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To: Acting Assistant Attorney General Alan R. Hanson

From: Corporation Counsel Margaret C. Daun

Date: June 28, 2017

Re: Certification of Milwaukee County's Compliance with 8 U.S.C. § 1371

Cc: Milwaukee County Executive Chris Abele
Milwaukee County Board Chairman Theodore Lipscomb, Sr.
Milwaukee County Board Supervisors
Milwaukee County Sheriff David A. Clarke, Jr.
Milwaukee County District Attorney John Chisholm
Milwaukee County Clerk of Courts John Barrett
First Judicial Circuit Chief Judge Maxine A. White

I. Introduction

In correspondence dated April 21, 2017 and November 22, 2016, from Acting Assistant Attorney General Hanson, Milwaukee County received notification from the United States Department of Justice ("DoJ"), Office of Justice Programs ("OJP"), that an official legal opinion regarding the County's compliance with 8 U.S.C. § 1373 would be required by June 30, 2017, from the Office of Corporation Counsel ("OCC"). This memorandum, and the supporting documentation submitted herewith, is the official legal opinion intended to satisfy this requirement.

Issuance of this opinion was complicated by uncertainty regarding the interpretation, scope and breadth of section 1373, including what form and substance a "validation of compliance" should take, as well as what constitutes sufficient "documentation" of validation. This quandary stems from the paucity of specific, clear, and actionable guidance from the federal government regarding compliance with section 1373, as well as conflicts among various interpretations of the law, specifically including:

- May 31, 2016 Memorandum from Inspector General Horowitz to Assistant Attorney General Mason regarding the "Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients" ("May 2016 IG Memo"), Appendix A;

- January 25, 2017 Executive Order 13768 ("Executive Order"), Appendix B;

- March 27, 2017 Attorney General statement ("March 2017 AG Statement"), Appendix C, which in part implies that compliance with the Immigration and Compliance Enforcement Agency ("ICE") detainer requests is somehow required under section 1373;

- various federal court rulings predating the Executive Order, none of which support any inference that section 1373 can constitutionally compel jurisdictions to honor detainer requests and none of which puts forward any workable definition of a "sanctuary jurisdiction," Appendices D-H;

- April 25, 2017 Order entered in *County of Santa Clara, et al. v. Trump, et al.*, No. 3:17-cv-00485 (N.D. Cal. April 25, 2017), enjoining the application of section 10(a) of the Executive Order 13768 ("Injunction Order"), Appendix I; and

- May 22, 2017 Attorney General "Memorandum for All Department Grant-Making Components" ("AG May 22 Memo"), Appendix J, which cites to the aforementioned Executive Order, but omits mention of its enjoinder by the Northern District of California, and also, for the first time, stated that:

    - the DoJ would interpret 1373 as applying only to Department of Justice and Department of Homeland Security grant moneys;
    - the DoJ would interpret 1373 as applying to "any existing grant administered by the Office of Justice Programs and the Office of Community Oriented Policing Services ... and to future grants for which the Department is statutorily authorized to impose such a condition;" and
    - for purposes of Executive Order 13768, "sanctuary jurisdiction" shall be defined as only those jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373." *Id.* (but failing to explain how the DoJ/OJP will interpret "willful" noncompliance).

II. Factual Background

The Milwaukee County Board adopted two relevant resolutions, attached hereto as Exhibits 1 and 2. Resolution 12-135 addresses detainer requests and sets forth a policy limiting the cooperation with such requests to an individual that is:

- convicted of at least one felony or two non-traffic misdemeanors;
- convicted or charged with any domestic violence offense or violation of a protective order;
- convicted or charged with intoxicated use of a vehicle;
- a defendant in a pending criminal case that is either an identified gang member or has an outstanding criminal warrant;
- that are a possible match on the U.S. terrorist watch list.

Importantly, the last clause of the resolution stated that "the County Board *requests* that ... the Milwaukee County Sheriff adopt the directed County policy."

Resolution 16-738 articulated several principles of the County Board, and urged certain actions, as follows:

- urged ICE to add courts to its list of sensitive locations and encouraged the Chief Judge of Milwaukee County to request that ICE agents not carry out enforcement actions in or around courthouse grounds;
- voiced opposition to 287(g) agreements generally and "urge[d]" the County Sheriff not to enter into a 287(g) agreement with ICE; and
- reaffirmed Resolution 12-135, and confirmed that detainer requests should not be honored absent a federal court order or warrant.

Resolution 16-738 did not set forth any new, binding policies. Furthermore, the County Board cannot legally mandate that the Sheriff implement, follow, or adhere to its desired policies or procedures as to information sharing with ICE and/or detainer requests (*see* section III below for further discussion).

Related, as set forth in ¶¶ 9, 11-12 of Exhibit 4 attached hereto, without receiving any reimbursement from the federal government for the nearly $1 million in annual taxpayer-incurred costs, the Milwaukee County Sheriff's Department, as a matter of practice, already routinely complies with ICE detainer requests without any deference to the restrictions articulated in Resolutions 12-135 and 16-738. In addition, in clear conflict with portions of Resolution 16-738, the Sheriff sent a letter to ICE dated March 8, 2017, attached as Exhibit 3, and requested that negotiations commence to expedite the Sheriff's Department's execution of a 287(g) agreement with ICE. *See also* Exh. 4, ¶ 10.

Furthermore, the Wisconsin legislature is currently considering legislation, *see* LRB-0909/1 attached hereto as Exhibit 8, to create a new state statute (section 66.0414), which, in relevant part, would prohibit Milwaukee County and any other political subdivision of the state from enacting any law or policy that would prohibit any employee from (a) sending, requesting, or receiving information from the federal government regarding the citizenship or immigration status of any individual lawfully detained or arrested; (b) assisting or cooperating with a federal immigration officer, including the provision of "enforcement assistance;" and (c) permitting an immigration officer to enter and conduct immigration enforcement activities in any building or facility under the control of the political subdivision. The new law also would expressly invalidate any inconsistent local ordinance or policy. The new statute would create a new private right of action, whereby any state resident could file a writ of mandamus to compel the County to comply with the new law. If a court were to find the County to be noncompliant, the law would require the court to impose a penalty of **$5,000 per day**, to be paid via a reduction in the County's shared revenue payments from the state.

Setting aside the new state statute under consideration, the economic stakes for the County are high should the DoJ/OJP withhold any funding under section 1373. The federal funding

putatively at risk for the selected departments, as noted below, totals approximately $6,374,900[1] per year.

REPORTED GRANT FUNDING BY DEPARTMENT, 2014-2015		
Department	**Year**	**Amount[1]**
District Attorney	2014	$1,740,152
	2015	1,776,310
	Average	1,758,231
Clerk of Courts	2014	388,175
	2015	79,203
	Average	233,689
Department of Administrative Services	2014	818,713
	2015	883,907
	Average	851,310
Department of Health and Human Services	2014	449,426
	2015	n/a
	Average	449,426
Pre-Trial Services	2014	635,517
	2015	502,096
	Average	568,807
Child Support	2014	1,581,228
	2015	1,401,990
	Average	1,491,609
Sheriff's Department	2014	699,873
	2015	742,273
	Average	721,073
Office of Emergency Management	2014	n/a
	2015	300,755
	Average	300,755
TOTAL ESTIMATED POTENTIAL ANNUAL GRANT FUNDING IMPACT FOR SELECTED DEPARTMENTS		**$6,374,900**

As demonstrated by the table above, a decision to withhold any federal grant funding from Milwaukee County would have a significant and dire impact on key public services provided by the County, many of which support our most vulnerable and at-risk citizens, particularly when the County's other revenue sources (shared revenue and property taxes, primarily) have seen significant decreases over the last few fiscal years. In short, even the specter of a draconian or

[1] Grant funding changes every year for each department. Furthermore, it is unclear which exact grants would be subject to withholding under 1373 and whether enforcement under 1373 would be prospective only. Thus, this figure and the dollar amounts reported in the table are merely estimates of potential funding at issue. These amounts were provided by the County's Budget Department.

otherwise unpredictable cut in grant funding will create budgetary chaos for the County. These facts, coupled with the lack of definitive legal guidance as to the scope and application of 8 U.S.C. § 1373, as well as the differing view of key policymakers in Milwaukee County, the OCC respectfully requests that if the DoJ/OJP finds this opinion in any way unsatisfactory, that the DoJ/OJP enter into discussions with the OCC to determine how to improve this certification and/or to identify any formal or informal, written or unwritten County policies that may require discussion and revision to avoid the loss of funding. The OCC remains ready, willing and able to work with the DoJ/OJP to review policies, advise policymakers, and to provide a satisfactory certification of compliance with section 1373.

III. Analysis

Section 1373 prohibits Milwaukee County and County officials from in any way restricting the maintenance, sending, or exchange of any individual's citizenship or immigration status information with ICE or any other state or local governmental entity.[2]

To verify compliance with this federal law, the OCC requested from the below-noted County Departments[3] verification regarding whether, as a matter of written or unwritten policy, course of practice, or any other formal or informal, written or unwritten understanding, the Department prohibits or restricts in any way the maintenance, sending, or exchange of information related to the citizenship or immigration status of any individual with ICE or any other governmental entity. This office also requested of those same departments whether any information request had been denied where relevant citizenship or immigration status information was actually maintained by the Department. The responses summarized below are evidenced by the attached affidavits, Exhibits 4-7.

Department	Any written or unwritten, formal or informal policy prohibiting or dissuading the sharing of citizenship/immigration status information with ICE?	Any instance where an ICE request for citizenship or immigration status data was denied where the dep't had such data?
Department of Administrative Services	No	No
Milwaukee County Sheriff	No	No
Milwaukee County House of Correction	No	No
Milwaukee County Juvenile Detention	No	No

On the basis of the foregoing, the Office of Corporation Counsel certifies without qualification that the County is fully in compliance with 8 U.S.C. § 1373. This assessment is based upon multiple factors, including: that the Sheriff's Department (a) routinely complies with detainer

[2] As summarized above, the distinctions between 8 U.S.C. § 1373 (a) and (b) are not relevant.

[3] If the DOJ/OJP requires verifications from any additional County departments, please notify the OCC of the specific departments and the OCC will seek to obtain such additional verifications.

requests without deference to the restrictions listed in Resolutions 12-135 and 16-738; and (b) has begun negotiations to enter into a 287(g) agreement with ICE; and (c) that the County Board's enacted policies and preferred processes as to information sharing with ICE and/or detainer requests, such as those set forth in Resolutions 12-135 and 16-738, cannot legally bind the Sheriff and are therefore more properly characterized as aspirational statements of belief.[4]

IV. Further Discussion

In his remarks on March 27, 2017, the Attorney General ("AG") specifically noted that some jurisdictions as a matter of policy "refus[e] to detain known felons under federal detainer requests." A few sentences later, he stated, "just last May, the Department of Justice Inspector General found that these policies also violate federal law," and concluded with a warning to jurisdictions that they must comply with 8 U.S.C. § 1373 or risk losing grant moneys and claw-backs of already-received grant moneys. In these comments, the AG appears to attempt to establish that compliance with section 1373 requires cooperation with detainer requests.

However, the Inspector General's report from last May, referred to by the AG in those same comments, expressly made clear that the Department of Homeland Security and several federal courts have concluded that civil immigration detainers are ***voluntary requests*** and that local jurisdictions need not comply with them. *See* IG May 2016 Memo at 4, attached as Appendix A. *See also New York v. United States*, 505 U.S. 144, 175-76 (1992), attached as Appendix D; *Printz v. United States*, 521 U.S. 898, 925 (1997), attached as Appendix E; *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("[S]ettled constitutional law clearly establishes that [immigration detainers] must be deemed requests" because any other interpretation would render them unconstitutional under the Tenth Amendment), attached as Appendix F; *City of New York v. United States*, 179 F.3d 29, 31-37 (2d Cir. 1999) (upholding 1373 in a Tenth Amendment challenge but making clear that the decision turned on the fact that 1373 did not actually compel affirmative action by the locality) , attached as Appendix G; *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 722 (Ct. App. 2009) (court upheld LAPD policy challenged under 1373 that prohibited police action to discover the immigration status of a person or arrest or booking of persons for immigration violations challenged under 1373 because 1373 on its face says nothing about police action or arrest/booking for illegal reentry), attached as Appendix H; *Santa Clara*, App. I, at 39-40.

The County concluded that, in its judgment and experience, Resolutions 12-135 and 16-738 make the community safer by fostering trust between residents and local law enforcement. *See* Exh. 4 at ¶¶ 3-4. If the resolutions were implemented, the County reasoned, residents will be more likely to call law enforcement when they observe illegal activity, will be more likely to provide statements to law enforcement, and will be more likely to become a sworn witness in a criminal prosecution. *See id. See also* App. I at 27-28 (listing other rationales for jurisdictions to

[4] As the attached Exhibit 9 demonstrates (*see* pp. 2-3), it has been the consistent advice of the OCC that the Milwaukee County Sheriff exercises a wide swath of powers (and may do so without deference to many County policies) given his status as an independently elected Constitutional officer. Notably, the County Board acknowledged this authority, as relevant here, in Resolution 12-135 where it stated (lines 51-52), "[T]he Milwaukee County Sheriff has broad latitude to administer his oversight over inmate detentions."

adopt "sanctuary policies" including that residents will be more likely to obtain preventative medical care and immunizations and that such policies improve overall delivery of education to all children).

More importantly, section 1373 on its face does not even mention the word "detainer," nor does it contain any language that could be reasonably interpreted as mandating cooperation with detainer requests. Instead, the language of 1373 on its face addresses information collection and exchange. Therefore, it is the opinion of the OCC that grant funding at issue under 8 U.S.C. § 1373 cannot be legally predicated upon the County's cooperation with detainer requests and that Resolutions 12-135 and 16-738 are fully in compliance with section 1373.

By extension then, even if the Sheriff had implemented Resolutions 12-135 and 16-738, which only address ***voluntary*** detainer requests, the County would still nonetheless be in compliance with 8 U.S.C. § 1373 because no County department has implemented or adopted any formal or informal, written or unwritten policy that prohibits the maintenance, sending, or exchange of any individual's citizenship or immigration status information with ICE or any other state or local governmental entity.

Alternately, even if a court were to hold that section 1373 could be legally interpreted to require cooperation with detainer requests and not run afoul of the Tenth Amendment, the Sheriff's Department as a matter of routine practice complies with detainer requests without deference to either Resolution 12-135 or Resolution 16-738, as noted above.

In short, under either a straightforward reading of 1373 on its face (i.e., prohibiting policies that restrict citizenship and immigration status information gathering and/or sharing) or a more expansive reading per the Attorney General's recent March 27 remarks (i.e., mandating compliance with detainer requests), it is the opinion of the OCC that Milwaukee County is in full compliance with 8 U.S.C. § 1373.

Lastly, should the DoJ/OJP seek to enforce section 1373 and/or the Executive Order to the County's financial detriment, the County hereby requests formal written notice of any such determination prior to application of no less than sixty (60) days, including a detailed explanation for the determination that the County is not in compliance with section 1373, as well as an explanation of the nexus between the grant funding proposed to be withheld and section 1373. Furthermore, the County wishes to make clear that should the DoJ/OJP wish to withhold or claw-back any grant funding under section 1373, the County would avail itself of all legal options available to it and raise numerous legal arguments, listed in part below, to protect its grant funding, avoid budgetary chaos and likely immediate and dire harm to its overall fiscal health and related, potentially significant reductions in service levels to its residents:

- The Executive Order is an unconstitutional violation of the separation of powers doctrine as it seeks to usurp Congress' exclusive spending powers, *Santa Clara*, App. I, at 35-37;

- Section 1373 and the Executive Order violate the Tenth Amendment because (a) the conditions placed on grant recipients are ambiguous, vague and are being applied retroactively; (b) (depending on the grants impacted) there is either no nexus or an insufficient nexus between section 1373 and most categories of federal funding; or (c) an application of 1373 or the Order to the County would be improperly coercive, *Santa Clara*, App. I, at 37-39; *see also South Dakota v. Dole*, 482 U.S. 203, 207-09, 211 (1987); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576-78 (2012);

- Section 1373 and the Executive Order would violate the Tenth Amendment if interpreted to compel cooperation with detainer requests, *Santa Clara*, App. I, at 39-40, *see supra* at 6 (citing numerous cases); [5]

- Section 1373 and the Executive Order violate the Fifth Amendment since both respectively fail to make clear what conduct is prohibited and fail to establish clear standards for enforcement, *Santa Clara*, App. I, at 41-43; and

- Section 1373 and the Executive Order violate the Fifth Amendment because neither provides the County with appropriate and sufficient procedural due process, given that neither establishes a notice and hearing process for the County to dispute any adverse decision prior to the withholding or claw-back of funds, *Santa Clara*, App. I, at 43-44.

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[5] In addition, numerous federal courts have held that it is a violation of the Fourth Amendment rights of individuals for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests because civil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 215-17 (1st Cir. 2015); *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9-11 (D. Or. Apr. 11, 2014); *Mendoza v. Osterberg*, No. 8:13-CV-65, 2014 WL 3784141, at *6 (D. Neb. July 31, 2014); *Villars v. Kubiatowski*, 45 F. Supp. 3d 791 (N.D. Ill. 2014); *Uroza v. Salt Lake Cnty.*, No. 2:11-CV-713-DAK, 2013 WL 653968, at *5-6 (D. Ut. Feb. 21, 2013); *Vohra v. United States*, No. 040972, 2010 U.S. Dist. LEXIS 34363, *25 (C.D. Cal. Feb. 4, 2010). Notably, ICE does not indemnify local jurisdictions for potential liability that they could face related to such Fourth Amendment violations. *See* 8 C.F.R. § 287.7(e); Exh. 4, ¶ 13. And critically, Congress may not condition federal spending on a local jurisdiction taking actions that violate the Constitution. *South Dakota v. Dole*, 483 U.S. 203 (1987). This line of reasoning provides an additional basis to challenge an application of section 1373 to the County that purports to compel the County's cooperation with ICE detainer requests.