



December 12, 2016

Dear Police Chief:

We are representatives of non-profit legal organizations in California that provide technical assistance and conduct litigation in the areas of immigration law and civil rights. As you know, the TRUTH Act (AB 2792) was signed into state law on September 28, 2016 by Governor Jerry Brown. Most of the provisions of this new law will go into effect on January 1, 2017.

As organizations involved in the TRUTH Act's drafting, refinement, and ultimate enactment, we have prepared this memorandum to support implementation of the law and to highlight key legal issues that may arise. This memorandum is divided into four parts. The first part summarizes the TRUTH Act's main features. The second part details the specific requirements in the law that affect California law enforcement agencies. The third part provides updated legal analysis on ICE detainers and what California law enforcement agencies should know. Finally, the fourth part provides other important background information about ICE detainers and immigration status. Please let us know if we can be of service as you work to interpret the TRUTH Act for agencies and departments in your County. We would be happy to provide further written analysis, as well as technical assistance and trainings, regarding any issues you encounter.

I. Summary of the TRUTH Act

The following is a summary of the key provisions in the TRUTH Act. The TRUTH Act:

- 1) **Ensures Notice to Every Individual.** The TRUTH Act requires that all local law enforcement agencies who receive an ICE detainer, transfer, or notification request must serve a copy of that request on the individual, and inform the individual if the law enforcement agency will comply with the request. In addition, if a local law enforcement agency decides to provide ICE with notification of an individual's release date and time, the local law enforcement agency also must promptly provide the same notification to the individual and their attorney or designee. This provision goes into effect on January 1, 2017.

- 2) **Requires that a consent form be provided to all individuals prior to an ICE interview.** The TRUTH Act requires a local law enforcement agency, prior to an interview between ICE and an individual in California custody, provide the individual with a written consent form that explains the purpose of the interview, that it is voluntary, and that the individual may decline the interview. The law requires the form to be available in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean. The form shall also be available in any additional languages that meet the county threshold as defined in subdivision (d) of Section 128552 of the Health and Safety Code if certified translations in those languages are made available to the local law enforcement agency at no cost. This provision goes into effect on January 1, 2017.
- 3) **Requires that communications with ICE are subject to the Public Records Act.** This law ensures that all communications to ICE and all records related to ICE access are subject to the California Public Records Act. Records relating to ICE access include, but are not limited to, data maintained by the local law enforcement agency regarding the number and demographic characteristics of individuals to whom the agency has provided ICE access, the date ICE access was provided, and whether the ICE access was provided through a hold, transfer, or notification request or through other means. This provision goes into effect on January 1, 2017.
- 4) **Increases Transparency Around Local Engagement with ICE.** The TRUTH Act requires a local legislative body to hold a community forum annually if local law enforcement allows ICE access to any individual. Local law enforcement is encouraged to participate in the forum. As part of this forum, the local law enforcement agency may provide the governing body with data it maintains regarding the number and demographic characteristics of individuals to whom the agency has provided ICE access, the date ICE access was provided, and whether the ICE access was provided through a hold, transfer, or notification request or through other means. This provision goes into effect on January 1, 2018.

II. Obligations of Local Law Enforcement Agencies Under the TRUTH Act

Here is a step-by-step summary of the actions that local law enforcement agencies must take to be in compliance with the TRUTH Act, including links to free resources. We also have attached a model policy for local law enforcement agencies to adopt to comply with the TRUTH Act, and it is available online at: <http://bit.ly/2hhvC4X>.

1. If ICE sends an immigration detainer, notification, or transfer request, you must promptly serve a copy on the individual who is the subject of the request, and inform the individual whether you intend to comply. As a resource for you, we have attached a model cover letter (entitled Truth Act Form 2) to include with the copy of the ICE detainer, transfer, or notification, and it is available online, with translations of the form into the required languages, at: <http://bit.ly/2gnCSYl>.

2. If ICE would like to interview an individual in your custody, you must first provide the individual with a consent form and have him/her complete the form. If the individual declines to be interviewed, you may not provide ICE with access to the individual. If the individual indicates that he or she is willing to be interviewed only with an attorney present, you may not provide ICE with access to the individual unless the attorney is present. Please note that the consent form must be available in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean, and you must make accommodations as defined by California Health and Safety Code Section 128552 (d) to other languages. As a resource for you, we have attached a model written consent form (Truth Act Form 1), and it is available online, along with translations of the form into the required languages, at: <http://bit.ly/2hk63hf>.
3. If you notify ICE of an individual's release date, you must provide the same notification to that individual and his or her attorney or other designated person as chosen by the individual. As a resource for you, we have attached a model form ((entitled Truth Act Form 3) to provide this notification, and it is available online here with translations into the required languages: <http://bit.ly/2hbu0Jr>.
4. Please be sure to maintain records of any communications with ICE, your policies with regard to ICE, any transfers of individuals to ICE as these are all public records subject to the California Public Records Act.
5. Please be prepared to attend and present at the annual community forum regarding local law enforcement policies and practices as they relate to ICE.

III. Legal Background of ICE Detainers and Other ICE Requests

Immigration detainers, as you know, do not legally authorize detention by California law enforcement agencies, and responding to such detainers could subject the agency to liability. Federal courts have held that detaining someone after they have been ordered released from custody constitutes a new arrest that must meet Fourth Amendment requirements. *See Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) *aff'd in part, dismissed in part*, 793 F.3d 208, 215-216 (1st Cir. 2015); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. April 11, 2014); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010). An immigration detainer is not a warrant, and any detention based on an immigration detainer is a warrantless arrest. *See Morales*, 996 F. Supp. 2d at 39; *Miranda-Olivares*, No. 3:12-cv-02317-ST at *29; *Vohra*, 2010 U.S. Dist. LEXIS 34363 at *24. As an arrest, such detention must be based upon probable cause "sufficient to warrant a prudent man in believing that the person to be arrested had committed or was committing an offense," and any

determination of probable cause must be reviewed by a neutral judicial official either before or promptly after the arrest. *Beck v. Ohio*, 379 U.S. 89 (1964); *Gerstein v. Pugh*, 420 U.S. 103 (1975). Lack of lawful immigration status is not a crime or a lawful basis for stop or arrest by local law enforcement agents. *Melendres v. Arpaio*, 695 F.3d 990, 1000-1001 (9th Cir. 2012) (state and local law enforcement officers do not have authority to stop or arrest for civil immigration violations).

California law enforcement should also be aware that in September, a federal court in Illinois held that all ICE detainers issued by the Chicago Field Office are invalid because they exceed ICE's warrantless arrest authority. *See Jimenez Moreno et al. v. Napolitano*, No. 1:11-cv-05452 (N.D. Ill. Sept. 30, 2016) (stay pending appeal filed) ("The bottom line is that, because immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained, ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2)."). This decision so far only applies to detainers issued from the Chicago Field Office. However, some agencies in California may have received detainers sent by the ICE Chicago Field Office. Moreover, the statutory analysis is plain and applicable across the country.

Following these federal court decisions, California law enforcement who elect to hold an individual beyond when they have been ordered released risk liability for unlawful detention. This cautionary rule also applies to delays in release in order to give ICE extra time to arrive, which may violate due process rights. *See Berry v. Baca*, 379 F.3d 764 (9th Cir. 2004). Local law enforcement must also respect the rights of individuals ordered released from court. If such individuals are returned to custody and taken back to the jail for processing their release, it may amount to a new arrest. *See Arline v. City of Jacksonville*, 359 F. Supp. 2d 1300 (M.D. Fla. 2005); *Barnes v. District of Columbia*, 242 F.R.D. 113, 115 (D.D.C. 2007); *Jones v. Cochran*, No. 92-6913, 1994 U.S. Dist. LEXIS 20625 (S.D.Fla. Aug. 8, 1994).

Furthermore, the California TRUST Act, Cal. Gov. Code § 7282, prohibits holding anyone on an ICE detainer after they are due for release, unless they fall into one of the exceptions enumerated in the law. Even when a person may fall into an exception, there is no requirement to hold a person, and as discussed above, there is no legal authority to do so without a judicial warrant. Any law enforcement agency that detains individuals beyond their release time on an ICE detainer or request from ICE that is not supported by a valid warrant may face liability.

IV. Other Effects of ICE Detainers

ICE detainers are not proof of immigration status or an indication that the subject presents a public safety risk. They should not be used in decisions regarding an individual's custody classification, work, or quarter assignments.

ICE detainers are merely notices of ICE's potential interest in the subject, and do not indicate a decision by ICE to arrest the person or put them in removal proceedings. Unlike other holds, ICE detainers are issued by an ICE agent, without supervisory review or any evaluation by a judge or neutral magistrate. They are not warrants for arrest or criminal detainers, and should not be treated as such. In addition, immigration detainers should not affect the subject's access to bail, work release, or jail alternatives or other supervision programs. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (striking down Arizona state law banning bail for undocumented immigrants charged with felonies).

Furthermore, all ICE detainers state plainly that "This request arises from DHS authorities and should not impact decisions about the subject's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters."

Pursuant to the California Public Records Act, we would like to request a copy of any policies that your agency adopts to comply with the TRUTH Act. Please send these policies to Jessica Karp Bansal at jbansal@ndlon.org.

Thank you for working with us to implement this important law. If you have any questions, please contact Angela Chan at (angelac@advancingjustice-alc.org or 415-848-7719) or Lena Graber at (lgraber@ilrc.org or 415-321-8545).

Sincerely,

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Attachments