OFFICE OF CORPORATION COUNSEL

MARGARET C. DAUN
Acting Corporation Counsel

COLLEEN FOLEY
PAUL D. KUGLITSCH
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
MOLLY J. ZILLIG
ALAN M. POLAN
DEWEY B. MARTIN
JAMES M. CARROLL
KATHRYN M. WEST
JULIE P. WILSON
CHRISTINE L. HANSEN
CARRIE THEIS
Assistant Corporation Counsel

To: Chairman Lipscomb and County Supervisors
County Executive Chris Abele

From: Acting Corporation Counsel Margaret C. Daun

Date: February 1, 2017

RE: ICE Detainer Requests and Section 287(g) Agreements

Over the past two business days, the Office of Corporation Counsel (OCC) received requests to review proposed and previously adopted County legislation that articulates policies discouraging the County's compliance with detainer requests from the federal Immigration and Customs Enforcement Agency (ICE), as well as section 287(g) agreements between local law enforcement agencies and ICE, *see* 8 U.S.C. § 1357(g) (1996) (*as amended*, Homeland Security Act of 2002, Public Law 107-296), under which local law enforcement performs certain immigration enforcement functions as delegated by ICE.

Specifically, a Substitute Resolution will be considered by the County Board tomorrow, File No. 16-738, which has been amended from its originally-submitted version. As relevant here, the revised Substitute Resolution states:

> BE IT FURTHER RESOLVED, that Milwaukee County … will not be bullied by threats to revoke our federal funding, nor will we sacrifice our values or members of our community for federal dollars;
>
> …
>
> BE IT FURTHER RESOLVED, that the County Board … encourages the Chief Judge of Milwaukee County to request that ICE agents not carry out enforcement actions in or around courthouse grounds; and
>
> BE IT FURTHER RESOLVED, that the County Board opposes the use of Section 287(g) Immigration and Nationality Act (INA) agreements, and urges the Office of the Sheriff to refuse to enter into Section 287(g) agreements with ICE; and
>
> BE IT FURTHER RESOLVED, that the policy adopted by the Milwaukee County Board of Supervisors in 2012 regarding detainer requests from ICE remains in full effect, and confirms that Milwaukee County will not honor detainer requests that are not accompanied by a federal judge's court order or warrant … .

The Resolution adopted in 2012, File No. 12-135, states in relevant part:

BE IT RESOLVED, that the Milwaukee County Board of Supervisors hereby adopts the following policy with regard to detainer requests from the US Department of 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

For the two reasons detailed below, the OCC respectfully advises that the County may put at risk federal grant funding if the Substitute Resolution is adopted in its current form.[1] In addition, the OCC advises that a review of the 2012 Resolution is appropriate at this time to determine if it might also possibly put at risk such grants.

Please note that the advice and analyses contained herein are preliminary. The OCC continues its research on these issues, including a review of analyses, litigation, and legislation prepared by other jurisdictions also deemed to be "sanctuaries" and other issue groups, including the U.S. Conference of Mayors, Major Cities Chiefs Association, the Immigrant Legal Defense Fund, the City of San Francisco, and the City of Chicago, among others.

Should policymakers request, the OCC will provide continuing advice on this topic, including recommendations for language most likely to be viewed as compliant with federal law and regulations which affirms, supports, and furthers the County's commitment to inclusiveness, openness, diversity, and nondiscrimination, the due process rights of all citizens, its acknowledgement and support of the dignity of all persons, and the importance of the relationships of trust and engagement between law enforcement and the people they protect.

1. Legal Landscape is Uncertain

The legal and regulatory landscape surrounding these issues is changing on a nearly daily basis and the OCC cannot currently ascertain how the new federal administration's Department of Justice, Homeland Security, ICE, and/or other executive branch agencies may attempt to enforce or compel the County's compliance with recent Executive Orders, current federal laws, and/or new regulations or laws through the withholding or threatened withholding of federal grant moneys. Specifically, the President's Executive Order dated January 25, 2017, states, that "[i]t is the policy of the Executive Branch … to ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law."

---

[1] The OCC is not providing any advice or guidance related to general statements of belief, values, or principles in a Resolution or Ordinance. The originally-proposed version of the Substitute Resolution currently under consideration, File 16-738, does not raise the same degree of concerns and risks articulated throughout the balance of this letter.

And while a handful of federal court rulings have rejected efforts by the federal executive branch to compel local governments to administer federal laws, the immediate risks to the County are unknown given the swiftness with which the new administration acts to implements its policies. New legal challenges are being raised equally swiftly. Just yesterday, the City of San Francisco filed a lawsuit challenging the President's Executive Order on state's rights grounds under the Tenth Amendment. The American Civil Liberties Union already filed a similar suit. Obviously, the arguments raised by the plaintiffs in these suits have not yet been ruled upon. Jurisdictions and entities with significant resources, such as the City of San Francisco and the ACLU, could establish a model for further legislation and/or litigation in this area.

In short, these resolutions raise complex legal questions with national ramifications, including state's rights under the Tenth Amendment and due process rights under the Fourth Amendment, and create risks, as discussed further below. Given the constantly changing legal landscape, the OCC recommends consultation and coordination with jurisdictions and groups pursuing similar legal efforts nationally.

2. Milwaukee County's Compliance Under Review by DOJ with Stricter Scrutiny and Standards Anticipated

The DOJ has already identified Milwaukee County as potentially in violation of federal immigration law and has threatened to withhold federal State Criminal Alien Assistance Program (SCAAP) grant funding in FY 2018. *See* Department of Justice, Office of the Inspector General (OIG), May 31, 2016 Memorandum, "Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients" (hereinafter, "May Memorandum"). In that May report, the OIG estimated that as of March 2016, Milwaukee County had received a total of $7,539,572 in Office of Justice Programs funding (i.e., SCAAP grants). May Memorandum at 11.

As part of its implementation of the recommendations set forth in the May Memorandum, the DOJ emailed the County in November and stated that the County (through a formal legal memorandum from the OCC) must demonstrate the County's compliance with 8 U.S.C. § 1373 by June 30, 2017, so that the County will continue to be eligible to receive SCAAP funds.

In relevant part, 8 U.S.C. § 1373 states:

> (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.

The purpose of section 1373 is "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." *See* House of Representatives Report, Immigration in the National Interest Act of 1995 (H.R. 2202), 1996, H. Rept. 104-469.

Importantly, in the May Memorandum, the OIG adopted a more broad interpretation of 8 U.S.C. § 1373 and viewed many policies as possibly noncompliant, including policies similar to the County's, that appear to merely attempt to influence how local law enforcement handles detainer requests issued by ICE. Importantly, OIG stated:

> [An ordinance's] message to [] employees, has the potential to affect the understanding of local officials regarding the performance of their duties, including the applicability of any restrictions on their interactions and cooperation with ICE.
>
> [W]e have concerns that other local laws and policies, that by their terms apply to the handling of [voluntary] 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. 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 local officials regarding ICE immigration status requests.

May Memorandum at 6-7. In addition, the May Memorandum went on to question the validity of ordinances that are very similar to the County's 2012 Resolution and the proposed Substitute Resolution. For example, the OIG took issue with an executive order issued by Philadelphia's mayor that limited compliance with detainer requests except where the request was "supported by a judicial warrant." *Id.* at 8.

At this time, considering ***only*** the 2012 Resolution, it is unclear if Milwaukee County is non-compliant with 8 U.S.C. § 1373. Significantly, although the 2012 Resolution established a policy to restrict the County's response to ICE detainer requests, the Sheriff already cooperates with ICE and other federal law enforcement agencies. Without further research and investigation, the OCC at this time cannot determine if the County is in compliance with 8 U.S.C. § 1373. Furthermore, adoption of the Substitute Resolution raises further legal issues regarding confirmation of compliance with section 1373.

In summary, despite that the 2012 Resolution and the proposed Substitute Resolution do not appear to violate 8 U.S.C. § 1373 on its face, and that the Sheriff may determine the policies of his Office, the May Memorandum raises significant legal questions regarding how the Board policies affect the County's compliance with section 1373.

Moreover and of greater concern, how compliance with 8 U.S.C. § 1373 will be viewed and verified under the new federal administration is uncertain and unpredictable. It is reasonable to anticipate that the new administration will adopt a more "aggressive" and/or broad interpretation of section 1373. It is reasonable to anticipate that the new administration will attempt to link additional grant funding to section 1373 compliance, beyond SCAAP. In other words, actions undertaken now by the County may have unanticipated consequences on future federal grant funding.

Therefore, the Office of Corporation Counsel respectfully advises caution and a very deliberate approach to this legislation, so that the County may maximally increase the likelihood that the OCC can validate section 1373 compliance in June 2017 and successfully challenge any federal agency's denial of grant funding on that basis.

***