 75-45—Use of Funds for Testimony Before State Legislature on Matters Related to Grantee's Activity—June 16, 1975

TO: LEAA Regional Administrator
Region IX - San Francisco

This is in response to your request of March 12, 1975, for a legal opinion with regard to the appearance of the Executive Director of the Arizona County Attorneys' Association (ACAA) before the Arizona State legislature for the purpose of speaking in favor of legislation supported by ACAA and against legislation opposed by ACAA.

The ACAA is an unincorporated association composed of the 14 elected county attorneys and their deputies, as well as the Arizona attorney general. The ACAA is financially supported under a fiscal year 1974, Part C subgrant of the Arizona State Criminal Justice Planning Agency (SPA) block grant, funded under the authority of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415).

The program description in the grant application states the purpose of the ACAA as follows:

> The program has been organized to provide technical assistance and professional expertise to all county attorneys' offices and to institute training programs within the state for prosecutors. Further goals will be to provide technical assistance, coordination and training to other law enforcement personnel, to bring about uniformity in operations and procedure for various county attorneys' offices in the state, to represent the office and its needs to other governmental and non-governmental agencies and to further professionalize the office [of] prosecutor and increase its proficiency.

Among the listing of methods to implement the project is the following: "Act as liaison for county attorneys and their deputies with other governmental units and non-governmental agencies, such as the legislature, courts, police, state planning agency, state bar, etc."

Pursuant to the above program description and method for achieving the representation purpose, the ACAA authorized its Executive Director to register as a lobbyist under Arizona law and appear before the legislature to testify on matters of interest to the ACAA. Article 8.1, Section 41-1232, Arizona Revised Statutes (1974) requires that:

> Any person who receives any contribution or compensation or expends any money for the purpose of attempting to influence the passage or defeat of any legislation by the legislature of this State or for the purpose of attempting to influence the actions of any State officer, agency, board, commission or council shall register with the Secretary of State before doing anything in furtherance of such object . . . .

The Arizona Statute specifically excepts, however, " . . . any duly elected or appointed public official acting in his official capacity and acting on matters pertaining to his public office." The applicability of this statutory exception to the ACAA is probable in view of the holding in *Bradley* v. *Saxbe*, 388 F. Supp. 53 (D.C. D.C. 1974), where a similar Federal statutory exception would except the ACAA from registration as a lobbyist under Federal law.

Issue

Is the type of activity being carried out by the Executive Director of ACAA (with the Arizona Legislature) prohibited by Federal statute, rule, or regulation?

Discussion

The applicable rule is established by LEAA Guideline Manual M 7100.1A, Chg. 1, Jan. 24, 1974, chapter 3, paragraph 42, which reads as follows:

> a. *No part of any grant shall be used:*
> (1) For publicity or propaganda purposes designed to support or defeat legislation pending before legislative bodies;
> (2) 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 (18 U.S.C. 1913); or
> (3) To pay a publicity expert (5 U.S.C. 3107).
> b. This provision is not to be construed as limiting expenses for the purpose of testimony before legislative bodies reviewing the effectiveness of grant programs or to prevent introduction and support in the State legislatures of general statutory reform, such as criminal code revisions, etc.

Conclusion

The guidelines make clear that LEAA funds may not be used to promote or support lobbying. Based on the information presented, it is clear that the appearance of the Executive Director of the ACAA before the State legislature to testify on matters of interest to the association is not prohibited by LEAA guidelines. The fact of registration as a lobbyist under the Arizona statute is

not determinative for purposes of whether the activity is lobbying under Federal statutes, rules, and regulations, at least in a situation where, as here, the definition is extremely broad in scope.

Testimony before the legislature or a legislative committee by the Executive Director not being prohibited lobbying activity, and no activity related to "public education" being at issue, this office defers to the Arizona SPA to determine whether the legislative activities of the ACAA are within the scope of the grant, are for the purpose of improving the legislative response to the needs of the law enforcement and criminal justice system, and are therefore necessary and reasonable for the proper and efficient administration of the grant.

The Arizona SPA should consider the facts as presented to this office and whatever other facts will focus upon the nature and scope of the legislative liaison activities of the Executive Director of the ACAA in making their determination. Finally, it is the responsibility of the State to determine whether the legislative activities of the ACAA are contrary to any provisions of State law.

Legal Opinion No. 75-46—Illinois 90-Day Application Review Procedure—May 20, 1975

TO: LEAA Regional Administrator
Region V - Chicago

This is in response to four questions that have been raised as to whether the Illinois review process for block subgrant applications is consistent with Section 303(a)(15) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415). The four questions are:

1. Whether the State Criminal Justice Planning Agency (SPA) may insist that applications be accompanied by a signed certification of equal employment opportunity (EEO) compliance and, if so, whether the SPA unilaterally may toll the 90-day period pending receipt of the signed certification.

2. Where the SPA has determined that an applicant's work-force analysis and/or affirmative action program is not in compliance with subpart E of 28 C.F.R. 42, whether the SPA unilaterally may toll the 90-day review period either for some limiting period or else pending the commencement or completion of remedial action by the applicant.

3. Whether an applicant may waive the 90-day processing requirement and, if so, whether there are any limitations on such waiver.

4. Whether the SPA may establish a schedule of deadlines for accepting competitive and noncompetitive applications for various SPA-created categories.

In considering these questions, general guidance may be found in Section 304 of the act and in LEAA Office of General Counsel (OGC) Legal Opinion No. 74-64. In OGC Legal Opinion No. 74-64, LEAA has taken the position

that Section 304 of the act gives an SPA discretion in defining what constitutes a conforming subgrantee application and that once a conforming application is received, Section 303(a)(15) of the act requires that the application be approved or disapproved within 90 days after actual receipt.

Notwithstanding the fact that an SPA in its discretion may define what constitutes a conforming application, that discretion or the exercise of the discretion is subject to challenge by a local government applicant and perhaps by other persons aggrieved. Because an administrative hearing examiner or court of law ultimately could decide whether an SPA's exercise of discretion in specific factual circumstances is proper, the following consideration of the above questions should be taken as general guidance.

In regard to the first question, 28 C.F.R. 42.305 requires that the recipient of LEAA block grant funds file an EEO certificate prior to the authorization to fund new or continuing programs. It is our opinion that the SPA may insist that subgrant applications be accompanied by a signed certification of EEO compliance, and that this constitutes a reasonable requirement. Where a subgrant application is not accompanied by a signed EEO certification and where the SPA has required the certification as a part of the application, the SPA unilaterally should be able to toll the 90-day period until a signed certification is received.

In reference to the second question, where the SPA has required that an applicant be in compliance with subpart E of 28 C.F.R. 42 at the time of application, and where the SPA has determined that an applicant is not in compliance, the SPA unilaterally should be able to toll the 90-day period until the SPA has determined that the applicant has implemented sufficient remedial action to qualify as an applicant.

The third question is whether an applicant may waive the 90-day processing requirement. In posing this question, the request states as an assumption that the SPA could not require such waivers as standard operating procedure but would need an individual waiver with special justification on a case-by-case basis.

The request correctly states that the SPA may not require waivers as standard operating procedure. As to whether an individual waiver based upon special justification may toll the 90-day requirement, however this office is of the opinion that a waiver may be used only where the waiver does not contravene the statutory policy of Section 303(a)(15).

A waiver is an intentional relinquishment or abandonment of a known right or privilege (*Barker* v. *Wingo*, 407 U.S. 514, 525 (1972); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). As a general rule, a party may waive any provision, either of a contract or of a statute, intended for his benefit (*Shutte* v. *Thompson*, 82 U.S. (15 Wall) 151, 158 (1872)). This general rule, however, has been modified as to waivers of statutory provisions as noted in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). The Court at pages 704-05 stated that:

> It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy . . . . Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or

colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. With respect to private rights created by a federal statute . . . the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute. [Citations and footnote omitted].

Section 303(a)(15) provides that, if the SPA fails to disapprove an application within the 90-day period, the applicant has a right to have the application considered to be approved. In applying the guidance provided in the *Brooklyn Savings Bank* case to whether this right may be waived by the applicant, the intent of the Congress must be examined to determine the policy considerations underlying Section 303(a)(15). The legislative history clearly demonstrates that the Congress enacted Section 303(a)(15) to expedite the delivery of funds to units of general local government. (See OGC Legal Opinion No. 74-64 for a review of the legislative history of Section 303(a)(15).)

It would appear that the 90-day period may be waived by the applicant where the waiver would not thwart the legislative purpose of Section 303(a)(15). An SPA should be forewarned that where the validity of a waiver is put into question, however, the burden would be on the SPA to demonstrate that the waiver does not frustrate the legislative purpose of Section 303(a)(15) in order to avoid the prohibition set forth in the *Brooklyn Savings Bank* case.

In regard to the fourth question, an SPA should be able to establish a schedule of deadlines to consider competitive applications. This use was recognized as a proper management tool in OGC Legal Opinion No. 74-64. The use of deadlines in regard to noncompetitive applications, however, does not appear to serve a useful purpose and would appear to frustrate the legislative purpose of Section 303(a)(15).

Legal Opinion No. 75-47—Integrated Grant Administration Project—May 20, 1975

TO: LEAA Regional Administrator
Region VIII - Denver

This is in response to your request for an opinion on the authority of the regional office to enter into an Integrated Grant Administration (IGA) program for the State of Utah that deals only with the 40 percent local planning funds available for local planning under Sections 202 and 203 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415).

For approximately 1½ years the Mountain Plains Federal Regional Council has been dealing with the State of Utah in the development of an IGA program for the purpose of submitting one application for all local planning funds awarded to the State of Utah. Pursuant to Section 203 of the act, LEAA makes one planning grant to the Utah State Criminal Justice Planning Agency (SPA) which is responsible for allocating a portion of the money to local planning

agencies. Governor Calvin Rampton of Utah has issued an executive order requiring all State agencies to cooperate and participate in the preparation of the IGA application. The issue involved here is whether LEAA is allowed to participate in the Utah IGA, sending the local planning funds directly to the IGA-designated Federal agency administering the arrangement, or must continue to make one planning grant to the State.

Interaction of IGA and LEAA

The Integrated Grant Administration Program was established pursuant to Title IV of the Intergovernmental Cooperation Act of 1968 (Public Law 90-577) and the President's Memorandum of November 8, 1968, to the Director of the currently titled Office of Management and Budget, 33 F.R. 16487 (November 13, 1968). This act vested in the President the power to prescribe rules and regulations that would be necessary and appropriate to effectuate the policy of Title IV. Title IV was designed to encourage the coordination, on the Federal level, of numerous Federal assistance programs. The aim of such coordination was to eliminate duplication of work and conflict among agencies and to foster cooperation between the agencies and State and local governments.

LEAA's policy regarding participation in IGA is set out in LEAA Guideline Manual G 4062.1, Guidelines for the Integrated Grant Administration Program (IGA) (1972):

A. The Law Enforcement Assistance Administration will cooperate fully with the Office of Management and Budget (OMB), Federal Regional Councils and other participating agencies in implementing, monitoring and evaluating the IGA Program. LEAA encourages State and local agencies to utilize this program.

B. LEAA representatives on task forces set up to process and administer pilot IGA programs are authorized to waive LEAA administrative requirements for funds utilized in this program; however, *LEAA statutory requirements must be maintained.* [Emphasis added.]

LEAA can, therefore, participate in an IGA in Utah and is in fact encouraged to do so, provided that all statutory requirements are complied with fully.

LEAA Statutory Requirements for Part B Planning Grants

Congress, in the preamble to the act, states that "Crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively." Pursuant to this philosophy, the act established a matching grant-in-aid program under which LEAA makes annual block planning and action grants to the States. The grants are called "block" grants because the grant funds are required by the act to be allocated in lump sums among the States on the basis of population for distribution and expenditure by the States and cities according to criteria and priorities determined by the States and cities themselves (Section 308). LEAA also makes "discretionary" action grants which may be distributed at LEAA's discretion to States or directly to units of local government for categorical purposes.

Block planning grants are utilized by the States to establish and maintain State Criminal Justice Planning Agencies (SPA's). The SPA is created or designated by the chief executive of the State and is subject to his jurisdiction (Section 202). Each SPA determines needs and priorities for the improvement of law enforcement and criminal justice throughout the entire State. The SPA then defines, develops, and correlates programs to improve and strengthen law enforcement and criminal justice for its State and all the units of local government within the State. All of this material and information is incorporated into a comprehensive statewide plan for the improvement of law enforcement and criminal justice throughout the State which is submitted annually to LEAA for review and approval (Section 203).

When a State's plan has been reviewed and approved, the State is eligible to receive its allocated block action grant for that fiscal year. It should be noted that LEAA is required by statute to make block action grants if the SPA has an approved comprehensive plan that conforms with the purposes and requirements of the act (Section 303). Under the block grant program the States order their own priorities through the comprehensive plan and LEAA cannot dictate to State and local governments how to run their criminal justice systems so long as the plan is consistent with the act. LEAA does not approve or disapprove specific projects in the comprehensive plan unless they are inconsistent with the provisions of the act.

To ensure that each State's comprehensive plan is in fact comprehensive, there must be local input at the planning stage:

> The State Planning Agency shall make such arrangements as such agency deems necessary to provide that at least 40 per centum of all Federal funds granted to such agency under this part [B] for any fiscal year will be available to units of general local government or combinations of such units to participate in the formulation of the comprehensive State plan required under this part. (Section 203(c).)

The actual amount or percentage of funds that is passed through to local units is determined by each State. Similarly, each State in drawing up its comprehensive plan determines the weight to be given to the plans submitted by local units. LEAA may not usurp the State's authority either to determine the amount of passthrough funds to any specific local planning jurisdiction or to decide which local plans to fund.

Application to the Proposed Utah IGA

LEAA cannot on its own authority channel 40 percent of Utah's planning grant to the IGA program. Only the State of Utah can determine how much planning money is to go to local units; 40 percent is merely the minimum statutory allocation. Once that determination is made, the act requires only that "[t]he State Planning Agency *shall make such arrangements as such agency deems necessary* . . ." (Section 203(c) [emphasis added] to provide for passthrough of funds to units of local government. There are no statutory requirements as to precisely how the local funds are to be passed through. Therefore, the State of Utah may participate in an IGA program involving only local planning grants, but the SPA still must oversee the allocation. The SPA

must submit an application for the State planning grant pursuant to Sections 202 and 302 of the act.

Once the application is approved, the SPA may request LEAA to send the funds designated for local agencies to the IGA-designated Federal agency administering the arrangement. Such a procedure complies with the State's statutory requirement to ". . . make such arrangements as such agency deems necessary to provide that at least 40 per centum of all Federal funds granted to such agency under this part . . . will be available to units of general local government. . . ." (Section 203(c).)

Limitations

The local planning units have an integral function in the preparation of the State's comprehensive plan. They submit plans and recommendations that are used to determine both the State's priorities and the specific programs that will be funded. The IGA planning units must continue to provide this input to the SPA. In fact, the IGA units must devote to LEAA planning purposes an amount of time proportionate to the amount of LEAA funding such units are receiving. If this can be accomplished within the requirements of the IGA program, then LEAA would have no objection and would, in fact, encourage Utah to participate in IGA on a local level.

Legal Opinion No. 75-48—Use of Comprehensive Employment and Training Act Funds as Match for LEAA Part C Programs—May 20, 1975

TO: LEAA Regional Administrator
Region V - Chicago

This is in response to your inquiry as to whether funds obtained under the Comprehensive Employment and Training Act (CETA), as amended (Public Law 93-203, as amended by Public Law 93-567), or CETA-funded personnel may be used in fulfillment of the LEAA non-Federal share requirement. The CETA program is administered by the U.S. Department of Labor in 29 C.F.R., parts 94-98.

The CETA statute contains no provisions that allow or prohibit the use of CETA funds as part of the non-Federal share that may be required for other Federal programs. However, 29 C.F.R. 98.12(b)(2) provides in part that:

> No funds granted under the Act may be used, directly or indirectly, as a contribution for the purpose of obtaining Federal funds under any other law of the United States which requires a contribution from the grantee in order to receive such funds, except if authorized under that law.

The Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415), does not authorize the use of funds obtained from other

Federal sources to satisfy the non-Federal share requirements. Section 301(c) provides that for block grants the non-Federal funding must be of "money appropriated in the aggregate" by State or individual units of government. Section 306(a) provides that for discretionary grants the non-Federal share must be of "money appropriated in the aggregate" by a State or units of general local government or provided in the aggregate by a private nonprofit organization.

The term "non-Federal funding" is used to denote that appropriated money is required. (See LEAA Office of General Counsel Legal Opinion No. 74-70.) The purpose of the use of appropriated money as the non-Federal share was expressed by Representative Richard H. Poff during the House floor debate on the Omnibus Crime Control Act of 1970 (Public Law 91-644) as follows:

> The controlling purpose of the hard-match provision is the desire to stimulate new State and local money for imaginative and innovative State and local anti-crime programs. (116 Cong. Rec. H 42197 (1970).)

This purpose was reaffirmed during the House floor debate on the Crime Control Act of 1973 (Public Law 93-83) by Representative Edward Hutchinson, who stated that:

> The purposes of requiring a match for Federal funds were: First, to insure State and local legislative oversight and thus guarantee some State and local political control over federally assisted programs; second, to bring into play the State and local fiscal controls to minimize the chances of waste; and third, to underscore the responsibility on the part of State and local government to fight crime. None of these purposes is served by a soft match. (119 Cong. Rec. H 4745 (daily ed. June 14, 1973).)

Consistent with the legislative intent of the non-Federal share requirement, it generally is true that funds obtained from other Federal sources may not be used to satisfy the non-Federal share requirement. There is one exception to this statement. Where another Federal statute specifically authorizes that funds made available under the statute may be used as part or all of the required non-Federal contribution to another Federal grant program, the Comptroller General of the United States has stated that such funds may be considered as "money appropriated" for the purposes of the "hard match" requirement (52 Comp. Gen. 558, 566 (1973)). The CETA statute, however, does not contain such a provision.

In sum, CETA funds or CETA-funded personnel may not be used for satisfaction in whole or in part of the non-Federal share requirement for Part C funds. This opinion would apply in like manner to Part B or Part E funds.

Legal Opinion No. 75-49—Retroactive Matching Provisions Not Applicable to Construction Programs—May 20, 1975

TO: LEAA Regional Administrator
Region V - Chicago

This is in response to your request for an opinion as to the authority for paragraph 1a(6)(b) of the LEAA Guideline Manual M 7100.1A, entitled "Financial Management for Planning and Action Grants," which provides guidelines for the allocation of funds under Section 523 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415).

Under Section 523, "[a]ny 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 above-mentioned LEAA guideline states that "[t]his retroactive provision does not apply to a construction program or project under Part C block action funds."

It is the opinion of this office that the guideline in question has proper authority. A close look at Section 523 and the purpose behind it reveals not only that LEAA has not usurped lawmaking powers, but that this regulation provides for enforcement of the section as Congress intended. LEAA is authorized under Section 501 of the act to "establish such rules, regulations, and procedures as are necessary to the exercise of its function, and are consistent with the stated purpose of this title." Furthermore, LEAA may, after reasonable notice and opportunity for hearing, discontinue a grant where "there is a substantial failure to comply with (b) regulations promulgated by the Administrator under this title." (Section 509.)

Legislative History

Section 523 is a retroactive provision aimed at achieving the same results with unobligated pre-1973 funds as with all later appropriated funds. In order to fully understand how this is accomplished, it is necessary to compare the pre-1973 requirements with the current ones.

Under the original LEAA legislation in 1968, Federal grant funds had to be matched by State or local funds in the ratio of 60 percent Federal to 40 percent State/local. Congress twice changed these match provisions. In the second change, Section 523 was added to the act in order to make the change retroactive. Representative Edward Hutchinson explained this need for a change in the House floor debate (Cong. Rec. H 4745 (June 14, 1973)):

> Congress never intended that the match be anything but money. Indeed, it was Federal money that was being matched. But somehow an administrative decision was made to accept what is called a 'soft match,' or noncash match. Once the practice was permitted, it became difficult to go back entirely to a 'hard match,' or cash match. So in 1970 Congress changed the matching ratio from 60 percent Federal, 40 percent non-Federal to 75 percent Federal, 25 percent non-Federal but further specifically required that 40 percent of the 25 percent part C block grant match be in cash.

This compromise in principle was financially easier for recipients to accept but administratively more burdensome. For now we have two kinds of match. And more important, a soft match can be manufactured by clever bookkeeping. For a State or local government can add costs to a program or project which it has already paid or would pay in any case. Then it becomes the task of LEAA to check compliance, and this takes time and effort.

The purposes of requiring a match for Federal funds were: First, to insure State and local legislative oversight and thus guarantee some State and local political control over federally assisted programs; second, to bring into play the State and local fiscal controls to minimize the chances of waste; and third, to underscore the responsibility on the part of State and local government to fight crime. None of these purposes is served by a soft match. Instead, it fosters imaginative bookkeeping and produces administrative burdens.

H.R. 8152 would put an end to the soft match. Wherever a match is required, it would become a 10 percent hard match–except for part C construction programs and projects which would remain at 50 percent but would become all hard match. 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 is clear that the 90:10 ratio was not intended to affect prior construction project funding ratios that remained unchanged from the original ratio. It is also clear that the provision for unobligated pre-1973 funds was intended to provide discretionary authority to LEAA to make the new ratio retroactive. Section 523 provides for permissive authority through use of the term "may" rather than "shall." It was not meant to extend the 90:10 ratio to construction projects funded with pre-1973 unobligated funds, and LEAA has not so interpreted the section.

Senator John L. McClellan also addressed the issue directly during the Senate debate. After explaining the new match provisions and the accompanying retroactive section, he stated:

> It is expected that the administration, however, will not provide in excess of 50 percent of the cost of any construction program or project funded under part C lest these nonobligated funds become more "desirable" than funds made available after July 1, 1973. (Cong. Rec. S 12415 (June 28, 1973).)

It seems clear, therefore, that Congress did not intend Section 523 to extend 90:10 match provisions to construction projects retroactively. The entire thrust of Section 523 is to put pre-1973 and post-1973 grants on an equal setting, and the construction matching ratio remained unchanged.

Authority for Statutory Interpretations

In general, statutory construction is applied only when the statute itself is ambiguous. In this case, it has been argued that the statute is clear and unambiguous on its face. Evidence of legislative intent has often been allowed notwithstanding the apparent unambiguous meaning of a statute. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974) dealt with a statute that interpreted the doctrine of *expressio unius est exclusio alterius* (direct inclusion of certain aspects implies exclusion of any others). The Supreme Court permitted evidence of legislative intent and reached a different interpretation of the statute, stating that "even

the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent."

In a similar case, the same conclusion was reached:

> We may give language in a statute, if it will reasonably bear such a construction, the meaning Congress intends, though read literally it would bear a different meaning. The courts are under an obligation at times to do this in order to give legislation its proper application. *Lynch* v. *Overholser,* 369 U.S. 705, 710, 82 S. Ct. 1063, 8 L. Ed. 2d 211, and cases cited. The courts have less reluctance in this regard when the interpretation they approve has been adopted by the agency charged with principal responsibility for administering the legislation, acting in the light of its special experience and expertise. *(Los Angeles Mailers Union No. 9, International Typographical Union, AFL-CIO* v. *National Labor Relations Board,* 311 F. 2d 121 (D.C. Cir. 1962).)

Although Section 523 clearly provides LEAA with authority to make the requested interpretation through the Section 501 guideline issuance process, the legislative history is equally clear that the requested interpretation would be contrary to congressional intent. It is the opinion of this office that the section should be construed in the light of that legislative history.

Conclusion

Under Section 523, fiscal year 1973 matching fund requirements may be applied to pre-1973 obligated funds. The section was not intended to allow Federal funding in a 90-percent ratio for construction programs. The LEAA guidelines assure enforcement of the act as intended by Congress. It should be noted that Congress, in Section 501 of the act, authorized the Administration (LEAA) to establish "such rules, regulations, and procedures as are necessary to the exercise of its functions, and are consistent with the stated purpose of this Title." These regulations have the force of law. Under Section 509, LEAA may discontinue payments to a grant where there is substantial failure to comply with either the statute itself or the regulations promulgated by the Administration.

Legal Opinion No. 75-50—Availability of Part C Discretionary Funds for Degree-Granting Educational Programs—August 7, 1975

TO: Acting Assistant Administrator
Juvenile Justice and Delinquency Prevention Operations Task Group, LEAA

This is in response to your request for an opinion as to the use of Part C discretionary funds for portions of the National Educateur Program. As one element of the program, a limited number of students would be trained to become educateurs, receiving in the process either an A.A., B.A., or M.A. degree. It is the opinion of this office that funding is not available for the degree-granting component of the program 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, Public Law 93-83, and Public Law 93-415).

Grants may be made under Part C of the act for general law enforcement and criminal justice purposes, such as recruiting and training of personnel, purchase of equipment, public education, and construction of facilities. Part D grants, on the other hand, may be used only for a specific purpose, that is, training, education, and research. "It is a well established rule of statutory construction that an appropriation for a specific object is available for that object to the exclusion of a more general appropriation (4 Comp. Gen. 476; 5 *id.* 399, 7 *id.* 400) and that the exhaustion of a specific appropriation does not authorize charging the excess payment to a more general appropriation. 1 Comp. Gen. 312." (19 Comp. Gen. 892, 893.) Similarly, "a specific appropriation for a particular object or class of supplies precludes the use of a more general appropriation therefore, even though the general appropriation might have been available for such use in the absence of the specific appropriation." (20 Comp. Gen. 739, 743.)

In the absence of Part D, Part C funds would certainly be available for training and education through Section 301(b)(1), (3), or (5). Part D, however, does provide for grants "to carry out programs of academic educational assistance to improve and strengthen law enforcement and criminal justice." (Section 406(a).) The existence of the specific appropriation for education in Part D precludes the use of Part C funds for that purpose. Therefore, Part C discretionary funds may not be used for the degree-granting component of the National Educateur Program.

It should be noted the LEAA has in the past allowed States to use their Part C block grants for educational scholarship programs under certain conditions. These conditions were that Part D funds had already been fully allocated and that the scholarship requirements were identical to Part D requirements so that the funds were not in competition. Block grants differ from discretionary funds in that upon allocation they become State funds and are no longer subject to this Federal restriction on use. "The funds involved are grant funds, which when paid over and expended by the States are not subject to the various restrictions imposed by Federal statute or our decisions with respect to the expenditures, by Federal departments and establishments, of appropriated moneys in the absence of a condition of a grant specifically prescribing to the contrary." (36 Comp. Gen. 221, 224.)

It is the opinion of this office, therefore, that although the States may continue to fund educational scholarship programs out of Part C block grants, Part C discretionary funds may not be used for that purpose.

Legal Opinion No. 75-51—Subgrants of Part E Discretionary Funds to Private Nonprofit Organizations; Scope of Part E Program Funding—July 11, 1975

TO: Juvenile Justice and Delinquency Prevention Operations Task Group, LEAA

This is in response to your request of April 16, 1975, for an opinion regarding the legality of the use of Part E discretionary funds for subgrants to private nonprofit organizations.

Background

In June 1974, LEAA transferred $100,000 in Part E funds to Region I in order to fund the Washington County, Vt., Youth Services Bureau. The grantee for the project is the Vermont Governor's Commission on the Administration of Justice (SPA). The subgrantee is the Washington County Council of Human Resources, a private nonprofit agency. The Youth Services Bureau established by the project acts as a referral mechanism by which delinquent and other youth may receive services from a number of local child-serving agencies. The Youth Services Bureau is also a provider of direct services for youth referred by courts, schools, churches, etc.

Your request raises the question of whether it is proper to award Part E funds to a State Criminal Justice Planning Agency (SPA) with the understanding that the SPA will subgrant to a private nonprofit organization. Although this issue is important, an additional question is raised with regard to the proper use of Part E funds in connection with the activities of the Youth Services Bureau.

Issues

1. Can Part E discretionary funds be subgranted to a private nonprofit organization by an SPA acting as grantee of the funds?
2. Can Part E discretionary funds be used to support project activity that does not involve the correctional system?

Discussion

The issue of receipt of Part E funds by private nonprofit organizations has been addressed by prior legal opinions of this office.

LEAA Office of General Counsel (OGC) Legal Opinion No. 75-38 (April 9, 1975) concluded that Part E funds awarded as grants to SPA's under Section 455(a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415), properly may be subgranted by SPA's to private nonprofit organizations. To qualify for such funds, the State must incorporate the activity in a program of the comprehensive State plan. The

funds are then disbursed by the State in accordance with the plan and application. The application requirements are set forth in Section 453(1)-(12).

Funds granted to SPA's under Section 455(a)(1) are not, strictly speaking, formula grants. There is no statutory formula for entitlement. Rather, such funds can be granted to States on the basis of need. Additional flexibility is built into the statute through the 455(a)(2) provision which permits the Administration to make the balance of the Part E funds (50 percent) "...available, as the Administration may determine, to State planning agencies, units of general local government, or combinations of such units, according to the criteria and on the terms and conditions the Administration determines consistent with this part."

Award of these discretionary funds may be for the purpose of supplementing correctional activities set out in the State plan or for the furtherance of innovative programs and national priorities established by LEAA. This office addressed, in OGC Legal Opinion No. 75-27 (April 11, 1975), the question of the eligibility of entities other than those enumerated in Section 455(a)(2) to receive discretionary Part E funds. We concluded that:

> LEAA does not have authority to award a Part E discretionary fund grant directly to Utah State University. Utah State University may be awarded a subgrant by either the Utah State Planning Agency or a unit of general local government or a combination thereof in the State of Utah to whom the grant award is made by LEAA, however.

Although this opinion did not directly address the question of eligibility of an educational institution to receive a subgrant of Part E funds, such a conclusion is consistent with OGC Legal Opinion No. 75-38.

To summarize, Part E block grant funds awarded to an SPA under Section 455(a)(1) and Part E discretionary funds awarded to an SPA, unit of local government, or combination thereof under Section 455(a)(2) may be subgranted by the grantee (1) to State-owned and -operated educational institutions; (2) to other types of (nonprofit) educational institutions; and (3) to nonprofit public or private agencies and organizations. The award of a subgrant under Section 455(a)(1) must be consistent with the approved program contained in the comprehensive State plan. The award of a subgrant under 455(a)(2) must be consistent with the discretionary grant guidelines promulgated by the Administration.

The second issue--the programmatic uses of Part E funds--is somewhat more complex. The addition of Part E to the act in the amendments to the Crime Control Act in 1971 resulted from congressional belief that increased emphasis on correctional system programing was needed. The emphasis was to be on the system itself, its facilities (jails, prisons, halfway houses, and community-based treatment facilities for adult and juvenile offenders), its programs and practices, and the personnel involved in administration of the system. Although there is no listing of programs eligible for funding in the act, the statement of purpose and the application requirements establish the parameters within which programing is to take place.

Section 451 states the purpose of Part E as follows:

> Section 451. It is the purpose of this part to encourage States and units of general local government to develop and implement programs and projects for the construction, acquisition, and renovation of correctional institutions and facilities, and for the improvement of correctional programs and practices.

Section 453 enumerates the means to accomplish these purposes through the State's application for funds:

> (1) sets forth a comprehensive statewide program for the construction, acquisition, or renovation of correctional institutions and facilities in the State and the improvement of correctional programs and practices throughout the State;. . .
>
> (4) provides satisfactory emphasis on the development and operation of community-based correctional facilities and programs, including diagnostic services, halfway houses, probation, and other supervisory release programs for preadjudication and postadjudication referral of delinquents, youthful offenders, and first offenders, and community-oriented programs for the supervision of parolees;. . .
>
> (7) provides satisfactory assurances that the personnel standards and programs of the institutions and facilities will reflect advanced practices;
>
> (8) provides satisfactory assurances that the State is engaging in projects and programs to improve the recruiting, organization, training, and education of personnel employed in correctional activities, including those of probation, parole, and rehabilitation;
>
> (9) provides necessary arrangements for the development and operation of narcotic and alcoholism treatment programs in correctional institutions and facilities and in connection with probation or other supervisory release programs for all persons, incarcerated or on parole, who are drug addicts, drug abusers, alcoholics, or alcohol abusers; . . .

Although LEAA has the authority to establish program areas for discretionary funding, it is clear on the face of the statute that the programs must be directly connected with the correctional system and affect persons, as service recipients, who are within the cognizance of that system.

OGC Legal Opinion No. 75-27 addressed the scope of the community-based correctional facilities and programs emphasis required by Section 453(4):

> In Section 453(4), Congress speaks of community-based correctional facilities and programs. Congress then proceeds to give examples "...including diagnostic services, halfway houses, probation, and *other supervisory release programs* for preadjudication and postadjudication referrals. . . ." [Emphasis added]. These examples, although not all-inclusive, indicate that the correctional programs envisioned are of a supervisory nature, are in response to court referral, and are primarily for those individuals who are within the cognizance of the system, i.e., pre- or postadjudicated, at the time of referral to the program. Under this interpretation, programs aimed at helping past offenders who are no longer within the system, i.e., whose sentence and parole or probation are completed, would not be of the type envisioned for Part E funding. This is true even though the program might prevent recidivism. Once an individual has left the system (or having never entered it), all other crime prevention oriented program efforts would come under the heading of prevention, fundable if at all under Part C rather than Part E. In sum, Part E was intended to be limited to improvements of correctional physical facilities and programs for individuals within the corrections system at the time of entrance into the program.

Congress intended that States and units of local government utilize Part E funds to develop resources, both public and private, that would serve the correctional system. Such resources were to be developed primarily, if not exclusively, however, for individuals within the system. If the Washington County, Vt., Youth Services Bureau provides services to youth referred by sources outside of the correctional system context on other than an incidental

or occasional basis, then full LEAA funding of this project from Part E funds is improper. This point was made by this office in a legal memorandum dated May 10, 1972, regarding the "National Youth Project Using Mini-Bikes." There we concluded:

> That portion of the proposal which involves referral of juveniles from the courts and probation officials is eligible for Part E funds. Delinquency prevention programs for other than those who have been before the court are not provided for in Part E of the Act.

This position was subsequently clarified in OGC Legal Opinion No. 74-30 (Sept. 26, 1973). There it was held that, in addition to court and probation referrals, the correctional system context can include police department referrals of youth and diversionary projects implemented by police departments where the police department is authorized by statute or court order to make such determinations and dispositions without formal court procedures.

LEAA has always taken a broad view of the concept of corrections, including aspects of police and court action as being within the correctional system context. This is justified both by the language of Part E and by the need to view the components of police, courts, and corrections as parts of a process that, in total, makes up the criminal justice system.

However, where the service recipients are not primarily individuals referred through the correctional system, as appears to be the case with the Washington County, Vt., Youth Services Bureau, the correct course of action is to fund entirely from Part C (Section 301(b)(9) authority) or to provide a mix of Part C and Part E funds according to the proportion of referrals to be accepted of individuals "within the cognizance of the system" and those referred by other sources. Your office should, therefore, review this grant to determine the proper fund mix and request the necessary accounting changes to reflect a proper allocation between Part C and Part E fund sources.

Conclusions

1. Part E block and discretionary funds may be sugbranted by eligible public agency grantees to public and private nonprofit educational institutions, agencies, and organizations for programs and projects that are consistent with the statutory purposes of Part E correctional program funds.

2. Where Part E funds are utilized for community-based correctional facilities and programs, the recipients of services must be primarily, if not exclusively, individuals within the cognizance of the correctional system at the time of referral to the facility, program, or project. The proper fund source for services provided to individuals referred from other sources is Part C funds. A facility, program, or project accepting correctional and noncorrectional referrals may be funded entirely with Part C funds or a proportionate mix of Part C and Part E funds determined by the anticipated or actual source of referrals to such facility, program, or project.

Legal Opinion No. 75-52—Proposed Pennsylvania Adverse Weather Exception to the 90-Day Review Requirement—June 16, 1975

TO: LEAA Regional Administrator
Region III - Philadelphia

This is in response to an inquiry made by the Pennsylvania Governor's Justice Commission (SPA). The SPA supervisory board has proposed to authorize the executive director, with the concurrence of the SPA supervisory board chairman, to disapprove without prejudice all subgrant applications scheduled to be considered at an SPA supervisory board meeting when such meeting cannot be convened due to adverse weather conditions. Under such circumstances, the SPA supervisory board would meet within 2 weeks of the canceled meeting to consider the disapproved subgrant applications, which would be treated as resubmitted applications. The question is whether the above proposal is consistent with the 90-day requirement contained in Section 303(a)(15) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415).

Two initial observations may be made. First, pursuant to Section 303(a)(15)(D), the disapproval of an application must always be without prejudice for resubmittal. Second, any proposal that is adopted by the SPA supervisory board is always subject to challenge in an administrative proceeding or court of law. With this in mind, the following guidance is offered.

An initial consideration is whether the inability of the SPA supervisory board to meet due to adverse weather conditions is a valid reason to disapprove subgrant applications. The relevant sections of the act are Section 303(a)(15)(A) and (C) and Section 304. Section 303(a)(15) provides in part that each State comprehensive plan must:

> (15) provide for procedures that will insure that (A) all applications by units of general local government or combinations thereof to the State planning agency for assistance shall be approved or disapproved, in whole or in part, no later than ninety days after receipt by the State planning agency . . . (C) the reasons for disapproval of such application or any part thereof, in order to be effective for the purposes of this section shall contain a detailed explanation of the reasons for which such application or any part thereof was disapproved, or an explanation of what supporting material is necessary for the State planning agency to evaluate such application . . . .

With respect to an application received by an SPA, Section 304 provides in part that:

> When a State planning agency determines that such an application is in accordance with the purposes stated in section 301 and is in conformance with any existing statewide comprehensive law enforcement plan, the State planning agency is authorized to disburse funds to the applicant.

Section 304 states that the purposes enumerated in Section 301 and the State comprehensive plan are the framework within which the SPA must approve or disapprove an application. Consistent with Section 304, this office

is of the opinion that the reasons for disapproving a subgrant application must be related to the adequacy or merits of an application. As a result, the inability of the SPA supervisory board to meet because of adverse weather conditions would not appear to be a proper basis for disapproving a subgrant application.

It is not the position of this office, however, that the 90-day requirement is never tolled because of weather conditions. The test would appear to be "unforeseeable" or "unusually severe" weather conditions. Where an SPA supervisory board meeting must be canceled due to unforeseeable or unusually severe weather conditions, e.g., a disruptive flood or a severe snowstorm, the SPA should be able to toll the 90-day requirement for a reasonable period of time. For guidance, the Pennsylvania SPA may find instructive the Pennsylvania Supreme Court's decision in *Wise* v. *Borough of Cambridge Springs*, 262 Pa. 139, 104 A. 863 (1918). At page 864 of 104 A., the Pennsylvania court stated that:

> Where a statute fixes the time within which an act must be done . . . courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence. Something more than mere hardship is necessary to justify an extension of time, or its equivalent, an allowance of the act nunc pro tunc.

In adopting such a procedure, the SPA should be forewarned that, if the tolling of the 90-day requirement is put into question, the SPA will have the burden to show that the procedures to ensure compliance with Section 303(a)(15) reasonably take into consideration the possibility of adverse weather conditions, that the cancellation was due to unforeseen or unusually severe weather conditions, and that the SPA supervisory board met within a reasonable time subsequent to the cancellation.

Legal Opinion No. 75-53—Waiver of 40 Percent Passthrough Requirement for Planning Grant Funds—June 4, 1975

TO: LEAA Regional Administrator
Region III - Philadelphia

This is in response to your request of April 10, 1975, for an opinion with regard to two issues involved in West Virginia's procedures for waiver of the 40 percent passthrough requirement for planning grant funds.

West Virginia's Regional Planning and Development Act (1971) created 11 regional planning councils (RPC's) in the State. These 11 RPC's also serve as the region A-95 clearinghouses, pursuant to Office of Management and Budget Circular A-95, in the State. In 1973, each RPC and the State's largest city and county signed agreements waiving their authority for criminal justice planning and their respective share of planning funds to the State Criminal Justice Planning Agency (SPA). These agreements stipulate that they will remain in effect until withdrawn by 12 months written notice.

Issues

1. Must the legislation creating the RPC's specifically establish that they will do criminal justice planning in order to qualify them as regional planning units that can waive the 40 percent passthrough requirement?

2. Does an "open end" waiver, requiring 12 months written notice for cancellation, meet the availability of planning funds requirements of Section 203(c) of the Crime Control Act?

Discussion

Section 203(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, Public Law 93-83, and Public Law 93-415), contains the following provision with regard to the passthrough of Part B planning funds:

> (c) The State Planning Agency shall make such arrangements as such agency deems necessary to provide that at least 40 per centum of all Federal funds granted to such agency under this part for any fiscal year will be available to units of general local government or combinations of such units to enable such units and combinations of such units to participate in the formulation of the comprehensive State plan required under this part. The Administration may waive this requirement, in whole or in part, upon a finding that the requirement is inappropriate in view of the respective law enforcement and criminal justice planning responsibilities exercised by the State and its units of general local government and that adherence to the requirement would not contribute to the efficient development of the State plan required under this part. In allocating funds under this subsection, the State planning agency shall assure that major cities and counties within the State receive planning funds to develop comprehensive plans and coordinate functions at the local level.

LEAA Guideline Manual M 4100.1D (State Planning Agency Grants, March 21, 1975) provides for regional criminal justice planning in chapter 1, paragraph 24:

> The Act requires that units of general local government or combinations of such units participate in the formulation of the comprehensive State plan . . . . As a means of meeting this requirement LEAA encourages the incorporation of criminal justice planning responsibilities within the multijurisdictional organizations established in accordance with the Intergovernmental Cooperation Act of 1968 . . . .

West Virginia's RPC's are established in accordance with the Intergovernmental Cooperation Act (Public Law 90-577) through the Regional Planning and Development Act.

Although the RPC's established by the West Virginia statute are required to perform the A-95 clearinghouse function, they are also statutorily authorized to engage in and implement comprehensive planning and development in a variety of areas, including law enforcement and criminal justice. The fact of their general purpose planning authority is sufficient to qualify them as combinations of units of general local government for purposes of the 40 percent passthrough requirement, so long as the staff of these regional units takes direction from and has a responsibility to the regional supervisory board, which is composed of local representatives.

The written waiver by the State's largest city and county meets the Section 203(c) requirement for availability of planning funds to major cities and counties within the State (see LEAA Guideline Manual M 4100.1D, *supra*, chapter 2, appendix 2-4).

The waiver of planning funds in West Virginia is not, of course, a waiver by the Administration as provided by Section 203(c). Rather, it is a waiver by the RPC's and major cities and counties of their right to receive planning funds from the SPA on the condition that the SPA's Regional Grants Development Division will perform comprehensive regional and local planning on their behalf.

The waiver agreement used by the West Virginia SPA provides that it shall be "effective from FY 1973 until withdrawn by twelve (12) months written notice to the contrary." The intent of Section 203(c) of the act is to insure the availability of annual planning funds to local units of government or combinations of such units.

The quoted provision appears contrary to this intent because it could, in effect, postpone the availability of planning funds for a full year, thereby foreclosing the local unit of government or combination from its statutory right to participate in the formulation of the comprehensive State plan following a determination to do so.

The intended annual availability of funds can be achieved through the requirement of a new waiver on a fiscal year basis. Alternatively, an "open ended" waiver is permissible where the SPA notifies the appropriate units or combinations each time that new annual planning funds are allocated indicating that these funds will be waived in accordance with the prior written waiver unless a contrary response is received. Such notice must provide a reasonable time in which to respond. Under either method, the appropriate amount of planning funds to which the local unit of government or combination would otherwise be entitled should be stated specifically in the waiver agreement or notice. Either of these methods would be sufficient to protect the rights and interests of both parties to a waiver agreement.

The current West Virginia waiver agreement is subject to challenge under Section 203(c) of the act and therefore West Virginia should be advised by the regional office to revise the procedure for future planning grant applications.

Conclusion

The West Virginia RPC's qualify as combinations of units of general local government for purposes of the 40 percent passthrough requirement of Section 203(c) of the act.

Either an annual or an "open end" waiver of planning funds is permissible. To conform with the Section 203(c) requirement of availability of annual planning funds for sub-State planning units, however, notice of the availability of such funds on an annual basis is required if an "open end" waiver is used by the SPA.

Legal Opinion No. 75-54—Criminal Justice Coordinating Councils—May 22, 1975

TO: LEAA Regional Administrators
Region V - Chicago
Region VIII - Denver
Region IX - San Francisco

This memorandum will address legal issues relating to the establishment of Criminal Justice Coordinating Councils (CJCC) in Illinois, California, and Colorado. In each instance, the Office of Inspector General has raised questions relating to the funding and establishment of CJCC's. This opinion will consider (1) the legislative background of the amendments to the Crime Control Act in 1970, which permitted the establishment of CJCC's with Part C funds; (2) the Omnibus Crime Control Act of 1970 (Public Law 91-644, Section 301(b)(8)); (3) Section 301(b)(8) as it relates to Section 203; and (4) a prior legal opinion of March 21, 1972, entitled "Legality of Oklahoma's Proposed 1972 Program for Criminal Justice Coordinating Councils" (see Attachment A). This memorandum will discuss how the above material relates to the audit exceptions and condition statements relevant to each of the above States.

Conclusions

Following our review of this material, we have concluded that whenever a unit of government has a population of 250,000 or more, or there are closely integrated units with a population of 250,000 or more that combine to form a CJCC, the combination or unit has met the statutory criteria for establishment without further requirements.

We have concluded that in concert with the March 21, 1972, opinion, governmental units that do not have the minimum 250,000 population may not establish a CJCC with Part C funds. This requirement may not be subverted by the amalgamation of large numbers of unrelated smaller units of government combining to form a CJCC without supplemental authority as specified in the March 21, 1972, legal opinion.

We have also concluded that a CJCC must perform the functions intended by the 1970 amendments to the Crime Control Act. Functions for which appropriated funds have been awarded to a State in accord with Part B, Section 203 of the act and subsequent appropriation acts of LEAA may be performed by a CJCC, provided that Part B funds are made available to the CJCC by the State in accord with Section 203(c) for the performance of local planning activities necessitated by the comprehensive planning process.

Discussion

Part C, Section 301(b)(8) of the act provides for the establishment of CJCC's as follows:

> (b) The Administration is authorized to make grants to States having comprehensive State plans approved by it under this part, for: . . .
> (8) The establishment of a Criminal Justice Coordinating Council for any unit of general local government or any combination of such units within the State, having a population of two hundred and fifty thousand or more, to assure improved planning and coordination of all law enforcement and criminal justice activities.

This amendment was explained in House Report No. 91-1174 (June 10, 1970) as follows:

> (2) Section 301(b) of the act is amended to authorize the Administration to make grants to States for the establishment of a criminal justice coordinating council for any unit of general local government or any combination of such units within the State. The function of such council is to provide improved coordination of all law enforcement activities such as those of the police, the criminal courts, and the correctional system. The establishment of coordinating councils of the type envisioned here will effectuate recommendations made by the National Commission on the Causes and Prevention of Violence.[4] Such councils should serve as a catalyst to overcome the pervasive fragmentation of police, court, and correctional agencies.

Footnote 4 referenced in this explanation cites the *Final Report of the National Commission on the Causes and Prevention of Violence*, December 1969, pp. 159-163 (see Attachment B).

It is important to understand the congressional intent behind Section 301(b)(8) because confusion about the fund source for planning activities has been created by the existence of this section and the provisions of Section 203(c), which provide for the State to pass through to local governments or combinations "at least 40 per centum of all Federal funds granted" to the State under Part B. Congressional intent relative to planning and Section 301(b)(8) is reflected in the establishment of separate Part B funding authority in the act; a specific Part C, Section 301(b)(8) funding authorization; and the separate provision of congressionally appropriated funds in each fiscal year for each funding category.

Congressional intent behind Section 301(b)(8) is clearly set out above and in Attachment B. Senator Roman L. Hruska, in presenting the section-by-section analysis of this amendment in what was then titled Amendment No. 715, stated that the 40 percent passthrough planning funds "will be made available to units of local government or combinations of such units to allow them to participate in the formulation of required comprehensive State plans." (Cong. Rec. S 5350 (May 10, 1968).) OGC Legal Opinion No. 75-13 (Nov. 5, 1974) covers the relation of LEAA's appropriation acts to this issue and concludes that Part C funds may not be used to supplement Part B planning activities.

The line of demarcation between appropriate use of funds for planning activities under Part B and CJCC activities under Part C is not well established when the CJCC is performing both functions. It is clear, however, that under Section 203(c), the State Criminal Justice Planning Agency (SPA) must assure

that major cities and counties within the State receive Part B planning funds to develop comprehensive plans at the local level. It is also clear that the legislation anticipates that those matters that relate to local priority-setting, support of the regional supervisory board, grant development, grant management, grant review, and grant-related input into the SPA be funded from Part B fund sources. Consequently, we have concluded that a CJCC performing both types of functions must receive in an equitable pro rata manner both Part C and Part B funds. The proration should take place on the basis of the State's best estimate of the CJCC's functions that are performed along the criteria specified in the National Commission's report as compared to those planning functions performed by the CJCC that relate to the administrative and grant application requirements of the State comprehensive plan.

Based upon this opinion, and the lack of specific LEAA guidelines covering this situation, we are recommending that the audit exceptions and condition statements be cleared and each State notified in writing that CJCC's that perform both the functions of the Part C council and the Part B planning agency must be allocated both types of funds in proportion to the staff efforts devoted to each type of function. We are also recommending that LEAA guidelines be issued to reflect this opinion and offer guidance for prorationing of costs in accord with the congressional intent of Sections 203(c) and 301(b)(8).

Attachment A

Memorandum to Region VI (Kansas City) Re Request for Opinion–Legality of Oklahoma's Proposed 1972 Program for Criminal Justice Coordinating Councils–March 21, 1972

This is in response to your request for an opinion regarding the legality of Oklahoma's proposed 1972 program, entitled "Aid to Substate Planning Districts for Developing and Implementing Programs." According to the Oklahoma program (as shown in your Exhibit 1), Part C funds are intended to be used to support coordination, technical assistance, and some planning aspects of the 11 sub-State planning districts.

Section 301(b) of the Omnibus Crime Control and Safe Streets Act (Public Law 90-351) was amended in 1970 (Public Law 91-644) to authorize the Administration to make grants to States for the establishment of a Criminal Justice Coordinating Council (CJCC) for any unit of general local government or any combination of such units within the State. A limitation was placed upon the eligibility of units of general local government or combinations of such units for grants under this program: A unit must have a population of 250,000 or more. In its report, the Senate Judiciary Committee indicated that this limitation was added because establishment of councils for smaller population areas would be needless proliferation of the planning function. As stated by Senator Roman L. Hruska:

> . . . The Senate amendment expresses the intent to concentrate this assistance in heavily populated areas which are the ones generally characterized by high law enforcement activity.

It was intended that LEAA would assure that this type of Part C assistance was provided in such a manner as to avoid a needless proliferation of the planning function. To this end, authority exists within LEAA to set limits or impose requirements for combinations of units without large individual concentrations of population. At the minimum, our recommendation would require individual governmental units that combine to achieve the 250,000 population minimum to qualify for eligibility for a CJCC grant meet the following requirements:

1. The CJCC agency (or region in this case) must have authority or capacity from the State level of government and delegations of authority from the local units that will enable that unit to achieve "regionalized" operations and activities effectively;

2. Some individual units totaling the 250,000 minimum population must have police, corrections, and court (where a unified court system does not exist) related operational responsibilities; and

3. The State Criminal Justice Planning Agency (SPA) must make a determination that adequate Part B funds are not available to achieve these purposes.

Under the above criteria, unless the 11 Oklahoma sub-State planning districts contain individual units with a population of 250,000 or meet the special requirements set out in this opinion, they would not be eligible for Part C CJCC money.

Regarding your question as to the definition of unit of local government, Section 601(d) defines a unit of general local government as a "city, county, township, town, borough, parish, village, or other general purpose political subdivisions of a State, or an Indian tribe which performs law enforcement functions. . . ." It is clear from the examples given in the definition and the phrase "other general purpose political subdivisions" that the only local governmental units that qualify are those with general political jurisdiction - that is, those that possess jurisdictional powers (i.e., taxing power, law making power, law enforcement authority) usually possessed by a city, town, county, or similar unit. As far as a CJCC is concerned, what was envisioned by Congress was a body whose purpose would be to provide improved coordination of all law enforcement activities, such as those of the police, the criminal courts, and the correctional system. The intent was that such a council would serve as a catalyst to overcome the pervasive fragmentation of police, court, and correctional agencies. It was viewed as a tool for the city to coordinate the operations of each functional area. This necessarily entails some planning functions so that, in some respects, similar types of activities may be handled by both Part B and Part C funds. However, each CJCC subgrant to a unit that has a Part B agency should receive close scrutiny by the SPA so that each operation is clear as to the scope of its activities and duplication may be avoided.

It is also to be noted that the only purpose to which these funds may be put are purposes relevant to criminal justice functions. One attachment to your memo contains an outline of the duties of the various regions in Oklahoma. Other than the limited type of clearinghouse activities relevant to criminal justice program coordination, the CJCC subgrant cannot be a fund source for a region to carry out clearinghouse activities or other multifunctional purpose activities related to other functional area planning or to the Project Notification and Review System.

You might note also that it was recommended that Part C assistance for a council be conditioned upon its meeting the representation requirements of amended Section 203(a) (S. Rept. 91-1253, Sept. 29, 1970 at 44).

Attachment B

Excerpt from the *Final Report of the National Commission on the Causes and Prevention of Violence*, pp. 159-63.

The Criminal Justice Office

The pervasive fragmentation of police, court and correctional agencies suggests that some catalyst is needed to bring them together. An assumption that parallel and overlapping public agencies will cooperate efficiently can no longer suffice as a substitute for deliberate action to make it happen in real life.

Periodic crime commissions - which study these agencies, file reports and then disappear - are valuable, but they are much too transient and non-operational for this coordinating role. A law enforcement council - consisting of chief judges and agency heads who meet periodically - is usually little more than another committee of overcommitted officials.

A full-time criminal justice office is basic to the formation of a criminal justice system. Its optimum form, i.e., line or staff, and its location in the bureaucracy, need to be developed through experimentation.

The function could be vested in a criminal justice assistant to the mayor or county executive, with staff relationships to executive agencies, and liaison with the courts and the community. Alternatively, it could operate as ministry of justice and be given line authority under the direction of a high ranking official of local government (e.g., Director of Public Safety or Criminal Justice Administrator), to whom local police, prosecutor, defender and correctional agencies would be responsive. (Special kinds of administrative ties to the courts would be evolved to avoid undermining the essential independence of the judiciary.) A third alternative might take the form of a well-staffed secretariat to a council composed of heads of public agencies, courts and private interests concerned with crime. To avoid the ineffectiveness of committees, however, either the chairman of the council or its executive director would have to be given a good measure of operating authority.

Whatever its form, the basic purposes of the criminal justice office would be to do continuing planning, to assure effective processing of cases, and to develop better functioning relationships among the criminal justice subsystems and with public and private agencies outside the criminal justice system. For example:

- It would develop a system of budgeting for crime control which takes account of the interrelated needs and imbalances among individual agencies and jurisdictions.
- It would initiate a criminal justice information system which would include not simply crime reports (as is typical today), but arrests, reduction of charges, convictions, sentences, recidivism, court backlogs, detention populations, crime prevention measures, and other data essential to an informed process.
- It would perform or sponsor systems analysis and periodic evaluation of agency programs and encourage innovations and pilot projects which might not otherwise have a chance in a tradition-oriented system.
- It would perform a mediating and liaison role in respect to the many functions of the criminal process involving more than one element of the system, e.g., to develop programs for the reduction of police waiting time in court, to improve pretrial release information and control, to enlist prosecutors and defense attorneys in cooperative efforts to expedite trials, to bring correctional inputs to bear on initial decisions whether to prosecute, to improve relations between criminal justice agencies and the community.
- It would also perform the vital but neglected function of coordinating the criminal justice agencies with programs and organizations devoted to improving individual lives - e.g., hospitals, mental health organizations, welfare and vocational rehabilitation agencies, youth organizations and other public and private groups.
- It would develop minimum standards of performance, new incentives and exchange programs for police, court attachés and correctional personnel.

The comprehensive grasp of the system by an experienced criminal justice staff would facilitate informed executive, judicial and legislative judgments on priorities. It would help decide, for example, whether the new budget should cover:

- A modern diagnostic and detention center to replace the jail, or an increase of comparable cost in the size of the police force;
- Additional judges and prosecutors, or a prior management survey of the courts;
- A computerized information system or a new facility for juveniles;
- New courtrooms or new halfway houses.

For a full-time well-staffed criminal justice office to be successful, it must achieve a balanced perspective within its own ranks on the problems of public safety and justice. Practical experience in law enforcement, in the protection of individual rights, and in the efficiency and effectiveness of programs must be represented, as must the interests of the community. Such representation can be provided through an advisory board to the criminal justice office and through involvement of relevant persons in task force efforts to attack particular problems. Broadbased support of the office is quite important.

The transition from today's condition to a well-run system will not be easy. Especially troublesome is the fact that the criminal justice process does not operate within neat political boundaries. Police departments are usually part of the city government; but county and state police and sheriffs usually operate in the same or adjacent areas. Judges are sometimes appointed, sometimes elected, and different courts are answerable to local, county and state constituencies. Correctional functions are a conglomerate of local and county jails, and county and state prisons. Prosecutors may be appointed or elected from all three levels of government. Defense lawyers usually come from the private sector but are increasingly being augmented by public defender agencies. Probation systems are sometimes administered by the courts, sometimes by an executive agency.

If this confusing pattern makes the creation, location, staffing and political viability of a criminal justice office difficult, it also symbolizes why little semblance of a system exists today and why criminal justice offices are so badly needed in our major metropolitan areas.

To encourage the development of criminal justice offices, we recommend that the Law Enforcement Assistance Administration and the state planning agencies created pursuant to the Omnibus Crime Control and Safe Streets Act take the lead in initiating plans for the creation and staffing of offices of criminal justice in the nation's major metropolitan areas.

The creation of criminal justice offices will require the active participation and cooperation of all the various agencies in the criminal justice process and of officials at many levels of state and local government. Helpful insights in establishing the first such offices may be derived from the experience of some of the state law enforcement planning agencies (e.g., Massachusetts) now making efforts in this direction, from the criminal justice coordinating role developed by the Mayor's office in New York over the past two years, and from the experience of the Office of Criminal Justice established in the Department of Justice in 1964.

Legal Opinion No. 75-55—Affirmative Action/Equal Employment Opportunity Requirements on SPA Subgrants—June 17, 1975

TO: LEAA Regional Administrator
Region X - Seattle

This is in response to your request for an opinion with regard to the following questions raised in connection with Washington State's

affirmative action/equal employment opportunity requirements on SPA subgrants:

1. Is Washington State prohibited from requiring an applicant (criminal justice agency) for funds to be awarded pursuant to the Crime Control Act of 1973 (Public Law 93-83) to comply with more stringent requirements regarding affirmative action/equal employment opportunity than are presently imposed by LEAA regulations (28 C.F.R. 42.301 *et seq.*, subpart E)?

2. Is Washington State prohibited from conditioning the receipt of the 5-percent State buy-in (presently provided on a project-by-project basis), and as a consequence the 90-percent LEAA funding, on the recipient/subgrantee's compliance with State-mandated conditions regarding affirmative action and equal employment opportunity that are more stringent than LEAA's regulations?

3. If Washington State changed its present buy-in system to a more selective system under which certain individual project grant awards did not include any of the State's required buy-in funds while others would include more than 5-percent State buy-in, would the State be prohibited from conditioning the receipt of LEAA Part C funds (matched totally by the subgrantee) on that subgrantee's compliance with State-mandated affirmative action and equal employment opportunity conditions that are more stringent than LEAA's regulations?

Discussion and Conclusion

The Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415), sets out in Section 518(c)(1) a statutory prohibition of discrimination as follows:

> (c)(1) No person in any State shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.

LEAA Guideline Manual M 4100.1D, State Planning Agency Grants (March 21, 1975), provides in chapter 1, paragraph 33, for State Criminal Justice Planning Agency (SPA) implementation of Title VI of the Civil Rights Act of 1964 (Public Law 88-352) and the Equal Employment Opportunity regulations of the Department of Justice as follows:

> The State Planning Agency in accepting a grant from the Law Enforcement Assistance Administration for the operation of the State Planning Agency assures that it will comply and will insure compliance by its subgrantees and contractors with Title VI of the Civil Rights Act of 1964, the Equal Employment Opportunity regulations of the Department of Justice, and Executive Order 11246, as amended, to the end that no person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity which receives financial assistance from the Department of Justice. The SPA also assures that it will comply and will insure compliance by its subgrantees and contractors with the Department of Justice regulations and LEAA guidelines on equal employment opportunity in federally assisted programs (28 C.F.R.

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42.201 and 42.301, *et seq.*, subparts D and E) to the end that there shall be no employment discrimination on the grounds of race, color, creed, sex or national origin in such programs. The State Planning Agency further assures that it will insure compliance by its subgrantees and contractors with Executive Order 11246 as amended, to the end that no one shall be discriminated against on the grounds of race, creed, color, national origin or sex in any construction project funded in whole or in part with LEAA funds.

The United States retains the right to seek judicial enforcement of these assurances against both the SPA and the SPA subgrant and contract recipients.

Both the LEAA statute and guidelines are silent as to affirmative action/equal employment opportunity requirements imposed by State law. Therefore, State governments are free to enforce civil rights responsibilities against a subgrant or contract recipient of LEAA funds pursuant to the State constitution and laws. Many States already have an office of the State government with responsibility in this area. Through this mechanism or through the SPA, if such agency has legal authority from the State to carry out State-mandated civil rights laws, a State can require compliance by recipients of State funds with additional or expanded affirmative action/equal employment opportunity requirements.

This condition is based on the general proposition that Federal funds granted to a State become State funds upon receipt by the State. This is the position taken by the Comptroller General of the United States in a series of decisions summarized by the following statement:

> It consistently has been held with respect to Federal funds granted to a State that, when such funds are receipted by the State, they become State funds and, in the absence of a condition of a grant specifically prescribing to the contrary, are totally divested of their identity as Federal funds and become funds of the State and the expenditure thereof is subject to the laws and regulations applicable to the expenditure of State funds rather than Federal laws applicable to the expenditure of appropriated moneys by the departments and establishments of the government. (14 Comp. Gen. 916 (1935); 28 Comp. Gen. 54 (1948).)

The implications of this holding are further discussed in 37 Comp. Gen. 86 at 87 (1957) in which it was held that:

> The States, therefore, in disbursing grant funds for purposes within the scope of the grant, may not be considered as "agents" of the United States; and, except for conditions specified by Congress in the grants, they are subject only to the restrictions imposed by State laws and regulations on the disbursement of other State funds.

Thus, although funds granted to the States are divested of their Federal character, they continue to be subject to the conditions prescribed by Congress, which include the implementing regulations (guidelines) of the granting agency. In 54 Comp. Gen. 6 (1974), the Comptroller General considered Illinois Equal Employment Opportunity requirements for publicly funded, federally assisted projects. He found the Illinois regulations to be ". . . inconsistent with the basic principles of Federal procurement law" and therefore invalid (54 Comp. Gen. at 11). It should be noted that in this instance the Office of Federal Contract Compliance regulations (41 C.F.R. 60-1.4(b)(2), 39 Fed. Reg. 2365, Jan. 21, 1974) specifically permitted State and local governments to

impose their own affirmative action hiring or training requirements provided that such regulations were consistent with the basic principles of Federal procurement law.

In this decision, the Comptroller General affirmed the principle that irrespective of the changed character of Federal funds upon receipt by the State they remain subject to federally imposed conditions:

> It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government [citations omitted]. (54 Comp. Gen. 6, 9 (1974).)

As a result, it is clear that no State civil rights requirements may be imposed where prohibited by or inconsistent with the Crime Control Act or LEAA guidelines. Questions of interpretation of the Crime Control Act and LEAA guidelines must remain within the authority of LEAA. States may not impose requirements under the guise of Federal authority that are beyond the intent and scope of the act or guidelines. This proposition is based on the Supremacy Clause of the U.S. Constitution and the rule has been stated clearly by the U.S. Supreme Court in the case of *King* v. *Smith*, 392 U.S. 309, 333 (1968):

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any State law or regulation inconsistent with such federal terms and conditions is to that extent invalid. [citations omitted.]

Thus, in the absence of statutory prohibition or guideline restriction, it is the opinion of this office, under the principles discussed above, that Washington State may require criminal justice agencies applying for SPA subgrants to be awarded with LEAA funds granted to the State to comply with more stringent requirements regarding affirmative action/equal employment opportunity than presently are required by LEAA statute and regulation (28 C.F.R. 42.301 *et seq.*, subpart E). Such requirements must, however, be formulated pursuant to the State constitution, statute, or implementing regulation, may not alter or be inconsistent with Federal requirements, and must be designated clearly as State imposed requirements for the receipt of funds.

The above position negates the need to answer questions 2 and 3 because the source of the funds is not relevant to this determination. Were a State to condition eligibility for State buy-in funds on requirements that were inconsistent with LEAA statute or regulation, however, this would be considered, ipso facto, a condition affecting eligibility for Federal funds and therefore violative of the principles set forth in *King* v. *Smith, supra.*

Where a State proposes equal employment opportunity/affirmative action guidelines that appear to go beyond the LEAA requirements, it is suggested that the regional office forward the proposed guideline to the LEAA Office of General Counsel and/or Office of Civil Rights Compliance for review. The supporting legislation or other State authority upon which the guideline is based should also be submitted.

Legal Opinion No. 75-56—(Number not used)

Legal Opinion No. 75-57—Eligibility of Indian Intertribal Councils for Part C Discretionary Grant—June 9, 1975

TO: Acting Assistant Administrator
Office of Regional Operations, LEAA

This is in response to your request for a determination of existing authority to fund Part C discretionary grants to Indian tribal councils. It is the opinion of this office that such authority does exist provided the tribal council is a legally established nonprofit corporation and the application is otherwise in accord 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, Public Law 93-83, and Public Law 93-415).

In order to receive Part C discretionary funding, an Indian tribal council must fall within one of the classes listed in Section 306(a)(2) of the act: "State planning agencies, units of general local government, combinations of such units, or private nonprofit organizations." Section 601(d) of the act does not provide authority for a tribal council representing a number of Indian tribes in a limited geographical area to be considered a unit of local government.

However, Part C discretionary grants may be awarded to Indian tribal councils that can establish that they are private nonprofit organizations in good standing with the State or other incorporating body. It is noted that similar authority does not exist under Part E of the act.

Legal Opinion No. 75-58—(Number not used)

Legal Opinion No. 75-59—Proposed Legislation Affecting the North Carolina Governor's Committee on Law and Order—June 11, 1975

TO: LEAA Regional Administrator
Region IV - Atlanta

In response to your request of May 22, 1975, and supplementary material sent in on June 4, 1975, we have reviewed North Carolina General Assembly House Bill DRH 5224 and proposed additional amendments to that bill. The bill, if enacted, would affect the composition and operation of the Governor's Committee on Law and Order. Specifically, Section 143(b) of the General Statute would be amended to structure the composition of the committee, require a membership appointment procedure, set out the committee's powers and duties, and locate the function in the Department of Natural and Economic Resources.

Section 337 of the bill provides for a committee of 26 members (27 in a proposed amendment). The composition of the committee is to be made up of eight ex officio members. Of these members, four are gubernatorial appointments, the remaining four are elected or appointed officers of the State government. The balance of the proposed membership is to be derived from appointments by the Governor of operating functional specialists and elected county commissioners and municipal officials.

The bill and the proposed amendment provide a procedure whereby the Governor would make his appointments from lists of nominees sent him by the Association of County Commissioners, North Carolina League of Municipalities, the Sheriffs' Association, and the Police Executives Association. This procedure unduly restricts the appointment authority of the Governor and is not in accord with Section 203(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, Public Law 93-83, and Public Law 93-415), which provides that:

> A grant made under this part to a State shall be utilized by the State to establish and maintain a State planning agency. Such agency shall be created or designated by the Chief Executive of the State and shall be subject to his jurisdiction.

In the event that the Governor would disagree on the appointment of the submitted nominees, his authority to create and designate the State planning agency would be eroded and restricted. Such a process would require the appointment of persons unacceptable to the Governor if the agency expects to meet the requirements of the legislation as proposed. It is our view, however, that the bill could be amended to provide for a procedure with appropriate time limitations on the submission of names to avoid an impasse, and for authority in the Governor to reject all nominees and call for new lists of county commissioners, municipal officials, police officers, or sheriffs.

It is noted that Section 337(b) provides that:

> The Governor shall have the power to remove any member of the committee from office for misfeasance, malfeasance, or nonfeasance.

This provision is also contrary to the authority placed in the Governor by the provisions of Section 203(a) cited above. A State committee to be under the Governor's jurisdiction has to be created by the Governor and his authority over the appointment and removal process may not be limited by "for cause" removal powers.

Section 338 provides for the powers and duties of the committee and specifies that the committee is empowered to perform all functions relating to grants to the State "by the Law Enforcement Assistance Administration of the United States Department of Justice." The proposed amendment, entitled Section 2, provides that the committee as it is presently constituted shall cease to exist on June 30, 1975. This legislation would override North Carolina General Statute 128-7 provisions. Unless it is subsequently determined that the Governor has the authority to continue the committee by Executive Order,

application of these provisions for enactment of this act would require notification to the State under Section 509 of the Crime Control Act that grant funds shall not be made available under LEAA's authorizing legislation until such time as the legislation establishing this committee is conformed to provisions of the Crime Control Act of 1973, as amended. Under the Supremacy Clause of the United States Constitution, North Carolina Bill DRH 5224 would be ineffective as to the allocation of LEAA funds (*King* v. *Smith*, 392 U.S. 309 (1968)).

It is noted that the representative character requirements of Section 203(a), as amended by Section 542 of the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415, Sept. 7, 1974), may not be met by this bill in that the specificity of the appointments to be made by the Governor does not include the required juvenile justice related citizen, professional, and community representation. State legislation establishing such committees must provide the Governor with sufficient discretionary appointment authority to meet the requirements of the Juvenile Justice and Delinquency Prevention Act as well as the requirements of LEAA guidelines. This matter is left for formal determinations by the regional office during Part B planning grant review.

Attention should also be given to the relative allocation of committee functions under Section 339. Although it is legally appropriate for the committee to be a part of the Department of Natural Resources, the LEAA legislation intends that the agency set up under Section 203 of the act retain sufficient authority and autonomy to set priorities in the State-LEAA criminal justice fund allocation process and be responsible for administration of LEAA-related activities.

If we can be of further assistance, please feel free to call on us during your efforts to assist the State in developing legislation in conformity with the provisions of the LEAA legislation.

Appendix

The following decisions of the Comptroller General of the United States are included in this volume because of their general interest to persons concerned with the operation of the LEAA program.

Decision—The Comptroller General of the United States—April 8, 1975

File: B-179973

Matter of: Relocation Assistance in Open Market Lease Transactions

Digest:

Tenants whose landlords exercise their legal right to gain possession of premises and then lease property to Federal Government or to federally assisted entity in open market transaction without threat of condemnation may not be considered "displaced persons" and hence are not entitled to benefits of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Government's obtaining of leasehold interest in open market transaction is not an "acquisition of such real property" causing tenants to vacate the premises within meaning of Section 101(6) of the Act.

Decision

At the suggestion of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, the Assistant Secretary for Administration and Management of the Department of Labor requested our views as to whether the benefits of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), Pub. L. No. 91-646, January 2, 1971, 84 Stat. 1894, 42 U.S.C. Section 4601 (1970 ed.), are available to tenants of a building which has been rented by the Government on the open market without condemnation or the threat of condemnation.

The Assistant Secretary's letter indicates an inclination to the view that such tenants are entitled to benefits afforded by the Relocation Act. Shortly thereafter we received a letter from the Assistant Administrator and General Counsel of the Law Enforcement Assistance Administration (LEAA), Department of Justice, indicating a contrary point of view. To assist us in rendering a decision in this matter we requested the views of the Administrator of the General Services Administration (GSA) and, at the suggestion of the Inter Agency Relocation Assistance Implementing Committee, we also requested the views of the Secretary of the Army, the Secretary of Housing and Urban Development, and the Secretary of Transportation. We received replies from the Acting General Counsel, GSA, and from the Director of Real Estate, Army Corps of Engineers, taking the position that such persons are not covered by the Relocation Act, and replies from the Acting General Counsel of Housing

and Urban Development and from the General Counsel, Department of Transportation, expressing the view that such persons are covered.

As described in the submission, the facts of the particular case involved are:

> The particular case before us arose in Cleveland, Ohio, where the Director of Job Corps, acting under authority delegated by the Secretary of Labor and pursuant to Section 602(m) of the Economic Opportunity Act, rented a building located at 10660 Carnegie Avenue from Housing Associates, Inc., a wholly-owned subsidiary of Case Western Reserve University. The purpose of the Government's lease was to obtain a new site for the Cleveland Job Corps Center, which is operated by a women's sorority under a cost-reimbursement contract with the Labor Department.
>
> The Government did not condemn the property or make any threat of condemnation. Rather it obtained the building by responding to an offer from the lessor who was making the property available on the open market. The Labor Department had no direct dealings with the Process Machine and Tool Company, which is the claimant, or with any of the numerous other tenants in the building.
>
> The claimant advises that it (and presumably the other tenants) was given notice by its landlord to move because the building had been rented to the Government. Claimant had a month-to-month lease, and advises that it had been a tenant in the building for 22 years and intended to remain indefinitely. It further advises it sought and obtained the help of a Relocation Advisory Assistance Service authorized under Section 205(a) of the act, and thereby found new premises at 3091 Mayfield Road, also in Cleveland, to which it has moved and where it is now conducting business. The company has submitted its bill for $2,318.03 to cover moving expenses.

The question presented is whether tenants of a building which has been rented to the Government in an open market transaction, without condemnation or threat thereof, are entitled to the various benefits provided by the Relocation Act. To be eligible one must qualify as a "displaced person." A "displaced person" as defined in pertinent part by Section 101(6) of the act, 42 U.S.C. Section 4601(6), is any person "who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, *as a result of the acquisition of such real property*, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance. . . ." [Emphasis added.] The crucial legal issue is whether, in situations where a tenant's lease (or period of occupancy) is not renewed by his landlord so that the latter may enter into a lease of the premises with the Government, there has been an "acquisition" of the property by the Government which displaces that person.

The arguments in support of entitlement center largely around the basic congressional purpose, expressed in Section 201 of the Relocation Act, that all persons required to move from buildings because a public facility would replace them should be reimbursed in order that "such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." The relocation provisions (Title II) of the act turn solely on the acquisition of an interest in real property by a Federal or federally assisted program or project designed to benefit the general public and, it is argued that the obtaining of a leasehold constitutes the acquisition of an interest in real property.

In commenting on the definition of "displaced person" and the then United States Post Office Department's option procedure, the House Committee on Public Works stated:

> (3) The term "displaced person" means any person who, on or after the effective date of the act, moves from real property, or moves his personal property from real property as a result of the acquisition of such real property, or as the result of the written notice of the acquiring agency or any other authorized person to vacate such property, for a program or project undertaken by a Federal agency, or by a State agency with Federal financial assistance. If a person moves as the result of such a notice to vacate, it makes no difference whether or not the real property actually is acquired.
>
> It is immaterial whether the real property is acquired before or after the effective date of the bill, or by Federal or State agency; or whether Federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a Federal or Federal financially assisted program or project. For example: . . .
>
> (b) Post Office Department witnesses before the committee called attention to the fact that although the Department's construction requirements involve about 1,000 buildings annually, the postal building program, as such, accounts for only a few construction starts each year. Occasionally, the Department acquires the site and transfers it to the successful bidder for construction and lease back to the Department. In most cases, however, building sites are obtained through the Department's leasing authority. Usually, these sites are controlled through an option procedure with title neither vesting in nor passing through the Post Office Department. Instead, the option is assigned to a successful bidder who becomes the owner of the land, and the Department's long-term lessor. Some of these sites are for large postal facilities to be constructed in metropolitan areas where the only available and suitable land is occupied by numerous low-income individuals and families, and by small businesses.
>
> It makes no difference to a person required to move because of the development of a postal facility which method the postal authorities use to obtain the facility, or who acquires the site or holds the fee title of the property. Since the end result is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is entitled to the benefits of this legislation. (H. Rept. No. 91-1656, 91st Cong., 2d Sess. 4-5 (1970).)

The General Counsel of the Department of Transportation notes:

> The Government taking of a leasehold interest in a parcel of realty certainly constitutes an acquisition of the exclusive right to occupy all of the realty for a term of years. While no reference is made in the act to "title" to realty, nothing in the language or legislative history of this act would appear to justify discrimination between tenants required to move out because of the Government moving in, merely on the basis of the quantum of title being acquired by the Federal agency or by a State agency with Federal financial assistance. The effect on the tenant is the same in any event . . . .

He and others point out that the Relocation Act encourages all acquisitions to be made by negotiation and the avoidance of condemnation whenever possible, and they suggest that there is no indication that the benefits to dislocated persons depend upon which method of acquisition is used.

This position has some support in the House Committee on Public Works' report on H.R. 104881, 92d Cong., which in amended form became the Public Buildings Amendments of 1972, Pub. L. No. 92-313, June 16, 1972, 87 Stat. 216. While not entitled to be considered as "legislative history" of the

Relocation Act, since it was issued well after the act was enacted, it is of interest in considering this matter. The report states in pertinent part:

RELOCATION ASSISTANCE

> The Committee emphasizes that the broad range of relocation benefits mandated by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646, 84 Stat. 1894), is available for persons displaced as the result of purchase contracts and lease construction agreements to the same extent as if displaced for GSA public buildings construction projects under the Public Buildings Act of 1959, or other Federal programs and projects. The Uniform Relocation Act was enacted as a humanitarian program that would relieve the impact of forced moves on persons displaced as the result of activities of the Federal Government and federally aided activities of state and local governments. It makes no difference to a person required to move as the result of the Federal Government's need for space which method the Government may use to obtain the space. If, in fact, a person is required to move as the result of the Government's to him. *The Committee did not intend to, and indeed it did not, exempt [sic] activity, the provisions of the Uniform Relocation Act are applicable [sic] any GSA leasing program activity from the provisions of the act.* The Uniform Relocation Act is remedial legislation and comprehensive in scope. The Committee intends that the act be administered in the spirit of the congressional objective to translate this broad authority into equitable and satisfactory conditions for the people affected. [Emphasis added.] (H. Rept. No. 92-989, 92d Cong., 2d Sess. 9-10 (1972).)

Hence, at that time while speaking specifically to purchase contracts and lease construction agreements, the House Public Works Committee seemed to endorse the application of the act to any displaced tenants in the emphasized portion.

The proponents of the view that the act does not apply in the subject situations set forth several arguments in support of their opinions. They point out that a decision favorable to the claimants would have a very significant impact on Government (and federally assisted) leasing programs. For example, in fiscal year 1973, GSA entered into over 1,800 leases in both existing buildings and new buildings, either constructed specifically for lease to the Government (lease construction projects) or constructed for rental in the open market. LEAA states that over a 2-year period, leases were entered into by State planning agencies (i.e., LEAA grantees) which required the relocation of 115 businesses, 63 families, two farms and nine nonprofit corporations. It estimates that if the Relocation Act was applicable, about $1 million in relocation costs might have been incurred.

It is further noted by GSA that an interpretation favorable to the claimants will necessitate a major modification of existing procedures by which space is leased for use by Federal agencies. Presently, leases are awarded to those proposing to furnish space meeting the Government's minimum requirements at the lowest cost. However, it is stated that if relocation payments are to be made, it will generally not be possible to determine which offers would be the lowest in cost since relocation costs could not be determined until well after award, at which time eligibility is established and claims considered. This would appear to place landlords with occupied properties—even if they offer the lowest bid or have the most desirable properties—at a competitive

disadvantage with respect to those with newly constructed buildings or buildings vacant by chance.

It is further contended that the Congress did not intend the Relocation Act to cover mere succession in tenancy. GSA notes that prior to enactment of the act, Section 112 of the Senate-passed version of S. 1, 91st Cong., 1st Sess., defined the term "real property" to include acquisiton of any interest in real property, which would have included a leasehold interest. GSA objected to the definition and suggested the section be amended specifically to exclude leasehold interests acquired by the Government under voluntary agreements with private parties. The House of Representatives extensively amended S. 1 and deleted the proposed definition entirely. With this background, GSA contends that had the Congress wished coverage to extend to the subject class of cases, it could (and would) have either retained the definition or specifically so provided. Whatever the merits of this position the fact remains that language initially included in S. 1 would have covered leasehold interests and as finally enacted, did not.

Floor statements by Members of Congress and other portions of the lesiglative history of the Relocation Act are also frequently cited by both LEAA and GSA to indicate that the Congress did not intend to have the act apply to succession in tenancy situations.

Taking the statute and its legislative history together, we tend to agree with this position. Section 101(6) requires there to be an "acquisition of such real property." An acquisition is generally, though not exclusively, thought of as accomplished by transfer of title. The bill was discussed and considered in relationship to the public's "taking" of private lands, through condemnation or the threat thereof. See, for example, Senator Mundt's statement at 115 Cong. Rec. 31534 (1969); Congressman Cleveland's speech at 116 Cong. Rec. 40169 (1970); and the statement of the manager of the bill on the Senate floor, Senator Muskie, at 116 Cong. Rec. 42137 (1970). Also of direct importance is the report of the House Committee on Public Works, H. Rept. No. 91-1656 (1970), quoted in pertinent part above, in which the Committee states that the legislation was intended to apply to lease construction projects of the kind undertaken by the former Post Office Department. No reference is made to the type of lease transaction where the Government becomes a tenant by succession. As GSA states:

> . . . Obviously, if Congress intended that all lease transactions should be subject to the act, it would not have been necessary, as indicated in the legislative history, to draw the singular project distinction as being the lease construction type. Further, we believe that the omission of any reference to lease transactions, other than lease construction projects, was not inadvertent.

Further, it is obvious that persons leasing property to the Government on a voluntary basis, without threat of coercive action, do so because it is to their advantage, financially or otherwise. While the tenants whose leases are not renewed are not in a position to make such a choice, the lessor may not require them to vacate the premises in the absence of a legal right to obtain possession thereof.

Hence, based on our reading of the statute and its legislative history, as well as the other factors discussed above, when a lessor exercises his legal right to possession in order to lease the property voluntarily to the Government, we do not feel that the Government may be said to have made an acquisition of real property within the meaning of the Relocation Act. This, of course, is entirely different from the situation where the Government, regardless of outstanding lease agreements, acquires the leasehold interest by eminent domain or the threat thereof.

Accordingly, it is our position that tenants whose leases are not renewed or whose tenancies from period to period (i.e., month-to-month tenancies, etc.) are terminated by their landlord in order that the premises may be leased to the Government (or to a federally assisted entity) in an open market transaction, without threat of condemnation, are not entitled to the benefits of the Relocation Act inasmuch as they were not required to vacate by either a written order of the Government or by the acquisition, as that term is used in the Relocation Act, of the property by the Government.

/s/ Deputy Comptroller General
of the United States

Decision—The Comptroller General of the United States—June 3, 1975

File: B-171019

Matter of: Waiver by LEAA of State Liability for Misspent Indian Subgrant Funds

Digest:

State liability for misspent Indian subgrant funds awarded under Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701 *et seq.*, as amended, may not be waived by LEAA, even though State may not take legal action against Indian Tribe to recover such funds because of traditional sovereignty of Indian tribes and consequent jurisdictional problems.

Decision

The Law Enforcement Assistance Administration (LEAA) requests our decision as to whether it can legally waive State liability for misused Indian subgrant funds awarded pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. Section 3701 *et seq.*, as amended by the Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197 (Aug. 6, 1973) (the Act).

This legislation seeks to assist State and local governments in strengthening and improving law enforcement and criminal justice at every level by national assistance. To accomplish this purpose LEAA is authorized, in accordance with

Sections 303(a) and 306(a), to make block grants to States which in turn are authorized to disburse the available funds to eligible subgrant applicants. Eligible subgrant applicants include city, county and State agencies, nonprofit organizations, and Indian tribes. Pursuant to Section 202, the States have set up State Planning Agencies (SPA's), which have the primary responsibility for administration and control of funds and, according to LEAA, the corresponding liability for improper expenditures.

LEAA in its request for decision states that due to the tradition and legal status of sovereignty which has been afforded many Indian tribes in the United States, some States may be virtually without jurisdiction for civil actions arising on the reservation unless the Indian tribes consent to such jurisdiction, and that the tribes may not be subject to State law, except insofar as the United States gives its consent. Therefore, according to LEAA, it is possible that the States may be held liable for the improper expenditure of the Indian subgrant funds without possessing the authority to enforce the subgrant condition or take fund recovery action against the tribal subgrantees. Thus, the question presented is whether LEAA can legally waive State liability for misused Indian subgrant funds.

Section 303(a)(12) of the Act provides that LEAA shall not make grants to the SPA unless it has filed a comprehensive State plan which shall:

> 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.

LEAA Guideline Manual M 4100-1B pertaining to "State Planning Agency Grants" provides that it will be a function of the SPA to "monitor progress and expenditures under grants to State law enforcement and criminal justice agencies, local units of government, and other recipients of LEAA grant funds." Chapter 2, paragraph 2 of LEAA Guideline Manual M 7100.1A, "Financial Management for Planning and Action Grants," provides, in pertinent part, that:

> *State Planning Agency Supervision and Monitoring Responsibility*
>
> 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 subgrantees 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.

Under the above provision of law as implemented by the quoted agency directives, and the conditions of the grant itself, LEAA considers an SPA liable for the misuse of grant funds by a subgrantee. Apparently the primary reason LEAA desires to waive State liability for improper expenditures of grant funds by an Indian subgrantee, as distinguished from other subgrantees, is that the State may be without legal authority to enforce the subgrant conditions or take court action against the Indian subgrantee to recover grant funds

improperly expended. As to waiver for the reason in question, however, we note the following statement in LEAA's letter:

> . . . LEAA would be forced to proceed only against a judgment-proof defendant–the Indian tribes–to recover the misspent funds.

Thus it would appear that even where a State could take legal action against an Indian subgrantee and obtain a favorable judgment it may not be able to satisfy the judgment.

It is our opinion that LEAA has no more authority to waive the liability of an SPA for an improper expenditure of grant funds by an Indian subgrantee than it has to waive an SPA's liability for an improper expenditure by any other subgrantee. We agree with the Legal Opinion No. 74-35, dated November 19, 1973, of the Assistant Administrator, General Counsel of LEAA, wherein it is stated:

> The State . . . . has questioned its liability under the [LEAA] act for subgrants made to Indian tribes. It is the opinion of this office that the . . . (State) . . . 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, that:
>
> > 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 it is 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.)

Furthermore, even though in some cases a State may not be able to bring an action in a State court against an Indian tribe for misspent grant funds, the record before us discloses that there may be other alternative competent forums such as Federal courts and tribal courts in which a State may be able to bring such an action.

In any event, as indicated above, it is our view that LEAA may not legally waive State liability for misused Indian subgrant funds even though the State may not be able to bring legal action against the Indian tribe to recover the funds improperly expended.

/s/ Deputy Comptroller General
of the United States

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