

<p>California Department of Justice CALIFORNIA JUSTICE INFORMATION SERVICES DIVISION Larry Wallace, Director, Division of Law Enforcement</p>		<h1 style="margin: 0;">INFORMATION BULLETIN</h1>	
<p><i>Subject:</i> Responsibilities of Local Law Enforcement Agencies under Secure Communities and the TRUST Act</p>	<p>No. 14-01</p>	<p><i>Contact for information:</i></p>	
	<p><i>Date:</i> June 25, 2014</p>	<p>Larry Wallace, Director, Division of Law Enforcement 916-319-8200</p>	

TO: Executives of State and Local Law Enforcement Agencies

The purpose of this bulletin is to update information provided in Information Bulletin No. 2012-DLE-01, dated December 4, 2012, titled “Responsibilities of Local Law Enforcement Agencies under Secure Communities.” In that Bulletin, we outlined the responsibilities of state and local law enforcement agencies regarding custody of undocumented immigrants subject to federal detainer requests. We clarified that federal detainers issued under the Secure Communities program are not mandatory, but are merely requests enforceable *at the discretion of the local law enforcement agency* holding the individual arrestee.

Since then, effective January 1, 2014, the “Transparency and Responsibility Using State Tools Act” (TRUST Act) has been enacted into California law. (Gov. Code, §§ 7282, 7282.5; Stats. 2013, ch. 570.) The TRUST Act limits the discretion of law enforcement officials to detain an individual pursuant to a federal immigration detainer request unless certain conditions are met. Additionally, new federal case law has created legal risk for local jurisdictions that voluntarily comply with an Immigration and Customs Enforcement (ICE) request to detain an individual. In summary:

- Jurisdictions that choose to comply with ICE detainer requests may only do so in circumstances that meet the TRUST Act’s enumerated conditions;
- The TRUST Act does not affect obligations under Health and Safety Code section 11369, which requires federal notification when an arrest is made for specified controlled substances offenses and there is reason to believe the individual may not be a citizen of the United States;
- New case law and the TRUST Act only limit discretion to *detain* individuals and do not affect local law enforcement agency discretion to provide information to or otherwise cooperate with federal immigration officials; and
- A federal court outside of California’s jurisdiction has held a county liable for damages where it voluntarily complied with an ICE request to detain an individual, and the individual was otherwise eligible for release. If courts with jurisdiction affecting California follow the decision reached by this court, local law enforcement agencies may also be held liable for such conduct.

TRUST Act Conditions for Retaining Custody of Detained Individuals

The TRUST Act provides that continued detention pursuant to an ICE detainer request is authorized only if two conditions are met. First, the continued detention must “not violate any federal, state, or local law, or any local policy,” and second, the detainee’s criminal history must include one of the following:

- Has been convicted of a serious felony or violent felony identified in subdivision (c) of Section 1192.7 or subdivision (c) of Section 667.5 of the Penal Code or has been convicted of an offense that was committed in another state which, if committed in California, would be punishable as a serious felony

or violent felony as defined by in subdivision (c) of Section 1192.7 or subdivision (c) of Section 667.5 of the Penal Code;

- Has been convicted of a felony punishable by imprisonment in state prison;
- Has been convicted within the past five years of a misdemeanor for a crime that is punishable as either a misdemeanor or a felony;
- Has been convicted at any time of a felony for any of the offenses listed in Government Code section 7282.5, subdivision (a)(3);
- Is a current registrant on the California Sex and Arson Registry;
- Is arrested and taken before a magistrate on a charge involving: (1) a serious or violent felony identified in subdivision (c) of Section 1192.7 or subdivision (c) of Section 667.5 of the Penal Code; (2) a felony punishable by imprisonment in state prison, other than domestic violence; or (3) a felony for any of the offenses listed in Penal Code section 7282.5, subdivision (a)(3), other than domestic violence; and the magistrate makes a finding of probable cause as to that charge;
- Has been convicted of a federal crime that meets the definition of aggravated felony under the federal Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(A)-(P); or
- Is identified by ICE as the subject of an outstanding federal felony arrest warrant.

(Gov. Code, § 7282.5, subd. (a).)

Only if both of these conditions are met, then local law enforcement may continue to detain the individual for up to 48 hours (excluding Saturdays, Sundays, and holidays) to permit ICE to assume custody. If one of these conditions is not satisfied, then an immigration detainer will not support the continued detention of an individual otherwise eligible for release, and under the TRUST Act, the individual shall not be detained on the basis of the detainer after the individual otherwise becomes eligible for release from custody.

The TRUST Act Does Not Affect Notification Obligations Under Health and Safety Code Section 11369

Health and Safety Code section 11369 provides that arresting agencies shall notify the appropriate federal agency (ICE) when there is reason to believe that a person arrested for violating a specified controlled substances offenses may not be a citizen of the United States. (See Health & Safety Code, § 11369.) The listed offenses are violations of sections 11350, 11351, 11351.5, 11352, 11353, 11355, 11357, 11359, 11360, 11361, 11363, 11366, 11368 or 11550 of the Health and Safety Code. Compliance with section 11369 only requires notification to ICE; it does not permit continued detention solely on the basis of an arrest for one of the specified offenses above.

ICE and Federal Court Rulings Confirm That ICE Detainer Requests Are Not Mandatory

Again, satisfaction of the TRUST Act conditions for compliance with ICE immigration detainer requests does not mean that compliance is mandatory. As we explained in Bulletin No. 2012-DLE-01, law enforcement agencies in California are not required to fulfill an ICE immigration detainer. Recent court rulings and correspondence from ICE's Acting Director have further confirmed that ICE immigration detainers are not mandatory. In a February 25, 2014, letter to Representative Mike Thompson, Acting ICE Director Daniel H. Ragsdale stated that “[w]hile immigration detainers are an important part of ICE’s effort to remove criminal aliens who are in federal, state, or local custody, they are not mandatory as a matter of law.”

In a March 4, 2014, ruling, the Third Circuit Court of Appeals held that ICE detainers are voluntary requests. (*Galarza v. Szalczyk* (3rd Cir. 2014) 745 F.3d 634.) The court concluded that “immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal” and that the county in that case was “free to disregard the ICE detainer.” (*Id.* at pp. 636, 645.) The court specified

that settled constitutional law clearly establishes that immigration detainers must be deemed requests, citing the Tenth Amendment concerns that were explained in Bulletin No. 2012-DLE-01. (*Id.* at pp. 643-645.)

A federal court in Oregon also recently held that ICE detainers are voluntary requests, relying on the reasoning in *Galarza* and on this office's December 4, 2012 Information Bulletin. (*Miranda-Olivares v. Clackamas Co.* (D.Or. April 11, 2014, No. 3:12-cv-02317-ST) [2014 WL 1414305].) Accordingly, subject to federal and state limitations described above, in circumstances where compliance with ICE immigration detainers is permitted, an agency may use its discretion whether to devote resources to holding a suspected undocumented immigrant on behalf of the federal government. California law enforcement agencies should consider the merits of each request carefully, consider whether the individual may be dangerous and pose a public safety risk, and take the course of action that best protects public safety.

Jurisdictions May Be Exposed to Liability If They Voluntarily Comply with ICE Detainer Requests

The *Miranda-Olivares* court held, consistent with Information Bulletin No. 2012-DLE-01, that local authorities can choose to comply with a request from ICE, but are not required to do so by law. The court also held that because compliance with an ICE detainer is voluntary rather than mandatory, a local agency could violate the Fourth Amendment by detaining an individual solely based on the request of ICE, without some other probable cause for arrest.

No state or federal court with California jurisdiction has yet ruled on whether detentions authorized under the TRUST Act, but solely based on the request of ICE, violate the Constitution. If a California court adopts the reasoning of the district court in *Miranda-Olivares*, local jurisdictions may be held liable for damages for such a detention.

Further, compliance with the TRUST Act may not immunize local jurisdictions from liability. As described above, the TRUST Act permits a law enforcement official to detain an individual on the basis of an immigration hold after that individual becomes otherwise eligible for release from custody only if the continued detention would “not violate any federal law” (Gov. Code, § 7282.5, subd. (a).) If continued detention is found to violate the Fourth Amendment, it would therefore likely be no defense for the local jurisdiction to argue that it was acting under the authority of the TRUST Act.

Federal Case Law and the TRUST Act Do Not Limit Other Cooperation with Immigration Officials

The *Miranda-Olivares* holding and the TRUST Act only affect discretion to *detain* individuals. They do not affect a law enforcement agency's discretion to otherwise cooperate with federal immigration officials. Specifically, law enforcement officials may provide information to ICE, including notification of the date that an individual will be released, as requested on an immigration detainer form. Federal law provides that state and local governments may not be prohibited from providing information to or receiving information from ICE. (8 U.S.C. §§ 1373, 1644; see also 75 Ops.Cal.Atty.Gen. 270, 277 (1992) [concluding that a city may not prohibit its officers and employees from cooperating in their official capacities with immigration officials].)

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