

OPINION NO. 89-005

Syllabus:

1. Pursuant to R.C. 3313.206, law enforcement authorities may use any reasonable method to check the criminal records of persons who volunteer to be block parents. R.C. 3313.206 does not require law enforcement authorities to use the Law Enforcement Automated Data System (LEADS) to perform the checks.
2. Pursuant to 28 C.F.R. §20.33(a)(3), law enforcement authorities are not authorized to use the Law Enforcement Automated Data System (LEADS) to check the criminal records of persons who volunteer to be block parents unless such use of LEADS is authorized by a state or federal statute and is approved by the United States Attorney General.

To: John T. Corrigan, Cuyahoga County Prosecuting Attorney, Cleveland, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 23, 1989

I have before me your request for my opinion concerning whether law enforcement authorities are permitted or required to use the Law Enforcement Automated Data System (LEADS) to check the criminal records of persons that volunteer to be block parents. Block parents are persons who volunteer their homes or other buildings as places of temporary refuge for children pursuant to R.C. 3301.076. Law enforcement authorities may be required to assist in checking the criminal records of block parents under R.C. 3313.206, which provides in pertinent part:

Each board of education that establishes or maintains a block parent program shall use the block parent symbol adopted by the state board of education....

At the request of a board of education, law enforcement authorities with jurisdiction in any of the territory of a school district that maintains a block parent program *shall assist the board of education of the district or a participating chartered nonpublic school in checking the criminal records of individuals and families that volunteer to participate in the district's block parent program.* (Emphasis added.)

It is well settled that absent a provision of law specifying how a particular duty is to be carried out, it may be carried out in any reasonable manner. *See, e.g., State ex rel. Hunt v. Hildebrand*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *affirmed*, 241 U.S. 565 (1916) (holding that where a statute gives no direction to a public officer as to the manner of performing a task, the officer has the "implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded"); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"). R.C. 3313.206 does not prescribe a method which law enforcement authorities must use in checking the criminal records of block parents. I conclude, therefore, that under R.C. 3313.206, law enforcement authorities may use any reasonable method to check the criminal records of block parents. Use of LEADS may be a reasonable manner of checking criminal records of block parents. It is clear, however, that R.C. 3313.206

does not mandate the use of LEADS in performing these checks. Therefore, I conclude that under R.C. 3313.206, law enforcement authorities are not required to use LEADS to check the criminal records of block parents.

I turn now to the question of whether law enforcement authorities are permitted to use LEADS to check the criminal records of block parents. LEADS is directly linked to the National Crime Information Center (NCIC), a computerized information system operated by the Federal Bureau of Investigation (FBI). See 28 C.F.R. §20.31 (1988). Law enforcement authorities in Ohio access NCIC through LEADS.¹ Because LEADS is directly linked to NCIC, Ohio law enforcement authorities have agreed to abide by NCIC rules. See 28 C.F.R. §20.36(a) (1988) (requiring local criminal justice agencies to execute agreements with the Director of the FBI whereby the agencies agree to abide by NCIC rules and procedures).

28 C.F.R. §20.20(a) (1988) provides that use of information obtained from the NCIC system shall be subject to the limitations set forth in 28 C.F.R. §20.33 (1988). 28 C.F.R. §20.33 provides, in pertinent part:

(a) Criminal history record information contained in any Department of Justice criminal history record information system will be made available:

- (1) To criminal justice agencies for criminal justice purposes; and
- (2) To Federal agencies authorized to receive it pursuant to Federal statute or Executive order.

(3) Pursuant to Pub. L. 92-544 (86 Stat. [1]115) for use in connection with licensing or local/state employment or for other uses only if such dissemination is authorized by Federal or state statutes and approved by the Attorney General of the United States. When no active prosecution of the charge is known to be pending arrest data more than one year old will not be disseminated pursuant to this subsection unless accompanied by information relating to the disposition of that arrest.

(4) For issuance of press releases and publicity designed to effect the apprehension of wanted persons in connection with serious or significant offenses.

(b) *The exchange of criminal history record information authorized by paragraph (a) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.* (Emphasis added.)

See also 28 C.F.R. §20.30 (1988) (the provisions in 28 C.F.R. §20.33 apply to local criminal justice agencies to the extent that they use the Department of Justice criminal history record information systems).

Thus, under 28 C.F.R. §20.33(a)(1), local criminal justice agencies may use NCIC for criminal justice purposes. 28 C.F.R. §20.3(c) (1988) provides that "criminal justice agency" includes "a government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice." 28 C.F.R. §20.3(d) (1988) provides that "administration of criminal justice" includes "performance of any of the following activities: Detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders." Clearly, Ohio law enforcement authorities qualify as criminal justice agencies under 28 C.F.R. §20.3(c) and thus are authorized to use

¹ In your request, you also mention Computerized Criminal History (CCH) files and the Interstate Identification Index (III). I understand that CCH, which formerly referred to criminal records kept by the FBI, now refers to criminal records kept by individual states. In Ohio, CCH is accessed through the LEADS network. III, which is an index to the current criminal histories maintained by individual states, is part of NCIC and is accessed through LEADS.

LEADS and NCIC for criminal justice purposes under 28 C.F.R. §20.33(a)(1). Thus, if checking criminal records of block parents qualifies as a criminal justice purpose, law enforcement authorities may use LEADS to perform the checks. I need not reach the issue of whether this is a criminal justice purpose, however, for the following two reasons. First, the law enforcement authorities involved in your question would be performing the checks for school boards, and consequently the information obtained from LEADS would be disseminated to the boards. This dissemination is not authorized by 28 C.F.R. §20.33(a)(1). See 28 C.F.R. §20.33(b) (if dissemination is made outside the receiving departments or related agencies, the exchange of criminal history record information is subject to cancellation). Second, and more importantly, 28 C.F.R. §20.33(a)(3) provides that law enforcement agencies are authorized to disseminate criminal history record information "for use in connection with licensing or local/state employment or for other uses *only if such dissemination is authorized by Federal or state statutes and approved by the Attorney General of the United States.*" (Emphasis added.) See also *Utz v. Cullinane*, 520 F.2d 467 (D.C. Cir. 1975) (discussing the possibility of infringement of personal rights if NCIC arrest information were used for employment and licensing purposes). Use of LEADS to check the criminal records of block parents is a use for "licensing or local/state employment or...other uses." Therefore, under 28 C.F.R. §20.33(a)(3), a law enforcement authority may use LEADS to check the criminal record of a block parent for a board of education only if this use is authorized by a state or federal statute and is approved by the United States Attorney General.

I am unaware of any state or federal statute that authorizes the use of NCIC or LEADS in checking criminal records of block parents, although it may be argued that R.C. 3313.206 provides such authorization. R.C. 3313.206 merely provides that certain law enforcement authorities "shall assist the board of education...in checking the criminal records" of block parents. Thus, R.C. 3313.206 does not expressly authorize the use of LEADS or NCIC. Further, I find that this broad language is insufficient to imply authorization, particularly in light of the federal mandate specifically requiring statutory authorization. I find, therefore, that R.C. 3313.206 does not provide authorization for the use of LEADS and that accordingly, 28 C.F.R. §20.33(a)(3) prohibits law enforcement authorities from using LEADS to check criminal records of block parents.²

I note also that 3 Ohio Admin. Code 3301-9-01(F) provides that criteria for approval of a block parent "may include, among other things, an [III] criminal record check...performed by a law enforcement authority." Rule 3301-9-01 was promulgated by the Ohio Department of Education. 28 C.F.R. §20.3(a)(3) requires that a statute, rather than an administrative regulation, authorize the use of LEADS to perform the checks. See 28 C.F.R. §20.3(f) (defining "statute" as an act of a state legislature or Congress, or a constitutional provision). Thus, Rule 3301-9-01 is not sufficient to authorize law enforcement authorities to use LEADS to check criminal records of block parents.

As a final matter, I note that it may be argued that information obtained through LEADS is a public record and that boards of education thus can demand, pursuant to R.C. 149.43, that law enforcement authorities use LEADS to perform the checks and to release information obtained through LEADS. R.C. 149.43, which generally mandates the disclosure of public records, provides in pertinent part:

(A) As used in this section:

(1) "Public record" means any record that is kept by any public office, including, but not limited to, state, county, city, village,

² I note that some information contained in LEADS may be available from other sources. For instance, criminal records may be obtained in Ohio from the Bureau of Criminal Identification and Investigation using the procedure set forth in 1 Ohio Admin. Code 109:5-1-01. Other information in LEADS may also be available from the federal government pursuant to the Federal Freedom of Information Act. See *Reporters Committee for Freedom of the Press v. United States Dept. of Justice*, 831 F.2d 1124 (D.C. Cir. 1987), cert. granted, 108 S. Ct. 1467 (1988).

township, and school district units, *except* medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, and *records the release of which is prohibited by state or federal law.*

....

(B) All public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. (Emphasis added.)

Thus, if information obtained through LEADS qualifies as a public record under R.C. 149.43(A), a board of education could demand that the information be made available as provided in R.C. 149.43(B). However, R.C. 149.43(A)(1) specifically exempts "records the release of which is prohibited by state or federal law" from the definition of "public record." Because I find that in this situation the release of information obtained through LEADS is prohibited by federal law, it follows that such information is not a public record under R.C. 149.43(A) and is not subject to the disclosure requirements of R.C. 149.43(B).

Therefore, it is my opinion and you are advised that:

1. Pursuant to R.C. 3313.206, law enforcement authorities may use any reasonable method to check the criminal records of persons who volunteer to be block parents. R.C. 3313.206 does not require law enforcement authorities to use the Law Enforcement Automated Data System (LEADS) to perform the checks.
2. Pursuant to 28 C.F.R. §20.33(a)(3), law enforcement authorities are not authorized to use the Law Enforcement Automated Data System (LEADS) to check the criminal records of persons who volunteer to be block parents unless such use of LEADS is authorized by a state or federal statute and is approved by the United States Attorney General.