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August 16, 2010

VIA FEDEX OVERNIGHT DELIVERY

David Venturella, Executive Director
Office of Secure Communities
U.S. Department of Homeland Security
500 12th Street SW
Washington, D.C. 20024

Dear Mr. Venturella:

I am writing to request clarification regarding the "Secure Communities" program. The Santa Clara County Board of Supervisors has asked me to provide them with an explanation of the way Secure Communities operates at the local level and the extent of the County's obligation to comply. I have found that much of the available information concerning this program is confusing and contradictory. I therefore request written clarification on the following questions.

1. Is there a mechanism by which localities may "opt out?"

The Secure Communities Standard Operating Procedures appear to describe Secure Communities as a program that is voluntary for counties. The cover page, for example, states that the Standard Operating Procedures are "[d]istributed for adoption by participating county and local law enforcement agencies[.]"¹ Yet nothing in the Standard Operating Procedures explains how counties elect to become "participating count[ies]," what the mechanism for "adoption" is, or whether they can opt out instead if they so choose.

Additionally, in the cover letter accompanying the 2009 Memorandum of Agreement between Immigration and Customs Enforcement ("ICE") and the California Department of Justice, you stated that "[d]eployment at the county and local level requires a signed Statement of Intent (SOI) by participating agencies that oversee booking locations to ensure those agencies understand and adhere to the principles set forth in the MOA and a set of Standard Operating

¹ Immigration and Customs Enforcement, *Secure Communities (SC) Standard Operating Procedures (SOP)* (2009), available at http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf (hereinafter "Standard Operating Procedures").

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Procedures.”² I have been unable to find any further information about these Statements of Intent. No department in Santa Clara County has signed or been asked to sign one; nor, to my knowledge, has any other California municipality.

Recent statements your office has made to the press suggest that you do not view county participation as voluntary, and that once ICE has signed an MOA with the relevant state department of justice, a county’s only recourse if it wishes not to participate in the program is to seek an exemption from the state. Is that correct? Do you view the State of California as having the ability, under the 2009 MOA your office signed with the California Department of Justice, to exempt certain counties from the program? Have you allowed other localities or law enforcement agencies, either inside or outside California, to opt out or modify their participation in the program?

I understand that ICE is offering counties one limited form of “opt out”: Counties may request not to receive “match messages” showing when an individual’s fingerprints have been matched with those in ICE’s IDENT database. My understanding is that these messages do not require or authorize counties to take any action with respect to the arrested individual. Assuming my understanding is correct, what is the purpose of receiving or not receiving these messages?

2. Once Secure Communities is deployed in a locality, is the locality required to comply with detainers, and will you provide reimbursement and indemnification?

The Standard Operating Procedures state that “[w]hen ICE determines an alien has been charged or convicted of a Level 1 offense that could result in removal, or when an alien who is already subject to removal is charged with a Level 1 offense, ICE will file an Immigration Detainer (Form I-247) at the time of booking with the local LEA that has custody of the alien.”³ ICE has not made clear, however, whether localities are *required* or merely *requested* to comply with such detainers. The Standard Operating Procedures use a mixture of mandatory and voluntary language.⁴ And the language of ICE’s Form I-247 states that “[f]ederal regulations (8 C.F.R. § 287.7) *require* you to detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays)” if ICE so requests.⁵ Is it ICE’s position that localities are legally required to hold individuals pursuant to Form I-247, or are detainers merely requests with which a county could legally decline to comply?

² Letter from David Venturella, U.S. Department of Homeland Security, to Linda Denly, Bureau of Criminal Identification and Information, California Department of Justice (Jan. 23, 2009), *available at* http://www.ice.gov/doclib/foia/secure_communities-moa/r_california_4-10-09.pdf.

³ Standard Operating Procedures at 5.

⁴ *Id.* at 6 (“*Requested* Local LEA Cooperative Actions . . . ICE *requests* that the LEAs: 2.2.1 Abide by Immigration Detainer conditions: The local LEA *will abide* by the conditions stated in the Immigration Detainer, Form I-247.”) (emphases added).

⁵ *Id.* at 11 (Form I-247, “Immigration Detainer—Notice of Action,” attached as Appendix C) (emphasis added).

It is also unclear who bears the costs related to detaining individuals at ICE's request. The federal regulation regarding detainers states that "[n]o detainer . . . shall incur any fiscal obligation on the part of the Department [of Homeland Security], until actual assumption of custody by the Department, except as provided in paragraph (d) of this section."⁶ I see nothing in paragraph (d) clarifying what financial reimbursement the Department provides to local agencies, although the paragraph itself deals with the kind of temporary detention at issue in the Secure Communities program.⁷ As you know, local governments are faced with increasing financial difficulties, and holding individuals pursuant to immigration detainers incurs costs and creates the risk of liability. Will ICE reimburse localities for the cost of detaining individuals pursuant to Form I-247 beyond their scheduled release times? Additionally, will ICE indemnify localities for any liability incurred because of that detention?

3. Once Secure Communities is deployed in a locality, is the locality required to comply with other "local LEA cooperative actions"?

As with detainers, the Standard Operating Procedures use a mixture of mandatory and voluntary language to describe other forms of local LEA cooperation.⁸ Is it ICE's position that localities where Secure Communities is deployed are legally required to a) inform ICE if a subject is to be transferred or released thirty days in advance of any release or transfer; b) allow ICE agents and officers access to detainees to conduct interviews and serve documents; and/or c) assist ICE in acquiring information about detainees? If so, what is the legal basis for such requirements?

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⁶ 8 C.F.R. § 287.7(e).

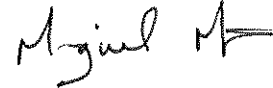
⁷ *Id.* § 287.7(d) (providing for "[t]emporary detention at Department request").

⁸ Standard Operating Procedures at 6 ("*Requested Local LEA Cooperative Actions . . . ICE requests that the LEAs: . . . 2.2.3 Inform ICE if subject is transferred or released: The local LEA will notify ICE when an alien's release or transfer to another location is imminent. . . . 2.2.4 Allow access to detainees: The local LEA will allow ICE Agents and Officers access to detainees 2.2.5 Assist ICE in acquiring information about detainees: The local LEA will locate and identify the booking and/or detention information on any alien against whom ICE has lodged a detainer.*") (emphases added).

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Your clarification on the above questions would be appreciated. Please do not hesitate to contact me at the address above. I look forward to hearing from you.

Very truly yours,



MIGUEL MÁRQUEZ
County Counsel

- c: Marc Rapp, Deputy Director of Secure Communities, U.S. Department of Homeland Security *(via email)*
Hon. Zoe Lofgren, Chair, U.S. House of Representatives Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law *(via email)*
Honorable Board of Supervisors, County of Santa Clara
Jeffrey V. Smith, County Executive, County of Santa Clara
Laurie Smith, Sheriff, County of Santa Clara
Edward Flores, Chief of Correction, County of Santa Clara