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July 26, 2011

Honorable Jesus G. Garcia
Commissioner – 7th District
Cook County Board of Commissioners
118 North Clark Street, Room 567
Chicago, Illinois 60602

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

In Re: Duty to Enforce ICE Detainers

Dear Commissioner Garcia:

This letter is in response to your request that this Office render an updated legal opinion regarding the duty to enforce detainers issued by the Bureau of Immigration and Customs Enforcement (ICE).

ISSUE

Whether the duty to enforce ICE detainers is mandatory.

CONCLUSION

Based upon a recently decided federal court decision, ICE detainers are not akin to a criminal warrant, but rather a voluntary request of a law enforcement agency to cooperate with ICE. It is our opinion that ICE detainers may be treated by the Sheriff as requests for voluntary cooperation, not as orders with which they are required to comply.

DISCUSSION

ICE has the authority to issue a detainer requesting that an inmate be held for a period of time after the completion of a term of imprisonment or release on bail. The regulation found at 8 CFR 287.7 governs ICE detainers and was promulgated pursuant to 8 USC 1227 and 1357 (Sections 236

Commissioner Garcia

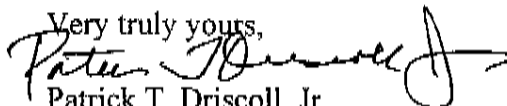
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and 287 of the Immigration and Nationality Act), which authorizes any immigration officer to issue a form I-247, Immigration Detainer, to any other Federal, State or local law enforcement agency. The purpose of ICE detainers are to allow ICE agents time to arrive at the Jail to take into custody a detainee whose immigration status is in question before the detainee is released from the Sheriff's custody. Although the regulations refer to the detainer as a "request," the language in the regulations directed that upon receipt of a retainer, the local law enforcement agency "shall maintain custody of the alien for a period not to exceed 48 hours." 8 CFR 287.7(d). Presumably in reliance on this language, ICE has always publicly suggested that a detainer requires cooperation by the local law enforcement agency.

However, a recent federal court opinion of first impression clarifies that local law enforcement agencies are not required to comply with ICE detainers. In *Buquer v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 68326 (S.D. Ind. June 24, 2011), a federal district court has provided the first clear guidance on the status of detainers as voluntary. The court stated that a detainer "is not a criminal warrant, but rather a voluntary request that the law enforcement agency "advise [the Department of Homeland Security (DHS)], prior to release of the alien, in order for [DHS] to arrange to assume custody." *Buquer* at *9. The court's interpretation provides the first clear indication that, despite some conflicting language within the regulations, ICE detainers are not mandatory orders, but merely a request for cooperation.

We further note that this interpretation is consistent with constitutional prohibitions against the federal government enacting laws directing states to participate in the administration of a federally enacted regulatory scheme. It is our opinion, based upon this recent clear authority from the federal courts, that ICE detainers may be treated by the Sheriff as requests for cooperation, not as orders with which they are required to comply. Please feel free to contact me if you have any further questions.

Very truly yours,

Patrick T. Driscoll, Jr.
Deputy State's Attorney
Chief, Civil Actions Bureau