SAN FRANCISCO SHERIFF’S DEPARTMENT: NO IMMIGRATION AND CUSTOMS ENFORCEMENT DETAINERS

Sheriff Ross Mirkarimi announces that effective immediately; the San Francisco Sheriff’s Department will no longer honor U.S. Immigration and Customs Enforcement (ICE) detainers unless they are supported by judicial determination of probable cause or with a warrant of arrest.

As a member of the San Francisco Board of Supervisors, Ross Mirkarimi advocated for separation of the local criminal justice system from the immigration enforcement system. As Sheriff, he strategically advanced department policy to reflect this belief.

In early 2013, Sheriff Mirkarimi revised the Sheriff’s Department ICE detainer practice, significantly limiting holds eligible for release to ICE authorities. This revision reduced the number of individuals released to ICE authorities by 62 percent. Only one other county in California had a policy of similar strength.

San Francisco furthered its commitment to immigration reform in November 2013. Sheriff Mirkarimi supported and enforced the “Due Process For All” ordinance passed by the San Francisco Board of Supervisors, extending further limits on the criteria for individuals facing ICE detainers.

San Francisco Sheriff's Department’s previous policy actions preceded two major court rulings that are now propelling sheriff’s departments throughout the country to stop or limit ICE detainment; Galarza v. Szalczyk, U.S. Court of Appeals for the Third Circuit ruled in March 2014 that states and counties are not required to keep undocumented immigrants in jail on immigration detainers; and in April 2014, Miranda-Olivares v. Clackamas County, the U.S. District Court in Portland, Oregon found that county governments would be exposed to civil rights lawsuits for honoring detainers without showing probable cause.

“My long-held belief is that local law enforcement should not be in the civil immigration detainer business. Arriving at a no-holds ICE policy culminates from San Francisco’s early leadership in challenging the deportation defects of Homeland Security's Secure Communities (S-Comm) Act, coupled with the Oregon court’s decision on the unconstitutionality of ICE Detainers. Public safety is not advanced and could be hindered when immigrant communities fear the repercussions of cooperating with law enforcement,” stated Sheriff Ross Mirkarimi.
Amended at Board - 9/24/13

FILE NO. 130764

ORDINANCE NO. 204-13

[Administrative Code - Due Process Ordinance for All on Civil Immigration Detainers]

Ordinance amending the Administrative Code by adding Chapter 121 to prohibit law enforcement officials from detaining individuals on the basis of a civil immigration detainer after they become eligible for release from custody, except for individuals who have a prior conviction for a violent felony within a certain period of time, are currently being charged with a violent felony, and may pose a public safety risk.

NOTE: Unchanged Code text and uncodified text are in plain Arial font. Additions to Codes are in single-underline italics Times New Roman font. Deletions to Codes are in strikethrough italics Times New Roman font. Board amendment additions are in double-underlined Arial font. Board amendment deletions are in strikethrough Arial font. Asterisks (*) indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The Administrative Code is hereby amended by adding Chapter 121, Sections 121.1 through 121.67, to read as follows:

CHAPTER 12I: CIVIL IMMIGRATION DETAINERS

SEC. 12I.1. FINDINGS.

The City and County of San Francisco (the “City”) is home to persons of diverse racial, ethnic, and national backgrounds, including a large immigrant population. The City respects, upholds, and values equal protection and equal treatment for all of our residents, regardless of immigration status. Fostering a relationship of trust, respect, and open communication between City employees and City residents is essential to the City’s core mission of ensuring public health, safety, and welfare, and serving the needs of everyone in the community, including immigrants. The purpose of this Chapter is to foster respect between law enforcement and residents, to protect limited local resources, and to ensure family unity, community security, and due process for all.
Our federal immigration system is in dire need of comprehensive reform. The federal government should not shift the burden of federal civil immigration enforcement onto local law enforcement by requesting that local law enforcement agencies continue detaining persons based on non-mandatory civil immigration detainers. It is not a wise and effective use of valuable City resources at a time when vital services are being cut.

The United States Immigration and Customs Enforcement’s (“ICE”) controversial Secure Communities program (also known as “S-Comm”) shifts the burden of federal civil immigration enforcement onto local law enforcement. S-Comm comes into operation after the state sends fingerprints that state and local law enforcement agencies have transmitted to California Department of Justice (“Cal DOJ”) to positively identify the arrestees and to check their criminal history. The FBI forwards the fingerprints to the Department of Homeland Security (“DHS”) to be checked against immigration and other databases. To give itself time to take a detainee into immigration custody, ICE sends an Immigration Detainer – Notice of Action (DHS Form I-247) to the local law enforcement official requesting that the local law enforcement official hold the individual for up to 48 hours after that individual would otherwise be released (“civil immigration detainers”). Civil immigration detainers may be issued without evidentiary support or probable cause by border patrol agents, aircraft pilots, special agents, deportation officers, immigration inspectors, and immigration adjudication officers.

Given that civil immigration detainers are issued by immigration officers without judicial oversight, and the regulation authorizing civil immigration detainers provides no minimum standard of proof for their issuance, there are serious questions as to their constitutionality. Unlike criminal warrants, which must be supported by probable cause, there is no such requirement for the issuance of a civil immigration detainer. Unlike criminal detainers, which are supported by a warrant and require probable cause, there is no requirement for a warrant and no established standard of proof, such as reasonable suspicion or probable cause, for issuing an requesting
a civil immigration detainer request. At least one federal court in Indiana has ruled that because civil immigration detainers and other ICE “Notice of Action” documents are issued without probable cause of criminal conduct, they do not meet the Fourth Amendment requirements for state or local law enforcement officials to arrest and hold an individual in custody.

On December 4, 2012, the Attorney General of California, Kamala Harris, clarified the responsibilities of local law enforcement agencies under S-Comm. The Attorney General clarified that S-Comm does not require state or local law enforcement officials to determine an individual’s immigration status or to enforce federal immigration laws. The Attorney General also clarified that civil immigration detainers are voluntary requests to local law enforcement agencies that do not mandate compliance. California local law enforcement agencies may determine on their own whether to comply with a voluntary non-mandatory civil immigration detainers. Other jurisdictions, including Berkeley, California; Richmond, California; Santa Clara County, California; Washington, D.C., and Cook County, Illinois, have already acknowledged the discretionary nature of civil immigration detainers hold requests and are declining to hold people in their jails for the additional forty-eight (48) hours as requested by ICE, under immigration detainers. Local law enforcement agencies’ responsibilities, duties, and powers are regulated by state law. However, complying with voluntary non-mandatory civil immigration detainers falls outside the scope of those responsibilities and frequently raises due process concerns.

According to Section 287.7 of Title 8 of the Code of Federal Regulations, the City is not reimbursed by the federal government for the costs associated with civil immigration detainers alone. The full cost of responding to a civil immigration detainer can include, but is not limited to, extended detention time, the administrative costs of tracking and responding to detainers, and the legal liability for erroneously holding an individual who is not subject to a civil immigration detainer. Compliance with civil immigration detainers and involvement in civil immigration enforcement diverts limited local resources from programs that are beneficial to the City.
The City seeks to protect public safety, which is founded on trust and cooperation of community residents and local law enforcement. However, civil immigration detainers undermine community trust of law enforcement by instilling fear in immigrant communities of coming forward to report crimes and cooperate with local law enforcement agencies. A 2013 study by the University of Illinois, entitled “Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement,” found that at least 40 percent of Latinos surveyed are less likely to provide information to police because they fear exposing themselves, family, or friends to a risk of deportation. Indeed, civil immigration detainers have resulted in the transfer of victims of crime, including domestic violence victims, to ICE. According to a national 2011 study by the Chief Justice Earl Warren Institute on Law and Social Policy at UC Berkeley, entitled “Secure Communities by the Numbers: An Analysis of Demographics and Due Process” (“2011 Warren Institute Study”), ICE has falsely detained approximately 3,600 U.S. citizens as a result of S-Comm. Thus, S-Comm leaves even those with legal status vulnerable to civil immigration detainers issued without judicial review or without proof of criminal activity, in complete disregard for the due process rights of those subject to the civil immigration detainers.

The City has enacted numerous laws and policies to strengthen communities and keep families united. In contrast, ICE civil immigration detainers have resulted in the separation of families. According to the 2011 Warren Institute Study, it is estimated that more than one-third of those targeted by S-Comm have a U.S. citizen spouse or child. Complying with the civil immigration detainers thus results in the deportation of potential aspiring U.S. citizens. According to the 2011 Warren Institute Study, Latinos make up 93% of those detained through S-Comm, although they only account for 77% of the undocumented population in the U.S. As a result, S-Comm has a disproportionate impact on Latinos.

The City has enacted numerous laws and policies to prevent its residents from becoming entangled in the immigration system. But, the enforcement of immigration laws is a responsibility of
the federal government. A December 2012 ICE news release stated that deportations have hit record figures each year. According to the Migration Policy Institute’s 2013 report, entitled “Immigration Enforcement in the United States: The Rise of a Formidable Machinery,” the federal government presently spends more on civil immigration enforcement than all federal criminal law enforcement combined. Local funds should not be expended on such efforts, especially because such entanglement undermines community policing strategies.

SEC. 121.2. DEFINITIONS.

“Eligible for release from custody” means that the individual may be released from custody because one of the following conditions has occurred:

(1) All criminal charges against the individual have been dropped or dismissed.
(2) The individual has been acquitted of all criminal charges filed against him or her.
(3) The individual has served all the time required for his or her sentence.
(4) The individual has posted a bond, or has been released on his or her own recognizance.
(5) The individual has been referred to pre-trial diversion services.
(6) The individual is otherwise eligible for release under state or local law.

“Civil immigration detainer” means a non-mandatory request issued by an authorized federal immigration officer under Section 287.7 of Title 8 of the Code of Federal Regulations, to a local law enforcement official to maintain custody of an individual for a period not to exceed forty-eight (48) hours, excluding Saturdays, Sundays, and holidays, and advise the authorized federal immigration officer prior to the release of that individual.

“Convicted” means state of having been proved guilty in a judicial proceeding, unless the convictions have been expunged or vacated pursuant to applicable law. The date that an individual is Convicted starts from the date of release.
"Firearm" means a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion as defined in Penal Code Section 16520.

"Law enforcement official" means any City Department or officer or employee of a City Department, authorized to enforce criminal statutes, regulations, or local ordinances; operate jails or maintain custody of individuals in jails; and operate juvenile detention facilities or to maintain custody of individuals in juvenile detention facilities.

"Violent Felony" means any crime listed in Penal Code Section 667.5(c); human trafficking as defined in Penal Code Section 236.1; felony assault with a deadly weapon as defined in Penal Code Section 245; any crime involving use of a firearm, assault weapon, machinegun, or .50 BMG rifle, while committing or attempting to commit a felony that is charged as a sentencing enhancement as listed in Penal Code Sections 12022.4 and 12022.5.

SEC. 121.3. RESTRICTIONS ON LAW ENFORCEMENT OFFICIALS.

(a) Except as provided in subsection (b), a law enforcement official shall not detain an individual on the basis of a civil immigration detainer after that individual becomes eligible for release from custody.

(b) Law enforcement officials may continue to detain an individual in response to a civil immigration detainer for up to forty-eight (48) hours after that individual becomes eligible for release if the individual meets both of the following criteria:

(1) The individual has been Convicted of a Violent Felony in the seven years immediately prior to the date of the civil immigration detainer; and
(2) A magistrate has determined that there is probable cause to believe the individual is guilty of a Violent Felony and has ordered the individual to answer to the same pursuant to Penal Code Section 872.

In determining whether to continue to detain an individual based solely on a civil immigration detainer as permitted in this subsection (b), law enforcement officials shall consider evidence of the individual's rehabilitation and evaluate whether the individual poses a public safety risk. Evidence of rehabilitation or other mitigating factors to consider includes, but is not limited to: the individual's ties to the community, whether the individual has been a victim of any crime, the individual's contribution to the community, and the individual's participation in social service or rehabilitation programs.

This subsection (b) shall expire by operation of law on October 1, 2016, or upon a resolution passed by the Board of Supervisors that finds for purposes of this Chapter, the federal government has enacted comprehensive immigration reform that diminishes the need for this subsection (b), whichever comes first.

(c) Law enforcement officials shall make good faith efforts to seek federal reimbursement for all costs incurred in continuing to detain an individual, after that individual becomes eligible for release, in response each civil immigration detainer.

SEC. 121.4. PURPOSE OF THIS CHAPTER.
The intent of this Chapter is to address requests for non-mandatory civil immigration detainers requests. Nothing in this Chapter shall be construed to apply to matters other than those relating to federal civil immigration detainers. In all other respects, local law enforcement agencies may continue to collaborate with federal authorities to protect public safety. This collaboration includes, but is not limited to, participation in joint criminal investigations that are permitted under
local policy or applicable city or state law, that are permitted under local policy or applicable
city or state law.

SEC. 121.5. ANNUAL REPORT.
By no later than July 1, 2014, the Sheriff and Juvenile Probation Officer shall each
provide to the Board of Supervisors and the Mayor a written report stating the number of
detentions that were solely based on civil immigration detainers during the first six months
following the effective date of this Chapter, and detailing the rationale behind each of those
civil immigration detainers. Thereafter, the Sheriff and Juvenile Probation Officer shall each
annually submit a written report to the Board of Supervisors and the Mayor, by July 1st of
each year, addressing the same issues for the time period covered by the report.

SEC. 121.66. SEVERABILITY.
If any section, subsection, sentence, clause, phrase, or word of this Chapter 121, or it
application, is for any reason held to be invalid or unconstitutional by a decision of any court of
competent jurisdiction, such decision shall not affect the validity of the remaining portions of this
Chapter 121. The Board of Supervisors hereby declares that it would have passed this Chapter 121 and
each and every section, subsection, sentence, clause, phrase, and word not declared invalid or
unconstitutional without regard to whether any other portion of this Chapter 121 would be subsequently
declared invalid or unconstitutional.

SEC. 121.76. UNDERTAKING FOR THE GENERAL WELFARE.
In enacting and implementing this Chapter 121, the City is assuming an undertaking only to
promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an
obligation for breach of which it is liable in money damages to any person who claims that such breach
proximately caused injury.

Section 2. Effective Date. This ordinance shall become effective 30 days after
enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
of Supervisors overrides the Mayor's veto of the ordinance.

Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors
intends to amend only those words, phrases, paragraphs, subsections, sections, articles,
numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal
Code that are explicitly shown in this ordinance as additions, deletions, Board amendment
additions, and Board amendment deletions in accordance with the "Note" that appears under
the official title of the ordinance.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: ALICIA CABRERA
Deputy City Attorney

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Ordinance amending the Administrative Code, by adding Chapter 121, to prohibit law enforcement officials from detaining individuals on the basis of a civil immigration detainer after they become eligible for release from custody, except for individuals who have prior conviction for a violent felony within a certain period of time, are currently being charged with a violent felony, and may pose a public safety risk.

September 05, 2013 Neighborhood Services and Safety Committee - AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE

September 05, 2013 Neighborhood Services and Safety Committee - RECOMMENDED AS AMENDED

September 17, 2013 Board of Supervisors - CONTINUED ON FIRST READING
   Ayes: 11 - Avalos, Breed, Campos, Chiu, Cohen, Farrell, Kim, Mar, Tang, Wiener and Yee

September 24, 2013 Board of Supervisors - AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE
   Ayes: 11 - Avalos, Breed, Campos, Chiu, Cohen, Farrell, Kim, Mar, Tang, Wiener and Yee

September 24, 2013 Board of Supervisors - PASSED ON FIRST READING AS AMENDED
   Ayes: 11 - Avalos, Breed, Campos, Chiu, Cohen, Farrell, Kim, Mar, Tang, Wiener and Yee

October 01, 2013 Board of Supervisors - FINALLY PASSED
   Ayes: 11 - Avalos, Breed, Campos, Chiu, Cohen, Farrell, Kim, Mar, Tang, Wiener and Yee
I hereby certify that the foregoing Ordinance was FINALLY PASSED on 10/1/2013 by the Board of Supervisors of the City and County of San Francisco.

Angela Calvillo
Clerk of the Board

Date Approved
10-8-13