



April 15, 2013

Gary D. Maynard  
Secretary, Maryland Department of Public Safety and Correctional Services  
6776 Reistertown Rd, Suite 310  
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**Re: Clarification of Legal Obligations Regarding Immigration  
Detainers (Form I-247) and Public Information Act Request**

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MARYLAND

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Dear Mr. Maynard:

As you may be aware, Immigration and Customs Enforcement recently released a new policy on immigration detainers and a new immigration detainer form (Form I-247).<sup>1</sup> An important purpose of this revision is to ensure that enforcement resources are not expended against low priority individuals and that immigration detainers are not illegally used to hold individuals longer than 48 hours. I now write on behalf of the American Civil Liberties Union of Maryland (“ACLU”) in order to clarify the legal requirements surrounding the use of immigration detainers, and to request copies of your written policies regarding the honoring of detainers as well as records relating to detainers issued to all detention and correctional facilities under the operation of the Maryland Department of Public Safety and Correctional Services.<sup>2</sup>

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<sup>1</sup> The revised Form I-247 is available at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>. For new policy guidance, see December 21, 2012 Memorandum from John Morton, Director of Immigration and Customs Enforcement Re: Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems [hereinafter “Morton Memorandum”], available at <https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>.

<sup>2</sup> Please consider this records request a formal request under the Maryland Public Information Act (“MPIA”), Md. Code, State Gov’t Art., §§ 10-611 to 628. The request is described more fully in the final paragraphs of this letter.

## Clarification of Legal Requirements

### **1. An immigration detainer does not establish a person's immigration status.**

The issuance of an immigration detainer does not mean that the subject of the detainer is unlawfully present in the United States or that he or she is subject to deportation. In most cases, immigration detainers are issued before the subject of the detainer has appeared before an immigration judge. In many cases, individuals against whom immigration detainers are lodged are not deportable or may qualify for some form of relief under federal immigration law, for example as a result of having a spouse or child who is a United States citizen.

Moreover, immigration detainers are usually lodged against individuals based largely on their place of birth, with little investigation of the individual's actual citizenship or immigration status. As a result, immigration detainers are frequently lodged against individuals who are not in violation of any immigration laws. For example, in the past 50 months, Immigration and Customs Enforcement (ICE) issued 834 detainers against U.S. citizens.<sup>3</sup> ICE also issued 20,281 detainers against lawful permanent residents ("green card" holders) who had not been convicted of any crimes.<sup>4</sup> Even U.S.-born citizens have had detainers unlawfully lodged against them because of mistakes in identification.

Thus, the mere presence of an immigration detainer reveals little about an individual's immigration status.

### **2. An immigration detainer does not usually indicate the seriousness of an individual's charges and is frequently not based on an outstanding warrant for his or her arrest.**

Frequently, individuals against whom immigration detainers are lodged have only been convicted of traffic violations and are not subsequently charged with or convicted of any other crimes.<sup>5</sup> Over the same 50-month period previously referenced, more than 77 percent of immigration detainers were lodged against

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<sup>3</sup> See TRAC Immigration, *Who Are the Targets of ICE Detainers?*, available at <http://trac.syr.edu/immigration/reports/310/>; see also TRAC Immigration, *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, available at <http://trac.syr.edu/immigration/reports/311/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

individuals who had no criminal record,<sup>6</sup> and only 8.6 percent were against individuals who were serious offenders.<sup>7</sup> Thus, the mere issuance of an immigration detainer does not indicate that a person poses a safety risk or a danger to the community.

Moreover, an immigration detainer is not an arrest warrant and, unlike a criminal detainer, is usually not based on pending charges and is not subject to approval by a judge. In most cases, an immigration detainer is not even based on the existence of an underlying immigration warrant. As previously noted, immigration detainers are often issued based largely on an individual's country of origin and with little further investigation. It therefore is not an indication that the individual against whom it is issued is the subject of an outstanding immigration warrant. The new Form I-247 includes greater elaboration of the reason the detainer request was issued. Unless the box indicating that an individual was "[s]erved a warrant of arrest for removal proceedings" is checked, the subject of the immigration detainer is not subject to an administrative immigration warrant.<sup>8</sup>

**3. Immigration detainers are requests, not orders, and the federal government may not compel you to detain anyone by issuing an immigration detainer.**

An immigration detainer (Form I-247) constitutes a request from ICE to hold someone for an additional 48 hours so that the Department of Homeland Security (DHS) can take custody of the subject of the detainer. As indicated on Form I-247, immigration detainers are *requests*, not arrest warrants or orders. The federal government does not have the authority to compel your assistance; it may only request it. As you may be aware, the Supreme Court has found that under the Tenth Amendment to the U.S. Constitution, the federal government may not commandeer state officers to do federal business.<sup>9</sup> It is therefore up to your agency to determine if an ICE request for detention is proper. ICE's issuance of a detainer does not limit your agency's discretion—or liability—with regard to individuals in your custody.

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<sup>6</sup>TRAC Immigration, *Who Are the Targets of ICE Detainers?*, available at <http://trac.syr.edu/immigration/reports/310/>.

<sup>7</sup> *Id.*

<sup>8</sup> Note that even ICE administrative immigration "arrest warrants" are based only on suspicion of civil, not criminal, violations and are issued without the safeguard of judicial approval for their issuance. *See* Form I-200, Warrant of Arrest.

<sup>9</sup> *See Printz v. United States*, 521 U.S. 898, 925-35 (1997).

**4. Under no circumstances should an individual be held on an immigration detainer for longer than 48 hours.**

The new Form I-247 clearly states that your agency should retain custody for a period **NOT TO EXCEED 48 HOURS**, exclusive of weekends and holidays. Please note that the 48-hour timeline begins at the moment the individual is released from state custody, for example because he or she posts bond; because the charges against him or her are dismissed; or because the state grounds for the person's detention expire for other reasons. If ICE does not take custody of the subject of the immigration detainer within 48 hours of that time, the detainer automatically lapses and the prisoner must immediately be released from custody.<sup>10</sup> In several recent court cases, individuals unlawfully held past the 48-hour limit have successfully obtained damages from local law enforcement agencies.<sup>11</sup> Holding an individual for more than 48 hours on the basis of an immigration detainer is illegal and could expose your agency to significant liability.<sup>12</sup>

**5. Immigration detainers impose significant costs on your agency that are not reimbursed by the federal government.**

The federal government's general policy is to not reimburse local agencies for the costs of holding inmates on ICE detainers. Pursuant to 8 C.F.R. § 287.7(e), ICE is not responsible for the incarceration costs of any individual against whom a detainer is lodged until "actual assumption of custody." No federal reimbursement is available for detention in local jails at the pre-trial stage, for detainees who are not convicted, or for detainers applied post-conviction to lawfully present individuals, such as legal permanent residents, visa holders, or U.S. citizens. Moreover, ICE frequently fails to assume custody of individuals against whom it has lodged an immigration detainer; in such cases, the local agency would have held those individuals for no reason.

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<sup>10</sup> See 8 C.F.R. § 287.7(d).

<sup>11</sup> See, e.g., *Quezada v. Mink*, No. 10-879 (D. Colo.) (filed April 21, 2010) (\$50,000 settlement); *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y.) (filed June 12, 2009) (\$145,000 settlement).

<sup>12</sup> Note that the ACLU also has serious constitutional concerns about application of this 48-hour rule in a way that excludes weekends and holidays. Under well-settled Supreme Court precedent, the Fourth Amendment requires a prompt probable cause hearing before a neutral magistrate within *at most* 48 hours of arrest, *inclusive* of weekends and holidays. Thus, any detention in excess of 48 hours absent a probable cause hearing would presumptively violate the Fourth Amendment. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991).

Particularly in these difficult financial times, many local law enforcement agencies are struggling with budget cuts. Local law enforcement agencies usually bear all of the cost of complying with immigration detainer requests. Because immigration detainers are simply requests, and not orders; because they are frequently not based on probable cause or on an underlying immigration warrant; and because they do not necessarily indicate anything about an individual's immigration status or about whether the individual has any serious criminal charges, agencies with limited financial resources need not expend those scarce resources on detaining individuals for the federal government without reimbursement.

**6. Individuals are constitutionally entitled to post bond on state or local charges even if an immigration detainer is lodged against them.**

We have heard some reports that individuals who are subject to an immigration detainer are not allowed to post bonds in some localities, even where bond for their release has been set. Denial of bond is a serious constitutional violation. An individual may post bond on state or local charges regardless of whether ICE has lodged an immigration detainer against him or her. Law enforcement officials should never prevent individuals from posting bond where they are otherwise entitled to do so because they are the subjects of an immigration detainer. Once a bond has been posted to allow pretrial release on state or local charges, ICE must take custody within 48 hours. Where ICE does not assume custody within that time, your agency must release the individual immediately. Any additional detention would be patently unlawful.

**7. The ACLU has serious constitutional concerns about the legality of imprisoning anyone on the sole basis of an immigration detainer, even within the 48-hour period.**

As previously discussed, immigration detainers are routinely issued without any judicial determination that a person is unlawfully present in the country, and are frequently applied to individuals who have not violated any immigration laws. Detention without a probable cause determination constitutes a serious violation of both the Fourth and Fifth Amendments to the U.S. Constitution. For this reason, we believe that detention solely on the basis of an immigration detainer is illegal.

Moreover, immigration detainers are frequently issued in circumstances Congress has not authorized, which casts further doubt on their legality. The statutory provision governing detainers, 8 U.S.C. § 1357(d), authorizes their use only against immigrants arrested "for a violation of any law relating to controlled

substances.” Nonetheless, ICE routinely issues detainers against individuals who are not charged with or convicted of violating laws relating to controlled substances.

Law enforcement agencies should therefore be aware that there are serious questions about the legality of 48-hour detentions. At the same time, law enforcement agencies should understand that there is *absolutely no dispute* that a person *must promptly be released when the 48-hour time period has expired and that the 48-hour time period begins as soon as the individual is released from state custody.*

**8. Numerous localities across the country have enacted policies that limit the circumstances under which individuals who are subject to an immigration detainer may be held in local custody.**

You may be aware that a number of local jurisdictions have enacted limited detainer policies in the last few years, including localities in New Mexico, California, Illinois, New York, Wisconsin, Connecticut, and the District of Columbia. Indeed, the Attorney General of the State of California recently issued an opinion confirming that local law enforcement agencies may “make their own decisions about whether to fulfill an individual ICE immigration detainer” and that detainers “are merely requests enforceable *at the discretion of the agency* holding the individual arrestee.”<sup>13</sup> We would be happy to provide further information about enacting limited detainer policies in your jurisdiction.

Records Request

Please consider this a formal request under the Maryland Public Information Act (MPIA) Md. Code, State Gov’t Art., §§ 10-611 to 628. We request that you provide the following documents relating to your agency’s use of immigration detainers:

1. All records regarding each detainer (Form I-247) issued by ICE to your agency on or after January 1, 2010, including but not limited to:
  - a. the date on which the detainer was issued;
  - b. the date, if any, on which the detainer was cancelled or lifted, as well as the reason the detainer was cancelled or lifted;
  - c. the offense code, if any;

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<sup>13</sup> California Department of Justice Information Bulletin Re: Responsibilities of Local Law Enforcement Agencies under Secure Communities, December 4, 2012.

- d. the crimes and/or violations of which the subject of the detainer has been accused and/or convicted;
- e. the date, if any, that the subject was taken into ICE custody;
- f. the date the subject of the detainer is released from state custody;<sup>14</sup>
- g. the date, if any, on which the receiving agency, jail, police department or sheriff's office provided notice of the anticipated date of release of the subject of the detainer to ICE;
- h. the country of origin of the subject of the detainer.

2. All records relating to guidance, training, or instruction provided to members of your agency regarding immigration detainees.

3. All records relating to your agency's policies or procedures on honoring immigration detainees.

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Pursuant to State Government Article § 10-621(e), we ask that all fees related to this request be waived. The American Civil Liberties Foundation of Maryland is a non-profit, tax-exempt organization dedicated to the public interest: protecting the civil liberties of all Marylanders and visitors to Maryland. We request this information in order carry out our charitable mission, specifically, to ensure that the policies which control the use of immigration detainees respect the constitutional rights of Maryland's citizens and visitors. We additionally plan to publicize any information gained from this request in order to further public understanding of how immigration detainees are used in the State of Maryland. This issue is undoubtedly a matter of public interest and concern. As a nonprofit organization with regular print and web publications, we are well-situated to disseminate information obtained from this request to the general public.

If the request for a waiver of fees is denied, please advise us in writing of the reason(s) for the denial. Please advise us of the cost, if any, for obtaining copies of the requested documents prior to producing any copies.

If you determine that some portions of the requested records are exempt from disclosure, we will expect, as the Act requires in § 10-614 (b)(3)(iii), that you provide us with any "reasonably severable" portions of the records sought. If all or any part of this request is denied, please provide us with a written statement of the grounds for the denial, citing the law or regulation under which you believe

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<sup>14</sup> This item refers to the date the subject of the detainer posts bond or has charges dismissed or completes his or her sentence or otherwise becomes no longer detainable on state grounds.

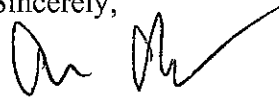
you may deny access. If this is the case, we also request that you inform us of the available remedies for review of the denial.

Please respond to this request within 30 days, as required by § 10-614 (b). If no response is received within 30 days, we will treat your failure to respond as a denial and will seek appropriate judicial relief.

Thank you for your time and attention to this matter. We look forward to receiving your response. Please feel free to contact us with any questions or concerns.

AMERICAN CIVIL  
LIBERTIES UNION OF  
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Sincerely,



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