Public Safety & Transportation Committee Report

City of Newton
In City Council

Wednesday, February 8, 2017

Present: Councilors Ciccone (Chair), Blazar, Fuller, Yates, Cote, Harney, Norton and Lipof

Also Present: Councilors Rice (Chair), Lennon, Leary, Albright, Auchincloss, Hess-Mahan, Brousal-Glaser, Gentile, Crossley, Danberg, Schwartz, Laredo and Baker

Absent: Councilors Sangiolo, Kalis and Lappin

City Staff: Chief David MacDonald, Newton Police Department; Chief Operating Officer, Dori Zaleznik ; City Solicitor, Donnalyn Khan and David Olson, City Clerk

REFERRED TO PROGRAM & SERVICES AND PUBLIC SAFETY COMMITTEES

#443-16 **Ord. amendment regarding immigration status and guidelines for community policing**
HIS HONOR THE MAYOR, CHIEF OF POLICE, PRESIDENT LENNON, AND COUNCILOR KALIS, proposing an amendment to the City of Newton Revised Ordinances Chapter 12, Article V; Human Rights Commission and Advisory Council, to add a new section (C) to §12-50 defining: 1) the Policy of the City of Newton regarding immigration status and 2) the final Foundational Guidelines for Community Policing. [12/16/16 @ 10:45 AM]

Action: **Program & Services voted No Action Necessary 6-0**
Public Safety & Transportation voted No Action Necessary 8-0

Note: The Public Safety & Transportation and the Programs & Services Committees met jointly on items #443-16 and #443-16(2).

Chair Ciccone stated that on January 18, 2017, the Public Safety & Transportation and the Programs & Services Committees met jointly on item #443-16 as well as #443-16(2) where both items were held for a future discussion within the Committees. Tonight, public comment will not be accepted as comments were received that evening.

Chair Ciccone then stated that he would expect an action of no action necessary on this version due to docket item #443-16(3) being docketed and being discussed this evening.

Without discussion, Councilor Cote made the motion for no action necessary in the Public Safety & Transportation Committee. Committee members agreed 8-0. A motion was made for no action necessary in the Programs & Services Committee. Committee members agreed 6-0.

REFERRED TO PROGRAM & SERVICES AND PUBLIC SAFETY COMMITTEES

#443-16(2) Ordinance amendment to protect undocumented residents

COUNCILORS ALBRIGHT, AUCHINCLOSS, HESS-MAHAN, NORTON, CROSSLEY, BROUSAL-GLASER, HARNEY, FULLER, LEARY AND DANBERG, proposing an amendment to the City of Newton Revised Ordinances to protect undocumented residents which at a minimum does the following:

1) No city official will request or seek information regarding a person's immigration status.
2) No city official will report to, respond to or cooperate with Immigration Customs Enforcement with regard to status of any persons who has contact with a city official or employee except in the case where that person has been convicted of a felony, is on a terrorist watch list, poses a serious substantive threat to public safety, or is compelled to by operation of law except as required by law. [12/16/16 @ 9:11 AM]

Action: **Program & Services voted No Action Necessary 6-0**
Public Safety & Transportation voted No Action Necessary 8-0

Note: The Public Safety & Transportation and the Programs & Services Committees met jointly on items #443-16 and #443-16(2).

Chair Ciccone stated that on January 18, 2017, the Public Safety & Transportation and the Programs & Services Committees met jointly on item #443-16 as well as #443-16(2) where both items were held for a future discussion within the Committees. Tonight, public comment will not be accepted as comments were received that evening.

Chair Ciccone then stated that he would expect an action of no action necessary on this version due to docket item #443-16(3) being docketed and being discussed this evening.

Without discussion, Councilor Yates made the motion for no action necessary in the Public Safety & Transportation Committee. Committee members agreed 8-0. Councilor Hess-Mahan made a motion for no action necessary in the Programs & Services Committee. Committee members agreed 6-0.

Referred to Program & Services and Public Safety Committees

#443-16(3) Ordinance amendment to create a "Welcoming City" Ordinance

HIS HONOR THE MAYOR, CHIEF OF POLICE, PRESIDENT LENNON, COUNCILOR ALBRIGHT, AUCHINCLOSS, BLAZAR, BROUSAL-GLASER, CROSSLEY, DANBERG, FULLER, HARNEY, HESS-MAHAN, KALIS, LAREDO, LEARY, LIPOF, NORTON, RICE, SANGIOLO AND FORMER MAYOR COHEN requesting an ordinance amendment that reaffirms the City's commitment to fair treatment for all and codifies current community policing practices. One of the city's most important objectives is to enhance relationships with all residents and make all residents, workers and visitors feel safe and secure regardless of immigration status.

Action: **Program & Services Approved 6-0**
Public Safety & Transportation Approved 6-2-0, Ciccone and Cote opposed

Note: At the City Council meeting on February 6, 2017, Councilor Schwartz requested to be added as a co-docketer to this item.

The Public Safety & Transportation and the Programs & Services Committees met jointly on this item. as well as #443-16 and #443-16(2).

Chief David MacDonald, Newton Police Department; Chief Operating Officer, Dori Zaleznik, City Solicitor, Donnalyn Khan and Former Mayor Cohen joined the Committees for discussion on this item.

Councilor Albright said that city staff and City Councilors have been working on this ordinance for some time. She stated that this has been a very fulfilling experience. City Councilors, city staff, Chief MacDonald and Former Mayor Cohen all came together working diligently to agree on ordinance language that she hopes all can support.

Former Mayor Cohen stated that the ordinance is designed to protect immigrants who are living peaceful and productive lives in the city. The ordinance is an amendment to the City of Newton Ordinances, revised 2012, Chapter 2, Article VII.

Former Mayor Cohen discussed the "Welcoming City" Ordinance and stated the following:

Sec 2-400. Purpose and Intent. A statement of purpose it is a general statement that does not contain any specific rights or duties or prohibitions but rather a statement of the intent of the drafters of the ordinance.

Sec 2-401. Definitions. A section of seven definitions. These definitions are straightforward.

Sec 2-402. Prohibitions. The City basically will not identify, investigate, arrest, detain or continue to detain a person solely on the belief that the person is not presently legal in the United States. There are certain exceptions, which will be discussed in Sec. 2-403. The idea of this section and Sec. 403 is to protect the rights and the ability of immigrants to live peacefully among us while at the same time ensuring the safety of the residents of the City of Newton and those who work or pass thru the city as well.

Section B. The City will not respond to or detain people based on federal Immigration detainers or administrative warrants or any other order or request in any form.

Section C. A safeguard about release. If a person is being released, then the city will not notify federal authorities about that release date.

Section D. Similarly provides another restriction on the release of information.

Section E. The City will not cooperate or enforce any federal program requiring the registration of individuals on the basis of religious affiliation or ethnic or national origin.

Sec 2-403. Exceptions to Prohibitions. In part…. In addition, the Newton Police Department may detain or arrest an individual in cooperation with ICE … with the following four criteria. If any of those four criteria are available, they may cooperate with the Federal Officials. 1) the individual has an outstanding criminal warrant, 2) has a prior conviction for a serious violent felony, 3) is being investigated for terrorism and 4) if there is a law enforcement or public safety purpose that does not relate to the enforcement of civil immigration law. The sponsors of the ordinance believe that it protects public safety. Any action by our Police Department will be based on valid Massachusetts arrest authority and is consistent with the 4th Amendment to the United States Constitution and Article XIV of the Massachusetts Constitution.

Sec 2-404. Requesting or Maintaining Information Prohibited. The city will keep information, which is required by valid state, or federal law that is to take account of the United States Code, Title 8, Section 1373 of the Federal Code, Communication between government agencies and the Immigration and Naturalization Service, which requires certain actions regarding information.

Sec 2-405. Use of City Resources Prohibited. The city will not expend city resources in the pursuit of gathering citizen information except when it falls under the four criteria in section 2-403.

Sec 2-406. Ordinance Not to Conflict with Federal Law. This ordinance is not to conflict with federal law.

Sec 2-407. No Private Right of Action. There is no private right of action based on this. If an error is made by the city, by overreaching its authority, there is no cause of action under this ordinance to sue the city.

Sec 2-408. Severability. If any portion of this ordinance is found unconstitutional, it is the intent of the City Council that the remainder of the ordinance will go into effect.

Councilor Baker stated it is remarkable to see many residents who are here tonight and communications the City Councilors have received. He feels the outpouring represents the sense that it is very important that the city stand with the residents and those who are not who may be affected by a change of administration. An important opportunity for the city to preserve is that during the past week, residents are able to enter the City of Boston safely. It is also important to make sure that this "Welcoming City" draft ordinance work as successfully as possible.

Councilor Baker said that he has questions regarding the language, which he hopes will enhance the quality of the draft. He stated that Former Mayor Cohen indicated that the draft implied agency or agents; this is fairly broad.

Councilor Baker suggested the following ordinance changes. **His suggestions are in bold and underlined.**

Sec 2-401.Definitions

FROM: "Agency" means every City department, division, commission, council, committee, board, other body, or person established by authority of an ordinance, executive order, or City Council order.
TO: **This draft does not include the words City Council and does not include the word the Mayor. In addition, the Charter establishes the City Council.**

Replace the word Council with City Council. It says Council but goes on to talk about a Council established pursuant to an Ordinance, we are established by Charter. It would be pretty anomalous for the City Council to pass an ordinance that doesn't bind itself. I hope that there is an opportunity to make a scriveners correction to clarify that it would be entertained as part to the drafting process.

Add the word Mayor. The ordinance does not apply to the Mayor. It applies to all the divisions and departments but not the Chief Executive and seems anomalous in passing an ordinance that binds every official in the City but not the Chief Executive. If this is not the intent, it would benefit from clarification and inclusion.

FROM: "Agent" means any person employed by or acting in behalf of an agency but shall not include independent sub-contractors of the City.
TO: "Agent" means any person employed by or acting **on behalf of an agency in their official capacity** but shall not include independent sub-contractors of the City.

Boards and Commissions can include citizen appointees. The ordinance is not just for city employees but some Boards and Commissions may be attorneys representing citizens who have to make inquiry about their status. He is hopeful that there is willingness to entertain a correction to indicate that **staff acting on behalf of a Board or Commission and their official capacity.**

Sec 2-405. Use of City Resources Prohibited
This section refers to section 2-403. **It is important that the exception also apply to section 2-406.**

Former Mayor Cohen noted Councilor Baker's ordinance suggestions correcting Agency and Agent definitions. **His responses are in bold and underlined.**

Agency - **to include the words City Council and Mayor.** The Executive is a city department but if you wish to point out the Mayor and City Council that is fine.

Agent – **change from in to on behalf of an agency in their official capacity**. The word Agent means an individual acting on behalf of an agency. This could be the member of the Commission or it could be staff.

Boards and Commissions –**on behalf of an agency in their official capacity.**

Councilor Baker provided Committee members with copies of the U.S. Department of Justice memorandum on the Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C.

Section 1373 by Grant Recipients and the Federal Statute 8 U.S. Code, Section 1373 Communication between government agencies and the Immigration and Naturalization Service. Both documents are attached to this report.

Councilor Baker stated in reference to the United States Code, Title 8, Section 1373, Communication between government agencies and the Immigration and Naturalization Service states the following:

A) IN **GENERAL.** Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

The draft ordinance states that those affiliated with the city cannot do this and that we have to also comply with valid federal law. Valid federal law states the city cannot restrict any communication that would relate to this.

An advisor from the Obama Administration Justice Department refers to grant recipients indicates that one of the values of solving this issue is that they advise that grant recipients be advised. The request from the INS had been voluntary in the sense that they do not require compliance when asking for specific assistance when requesting a detainer.

It is important that grant recipients understand the provisions of federal law. It is important that grant recipients clearly communicate to the public employees and officials cannot be prohibited or restricted from sending citizenship or immigration status information to ICE. The city must follow federal law otherwise; the city would be in a difficult situation. It is vital that the provisions of the Federal Statute 8 U.S. Code, Section 1373 be appended to and made part of the ordinance allowing any city official who is otherwise concerned about what he/she is allowed to do under federal law, without violating federal law.

Former Mayor Cohen stated that he would support appending the federal law to the ordinance.

City Solicitor Khan stated that the city ordinance references many different state and federal laws that are not appended. The city references the laws in the back of the ordinance allowing interested people the opportunity to look up the federal and state laws. If the ordinance is appended with the state and federal laws, she feels they would overburden the ordinance. She then suggested leaving the reference in the statute and as in all the City Ordinances if there is a particular statutory reference within it people are obliged to know what the ordinance states. It would be appropriate to distribute or train employees on the federal law. She then stated that she does not feel it is appropriate to append a federal law to an ordinance.

Councilor Baker said that it is important in this case, at this time to append the federal law to the City Ordinance. By the provisions of the ordinance, he does not want any community member to be misled that they are allowed to violate the Federal Statute 8 U.S. Code, Section 1373. It is necessary for all to understand and know what Section 1373 states. He reiterated the importance and requested that the

Federal Statute 8 U.S. Code, Section 1373 be appended to the ordinance. He then said that it is the City Council's decision if the Federal Statute be appended to the ordinance.

City Solicitor Khan provided an example of a section of this draft ordinance that would not be appended. She stated that under Sec 2-401. Definitions. "Serious violent felony" means a felony crime as defined in M.G.L. c. 265, *Crimes Against the Person*. This is a very long section of the Massachusetts General Law including many crimes. It would be the City Council's decision.

Councilor Hess-Mahan stated that when drafting this ordinance the city was very careful that the definitions of City Agent or City Agency would not be violating any federal law to the extent that they were specifically sited and briefly summarized the provisions of Federal Statute 8 U.S. Code, Section 1373 and what type of information is allowed to be shared which are citizenship and immigration status. He feels that appending the statute (which may be amended) to the ordinance may be difficult. A clear and simple ordinance is best.

Councilor Baker said that the U.S. Department of Justice memorandum on the Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. Section 1373 by Grant Recipients allows additional protection to the city, a very explicit document covering the rules at the federal level.
It is important that the city not leave any uncertainty as to what the federal law requires by relying only upon a reference to the law, rather than making those involved aware of its contents.

Councilor Fuller said that the docketers of the original items always believed that the Newton Police Department has always focused on and should continue their focus on keeping Newton a safe city. The police department should not get involved in civil immigration policies. She then said that the City Councilors did not want a resident or a visitor to feel afraid to report any crime because of their immigration status. If people are afraid to speak, it makes the city feel unsafe. She feels that a "Welcoming City" Ordinance is necessary and is appropriate to accept.

Councilor Fuller asked Chief MacDonald his thoughts on the "Welcoming City" Ordinance and the department's ability and authority to handle any criminal behavior by an undocumented person. She is hopeful that all City Councilors will approve this "Welcoming City" Ordinance to continue keeping the City of Newton safe and allow undocumented immigrants the opportunity to interact with the police department. Federal, civil and immigration law is not being applied. People will only be detained if they have a criminal behavior.

Chief MacDonald stated that when the department received a detainer from Immigration & Customs Enforcement the person was perceived under the Newton Police Department by violating state law. The Newton Police Department is mandated in keeping all who travel in and throughout the city safe. The department does not ask an individual their immigration status. Individuals in the custody of the department are there due to violating Mass General Laws. Chief MacDonald provided examples and stated that the language in the "Welcoming City" Ordinance allows the department to continue acting and fulfilling their duties as they do.

Chief Operating Officer Dori Zaleznik stated when City Councilors, city staff, Chief MacDonald and Former Mayor Cohen were working on the ordinance, they asked if there was anything from keeping the Newton Police Department from acting as they currently do.

Councilor Norton referenced President Trump's Executive Order and actions that have been taken. She asked the Executive Department and Chief MacDonald if they feel the "Welcoming City" Ordinance prohibits all these types of actions? She then stated that she supports the "Welcoming City" Ordinance.

City Solicitor Khan answered yes; and stated that the Newton Police Department will not stop or detain individuals based on immigration status alone and this ordinance does not propose this.

Councilor Cote said that it is remarkable to see many residents here tonight. He explained the role of the City Councilor's who are responsible for City laws. The City Councilor's should not take up items that are partisan issues. The previous items were docketed hoping to compromise and looked for a solution that was not an issue in the municipal level of the City of Newton. The Newton Police Department and the City of Newton must follow federal laws. The Newton Police Department did not and does not have a problem with individuals. He said that it is concerning that at the previous discussion people felt like they had to choose a side and some expressed fear. Individuals should never feel fearful to contact the police.

Councilor Gentile said that tonight's discussion is important to members of the community. He stated that he did not request being a co-docketer to this item at the time due to the need for additional time to understand and review the proposed ordinance. His concerns are to ensure the City Council pass an ordinance that protects all residents of the City of Newton and allows the Police Department the ability to do their job and keep all people safe. Councilor Gentile referenced a resident's letter requesting that the City Council receive additional information before the ordinance is passed. The resident feels the City Council should particularly be cautious about passing this ordinance if the City is put in a position of opposing federal laws and regulations. Councilor Gentile wants to assure all residents that he feels this ordinance does not put the city in that position.

Councilor Gentile provided Committee members with a copy of the FY16 Federal Funds Receipts for the City of Newton, attached to this report.

Councilor Gentile stated that as Chair of the Finance Committee, he has been very concerned about possible ramifications on the final version of this ordinance. He will not request that this item be referred to the Finance Committee as the ordinance is written. He stated that he would not support something if he felt that that large sum of money was in jeopardy. The City receives between $11 to $12 million dollars per year from the Federal Government to provide grants for School Federal Grant Fund, Federal Community Development Grants, Federal HOME Grant Fund, Municipal Federal Grant Fund and School Food Service Meal Reimbursement.

Chair Ciccone expressed his concerns and stated that the city should assist in helping immigrants to become legal giving them the opportunity to reside legally.

On February 15, 2017, Councilor Albright provided a copy of the Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions from the State of New York, attached to this report.

Without further discussion, Councilor Fuller made the motion to approve the creation of a "Welcoming City" Ordinance in the Public Safety & Transportation Committee. Committee members agreed 6-2-0, Councilors Cote and Ciccone opposed.

Councilor Hess-Mahan made the same motion to approve the creation of a "Welcoming City" Ordinance in the Programs & Services Committee. Committee members agreed 6-0.

At approximately 9:30 p.m., the Committees adjourned.

Respectfully submitted,

Allan Ciccone, Jr. Chair

~~LAW ENFORCEMENT SENSITIVE~~

May 31, 2016 [Re-posted to oig.justice.gov on September 23, 2016, due to a corrected entry in the Appendix, see page 12.]

MEMORANDUM FOR KAROL V. MASON
ASSISTANT ATTORNEY GENERAL
FOR THE OFFICE OF JUSTICE PROGRAMS

FROM: MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT: Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients

This is in response to your e-mail dated April 8, 2016, wherein you advised the Office of the Inspector General (OIG) that the Office of Justice Programs (OJP) had "received information that indicates that several jurisdictions [receiving OJP and Office of Violence Against Woman (OVW) grant funds] may be in violation of 8 U.S.C. § 1373." With the e-mail, you provided the OIG a spreadsheet detailing Department grants received by over 140 state and local jurisdictions and requested that the OIG "investigate the allegations that the jurisdictions reflected in the attached spreadsheet, who are recipients of funding from the Department of Justice, are in violation of 8 U.S.C. Section 1373." In addition to the spreadsheet, you provided the OIG with a letter, dated February 26, 2016, to Attorney General Loretta E. Lynch from Congressman John Culberson, Chairman of the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, regarding whether Department grant recipients were complying with federal law, particularly 8 U.S.C. § 1373 (Section 1373). Attached to Chairman Culberson's letter to the Attorney General was a study conducted by the Center for Immigration Studies (CIS) in January 2016, which concluded that there are over 300 "sanctuary" jurisdictions that refuse to comply with U.S. Immigration and Customs Enforcement (ICE) detainers or otherwise impede information sharing with federal immigration officials.[1]

[1] Your e-mail also referenced and attached the OIG's January 2007 report, *Cooperation of SCAAP [State Criminal Alien Assistance Program] Recipients in the Removal of Criminal Aliens from the United States*. In that Congressionally-mandated report, the OIG was asked, among other things, to assess whether entities receiving SCAAP funds were "fully cooperating" with the Department of Homeland Security's efforts to remove undocumented criminal aliens from the United States, and whether SCAAP recipients had in effect policies that violated Section

The purpose of this memorandum is to update you on the steps we have undertaken to address your question and to provide you with the information we have developed regarding your request. Given our understanding that the Department's grant process is ongoing, we are available to discuss with you what, if any, further information you and the Department's leadership believe would be useful in addressing the concerns reflected in your e-mail.

OIG Methodology

At the outset, we determined it would be impractical for the OIG to promptly assess compliance with Section 1373 by the more than 140 jurisdictions that were listed on the spreadsheet accompanying your referral. Accordingly, we judgmentally selected a sample of state and local jurisdictions from the information you provided for further review. We started by comparing the specific jurisdictions cited in the CIS report you provided to us with the jurisdictions identified by ICE in its draft *Declined Detainer Outcome Report*, dated December 2, 2014.[2] Additionally, we compared these lists with a draft report prepared by ICE that identified 155 jurisdictions and stated that "all jurisdictions on this list contain policies that limit or restrict cooperation with ICE and, as of Q3 FY 2015, have declined detainers."[3] From this narrowed list of jurisdictions, we determined, using the spreadsheet provided with your e-mail, which jurisdictions had active OJP and OVW awards as of March 17, 2016, the date through which you provided award information, and received fiscal year (FY) 2015 State Criminal Alien Assistance Program (SCAAP) payments. Lastly, we considered, based on the spreadsheet, the total dollars awarded and the number of active grants and payments made as of March 17,

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1373. As we describe later in this memorandum, the information we have learned to date during our recent work about the present matter differs significantly from what OIG personnel found nearly 10 years ago during the earlier audit. Specifically, during the 2007 audit, ICE officials commented favorably to the OIG with respect to cooperation and information flow they received from the seven selected jurisdictions, except for the City and County of San Francisco. As noted in this memorandum, we heard a very different report from ICE officials about the cooperation it is currently receiving. Additionally, our 2007 report found that the SCAAP recipients we reviewed were notifying ICE in a timely manner of aliens in custody, accepting detainers from ICE, and promptly notifying ICE of impending releases from local custody. By contrast, as described in this memorandum, all of the jurisdictions we reviewed had ordinances or policies that placed limits on cooperation with ICE in connection with at least one of the three areas assessed in 2007.

[2] At the time of our sample selection we only had a draft version of this report. We later obtained an updated copy which was provided to Congress on April 16, 2016. Although it was provided to Congress, this report was also marked "Draft." The updated draft version of the report did not require us to alter our sample selection.

[3] This version of the declined detainer report covered declined detainers from January 1, 2014 through June 30, 2015.

2016, and sought to ensure that our list contained a mix of state and local jurisdictions.

Using this process, we judgmentally selected 10 state and local jurisdictions for further review: the States of Connecticut and California; City of Chicago, Illinois; Clark County, Nevada; Cook County, Illinois; Miami-Dade County, Florida; Milwaukee County, Wisconsin; Orleans Parish, Louisiana; New York, New York; and Philadelphia, Pennsylvania. These 10 jurisdictions represent 63 percent of the total value of the active OJP and OVW awards listed on the spreadsheet as of March 17, 2016, and FY 2015 SCAAP payments made by the Department.

Section 1373 states in relevant part:

(a) **In General**. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) **Additional authority of government entities.** Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

According to the legislative history contained in the House of Representatives Report, Section 1373 was intended "to give State and local officials the authority to communicate with the Immigration and Naturalization Service (INS) regarding the presence, whereabouts, and activities of illegal aliens. This section is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS."[4]

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[4] House of Representatives Report, *Immigration in the National Interest Act of 1995,* (H.R. 2202), 1996, H. Rept. 104-469, https://www.congress.gov/104/crpt/hrpt469/CRPT-

For the 10 selected jurisdictions, we researched the local laws and policies that govern their interactions with ICE – particularly those governing the ability of the jurisdictions' officers to receive or share information with federal immigration officials. We then compared these local laws and policies to Section 1373 in order to try to determine whether they were in compliance with the federal statute. We also spoke with ICE officials in Washington, D.C., to gain their perspective on ICE's relationship with the selected jurisdictions and their views on whether the application of these laws and policies was inconsistent with Section 1373 or any other federal immigration laws.

The sections that follow include our analysis of the selected state and local laws and policies.

State and Local Cooperation with ICE

A primary and frequently cited indicator of limitations placed on cooperation by state and local jurisdictions with ICE is how the particular state or local jurisdiction handles immigration detainer requests issued by ICE, although Section 1373 does not specifically address restrictions by state or local entities on cooperation with ICE regarding detainers.[5] A legal determination has been made by the Department of Homeland Security (DHS) that civil immigration detainers are voluntary requests.[6] The ICE officials with whom we spoke stated that since the detainers are considered to be voluntary, they are not enforceable against jurisdictions which do not comply, and these ICE officials stated further that state and local jurisdictions throughout the United States vary significantly on how they handle such requests.

In our selected sample of state and local jurisdictions, as detailed in the Appendix, each of the 10 jurisdictions had laws or policies directly related to how those jurisdictions could respond to ICE detainers, and each limited in some way the authority of the jurisdiction to take action with regard to ICE detainers. We found that while some honor a civil immigration detainer request when the subject meets certain conditions, such as prior felony

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104hrpt469-pt1.pdf (accessed May 24, 2016).

[5] A civil immigration detainer request serves to advise a law enforcement agency that ICE seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. 8 C.F.R. § 287.7(a)

[6] Several courts have reached a similar conclusion about the voluntary nature of ICE detainers. See *Galarza v, Szalczyk et al*, 745 F.3d 634 (3rd Cir. 2014) (noting that all Courts of Appeals to have considered the character of ICE detainers refer to them as "requests," and citing numerous such decisions); and *Miranda-Olivares v. Clackamas County*, 2014 1414305 (D. Or. 2014).

convictions, gang membership, or presence on a terrorist watch list, others will not honor a civil immigration detainer request, standing alone, under any circumstances. ICE officials told us that because the requests are voluntary, local officials may also consider budgetary and other considerations that would otherwise be moot if cooperation was required under federal law.

We also found that the laws and policies in several of the 10 jurisdictions go beyond regulating responses to ICE detainers and also address, in some way, the sharing of information with federal immigration authorities. For example, a local ordinance for the City of Chicago, which is entitled "Disclosing Information Prohibited," states as follows:

> Except as otherwise provided under applicable federal law, no agent or agency shall disclose information regarding the citizenship or immigration status of any person unless required to do so by legal process or such disclosure has been authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or guardian. *Chicago Code, Disclosing Information Prohibited § 2-173-030.*

The ordinance's prohibition on a city employee providing immigration status information "unless required to do so by legal process" is inconsistent with the plain language of Section 1373 prohibiting a local government from restricting a local official from sending immigration status information to ICE. The "except as otherwise provided under applicable federal law" provision, often referred to as a "savings clause," creates a potential ambiguity as to the proper construction of the Chicago ordinance and others like it because to be effective, this "savings clause" would render the ordinance null and void whenever ICE officials requested immigration status information from city employees. Given that the very purpose of the Chicago ordinance, based on our review of its history, was to restrict and largely prohibit the cooperation of city employees with ICE, we have significant questions regarding any actual effect of this "savings clause" and whether city officials consider the ordinance to be null and void in that circumstance.[7]

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[7] The New Orleans Police Department's (NOPD) policy dated February 28, 2016, and entitled "Immigration Status" also seemingly has a "savings clause" provision, but its language likewise presents concerns. In your April 8 e-mail to me, you attached questions sent to the Attorney General by Sen. Vitter regarding whether the NOPD's recent immigration policy was in compliance with Section 1373. Paragraph 12 of the NOPD policy is labeled "Disclosing Immigration Information" and provides that "Members shall not disclose information regarding the citizenship or immigration status of any person unless:

(a) Required to do so by federal or state law; or

(b) Such disclosure has been authorized in writing by the person who is the subject of the request for information; or

In addition, whatever the technical implication of the clause generally referencing federal law, we have concerns that unless city employees were made explicitly aware that the local ordinance did not limit their legal authority to respond to such ICE requests, employees likely would be unaware of their legal authority to act inconsistently with the local ordinance. We noted that in connection with the introduction of this local ordinance the Mayor of Chicago stated, "[w]e're not going to turn people over to ICE and we're not going to check their immigration status, we'll check for criminal background, but not for immigration status."[8] We believe this stated reason for the ordinance, and its message to city employees, has the potential to affect the understanding of

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(c) The person is a minor or otherwise not legally competent, and disclosure is authorized in writing by the person's parent or guardian.

Sub-section (a) applies only when an NOPD employee has an affirmative obligation, i.e., is "required" by federal law, to disclose information regarding citizenship or immigration status. Section 1373, however, does not "require" the disclosure of immigration status information; rather, it provides that state and local entities shall not prohibit or restrict the sharing of immigration status information with ICE. Accordingly, in our view, sub-section (a) of the NOPD policy would not serve as a "savings clause" in addressing Section 1373. Thus, unless the understanding of NOPD's employees is that they are not prohibited or restricted from sharing immigration status information with ICE, the policy would be inconsistent with Section 1373. We did not consider selecting the City of New Orleans to evaluate in this memorandum because it was not listed as a grant recipient on the spreadsheet you provided.

Similarly, the City and County of San Francisco, CA administrative code, Section 12H.2, is entitled "Immigration Status" and provides, "No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by federal or State statute, regulation or court decision." As with the NOPD policy, a "savings clause" that only applies when a city employee is "required" by federal law to take some action would not seem to be effective in precluding the law from running afoul of Section 1373, which "requires" nothing, but instead mandates that state and local entities not prohibit, or in any way restrict, the sharing of immigration status information with ICE. Thus, as with the NOPD policy, unless the understanding of San Francisco employees is that they are permitted to share immigration status information with ICE, the policy would be inconsistent with Section 1373. According to news reports, last week the San Francisco Board of Supervisors reaffirmed its policy restricting local law enforcement's authority to assist ICE, except in limited circumstances. Curtis Skinner, "San Francisco Lawmakers Vote to Uphold Sanctuary City Policy," *Reuters*, May 24, 2016, http://www.reuters.com/article/us-sanfrancisco-immigration-idUSKCN0YG065 (accessed May 26, 2016). We did not consider selecting the City and County of San Francisco to evaluate in this memorandum because it was not listed as a grant recipient on the spreadsheet you provided.

[8] Kristen Mack, "Emanuel Proposes Putting Nondetainer Policy On Books," *Chicago Tribune*, July 11, 2012, http://articles.chicagotribune.com/2012-07-11/news/ct-met-rahm-emanuel-immigrants-0711-2012 (accessed May 24, 2017).

local officials regarding the performance of their duties, including the applicability of any restrictions on their interactions and cooperation with ICE.

Similarly, we have concerns that other local laws and policies, that by their terms apply to the handling of ICE detainer requests, may have a broader practical impact on the level of cooperation afforded to ICE by these jurisdictions and may, therefore, be inconsistent with at least the intent of Section 1373.[9] Specifically, local policies and ordinances that purport to be focused on civil immigration detainer requests, yet do not explicitly restrict the sharing of immigration status information with ICE, may nevertheless be affecting ICE's interactions with the local officials regarding ICE immigration status requests. We identified several jurisdictions with policies and ordinances that raised such concerns, including Cook County, Orleans Parish, Philadelphia, and New York City.

For example, the Cook County, Illinois, detainer policy states, "unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty." Although this policy falls under the heading "Section 46-37 – Policy for responding to ICE Detainers" and does not explicitly proscribe sharing immigration status information with ICE, the portion of the prohibition relating to personnel expending their time responding to ICE inquiries could easily be read by Cook County officials and officers as more broadly prohibiting them from expending time responding to ICE requests relating to immigration status. This possibility was corroborated by ICE officials who told us that Cook County officials "won't even talk to us [ICE]."

In Orleans Parish, Louisiana, Orleans Parish Sheriff's Office (OPSO) policy on "ICE Procedures" states that, "OPSO officials shall not initiate any immigration status investigation into individuals in their custody or affirmatively provide information on an inmate's release date or address to ICE." While the latter limitation applies by its terms to information related to release date or address, taken in conjunction with the prior ban on initiating immigration status investigations, the policy raises a similar concern as to the

[9] A reasonable reading of Section 1373, based on its "in any way restrict" language, would be that it applies not only to the situation where a local law or policy specifically prohibits or restricts an employee from providing citizenship or immigration status information to ICE, but also where the actions of local officials result in prohibitions or restrictions on employees providing such information to ICE.

limits it places on the authority of OPSO officials to share information on that topic with ICE.

In Philadelphia, Pennsylvania, the Mayor, on January 4, 2016, issued an executive order that states, in part, that notice of the pending release of the subject of an ICE immigration detainer shall not be provided to ICE "unless such person is being released after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant." According to news reports, the purpose of the order was to bar almost all cooperation between city law enforcement and ICE.[10]

In New York City (NYC), a law enacted in November 2014 restricts NYC Department of Corrections personnel from communicating with ICE regarding an inmate's release date, incarceration status, or upcoming court dates unless the inmate is the subject of a detainer request supported by a judicial warrant, in which case personnel may honor the request. The law resulted in ICE closing its office on Riker's Island and ceasing operations on any other NYC Department of Corrections property.

Although the Cook County, Orleans Parish, Philadelphia, and New York City local policies and ordinances purport to be focused on civil immigration detainer requests, and none explicitly restricts the sharing of immigration status with ICE, based on our discussions with ICE officials about the impact these laws and policies were having on their ability to interact with local officials, as well as the information we have reviewed to date, we believe these policies and others like them may be causing local officials to believe and apply the policies in a manner that prohibits or restricts cooperation with ICE in all respects.[11] That, of course, would be inconsistent with and prohibited by Section 1373.[12]

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[10] Michael Matza, "Kenney restores 'sanctuary city' status," *Philadelphia Inquirer*, January 6, 2016, http://articles.philly.com/2016-01-06/news/69541175_1_south-philadelphia-secure-communities-ice (accessed May 24, 2016) and "Kenney rejects U.S. request to reverse 'sanctuary city' status," *Philadelphia Inquirer, May 4, 2016,* http://www.philly.com/philly/news/20160504_Kenney_rejects_Homeland_Security_s_request_to_reverse_Philadelphia_s__sanctuary_city__status.html (accessed May 24, 2016)

[11] For example, the Newark, NJ police department issued a "Detainer Policy" instructing all police personnel that "There shall be no expenditure of any departmental resources or effort by on-duty personnel to comply with an ICE detainer request." More generally, Taos County, NM detention center policy states: "There being no legal authority upon which the United States may compel expenditure of country resources to cooperate and enforce its immigration laws, there shall be no expenditure of any county resources or effort by on-duty staff for this purpose except as expressly provided herein."

[12] The ICE officials we spoke with noted that no one at DHS or ICE has made a formal legal determination whether certain state and local laws or policies violate Section 1373, and we are unaware of any Department of Justice decision in that regard. These ICE officials were

Effect on Department of Justice 2016 Grant Funding

We note that, in March 2016, OJP notified SCAAP and JAG applicants about the requirement to comply with Section 1373, and advised them that if OJP receives information that an applicant may be in violation of Section 1373 (or any other applicable federal law) that applicant may be referred to the OIG for investigation. The notification went on to state that if the applicant is found to be in violation of an applicable federal law by the OIG, the applicant may be subject to criminal and civil penalties, in addition to relevant OJP programmatic penalties, including cancellation of payments, return of funds, participation in the program during the period of ineligibility, or suspension and debarment.

In light of the Department's notification to grant applicants, and the information we are providing in this memorandum, to the extent the Department's focus is on ensuring that grant applicants comply with Section 1373, based on our work to date we believe there are several steps that the Department can consider taking:

- Provide clear guidance to grant recipients regarding whether Section 1373 is an "applicable federal law" that recipients would be expected to comply with in order to satisfy relevant grant rules and regulations;[13]

- Require grant applicants to provide certifications specifying the applicants' compliance with Section 1373, along with documentation sufficient to support the certification.

- Consult with the Department's law enforcement counterparts at ICE and other agencies, prior to a grant award, to determine whether, in their view, the applicants are prohibiting or restricting employees from sharing with ICE information regarding the citizenship or immigration status of individuals, and are therefore not in compliance with Section 1373.

- Ensure that grant recipients clearly communicate to their personnel the provisions of Section 1373, including those

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also unaware of any legal action taken by the federal government against a state or local jurisdiction to require cooperation.

[13] We note that AAG Kadzik's letter to Chairman Culberson dated March 18, 2016, states that Section 1373 "could" be an applicable federal law that with which grant recipients must comply in order to receive grant funds, not that it is, in fact, an applicable federal law.

employees cannot be prohibited or restricted from sending citizenship or immigration status information to ICE.

These steps would not only provide the Department with assurances regarding compliance with Section 1373 prior to a grant award, but also would be helpful to the OIG if the Department were to later refer to the OIG for investigation a potential Section 1373 violation (as the Department recently warned grant applicants it might do in the future).

We would be pleased to meet with you and Department's leadership to discuss any additional audit or investigative efforts by the OIG that would further assist the Department with regard to its concerns regarding Section 1373 compliance by state and local jurisdictions. Such a meeting would allow us to better understand what information the Department's management would find useful so that the OIG could assess any request and consult with our counterparts at the Department of Homeland Security Office of the Inspector General, which would necessarily need to be involved in any efforts to evaluate the specific effect of local policies and ordinances on ICE's interactions with those jurisdictions and their compliance with Section 1373.

Thank you for referring this matter to the OIG. We look forward to hearing from you regarding a possible meeting.

APPENDIX

OIG Approach

At the outset, we determined it would be impractical for the OIG to promptly assess compliance with Section 1373 by the more than 140 jurisdictions that were listed on the spreadsheet accompanying your referral. Accordingly, we judgmentally selected a sample of state and local jurisdictions from the information you provided for further review. We started by comparing the specific jurisdictions cited in the CIS report you provided to us with the jurisdictions identified by ICE in its draft *Declined Detainer Outcome Report,* dated December 2, 2014.[14] Additionally, we compared these lists with a draft report prepared by ICE that identified 155 jurisdictions and stated that "all jurisdictions on this list contain policies that limit or restrict cooperation with ICE and, as of Q3 FY 2015, have declined detainers."[15] From this narrowed list of jurisdictions, we determined, using the spreadsheet that you provided with your e-mail, which jurisdictions had active OJP and OVW awards as of March 17, 2016, the date through which you provided award information, and received fiscal year (FY) 2015 State Criminal Alien Assistance Program (SCAAP) payments. Lastly, we considered, based on the spreadsheet, the total dollars awarded and the number of active grants and payments made as of March 17, 2016, and sought to ensure that our list contained a mix of state and local jurisdictions. Using this process we selected the 10 jurisdictions listed in the following table for further review. The dollar figure represents 63 percent of the active OJP awards as of March 17, 2016, and FY 2015 SCAAP payments made by the Department.

Jurisdiction	Total Award Amounts Reported by OJP
State of Connecticut	$69,305,444
State of California	$132,409,635
Orleans Parish, Louisiana	$4,737,964
New York, New York	$60,091,942
Philadelphia, Pennsylvania	$16,505,312
Cook County, Illinois	$6,018,544
City of Chicago, Illinois	$28,523,222
Miami-Dade County, Florida	$10,778,815
Milwaukee, Wisconsin	$7,539,572
Clark County, Nevada	$6,257,951
TOTAL	**$342,168,401**

Source: OJP

[14] At the time of our sample selection we only had a draft version of this report. We later obtained an updated copy which was provided to Congress on April 16, 2016. Although it was provided to Congress, this report was also marked "Draft." The updated draft version of the report did not require us to alter our sample selection.

[15] This version of the declined detainer report covered declined detainers from January 1, 2014 through June 30, 2015.

The following table lists each of the jurisdictions selected for review by the OIG and the key provisions of its laws or policies related to ICE civil immigration detainer requests and the sharing of certain information with ICE, if applicable.

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
State of Connecticut **The statement of Connecticut law has been corrected from a prior version of this memorandum. This correction does not affect the analysis or conclusions of this memorandum. We regret the error, and have notified those to whom we sent the memorandum of the correction.**	*Public Act No. 13-155, An Act Concerning Civil Immigration Detainers …* (b) No law enforcement officer who receives a civil immigration detainer with respect to an individual who is in the custody of the law enforcement officer shall detain such individual pursuant to such civil immigration detainer unless the law enforcement official determines that the individual: (1) Has been convicted of a felony; (2) Is subject to pending criminal charges in this state where bond has not been posted; (3) Has an outstanding arrest warrant in this state; (4) Is identified as a known gang member in the database of the National Crime Information Center or any similar database or is designated as a Security Risk Group member or a Security Risk Group Safety Threat member by the Department of Correction; (5) Is identified as a possible match in the federal Terrorist Screening Database or similar database; (6) Is subject to a final order of deportation or removal issued by a federal immigration authority; or (7) Presents an unacceptable risk to public safety, as determined by the law enforcement officer. (c) Upon determination by the law enforcement officer that such individual is to be detained or released, the law enforcement officer shall immediately notify United States Immigration and Customs Enforcement. If the individual is to be detained, the law enforcement officer shall inform United States Immigration and Customs Enforcement that the individual will be held for a maximum of forty-eight hours, excluding Saturdays, Sundays and federal holidays. If United States Immigration and Customs Enforcement fails to take custody of the individual within such forty-eight-hour period, the law enforcement officer shall release the individual. In no event shall an individual be detained for longer than such forty-eight-hour period solely on the basis of a civil immigration detainer. **Approved June 25, 2013**

[16] Several specific citations to various state and local laws and policies were removed for brevity.

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
State of California	*An act to add Chapter 17.1 (commencing with Section 7282) to Division 7 of Title I of the Government Code, relating to state government….* 7282.5. (a) A law enforcement official shall have discretion to cooperate with federal immigration officials by detaining an individual on the basis of an immigration hold after that individual becomes eligible for release from custody only if the continued detention of the individual on the basis of the immigration hold would not violate any federal, state, or local law, or any local policy, and only under any of the following circumstances … **Effective Date: October 5, 2013.**
Orleans Parish, Louisiana	The Orleans Parish Sheriff's Office (OPSO) shall decline all voluntary ICE detainer requests unless the individual's charge is for one or more of the following offenses: First Degree Murder; Second Degree Murder; Aggravated Rape; Aggravated Kidnapping; Treason; or Armed Robbery with Use of a Firearm. If a court later dismisses or reduces the individual's charge such that the individual is no longer charged with one of the above offenses or the court recommends declining the ICE hold request, OPSO will decline the ICE hold request on that individual. **Orleans Parish Sheriff's Office Index No. 501.15, Updated June 21, 2013.**
New York, New York	Title: *A Local Law to amend the administrative code of the city of New York, in relation to persons not to be detained by the department of correction.* Bill Summary: … The DOC would only be permitted to honor an immigration detainer if it was accompanied by a warrant from a federal judge, and also only if that person had not been convicted of a "violent or serious" crime during the last five years or was listed on a terrorist database. Further, the bill would prohibit DOC from allowing ICE to maintain an office on Rikers Island or any other DOC property and would restrict DOC personnel from communicating with ICE regarding an inmate's release date, incarceration status, or court dates, unless the inmate is the subject of a detainer request that DOC may honor pursuant to the law. **Enacted Date: November 14, 2014, Law No. 2014/058.**

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
Philadelphia, Pennsylvania	*Executive Order No. 5-16 - Policy Regarding U.S. Immigration and Customs Enforcement Agency Detainer Requests…* NOW, THEREFORE, I, JAMES F. KENNEY, Mayor of the City of Philadelphia, by the powers vested in me by the Philadelphia Home Rule Charter, do hereby order as follows: SECTION 1. No person in the custody of the City who otherwise would be released from custody shall be detained pursuant to an ICE civil immigration detainer request pursuant to 8 C.F.R. § 287.7, nor shall notice of his or her pending release be provided, unless such person is being released after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant. **Signed by Philadelphia Mayor, January 4, 2016.**
Cook County, Illinois	*Sec. 46-37- Policy for responding to ICE detainers …* (b) Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty. **Approved and adopted by the President of the Cook County Board of Commissioners on September 7, 2011.**
City of Chicago, Illinois	*Civil Immigration Enforcement Actions – Federal Responsibility §2-173-042 …* (b)(1) Unless an agent or agency is acting pursuant to a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, no agency or agent shall: (A) permit ICE agents access to a person being detained by, or in the custody of, the agency or agent; (B) permit ICE agents use of agency facilities for investigative interviews or other investigative purpose; or (C) while on duty , expend their time responding to

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
	ICE inquiries or communicating with ICE regarding a person's custody status or release date … *Disclosing Information Prohibited § 2-173-030* Except as otherwise provided under applicable federal law, no agent or agency shall disclose information regarding the citizenship or immigration status of any person unless required to do so by legal process or such disclosure has been authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or guardian. **Updated November 8, 2012.**
Miami-Dade County, Florida	*Resolution No. R-1008-13: Resolution directing the mayor or mayor's designee to implement policy on responding to detainer requests from the United States Department of Homeland Security Immigration and Customs Enforcement* NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that the Mayor or Mayor's designee is directed to implement a policy whereby Miami-Dade Corrections and Rehabilitations Department may, in its discretion, honor detainer requests issued by United States Immigration and Customs Enforcement only if the federal government agrees in writing to reimburse Miami-Dade County for any and all costs relating to compliance with such detainer requests and the inmate that is the subject of such a request has a previous conviction for a Forcible Felony, as defined in Florida Statute section 776.08, or the inmate that is the subject of such a request has, at the time the Miami-Dade Corrections and Rehabilitations Department receives the detainer request, a pending charge of a non-bondable offense, as provided by Article I, Section 14 of the Florida Constitution, regardless of whether bond is eventually granted. **Resolution passed and adopted by Miami-Dade Mayor, December 3, 2013.**
Milwaukee County, Wisconsin	Amended Resolution - File No. 12-135 BE IT RESOLVED, that the Milwaukee County Board of Supervisors hereby adopts the following policy with regard to detainer requests from the U.S. Department of

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
	Homeland Security - Immigrations and Customs Enforcement: 1. Immigration detainer requests from Immigrations and Customs Enforcement shall be honored only if the subject of the request: a) Has been convicted of at least one felony or two non-traffic misdemeanor offenses b) Has been convicted or charged with any domestic violence offense or any violation of a protective order c) Has been convicted or charged with intoxicated use of a vehicle d) Is a defendant in a pending criminal case, has an outstanding criminal warrant, or is an identified gang member e) Is a possible match on the US terrorist watch list **Enacted: June 4, 2012**
Clark County, Nevada	"Recent court decisions have raised Constitutional concerns regarding detention by local law enforcement agencies based solely on an immigration detainer request from the Immigration and Customs Enforcement (ICE). Until this areas of the law is further clarified by the courts, effective immediately the Las Vegas Metropolitan Police Department will no longer honor immigration detainer requests unless one of the following conditions are met: 1. Judicial determination of Probable Cause for that detainer; or 2. Warrant from a judicial officer. … The Las Vegas Metropolitan Police Department continues to work with our federal law enforcement partners and will continue to provide professional services to the Las Vegas community regardless of their immigration status in United States. **Via Press Release on: July 14, 2014.**

8 U.S. Code § 1373 - Communication between government agencies and the Immigration and Naturalization Service

(A) **IN GENERAL.** Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(B) **ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES.** Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(C) **OBLIGATION TO RESPOND TO INQUIRIES.** The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

(Pub. L. 104–208, div. C, title VI, § 642, Sept. 30, 1996, 110 Stat. 3009–707.)

#443-16(3)
submitted on 02-08-17 by Councilor Gentile

FY16 Federal Funds Receipts for the City of Newton

School Federal Grant Fund	5,141,710	See list below (1)
Federal Community Development Grants	3,001,790	Community Development Block Grants
Federal HOME Grant Fund	1,420,767	Housing Assistance Programs
Municipal Federal Grant Fund	1,317,569	See list below (2)
School Food Service Meal Reimbursement	644,498	Per Meal Reimbursement based on paid, reduced and free meals
Total FY16 Federal Funds Receipts	**$11,526,334**	

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(1) School Federal Grants

Special Education SPED IDEA	3,125,169
Title I	783,851
School Climate Transformation	419,110
Educator Quality	223,042
LEP Support - NCLB Title III	194,941
SPED Induction Grant	105,543
Perkins Occupational Education	99,260
SPED Early Childhood	72,205
Project AWARE	59,881
Physical Education Grant	40,696
Race to the Top	9,042
McKinney-Vento Homeless Transportation	4,970
SPED Early Childhood Program Improvement	4,000
Total School Federal Grants	**$5,141,710**

(2) Municipal Federal Grants

FEMA Storm Assistance	939,987	Public Works
Emergency Solutions	127,108	Planning & development
Byrne Justice Assistance Jail Diversion	81,984	Police
FDA-Food Safety Inspection Grant	70,000	Health & Human Services
Byrne Justice Assistance Equipment	29,914	Police
HUD Continuum of Care	21,830	Planning & development
LSCA Robotics	16,709	Newton Public Library
CDC-Public Health Preparedness	16,579	Health & Human Services
Justice Dept Underage Alcohol	6,242	Police
FDA-Municipal Food System Grading Toolkit	3,976	Health & Human Services
CDC-Medical Reserve Corp	3,000	Health & Human Services
FEMA Homeland Security-Beverly Pass-Through	240	Fire
Total Municipal Federal Grants	**$1,317,569**	

#443-16(3)
submitted 02-15-17 Councilor Albright

Guidance Concerning Local Authority Participation In Immigration Enforcement And Model Sanctuary Provisions

New York State Attorney General
Eric T. Schneiderman

January 2017

#443-16(3)
Submitted 02-15-17 Councilor Albright

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

EXECUTIVE OFFICE

January 19, 2017

Dear Colleague:

As the chief law enforcement officer in our state, I have heard from many New Yorkers who have questions about what this week's transfer of power in Washington, D.C. means for federal immigration enforcement. Local elected officials and law enforcement agencies rightly want to promote public safety while protecting vulnerable communities. I write today to set forth what the US Constitution and federal law currently require and describe concrete steps that local governments and law enforcement agencies can immediately take to achieve these important dual objectives.

The enclosed *Guidance Concerning Local Authority Participation In Immigration Enforcement and Model Sanctuary Provisions* first describes the legal landscape governing local jurisdictions' involvement in immigration investigation and enforcement, so that local officials understand the extent to which they may decline to participate in such activities. The *Guidance* follows the letter that I sent on December 2, 2014 to police chiefs and sheriffs throughout the state, but provides much greater detail and context for law enforcement officials and local policymakers. The *Guidance* also provides model language that localities can voluntarily enact—consistent with current federal law—to limit law enforcement and local agency participation in federal immigration activities. The model language is based on an extensive review of provisions from the numerous states, cities, and towns around the country—including many in New York State—that have already have acted to protect this vulnerable population.

The Attorney General's Office recognizes that by protecting the rights and well-being of immigrant families, we build trust in law enforcement and other public agencies, thus enhancing public safety for all. As you know, justice cannot be served when a victim of domestic violence or a witness to a shooting does not call the police because she fears that doing so will attract the attention of officials who wish to deport her family members. That's why standing together in this time of uncertainty is our most effective tool for keeping our communities safe.

Sincerely yours,

ERIC T. SCHNEIDERMAN

#443-16(3)
submitted 02-15-17 Councilor Albright

GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS

PART I: PURPOSE AND PRINCIPLES

The purpose of this guidance is two-fold: (1) to describe for local governments in New York State the legal landscape governing the participation of local authorities in immigration enforcement; and (2) to assist local authorities that wish to become "sanctuary" jurisdictions by offering model language that can be used to enact local laws or policies that limit participation in immigration enforcement activities.[1]

As the United States Supreme Court recognized in *Arizona v. United States*, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."[2] In addition, undocumented aliens—like other New Yorkers—are afforded certain rights by the New York State and United States Constitutions. As explained in detail in Part II, local law enforcement agencies ("LEAs") retain significant discretion regarding whether and how to participate in federal immigration enforcement. LEAs nonetheless must adhere to the requirements and prohibitions of the New York State and United States Constitutions and federal and state law in serving the public, regardless of whether an individual is lawfully present in the U.S.

In light of concerns expressed by many local governments about protecting immigrants' rights while appropriately aiding federal authorities, Part III of this guidance offers model language that can be used to enact laws and policies on how localities can and should respond to federal requests for assistance with immigration enforcement. Several states and hundreds of municipalities—including New York City and other local governments throughout New York State—have enacted sanctuary laws and policies that prohibit or substantially restrict the involvement of state and local law enforcement agencies with federal immigration enforcement. *See* Appendix B. The Office of the Attorney General believes that effective implementation of the policies set forth in this guidance can help foster a relationship of trust between law enforcement officials and immigrants that will, in turn, promote public safety for all New Yorkers.

This guidance recommends eight basic measures:

1. LEAs should not engage in certain activities solely for the purpose of enforcing federal immigration laws.

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[1] "Sanctuary" is not a legal term and does not have any fixed or uniform legal definition, but it is often used to refer to jurisdictions that limit the role of local law enforcement agencies and officers in the enforcement of federal immigration laws.

[2] 132 S. Ct. 2492, 2505 (2012) (citation omitted).

2. Absent a judicial warrant, LEAs should honor U.S. Immigration and Customs Enforcement ("ICE") or Customs and Border Protection ("CBP") detainer requests only in limited, specified circumstances.

3. Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.

4. LEAs should not provide ICE or CBP with access to individuals in their custody for questioning solely for immigration enforcement purposes.

5. LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.

6. Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.

7. Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.

8. LEAs should collect and report data to the public regarding detainer and notification requests from ICE or CBP in order to monitor their compliance with applicable laws.

As explained in Part II below, state and federal law permit localities to adopt these proposed measures.

PART II: LAWS GOVERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT

A. The Tenth Amendment to the U.S. Constitution

The Tenth Amendment to the U. S. Constitution[3] limits the federal government's ability to mandate particular action by states and localities, including in the area of federal immigration law enforcement and investigations. The federal government cannot "compel the States to enact or administer a federal regulatory program,"[4] or compel state employees to participate in the administration of a federally enacted regulatory scheme.[5] Importantly, these Tenth Amendment protections extend not only to states but to localities and their employees.[6] *Voluntary* cooperation with a federal scheme does not present Tenth Amendment issues.[7]

B. The N.Y. Constitution and Home Rule Powers

Under the home rule powers granted by the New York State Constitution,[8] as implemented by the Municipal Home Rule Law,[9] a local government may adopt a local law relating to the "government, protection, order, conduct, safety, health and well-being of persons" therein, as long as its provisions are not inconsistent with the state constitution or a general state law.[10]

The model provisions for localities outlined in Part III are consistent with both the state constitution and existing state law.

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[3] The Tenth Amendment to the United States Constitution provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Am. X.

[4] *New York v. United States*, 505 U.S. 144, 188 (1992). The compelled conduct invalidated in *New York v. United States* was a federal statutory requirement that States enact legislation providing for the disposal of their radioactive waste or else take title to that waste. *See id*. at 152-54.

[5] *Printz v. United States*, 521 U.S. 898, 935 (1997). The compelled conduct invalidated in *Printz* was the Brady Handgun Violence Prevention Act's requirement that state and local law enforcement officers perform background checks on prospective firearm purchasers. *See id.* at 903-04.

[6] *See id.* at 904-05 (allowing county-level law enforcement officials to raise Tenth Amendment claim); *see also Lomont v. O'Neill*, 285 F.3d 9, 13 (D.C. Cir. 2002) (same); *City of New York v. United States*, 179 F.3d 29, 34 (2d Cir. 1999) (city may raise a Tenth Amendment claim), *cert. denied*, 528 U.S. 1115 (2000).

[7] *See Lomont*, 285 F.3d at 14.

[8] N.Y. Const., Art. IX, § 2(c)(ii)(10).

[9] Municipal Home Rule Law § 10(1)(ii)(a)(12).

[10] *See*, *e.g.*, *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 690 (2015).

C. Laws Governing Treatment of ICE and CBP Detainer Requests

ICE and CBP have a practice of issuing detainer or immigration-hold requests to LEAs, asking that the LEA keep an individual in its custody for up to 48 hours beyond that individual's normal release date (i.e., the date the individual is scheduled for release in whatever matter brought that person into the LEA's custody) while ICE determines whether to take custody of the individual to pursue immigration enforcement proceedings. LEAs have the authority to honor or decline an ICE or CBP request to detain, transfer, or allow access to any individual within their custody for immigration enforcement purposes. As the Attorney General's December 2, 2014 letter to police chiefs and sheriffs across New York State explained, an LEA's compliance with ICE detainers or requests for immigration holds is *voluntary*—not mandatory—and compliance with such requests remains at the discretion of the LEA.[11]

This guidance recommends that LEAs honor ICE or CBP detainers or requests for immigration holds only when (1) ICE or CBP presents a judicial warrant or (2) there is probable cause to believe that the individual committed a limited number of criminal offenses, including terrorism related offenses. *See infra* Part III, Objective 2. Such an approach promotes public safety in a manner that also respects the constitutional rights of individuals and protects LEAs from potential legal liability.

All LEAs in New York State must comply with the Fourth Amendment to the U.S. Constitution's prohibition on unreasonable searches and seizures, as well as with the similar provision in Article I, § 12 of the New York State Constitution.[12] This mandate does not change simply because ICE or CBP has issued a detainer request to an LEA. Should an LEA choose to comply with an ICE or CBP detainer request and hold an individual beyond his or her normal release date, this constitutes a new "seizure" under the Fourth Amendment. That new seizure must meet all requirements of the Fourth Amendment, including a showing of probable cause that the individual committed a criminal offense.[13]

A judicial warrant would fulfill the Fourth Amendment's requirements. Absent a judicial warrant, however, further detention is permissible only upon a showing of probable cause that

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[11] *See* Letter from New York Attorney General Eric T. Schneiderman to New York State Police Chiefs and Sheriffs (Dec. 2, 2014) (available at https://ag.ny.gov/pdfs/AG_Letter_And_Memo_Secure_Communities_12_2.pdf).

[12] Article I, § 12 of the New York State Constitution provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[13] *Cf. Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (noting that a legitimate seizure "can become unlawful if it is prolonged beyond the time reasonably required" to achieve its purpose); *see also Dunaway v. New York,* 442 U.S. 200, 213 (1979) (noting general rule that "Fourth Amendment seizures are 'reasonable' only if based on probable cause").

the individual committed a crime or that an exception to the probable cause requirement applies.[14]

The mere fact that an individual is unlawfully in the U.S. is not a criminal offense.[15] Therefore, unlawful presence in the U.S., by itself, does not justify continued detention beyond that individual's normal release date. This applies even where ICE or CBP provide an LEA with administrative forms that use terms such as "probable cause" or "warrant."[16] A determination of whether the LEA had probable cause to further detain an individual will turn on all the facts and circumstances, not simply words that ICE or CBP places on its forms.

Accordingly, in several different lawsuits, federal courts have held that an LEA violated the Fourth Amendment rights of an individual whom the LEA held past his or her normal release date in response to an ICE detainer request.[17] The courts reasoned that the ICE detainer requests did not constitute probable cause to believe that the individual had committed a crime; therefore further detention was unconstitutional. Indeed, LEAs that detain individuals in the absence of a judicial warrant or probable cause may be liable for monetary damages.[18] For these reasons, this guidance recommends that LEAs respond to ICE or CBP detainer requests only when they are accompanied by a judicial warrant, or in other limited circumstances in which there is probable cause to believe a crime has been committed.

D. Laws Governing Information Sharing with Federal Authorities

In addition to issuing detainer requests, ICE and CBP have historically sought information about individuals in an LEA's custody. For example, ICE may request notification of an individual's release date, time, and location to enable ICE to take custody of the individual upon release.

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[14] *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975).

[15] *See Arizona*, 132 S. Ct. at 2505.

[16] For example, a "Warrant of Removal" is issued by immigration officials, and not by a neutral fact-finder based on a finding of probable cause that the individual committed a crime. *See* 8 C.F.R. § 241.2. In addition, DHS Form I-247D ("Immigration Detainer—Request for Voluntary Action") (5/15), available at https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF, includes a check-box for ICE to designate that "Probable Cause Exists that The Subject is a Removable Alien." It is not a crime to be in the U.S. unlawfully. *See supra* at 4. Thus, ICE's checking of a "probable cause" box on the I-247D does not constitute probable cause to believe that an individual has committed a crime, and cannot on its own justify continued detention.

[17] *See, e.g.*, *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 464-65 (4th Cir. 2013)*; Miranda-Olivares v. Clackamas Cnty.,* 12-CV-02317, 2014 U.S. Dist. LEXIS 50340, at *32-33 (D. Or. April 11, 2014); *see also Gerstein*, 420 U.S. at 111-12 (discussing underlying basis of Fourth Amendment's probable cause requirement).

[18] *See, e.g.*, *Santos*, 725 F.3d at 464-66, 470 (holding that municipality was not entitled to qualified immunity in § 1983 lawsuit seeking, *inter alia*, compensatory damages, where deputies violated arrestee's constitutional rights by detaining her solely on suspected civil violations of federal immigration law).

This guidance recommends that, unless presented with a judicial warrant, LEAs should not affirmatively respond to ICE or CBP requests for sensitive information that is not generally available to the public, such as information about an individual's release details or home address. *See infra* Part III, Objective 3. This approach enables LEAs to protect individual privacy rights and ensure positive relationships with the communities they serve, which in turn promotes public safety.

(1) 8 U.S.C. § 1373 and the Tenth Amendment

Federal law "does not require, in and of itself, any government agency or law enforcement official to communicate with [federal immigration authorities]."[19] Rather, federal law limits the ability of state and local governments to enact an outright ban on sharing certain types of information with federal immigration authorities. Specifically, 8 U.S.C. § 1373 provides that state and local governments *cannot prohibit* employees or entities "from sending to, or receiving from, [federal immigration authorities] information regarding *the citizenship or immigration status*, lawful or unlawful, of any individual."[20] In addition, federal law bars restrictions on "exchanging" information regarding "*immigration status*" with "any other Federal, State, or local government entity" or on "maintaining" such information.[21] By their own language, these laws apply only to information regarding an individual's "citizenship or immigration status."

Section 1373 thus does not impose an affirmative mandate to share information—nor could it, for the reasons discussed below. Instead, this law simply provides that localities may not forbid or restrict their employees from sharing information regarding an individual's "citizenship or immigration status."[22] Nothing in Section 1373 restricts a locality from declining to share other information with ICE or CBP, such as non-public information about an individual's release, her next court date, or her address.

In addition, Section 1373 places no affirmative obligation on local governments to *collect* information about an individual's immigration status. Thus, local governments can adopt

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[19] H.R. Rep. No. 104-725, Subtitle B, § 6, at 383 (1996).

[20] 8 U.S.C. § 1373(a)-(b) (emphasis added).

[21] 8 U.S.C. § 1373(b) (emphasis added).

[22] It should be noted that the U.S. Department of Justice's Office of the Inspector General, which monitors compliance with various federal grant programs, has interpreted Section 1373 to preclude not just express restrictions on information disclosure, but also "actions of local officials" that result in "restrictions on employees providing information to ICE." *See* United States Department of Justice, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), at 7 n.9 (*available at* https://oig.justice.gov/reports/2016/1607.pdf).

policies prohibiting their officers and employees from inquiring about a person's immigration status except where required by law.[23]

The Tenth Amendment may further limit Section 1373's reach. The Tenth Amendment's reservation of power to the states prohibits the federal government from "compel[ling] the States to enact or administer a federal regulatory program" or "commandeering" state government employees to participate in the administration of a federally enacted regulatory scheme.[24] As noted above, these Tenth Amendment protections extend to localities and their employees.

Although the United States Court of Appeals for the Second Circuit has rejected a facial Tenth Amendment challenge to Section 1373, that court has recognized that a city may be able to forbid voluntary information sharing where such information sharing interferes with the operations of state and local government.[25] As the Second Circuit has observed, "[t]he obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved," and "[p]reserving confidentiality may in turn require that state and local governments regulate the use of such information by their employees."[26] Accordingly, the Tenth Amendment may be read to limit the reach of Section 1373 where a state or locality can show that the statute creates "an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees"—such as the impairment of the entity's ability to collect information necessary to its functioning—"if some expectation of confidentiality is not preserved."[27]

Some jurisdictions have adopted policies expressly restricting the disclosure of immigration-status information to any third parties, including federal authorities, on the grounds that confidentiality is necessary to gather this information and the information is crucial to various governmental functions. For these reasons, New York City, for example, prohibits its employees from "disclos[ing] confidential information"—including information relating to "immigration status"—except under certain circumstances (e.g., suspicion of illegal activity unrelated to

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[23] Under a New York City Executive Order, for example, officers and employees (other than law enforcement officers) are not permitted to inquire about a person's immigration status "unless: (1) Such person's immigration status is necessary for the determination of program, service or benefit eligibility or the provision of . . . services; or (2) Such officer or employee is required by law to inquire about such person's immigration status." N.Y.C. Exec. Order No. 41, § 3(a) (2003).

[24] *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 916.

[25] *City of New* York, 179 F.3d at 35-37.

[26] *Id.*

[27] *Id.* at 36, 37.

undocumented status or the investigation of potential terrorist activity), or if "such disclosure is required by law."[28]

(2) Freedom of Information Law

Disclosure of information held by the government is also governed by New York's Freedom of Information Law ("FOIL"). While FOIL generally requires state agencies to make publicly available upon request all records not specifically exempt from disclosure by state or federal statute,[29] FOIL also mandates that an agency withhold such records where disclosure would "constitute an unwarranted invasion of personal privacy."[30] Non-public information about an individual, such as home address, date and place of birth, or telephone number, would likely be exempt from disclosure on personal privacy grounds.[31]

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[28] N.Y.C. Exec. Order No. 41, Preamble, § 2 (2003).

[29] Public Officers Law § 87(2).

[30] *Id.* § 89(2)(b); *see also In re Massaro v. N.Y. State Thruway Auth.*, 111 A.D.3d 1001, 1003-04 (3d Dep't 2013) (records containing employee names, addresses, and Social Security numbers subject to personal privacy exemption under FOIL).

[31] These examples are illustrative, not exhaustive.

PART III: MODEL SANCTUARY PROVISIONS[32]

This Part describes eight core objectives and proposes model language that jurisdictions can use to enact local laws and/or policies to achieve these objectives.

1. Objective: LEAs should not engage in certain activities solely for the purpose of enforcing federal immigration laws.

Model Language:

(a) [The LEA] shall not stop, question, interrogate, investigate, or arrest an individual based solely on any of the following:

(i) Actual or suspected immigration or citizenship status; or

(ii) A "civil immigration warrant," administrative warrant, or an immigration detainer in the individual's name, including those identified in the National Crime Information Center (NCIC) database.

(b) [The LEA] shall not inquire about the immigration status of an individual, including a crime victim, a witness, or a person who calls or approaches the police seeking assistance, unless necessary to investigate criminal activity by that individual.

(c) [The LEA] shall not perform the functions of a federal immigration officer or otherwise engage in the enforcement of federal immigration law--whether pursuant to Section 1357(g) of Title 8 of the United States Code or under any other law, regulation, or policy.

2. Objective: Absent a judicial warrant, LEAs should honor ICE or CBP detainer requests only in limited, specified circumstances.

Model Language:

[The LEA] may respond affirmatively to a "civil immigration detainer" from ICE or CBP to detain or transfer an individual for immigration enforcement or investigation purposes for up to 48 hours ONLY IF the request is accompanied by a judicial warrant,

(i) EXCEPT THAT local police may detain a person for up to 48 hours on a "civil immigration detainer" in the absence of a judicial warrant IF

[32] See Appendix A for definitions of key terms used in this Part.

See Appendix B for a compilation of states and localities with similar provisions.

- (1) there is probable cause to believe that the individual has illegally re-entered the country after a previous removal or return as defined by 8 U.S.C. § 1326 and (2) the individual has been convicted at any time of (i) a specifically enumerated set of serious crimes under the New York Penal Law (e.g., Class A felony, attempt of a Class A felony, Class B violent felony, etc.)[33] or (ii) a federal crime or crime under the law of another state that would constitute a predicate felony conviction, as defined under the New York Penal Law, for any of the preceding felonies; or

- there is probable cause to believe that the individual has or is engaged in terrorist activity.

3. Objective: Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.

Model Language:

(a) [The LEA] may respond affirmatively to an ICE or CBP request for non-public information about an individual—including but not limited to non-public information about an individual's release, home address, or work address—ONLY IF the request is accompanied by a judicial warrant,

(i) EXCEPT THAT nothing in this law prohibits any local agency from:

- sending to or receiving from any local, state, or federal agency—as per 8 U.S.C. § 1373—(i) information regarding an individual's country of citizenship or (ii) a statement of the individual's immigration status; or

- disclosing information about an individual's criminal arrests or convictions, where disclosure of such information about the individual is otherwise permitted by state law or required pursuant to subpoena or court order; or

- disclosing information about an individual's juvenile arrests or delinquency or youthful offender adjudications, where disclosure of such information about the individual is otherwise permitted by state law or required pursuant to subpoena or court order.

(b) [The LEA] shall limit the information collected from individuals concerning immigration or citizenship status to that necessary to perform agency duties and

[33] *See, e.g.*, N.Y.C. Admin. Code § 14-154(a)(6) for a list of designated felonies in New York City's law.

shall prohibit the use or disclosure of such information in any manner that violates federal, state, or local law.

4. Objective: LEAs should not provide ICE or CBP with access to individuals in their custody for questioning solely for immigration enforcement purposes.

Model Language:

[The LEA] shall not provide ICE or CBP with access to an individual in their custody or the use of agency facilities to question or interview such individual if ICE or CBP's sole purpose is enforcement of federal immigration law.

5. Objective: LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.

Model Language:

(a) [The LEA] shall not delay bail and/or release from custody upon posting of bail solely because of (i) an individual's immigration or citizenship status, (ii) a civil immigration warrant, or (iii) an ICE or CBP request—for the purposes of immigration enforcement—for notification about, transfer of, detention of, or interview or interrogation of that individual.

(b) Upon receipt of an ICE or CBP detainer, transfer, notification, interview or interrogation request, [the LEA] shall provide a copy of that request to the individual named therein and inform the individual whether [the LEA] will comply with the request before communicating its response to the requesting agency.

(c) Individuals in the custody of [the LEA] shall be subject to the same booking, processing, release, and transfer procedures, policies, and practices of that agency, regardless of actual or suspected citizenship or immigration status.

6. Objective: Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.

Model Language:

[Local agency] may not use agency or department monies, facilities, property, equipment, or personnel to investigate, enforce, or assist in the investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, ethnicity, or national origin.

7. Objective: Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.

Model Language:

(a) [Local agency] personnel shall not inquire about or request proof of immigration status or citizenship when providing services or benefits, except where the receipt of such services or benefits are contingent upon one's immigration or citizenship status or where inquiries are otherwise lawfully required by federal, state, or local laws.

(b) [Local agencies] shall have a formal Language Assistance Policy for individuals with Limited English Proficiency and provide interpretation or translation services consistent with that policy.[34]

8. Objective: LEAs should collect and report aggregate data containing no personal identifiers regarding their receipt of, and response to, ICE and CBP requests, for the sole purpose of monitoring the LEAs' compliance with all applicable laws.

Model Language:

(a) [The LEA] shall record, solely to create the reports described in subsection (b) below, the following for each immigration detainer, notification, transfer, interview, or interrogation request received from ICE or CBP:

- The subject individual's race, gender, and place of birth;
- Date and time that the subject individual was taken into LEA custody, the location where the individual was held, and the arrest charges;
- Date and time of [the LEA's] receipt of the request;
- The requesting agency;
- Immigration or criminal history indicated on the request form, if any;
- Whether the request was accompanied any documentation regarding immigration status or proceedings, e.g., a judicial warrant;
- Whether a copy of the request was provided to the individual and, if yes, the date and time of notification;
- Whether the individual consented to the request;
- Whether the individual requested to confer with counsel regarding the request;

[34] Under Title VI of the Civil Rights Act of 1964, any agency that is a direct or indirect recipient of federal funds must ensure meaningful or equal access to its services or benefits, regardless of ability to speak English. *See* 42 U.S.C. § 2000d *et seq.*; *Lau v. Nichols*, 414 U.S. 563 (1974).

- [The LEA's] response to the request, including a decision not to fulfill the request;
- If applicable, the date and time that ICE or CBP took custody of, or was otherwise given access to, the individual; and
- The date and time of the individual's release from [the LEA's] custody.

(b) [The LEA] shall provide semi-annual reports to the [designate one or more public oversight entity] regarding the information collected in subsection (a) above in an aggregated form that is stripped of all personal identifiers in order that [the LEA] and the community may monitor [the LEA's] compliance with all applicable law.

APPENDIX A
DEFINITION OF KEY TERMS

- "Civil immigration detainer" (also called a "civil immigration warrant") means a detainer issued pursuant to 8 C.F.R. § 287.7 or any similar request from ICE or CPB for detention of a person suspected of violating civil immigration law. *See* DHS Form I-247D ("Immigration Detainer—Request for Voluntary Action") (5/15), available at https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF .

- "Judicial warrant" means a warrant based on probable cause and issued by an Article III federal judge or a federal magistrate judge that authorizes federal immigration authorities to take into custody the person who is the subject of the warrant. A judicial warrant does not include a civil immigration warrant, administrative warrant, or other document signed only by ICE or CBP officials.

- "Probable cause" means more than mere suspicion or that something is at least more probable than not. "Probable cause" and "reasonable cause," as that latter term is used in the New York State criminal procedure code, are equivalent standards.[35]

- "Local law enforcement agencies" or "LEAs" include, among others, local police personnel, sheriffs' department personnel, local corrections and probation personnel, school safety or resource officers, and school police officers.

[35] *People v. Valentine*, 17 N.Y.2d 128, 132 (1966).

APPENDIX B
COMPILATION OF SIMILAR PROVISIONS FROM OTHER STATES AND LOCALITIES

1. Objective: LEAs should not engage in certain activities that are solely for the purpose of enforcing federal immigration laws.

N.Y.C. Exec. Order 41 (2003): "Law enforcement officers shall not inquire about a person's immigration status unless investigating illegal activity other than mere status as an undocumented alien."

N.Y.C. Exec. Order 41 (2003): It is the "policy of the Police Department not to inquire about the immigration status of crime victims, witnesses or others who call or approach the police seeking assistance."

Illinois Executive Order 2 (2015): "No law enforcement official . . . shall stop, arrest, search, detain, or continue to detain a person solely based on an individual's citizenship or immigration status or on an administrative immigration warrant entered into [NCIC or similar databases]."

Oregon State Law § 181A.820 (2015): "No [state or local] law enforcement agency shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws," subject to certain exceptions including where a person is charged with criminal violation of federal immigration laws.

LAPD Special Order 40 (1979): "Officers shall not initiate police action with the objective of discovering the alien status of a person. Officers shall not arrest or book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry)."

Washington D.C. Mayor's Order 2011-174: Public safety agencies "shall not inquire about a person's immigration status . . . for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation."

Washington D.C. Mayor's Order 2011-174: "It shall be the policy of Public Safety Agencies not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance."

2. Objective: Absent a judicial warrant, LEAs should honor ICE or CBP detainer requests only in limited, specified circumstances.

Philadelphia, PA Executive Order No. 5-2016: "No person in the custody of the City who would otherwise be released from custody shall be detained pursuant to an ICE civil

immigration detainer request pursuant to 8 C.F.R. Sec. 287.7 . . . unless [a] such person is being released from conviction for a first or second degree felony involving violence and [b] the detainer in supported by a judicial warrant."

3. Objective: Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.

Illinois Executive Order 2 (2015): LEAs may not "communicat[e] an individual's release information or contact information" "solely on the basis of an immigration detainer or administrative immigration warrant."

Philadelphia, PA Executive Order No. 5-2016: Notice of an individual's "pending release" shall not be provided "unless [a] such person is being released from conviction for a first or second degree felony involving violence and [b] the detainer is supported by a judicial warrant."

California Values Act, SB No. 54 *(Proposed)* (2016):

An LEA may not (a) "[r]espond[] to requests for nonpublicly available personal information about an individual," including, but not limited to, information about the person's release date, home address, or work address for immigration enforcement purposes," or (b) "make agency or department databases available to anyone . . . for the purpose of immigration enforcement or investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, immigration status, or national or ethnic origin."

An LEA may (a) share information "regarding an individual's citizenship or immigration status" and (b) respond to requests for "previous criminal arrests and convictions" as permitted under state law or when responding to a "lawful subpoena."

4. Objective: LEAs should not provide ICE or CBP with access to individuals in their custody for questioning for solely immigration enforcement purposes.

Vermont Criminal Justice Training Council Policy: "Unless ICE or Customs and Border Patrol (CBP) agents have a criminal warrant, or [Agency members] have a legitimate law enforcement purpose exclusive to the enforcement of immigration laws, ICE or CBP agents shall not be given access to individuals in [Agency's] custody."

Santa Clara, CA Board of Supervisor Resolution No. 2011-504 (2011): ICE "shall not be given access to individuals or be allowed to use County facilities" for investigative interviews or other purposes unless ICE has a judicial warrant or officials have a "legitimate law enforcement purpose" not related to immigration enforcement.

California Values Act, SB No. 54 *(Proposed)* (2016): LEAs may not "[g]iv[e] federal immigration authorities access to interview individuals in agency or department custody for immigration enforcement purposes."

5. **Objective: LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.**

Connecticut Department of Correction, Administrative Directive 9.3 (2013): "If a determination has been made to detain the inmate, a copy of Immigration Detainer – Notice of Action DHS Form I-247, and the Notice of ICE Detainer form CN9309 shall be delivered to the inmate."

6. **Objective: Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.**

California Values Act, SB No. 54 *(Proposed)* (2016): State and local law enforcement shall not "[u]se agency or department moneys, facilities, property, equipment, or personnel to investigate, enforce, or assist in the investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, or national or ethnic origin."

7. **Objective: Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.**

N.Y.C. Exec. Order 41 (2003): "Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law."

N.Y.C. Exec. Order 41 (2003): "A City officer or employee, other than law enforcement officers, shall not inquire about a person's immigration status unless: (1) Such person's immigration status is necessary for the determination of program, service or benefit eligibility or the provision of City services; or (2) Such officer or employee is required by law to inquire about such person's immigration status."

8. **Objective: LEAs should collect and report aggregate data containing no personal identifiers regarding their receipt of, and response to, ICE and CBP requests, for the sole purpose of monitoring the LEAs' compliance with all applicable laws.**

N.Y.C. Local Law Nos. 58-2014 and 59-2014 (N.Y.C. Admin Code § 9-131 and § 14-154) (2014): By October 15 each year, NYPD and NYC DOC "shall post a report on the department's website" that includes, among other things, the number of detainer

requests received, the number of persons held or transferred pursuant to those requests, and the number of requests not honored.

King County (Seattle), WA, Ordinance 17706 (2013): The detention department "shall prepare and transmit to the [county] council a quarterly report showing the number of detainers received and descriptive data," including the types of offenses of individuals being held, the date for release from custody, and the length of stay before the detainer was executed.

#443-16(3)

***Be it ordained by the City Council of the City of Newton as follows:**

That the Revised Ordinances of the City of Newton, 2012, as amended, are hereby further amended with respect to Chapter 2 by inserting after Article VI the following new article:

Article VII. Welcoming City

Sec 2-400. Purpose and Intent. The City of Newton has long derived strength from its diverse community, including those who identify as immigrants. Through the City's commitment to social justice and inclusion, one of the City's most important objectives is to enhance relationships with all residents, including immigrants, and to make all residents, workers and visitors feel safe and secure regardless of immigration status. We believe it is critical to reaffirm in this ordinance, the City's commitment to fair treatment for all.

Sec 2-401. Definitions.

"Administrative warrant" means an immigration warrant issued by ICE, or a successor or similar federal agency charged with enforcement of civil immigration laws, used as a non-criminal, civil warrant for immigration purposes.

"Agency" means every City department, division, commission, council, committee, board, other body, or person established by authority of an ordinance, executive order, or City Council order.

"Agent" means any person employed by or acting in behalf of an agency but shall not include independent sub-contractors of the City.

"Citizenship or immigration status" means all matters regarding questions of citizenship of the United States or any other country, the authority to reside in or otherwise be present in the United States.

"ICE" means the United States Immigration and Customs Enforcement Agency and shall include any successor agency charged with the enforcement of civil immigration laws.

"Immigration detainer" means an official request issued by ICE, or other federal agency charged with the enforcement of civil immigration laws, to another federal, state or local law enforcement agency to detain an individual based on a violation of a civil immigration law.

"Serious violent felony" means a felony crime as defined in M.G.L. c. 265, *Crimes Against the Person*.

Sec 2-402. Prohibitions.

No Agency or Agent shall:

(a) identify, investigate, arrest, detain, or continue to detain a person solely on the belief that the person is not present legally in the United States or that the person has committed a civil immigration violation or that the person is otherwise deportable;
(b) arrest, detain, or continue to detain a person based on any immigration detainer, federal administrative warrant, or any other such order or request in any form whatsoever or otherwise honor any such detainer, warrant or request to detain, interview or transfer a person to federal authorities, provided however, the police department may arrest, detain or continue to detain a person in accordance with Sec 2-403;
(c) notify federal authorities about the release or pending release of any person for immigration purposes except in accordance with Sec 2-403;
(d) provide federal authorities with information about the upcoming release of a person in custody or the person's home or work address for immigration purposes;
(e) cooperate with or enforce any federal program requiring the registration of individuals on the basis of religious affiliation or ethnic or national origin.

Sec 2-403. Exceptions to Prohibitions. The prohibitions in Sec 2-402 shall not apply where the individual to whom such information pertains provides his or her informed consent as to how the information might be used (or if such individual is a minor, the informed consent of that person's parent or guardian), where the information is necessary to provide a City service or where otherwise required by valid state or federal law. In addition, the Newton Police Department may detain or arrest an individual in cooperation with ICE only when an investigation conducted by or information received by any City Agency indicates that: the individual has an outstanding criminal warrant, has a prior conviction for a serious violent felony, is being investigated for terrorism, or if there is a law enforcement or public safety purpose to do so that is not related to the enforcement of civil immigration law provided that the arrest or detention is based upon valid Massachusetts arrest authority and is consistent with the 4th Amendment to the United States Constitution and Article XIV of the Massachusetts Constitution.

Sec 2-404. Requesting or Maintaining Information Prohibited. No Agency, or Agent shall request or maintain information about, or otherwise investigate or assist in the investigation of, the citizenship or immigration status of any person unless such inquiry is required by valid state or federal law.

Sec 2-405. Use of City Resources Prohibited. No Agency or Agent shall use City funds, resources, facilities, property, equipment, or personnel to assist in the enforcement of federal civil immigration law or to gather information regarding the citizenship or immigration status of any person, unless permitted under section 2-403. Nothing in this section shall prevent an Agency or Agent from lawfully discharging duties in compliance with and in response to a lawfully issued judicial warrant, judicial subpoena or immigration detainer.

Sec 2-406. Ordinance Not to Conflict with Federal Law. Nothing in this ordinance shall be construed or implemented to conflict with any otherwise valid and enforceable duty and obligation imposed by a court order or any valid federal or applicable law. Nothing in this subsection shall prohibit or restrain the Agency or Agent from sending to, or receiving from, any local, state, or federal agency, information regarding citizenship or immigration status, consistent with Section 1373 of Title 8 of the United States Code.

Sec 2-407. No Private Right of Action. This ordinance does not create or form the basis of liability on the part of the City, its Agencies or Agents. It is not intended to create any new rights for breach of which the City is liable for money or any other damages to any person who claims that such breach proximately caused injury. The exclusive remedy for violation of this ordinance shall be through the City's disciplinary procedures for employees under applicable City regulations, unless the Agency or Agent is lawfully discharging duties as set forth in Sec 2-402 and Sec 2-403.

Sec 2-408. Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Newton hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions were to be declared invalid or unconstitutional.

#443-16(3)

***Be it ordained by the City Council of the City of Newton as follows:**

That the Revised Ordinances of the City of Newton, 2012, as amended, are hereby further amended with respect to Chapter 2 by inserting after Article VI the following new article:

Article VII. Welcoming City

Sec 2-400. Purpose and Intent. The City of Newton has long derived strength from its diverse community, including those who identify as immigrants. Through the City's commitment to social justice and inclusion, one of the City's most important objectives is to enhance relationships with all residents, including immigrants, and to make all residents, workers and visitors feel safe and secure regardless of immigration status. We believe it is critical to reaffirm in this ordinance, the City's commitment to fair treatment for all.

Sec 2-401. Definitions.

"Administrative warrant" means an immigration warrant issued by ICE, or a successor or similar federal agency charged with enforcement of civil immigration laws, used as a non-criminal, civil warrant for immigration purposes.

"Agency" means the City Council, Executive Office and every City department, division, commission, council, committee, board, other body, or person established by authority of an ordinance, executive order, or City Council order.

"Agent" means any person employed by or acting ~~in~~ on behalf of an agency in an official capacity, but shall not include independent sub-contractors of the City.

"Citizenship or immigration status" means all matters regarding questions of citizenship of the United States or any other country, the authority to reside in or otherwise be present in the United States.

"ICE" means the United States Immigration and Customs Enforcement Agency and shall include any successor agency charged with the enforcement of civil immigration laws.

"Immigration detainer" means an official request issued by ICE, or other federal agency charged with the enforcement of civil immigration laws, to another federal, state or local law enforcement agency to detain an individual based on a violation of a civil immigration law.

"Serious violent felony" means a felony crime as defined in M.G.L. c. 265, *Crimes Against the Person*.

Sec 2-402. Prohibitions.

No Agency or Agent shall:

(a) identify, investigate, arrest, detain, or continue to detain a person solely on the belief that the person is not present legally in the United States or that the person has committed a civil immigration violation or that the person is otherwise deportable;
(b) arrest, detain, or continue to detain a person based on any immigration detainer, federal administrative warrant, or any other such order or request in any form whatsoever or otherwise honor any such detainer, warrant or request to detain, interview or transfer a person to federal authorities, provided however, the police department may arrest, detain or continue to detain a person in accordance with Sec 2-403;
(c) notify federal authorities about the release or pending release of any person for immigration purposes except in accordance with Sec 2-403;
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