



LEGAL SERVICES CORPORATION

750 1st St., NE, 11th Fl., Washington, D.C. 20002-4250

(202) 336-8800

Fax (202) 336-8959

Alexander D. Forger
President

Writer's Direct Telephone
(202) 336-8800

June 21, 1996

Brent Haynes
1703 W. 11th Street
Austin, Texas 78703

Re: FOIA Request No. 96-19

Dear Mr. Haynes:

This is in reference to your appeal of the denial of your FOIA request for a copy of the 1988 third draft of the San Antonio Voucher Project Report by Professor Steven R. Cox. Your letter of appeal was received by the Legal Services Corporation ("LSC" or "Corporation") on June 3, 1996, and, thus, was filed within the ninety-day period provided in 45 C.F.R. §1602.12 of LSC's regulations.

By letter dated March 4, 1996, LSC's FOIA Administrator informed you that the draft document you requested was covered by the exemption provided by 5 U.S.C. § 552(b)(5) and 45 C.F.R. § 1602.9(a)(4) of LSC's regulations, which allow an agency/LSC to withhold draft documents that are deliberative and predecisional from disclosure.¹

¹ Your FOIA request also covered the following categories of documents: the 1989 American Bar Association ("ABA") Report on the San Antonio Study of Legal Services Delivery Programs and all 1988-89 correspondence regarding publication and editing of the report. With respect to the ABA report itself, you were informed that it was not a Corporation record and that, if you were dissatisfied with this response, you could file an appeal within 90 days of LSC's March 4, 1996, letter, which you have not done. As for the correspondence, you were provided with 24 pages of records and notified that, in order to conduct a search for all relevant documents, LSC needed your written agreement in advance to bear all actual search fees and pay duplication costs, which I understand you have recently agreed to do.

Therefore, I have interpreted your appeal as relating solely to the 1988 third draft report

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Brent Haynes
Ltr. re. FOIA appeal
June 21, 1996
- Page 2

In your appeal, you request that LSC either segregate and release those portions of the draft report which you proffer are releasable -- such as facts, tables, statistics, etc. -- or exercise its discretion and release the entire document "given the age of the report and the fact that all decisions pertaining to it have been made."

For the following reasons, your appeal is denied. The draft report, in fact, is not a Corporation record, which is borne out by the records LSC has already provided you and, as such, is not an "agency record" within the meaning of the FOIA.² Rather, the draft report is an ABA record.

Please note, in particular, the following sections of the Memorandum of Understanding

by Professor Cox.

² The Supreme Court in Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 100 Sup. Ct. 960, 969 (1980), noted that most courts had concluded "the FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control." Thus, FOIA only obligates an agency/LSC to provide access to records which it, in fact, has created and retained.

Moreover, in Forsham v. Harris, 445 U.S. 169, 181-82, 100 S.Ct. 977, 985 (1980), the Supreme Court, noting that Congress provided no definition of "agency records" in the FOIA, considered the question of whether the combination of federal funding to a private organization and agency supervisory activities over the grant made the grantee's records "agency records" for purposes of the FOIA. The Court concluded that Congress had not intended that grant supervision short of government control served as a sufficient basis to make private records "agency records" under the FOIA --

... if Congress found that federal funding and supervision did not justify direct access to the grantee's records as it clearly did, we fail to see why we should nevertheless conclude that those identical activities were intended to permit indirect access through an expansive definition of "agency records." Such a conclusion would not implement the intent of Congress; it would defeat it.

More recently, in U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 109 S.Ct. 2841 (1989), the Supreme Court reiterated that, in order to be considered an "agency record," the record must both have been created or obtained by an agency and the agency must be in control of the requested materials at the time the FOIA request is made.

Brent Haynes
Ltr. re. FOIA appeal
June 21, 1996
- Page 3

("MOU") between LSC and the ABA, which we have already provided to you: Section (2) provides that the ABA was to hire and pay Professor Cox during the term of the project from implementation through a final report and, thus, Professor Cox was not an employee or consultant of LSC (and neither was the Project Supervisor who assisted him, although, under section 7, LSC was to provide funds to pay ABA costs associated with employment and training of the Project Supervisor); section 9 provides that LSC had the right to appoint one expert to a panel made up of three experts who were to evaluate the study being undertaken, which underscores the point that LSC was not in control of the study or the report; and section 11 provides that the ABA was to prepare a final project report to be submitted to the ABA Special Committee on the Delivery of Legal Services and LSC for review and comment, which demonstrates that LSC's role with respect to the project and report was not of a controlling nature. In conclusion, there is no provision in the MOU between LSC and the ABA giving LSC any control over the report -- whether in draft or final form.

In addition, when LSC's then Vice President and General Counsel, Timothy B. Shea, by letter of April 28, 1989, informed the ABA that LSC was considering dissemination of the third draft of the Cox report, LSC was advised by the Chair and the Director of the ABA Special Committee mentioned above and by the ABA General Counsel that, pursuant to the parties' agreement and the ABA copyright, only the ABA had the right to decide if and when to disseminate the report. In this connection, please see the exchange of letters between LSC and the ABA, which we previously provided to you. Moreover, as noted in LSC's March 4, 1996, response, the Corporation has never released or disseminated the draft report, and does not have the ABA's approval to do so.³

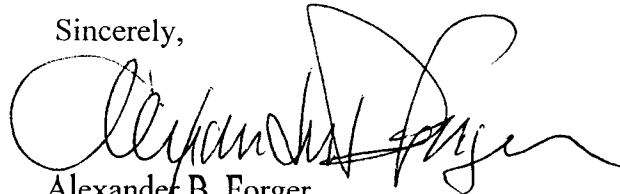
Consequently, on the basis that the requested draft report is not an LSC record for purposes of the FOIA, I must deny your appeal and uphold LSC's decision to withhold this document. If you are not satisfied with this disposition of your appeal, a FOIA complaint may be filed in the district

³ It is my understanding that you can purchase from the ABA the 1989 ABA Report on the San Antonio Study of Legal Services Delivery Programs, which is the final report. As mentioned in note 1, above, in its March 4, 1996, letter, LSC informed you that the final report is not a Corporation record and suggested that you contact the ABA directly for this document.

Brent Haynes
Ltr. re. FOIA appeal
June 21, 1996
- Page 4

court of the United States for the district in which you reside, the district in which the records are maintained, or the District of Columbia.⁴ 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Alexander B. Forger
President

⁴ Please note that it is the Corporation's position that draft reports are covered by FOIA Exemption 5 and § 1602.9(a)(4) of its regulations and may be withheld from disclosure as deliberative and predecisional documents. In this regard, since the requested draft report is considered by the ABA and LSC to be an ABA record -- not an LSC record, further discussion of this exemption and its application to the draft report at issue appears unnecessary under the circumstances. However, should this matter become the subject of a court suit, in addition to the position taken herein that the draft report is not an LSC record for purposes of the FOIA, LSC maintains that this draft report is covered by the exemption provided by 5 U.S.C. § 552(b)(5) and § 1602.9(a)(4) and may be withheld from release in response to a FOIA request.