



**STATE OF MISSISSIPPI**  
**OFFICE OF THE STATE AUDITOR**  
**STACEY E. PICKERING**  
**STATE AUDITOR**

February 21, 2017

S. Trent Favre  
Wise Carter  
1105 30<sup>th</sup> Avenue  
Suite 300  
Gulfport, MS 39501

Dear Mr. Favre:

We answer the questions in the order presented in your correspondence dated January 30, 2017, regarding the City of Bay St. Louis, Equitable Sharing Program/DOJ fund. Further, the answers apply only to the facts as we currently understand them, and the advice is subject to change if the circumstances change. The Office of State Auditor (OSA) is not able to opine on whether the council should seek redress from the individuals involved in either the commingling of the funds or the funds' subsequent expenditure. Any decision to pursue funds through legal processes by the Council is their decision. The following information is intended only to provide the city with OSA's thoughts on the issues rather than legal advice to the Council. The Council should seek legal advice from an attorney licensed in the applicable jurisdiction. Further, OSA is unable to comment on the likelihood of success of any claims made against the bonding agency or the individuals involved.

1. The courts are the only entity which can make the determination conclusively as to whether a loss has occurred. As we understand the facts, the Department of Justice (DOJ) money, which was incorrectly commingled with the city's operating funds, was spent for a legitimate government purpose. In other words, once the money was commingled, no further violations of the law occurred. The money was not embezzled, stolen, or used for personal gain of any members of the city's government. An error, whether purposeful or accidental, has occurred. DOJ has not forced the city to pay any additional money due to the error.

The key issue is the difference between *impermissible* and *illegal*. The DOJ funds were spent on impermissible items. The funds were only to be spent for the benefit of the police department; however, the funds were spent on other proper governmental functions. The expenditure was impermissible based on the terms set forth in the grant. Because the funds were spent on a proper governmental purpose, the expenditures are not viewed by OSA as illegal, but only a court can make that determination.

As an analogy, if an individual has money in an account separate from his general banking account and the separate account is to be used exclusively for mortgage payments but he transfers the mortgage account money into the general banking account, the total amount of money remains unchanged. If the individual then spends the money from the now-consolidated account on

groceries but later replaces the full amount in the mortgage account, no financial loss has occurred even if the replacement funds for the mortgage account are deposited from the individual's next paycheck. Effectively, the individual took a loan from the mortgage account to pay for groceries. The individual did not pay for either the mortgage or groceries twice. If the individual transferred the money into the now-consolidated account and money were stolen, a loss would have occurred. There is no evidence of any theft or wrongdoing, other than commingling, in the case of DOJ funds.

2. Our understanding of the facts surrounding the DOJ grant is that DOJ has allowed the city to segregate the money rather than repay the money. Consequently, this question is moot.
3. We are unable to speak to the specifics of the DOJ grant, but the decision to pay the money back via a decision to not segregate the necessary money would be the prerogative of the council. Using the money on an impermissible purchase probably does not result in a loss to the city. Our understanding of the situation is the city was allotted roughly \$300,000 to pay for items for its police department. Instead, the city bought other legitimate government items. The city, then, effectively took a loan from the federal government to pay for the other legitimate government items. Repaying the money results in the city using its own funds to pay for the other legitimate government items already purchased via federal dollars. Alternatively, the situation could be viewed as the city returning the grant to the federal government.

Using the prior analogy, if the individual who commingled his mortgage and general expenses account receives a large check, which he uses to pay for living expenses, no loss has occurred if the individual repays the entity that issued the check. No loss has occurred because he still received the benefit of the living expenses, despite using his subsequent paycheck to make the entity which issued the check whole.

4. See the response to question two.

OSA is unable to comment definitively on whether a loss has occurred or if a recovery is possible. Any suggestion made in prior draft reports by OSA regarding repayment of funds is entirely inapplicable to the current facts. In addition to being contained only in a draft report and subsequently removed for the final copy, the circumstances have changed to the point any inference drawn from the draft report regarding repayment of funds is invalid. Segregating the funds does not result in the city paying twice for any expenditures. OSA encourages the city's elected officials to continue to act in a manner that best represents the interests of the city's citizens.

Sincerely,



Patrick Dendy  
Deputy State Auditor