

## Microsoft Outlook

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**From:** (b)(6), (b)(7)(C)  
**Sent:** Monday, September 20, 2010 7:34 AM  
**To:** (b)(6), (b)(7)(C)  
**Cc:** (b)(6), (b)(7)(C)  
**Subject:** FW: SC Info  
**Attachments:** ESC Minutes - July 19 2010.doc; bulletpoint of IT-projects.doc; SUMMARY OF ATP.doc; 07 20 10 Criminal Alien Removal Strategy draft 7-20 (07 23 comments).doc; 09 16 10 opt out bulletpoints.doc; QUICK OVERVIEW OF SC (09 16 10).doc; Interoperability Deployment 09-10-10.xls; IAR-levelsremarks-draft-100910.doc

(b)(6), (b)(7)(C)

In anticipation of last week's SC meeting with (b)(6), (b)(7)(C) I sent (b)(6), (b)(7)(C) the above background documents on SC in case the topics came up. The below email summarizes the docs.

Please let me know if you wish to discuss anything & everything SC before Tues's 2pm meeting with (b)(6), (b)(7)(C) abt SC.

(b)(6)

in am (and wife does pm), I will be in the office prob abt 1230-1pm.

Thank you.

(b)(6), (b)(7)(C)  
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(b)(5) AWP

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**From:** (b)(6), (b)(7)(C)  
**Sent:** Thursday, September 16, 2010 10:58 AM  
**To:** (b)(6), (b)(7)(C)  
**Cc:** (b)(6), (b)(7)(C)  
**Subject:** SC Info

Sarah,

As requested, attached are:

1. July 19, 2010 ESC Meeting Minutes. According to (b)(6), (b)(7)(C) there is no currently scheduled ESC Meeting, but there will probably be one mid to late October (too early to know agenda)

12/21/2010

ICE FOIA 10-2674.0002912

2. The Bullet points of SC's Criminal Alien Identification IT projects
3. Summary of the Automated Threat Prioritization IT Project (i.e, further details abt one of the IT projects identified in #2)
4. Our Comments to the last draft Criminal Alien Removal Strategic Plan
5. Bulletpoints on Opt Out.
6. A brief, general big-picture overview of SC (08-10 Appropriation Act language, 3 SC Pillars of identify, prioritize, transform and what they mean, including the interoperability process)
7. Interoperability Deployment Spreadsheet listing all current activated jurisdictions, and status of pending activations (as of Sept 10)
8. As an example of the random SC tasks have popped up in the past, just arrived this am: SC's final language for the Immigration Alien Response (IAR) that is sent to both ICE field office and LEA during the interoperability process that will reference the new offense levels.

(b)(6), (b)(7)(C)

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## OVERVIEW OF SECURE COMMUNITES

### I. Legal Background – Appropriations Acts Summaries

**FY 08** - Congress appropriated \$200 million for ICE to develop a comprehensive plan, specifically: “to improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States, once they are judged deportable.” In response, ICE launched Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens to transform the way ICE identifies and removes criminal aliens from the United States.

**FY 09** - Congress appropriated an additional \$150 million for SC with instructions to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime” and “identify individuals illegally present in the United States who have criminal records, whether incarcerated or at-large, and to remove those aliens once they have been judged deportable in an immigration court.”

**FY 10** - Congress required that ICE obligate at least \$1.5 billion “to identify aliens convicted of a crime who may be deportable, and to remove them from the United States once they are judged deportable” of which \$200 million would be available SC/CIRCA through FY 2011 to meet its program goals. Congress also restated previous mandate “to prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.”

### II. SC Overview.

- 1) Identify criminal aliens through modernized information sharing
- 2) Prioritize enforcement actions to ensure arrest and removal of dangerous criminal aliens;
- 3) Transform criminal alien enforcement processes and systems to achieve lasting results

### Identify – IDENT/IAFIS Interoperability.

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## OVERVIEW OF SECURE COMMUNITES

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### **Prioritize enforcement actions**

- Level 1 offenders: aliens convicted of “aggravated felonies,” as defined in INA §101(a)(43), or two or more crimes each punishable by more than one year, commonly referred to as "felonies";
- Level 2 offenders: aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors"; and
- Level 3 offenders: aliens convicted of crimes punishable by less than one year.

**Transformation** - SC is developing models of the current and future state of the criminal alien enforcement life cycle to understand the full impact of a more effective biometric criminal alien identification process. SC will use that analysis in making decisions about our detention and removal activities and the allocation of our resources and in identifying additional efficiencies. For ex: (1) automate bed space & transportation management, (2) track criminal aliens from time of acceptance into ICE custody through removal from the United States; (3) expand the network of video teleconferencing sites to increase efficiency in the interview process for immigration status determinations, (4) expand interviews by foreign consulate officials for the issuance of travel documents, to expedite immigration hearings by EOIR, and to help CAP teams identify incarcerated criminal aliens; (5) expanding the ICE Rapid Repatriation (REPAT) program.

## **“OPT OUT” BACKGROUND**

**Secure Communities’ (SC) Position.** LEA participation in SC’s current deployment plan, which runs through 2012, is not mandatory. Local jurisdictions inside a State with an MOA with SC that do not want to participate must formally notify their SIB and ICE (via letter, email or facsimile). Upon notification, ICE will request a meeting with CJIS, the LEA, and the SIB to discuss the request and come to a resolution, which may include adjusting the jurisdiction’s activation date or removing the jurisdiction from the deployment plan. Because Secure Communities’ MOA is with the SIB, and CJIS currently requires an SIB to approve LEA activation, Secure Communities’ current internal position is that the decision to allow an LEA to “opt out” rests with the State (i.e. state can veto LEA). Negotiations between CJIS, SC, and the various states, however, are fluid; therefore, the procedures by which an LEA may “opt out” (or even “opt in”) may change soon depending on future negotiations.

### **The FBI Authority to Share Fingerprint Submission Info with ICE and the 2013 Fix to “Opt Out.”**

The FBI has authority to share fingerprint submission information with DHS/ICE. *See* 28 U.S.C. § 534(a)(1),(4). IDENT/IAFIS Interoperability is the technological mechanism by which the FBI automates the sharing of the fingerprint submissions from LEAs to IAFIS, including submissions from subjects booked into custody, with DHS/ICE. Current ICE/SC & CJIS policy require State/LEA involvement in order to activate an LEA, including the CJIS requirement that the LEA perform an IT-related ministerial act prior to activation. According to SC, however, Assistant Director David Venturella and the CJIS Director met last week and reached an agreement by which CJIS will send ICE, starting in 2013, all fingerprint requests from any LEAs that do not participate in SC. This information-sharing ability is technologically available now; however for policy reasons and to ensure adequate resources are in place, SC and CJIS have currently chosen to wait until 2013 until sharing info without state/local participation.

Until the 2013 fix, for jurisdictions that “opt out,” there are other currently-utilized methods by which ICE may be informed of a subject’s arrest in order to run an immigration query to determine a subject’s immigration status: (1) the LEA may initiate a biographic (as opposed to biometric) query request to the ICE LESC; (2) the LEA may call the local ICE field office for assistance; (3) CAP agents stationed at jails may manually review jail rosters to determine which individuals need additional screening.

### **The Legal Determination Whether Participation is Mandatory is Influenced by Perception.**

SC’s position that participation in the “Secure Communities initiative” is voluntary is supported by applicable case-law. Under the Tenth Amendment, “[t]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.” *Printz v. United States*, 521 U.S. 898, 925 (1997). Similarly, “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Id.* at 935. Although SC defines itself as a “plan,” “strategy,” or “initiative,” and not a “program,” its staff is located in the “Program Management Office,” DHS and ICE has called SC a “program” in official documents, ICE created SC to address programmatic changes to the manner in which ICE identifies and removes criminal aliens, and the public perceives it as an ICE program. Moreover, although the currently CJIS requirement that the LEA perform a ministerial task may be very minor, and involve no local costs, the Supreme Court in *Printz* held that Congress cannot force state officials to even perform “discrete, ministerial tasks” to implement a federal regulatory program. *Id.* at 929-30. Therefore, even though ICE may not truly consider SC a “program” in the same manner as, e.g., CAP, a court may find that SC’s infrastructure, purpose, and activities mark it a program and, thus, could find that ICE cannot compel LEAs to participate.

**8 U.S.C. §§ 1373 and 1644 do not support mandatory participation in SC.** In *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), the Second Circuit held that 8 U.S.C. § § 1373 and 1644 “do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local government entities or officials only from directly restricting the voluntary exchange of immigration information with the INS.” *City of New York*, 179 F. 3d at 35 (emphasis added).



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