

Kamala D. Harris, Attorney General

<p>California Department of Justice CALIFORNIA JUSTICE INFORMATION SERVICES DIVISION Larry Wallace, Director, Division of Law Enforcement</p>		<h1>INFORMATION BULLETIN</h1>	
<p><i>Subject:</i> Responsibilities of Local Law Enforcement Agencies under Secure Communities</p>	<p><i>No.</i> 2012-DLE-01</p>	<p><i>Contact for information:</i></p>	
	<p><i>Date:</i> 12-4-12</p>	<p>Larry Wallace, Director, Division of Law Enforcement 916-319-8200</p>	

TO: Executives of State and Local Law Enforcement Agencies

The California Department of Justice (CalDOJ) and the Office of the Attorney General have received inquiries about state and local law enforcement responsibilities under Secure Communities, a federal program administered by the Immigration and Customs Enforcement agency (ICE) of the United States Department of Homeland Security (DHS). These inquiries have included whether local law enforcement must fulfill a federal detainer request even if that agency determines that fulfilling the request would not be consistent with public-safety priorities or the best use of limited local law enforcement resources; and whether a local law enforcement agency may adopt guidelines for fulfilling federal detainer requests. To provide needed clarity on these matters, this bulletin:

- Provides information on the purpose and operation of the Secure Communities program;
- Outlines the responsibilities of state and local law enforcement agencies regarding custody of unlawfully present immigrants subject to federal detainer requests;
- Clarifies that individual federal detainers are requests, not commands, to local law enforcement agencies, who make their own determination of whether to use their resources to hold suspected unlawfully present immigrants; and
- Determines that the Secure Communities program does not prohibit local law enforcement agencies from adopting a protocol governing the circumstances under which they will fulfill federal detainer requests.

What is Secure Communities?

DHS implemented the Secure Communities program as a way to identify, detain, and remove from the United States unlawfully present immigrants who have been convicted of a crime and those who pose a threat to public safety. The program does not require California law enforcement agencies to determine an individual's immigration status or to enforce federal immigration laws.

Secure Communities works when fingerprints taken by state and local law enforcement agencies are sent to CalDOJ to positively identify the arrestee and to check his or her criminal history. In addition to checking its own records, CalDOJ forwards the fingerprints to the FBI's Criminal Justice Information Services division to search for federal and out-of-state arrest, warrant, and conviction history—an action that is essential both for officer safety and to identify and detain fugitives who may have fled other jurisdictions. Under the Secure Communities program, the FBI forwards the fingerprints to DHS to be checked against immigration and other databases. DHS then sends the immigration response, if any, to the FBI, which sends it, along with any criminal history information, to CalDOJ, which generally delivers all the information to the requesting law enforcement agency.

If fingerprints match an immigration record, ICE evaluates whether to take action. In deciding how to respond, ICE has purported to use a risk-based approach that classifies arrestees into levels, beginning with those who have serious prior convictions and those who present the greatest threat to public safety, which it has described as a "worst first" approach. If ICE chooses to assume custody of a detainee, it sends an "Immigration Detainer – Notice of Action" (DHS Form I-247) to the jailor asking that the jailor hold the individual for up to 48 hours after he or she would otherwise be released to give ICE time to complete its evaluation or to take the person into immigration custody. Unlike arrest warrants and criminal detainers, however, immigration detainers may be issued by border patrol agents, including aircraft pilots, special agents, deportation officers, immigration inspectors, and other employees of ICE, without the review of a judicial officer and without meeting traditional evidentiary standards.

What Responsibilities Do State and Local Law Enforcement Agencies Have under Secure Communities?

As explained above, the Secure Communities program does not require state or local law enforcement officers to determine an individual's immigration status or to enforce federal immigration laws. Under the Secure Communities program, anyone who is arrested is automatically screened for immigration violations when his or her fingerprints are sent to the FBI to check for federal and out-of-state criminal history. And while the results of the immigration search generally are returned to the arresting law enforcement agency along with any criminal history, ICE alone evaluates whether to take immigration enforcement action based upon the facts of each case.

Are Local Law Enforcement Agencies Required to Fulfill Individual ICE Immigration Detainers?

No. Local law enforcement agencies in California can make their own decisions about whether to fulfill an individual ICE immigration detainer. After analyzing the public-safety risks presented by the individual, including a review of his or her arrest offense and criminal history, as well as the resources of the agency, an agency may decide for itself whether to devote resources to holding suspected unlawfully present immigrants on behalf of the federal government.

Several local law enforcement agencies appear to treat immigration detainers, sometimes called "ICE holds," as mandatory orders. But immigration detainers are not compulsory. Instead, they are merely requests enforceable *at the discretion of the agency* holding the individual arrestee. (See ICE Website, available at http://www.ice.gov/secure_communities ["Secure Communities imposes no new or additional requirements on state and local law enforcement"].) We reach this conclusion both because the I-247 form is couched in non-mandatory language and because the Tenth Amendment to the U.S. Constitution reserves power to the states to conduct their affairs without specific mandates from the federal government. Under the Secure Communities program, the federal government neither indemnifies nor reimburses local law enforcement agencies for complying with immigration detainers. (See 8 C.F.R. § 287.7(e).) Under principles of federalism, neither Congress nor the federal executive branch can require state officials to carry out federal programs at their own expense. If such detainers were mandatory, forced compliance would constitute the type of commandeering of state resources forbidden by the Tenth Amendment. (*Printz v. United States* (1997) 521 U.S. 898, 925 ["The Federal Government . . . may not compel the States to implement, by legislation or executive action, federal regulatory programs"]; *New York v. United States* (1992) 505 U.S. 144, 161 ["the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions"].)

In a time of shrinking financial resources, a growing range of critical public-safety priorities, limited space for housing prisoners, and layoffs of police officers and sheriffs deputies, it is appropriate that California law enforcement agencies that receive immigration detainer requests consider them carefully and determine what

course of action best protects public safety in light of the facts of each case. All efforts must be made to identify, detain, and remove from the United States unlawfully present immigrants who may be dangerous, pose a public-safety risk, or have been convicted of offenses of a serious or violent nature. Any action to the contrary could pose a great risk to public safety.

Does the Secure Communities Program Prohibit a Local Law Enforcement Agency from Adopting a Protocol Governing Its Response to ICE Immigration Detainers?

No. Immigration detainer requests are not mandatory, and each agency may make its own decision about whether or not to honor an individual request. Accordingly, local law enforcement agencies may establish a protocol to assist them in determining how to respond to a federal request to hold, at the local agency's own expense, suspected unlawfully present immigrants with minor or no criminal history, so long as any such protocol gives primary consideration to protecting public safety in determining whether to honor a detainer request.

Local agencies are best positioned to determine the highest use of local resources, and if the local law enforcement agency determines that releasing certain individuals does not present a risk to public safety, a federal detainer request cannot, by itself, reverse that determination.

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