



August 8, 2019

Ottawa County Sherriff
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Delivered via E-Mail

CC:
Ottawa County Prosecutor's Office
Ronald Frantz
prosecutor@miottawa.org

RE: Ottawa County risks legal liability for complying with ICE detainer requests & Freedom of Information Act request

Dear Sheriff Kempker:

We write to strongly urge you to stop detaining non-citizens at the request of Immigration and Customs Enforcement (ICE) unless ICE has obtained and provided a court order mandating such detention. You have no legal obligation to honor "ICE detainers" without a court order. In fact, doing so is unconstitutional and opens Ottawa County up to liability for violating the Fourth Amendment.

Immigration detainers (also known as "ICE holds") are simply non-mandatory requests that ICE makes, using Form I-247, Immigration Detainer–Notice of Action to detain a person in your custody past a time when there is no legal reason to do so. These requests ask that you hold a person for an additional 48 hours, excluding weekends and holidays, after s/he would otherwise be released.¹ Thus, if the request is made before a holiday weekend, you could be holding someone unlawfully – for up to five days.

All law enforcement agencies must comply with the Fourth Amendment to the U.S. Constitution's prohibition on unreasonable searches and seizures. This obligation does not change simply because ICE has issued a detainer request. Should a law enforcement agency choose to comply with an ICE detainer request and hold an individual beyond the normal release date, this constitutes a new "seizure" under the Fourth Amendment. That new seizure must meet all requirements of the Fourth Amendment, including a finding by a judicial officer of probable cause that the individual committed a criminal offense.²

¹ ICE issues immigration detainers pursuant to 8 C.F.R. § 287.7

² Cf. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (noting that a legitimate seizure "can become unlawful if it is

A growing number of local law enforcement agencies have revised their policies to ensure that they do not violate the Fourth Amendment.³ To date, over fifty jurisdictions outside of Michigan, have abandoned their prior practice of automatically honoring all ICE detainers.⁴ Earlier this year, Kent County changed its detainer compliance policy after ICE unlawfully requested the detention of Jilmar Ramos-Gomez, a United States citizen and decorated military veteran. Kent County, which received the largest percentage of detainer requests from ICE in the state, now requires that ICE provide a judicial warrant in order for the Sheriff to hold individuals for immigration purposes.

Immigration detainers are not warrants

Immigration detainers are not warrants, they are not court orders, and they are not issued or approved by judges. Instead, they are unsworn documents that may be issued by a wide variety of immigration enforcement agents and deportation officers.⁵ They are frequently issued without even a supervisor's review and simply because an ICE agent has "initiated an investigation" to determine whether a person *may be* deportable. Detainer requests do not establish a person's non-citizen status. The fact that ICE has issued a detainer does not mean that the subject is actually a non-citizen subject to deportation, as seen in the example referenced above regarding Mr. Ramos-Gomez. ICE frequently issues immigration detainers without even probable cause to believe the subject is deportable.

Prolonging an individual's detention pursuant to an immigration detainer request constitutes a *new* arrest, which, as you know, requires probable cause. Since these detainer requests often fall below the probable cause standard, this becomes a legally insufficient basis to continue detention. In *Morales v. Chadbourne*, the First Circuit Court of Appeals found that detaining someone beyond their release date is an arrest under the Fourth Amendment, requiring probable cause and it denied the officers' claims of qualified immunity.⁶ In 2017, federal courts in Washington, Minnesota, Oregon, and Texas all found that detention pursuant to immigration detainer requests qualify as seizures under the U.S. Constitution and therefore must be supported by either probable cause or a warrant that complies with the Fourth Amendment.⁷ Further, as court in Michigan recently

prolonged beyond the time reasonably required" to achieve its purpose); see also *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (noting general rule that "Fourth Amendment seizures are 'reasonable' only if based on probable cause").

³ See, for example, Dustin Dwyer, *Kent County changes its policy on ICE requests after Marine veteran mistakenly detained*, January 18, 2019, <https://www.michiganradio.org/post/kent-county-changes-its-policy-ice-requests-after-marine-veteran-mistakenly-detained>. See Immigrant Legal Resource Center, *National Map of Local Entanglement with ICE*, Jan. 25, 2018, <https://www.ilrc.org/local-enforcement-map>.

⁴ See, e.g., Catholic Immigration Network, "States and Localities That Limit Compliance with ICE Detainer Requests (Jan 2014)," (listing over twenty jurisdictions), available at <https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014>; Detroit Free Press, July 2, 2017, Wayne County sheriff, ICE clash on holding immigrant inmates, available at <https://www.freep.com/story/news/local/michigan/wayne/2017/07/03/wayne-county-sheriff-ice-immigrants/443959001/>; MI Live, December 5, 2019, Kalamazoo County sheriff sets new time limit for holding ICE detainees, available at, <https://www.thetimesherald.com/story/news/local/port-huron-township/2017/12/08/immigration-crackdown-pays-bills-county-jail/920909001/>

⁵ 8 C.F.R. § 287.7(b).

⁶ 793 F.3d 208 (1st Cir. 2015); see also *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (noting that DHS conceded that detention pursuant to an immigration detainer request constitutes a warrantless arrest).

⁷ *Ochoa v. Campbell*, No. 1:17-CV-03124-SMJ, 2017 WL 3476777, at *7 (E.D. Wash. July 31, 2017); *Trujillo Santoyo v. United States*, et al., 5:16-cv-855-OLG, 2017 WL 2896021, at *6 (W.D. Tex. June 5, 2017) (—[D]etention pursuant to an ICE detainer request is a Fourth Amendment seizure that must be supported by probable cause or a warrant.); *Mercado v. Dallas Cty.*, Texas, 229 F. Supp. 3d 501, 511 (N.D. Tex. 2017) (—The parties appear to agree that, under Fourth Amendment jurisprudence, absent

determined, “when states or localities seize suspected aliens based solely on an ICE Detainer or solely on an administrative warrant, they may violate the Fourth Amendment.”⁸

Complying with ICE detainer requests erodes trust in local law enforcement

The negative effects on communities when local law enforcement aids ICE’s federal immigration efforts have been well documented. Law enforcement leaders across the country have explained that attaching immigration consequences to police interactions makes ordinary police work more difficult.⁹ And academic studies have confirmed that immigrants avoid local authorities who act as a pipeline to the deportation system.¹⁰ In one recent study, a majority of prosecutors, judges, and police officers reported that ramped-up immigration enforcement activities nationally makes it harder to protect local communities from crime.¹¹ Indeed, crime reporting has plummeted amongst Latinos in multiple cities.¹²

ICE has tried to minimize those disturbing patterns by claiming that its detainer requests only target people with serious criminal records. But ICE’s own data shows that this is false. The vast majority of detainer requests are issued against people with little to no criminal history.¹³ Indeed, *two-thirds* of the people targeted for deportation in recent months have no criminal convictions of any kind.¹⁴ The reality is that ICE detainer requests are indiscriminately issued against almost anyone who comes into contact with local police—immigrants, refugees, students, moms, dads,

probable cause, ‘ Dallas County was not permitted to detain the plaintiffs after they were otherwise eligible for release.); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 944 (D. Minn. 2017) (concluding that plaintiff’s continued detention constituted a warrantless arrest, which is reasonable under the Fourth Amendment only when supported by probable cause); *City of El Cerrito v. State*, No. SA-17-CV-404-OLG, 2017 WL 3763098, at *33 (W.D. Tex. Aug. 30, 2017) (noting that no provisions of state or federal law authorized local officials to arrest and detain individuals for civil immigration violations or to assess probable cause of an individual’s removability). See also *Miranda–Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014) (holding that continuation of detention pursuant to an ICE detainer constituted a new seizure independent of plaintiff’s detention on state charges).

⁸ *Lopez-Lopez v. Allegan*, U.S. District Court Western Michigan Southern Division, No. 1:2017cv00786 (July 13, 2018).

⁹ See, for example, Nat’l Imm. Law Ctr., *Local Law Enforcement Leaders Oppose Mandates to Engage in Immigration Enforcement* (August 2013), <https://bit.ly/2J929st> (dozens of law enforcement leaders criticizing police-ICE entanglement); Dep’t of Justice, *The President’s Task Force on 21st Century Policing Guidebook*, at 18 (May 2015) (recommending that ICE not issue detainer requests to local jails), <https://bit.ly/2G8S75v>; William J. Bratton, *The LAPD Fights Crime, Not Illegal Immigration*, L.A. Times, Oct. 27, 2009, <https://lat.ms/2LXm8IE>.

¹⁰ See, for example, Marcella Alsan & Crystal S. Yang, *Fear and the Safety Net: Evidence from Secure Communities*, Harvard Law School, May 2018, <https://bit.ly/2kN47QJ>; Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Ctr. for Am. Progress, Jan. 26, 2017, <https://ampr.gs/2kxOchX>.

¹¹ Rafaela Rodrigues et al., *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims*, May 3, 2018, <https://bit.ly/2jvGfAr>; see also Am. Civil Liberties Union, *Freezing Out Justice* (2018) (summarizing the results), <https://www.aclu.org/report/freezing-out-justice>.

¹² See, for example, Rob Arthur, *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight.com, May 10, 2017, <https://53eig.ht/2rjgs40>; Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. Times, June 3, 2018, <https://nyti.ms/2Lk35ad>; James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. Times, Oct. 9, 2017, <https://lat.ms/2gqsqz93>.

¹³ Syr. Univ., *Few ICE Detainers Target Serious Criminals*, Sept. 17, 2013 (half of all detainers targeted people with no convictions of any kind; over 80% had either no convictions or non-violent ones only), <http://trac.syr.edu/immigration/reports/330/>.

¹⁴ John Bowden, *ICE Arrests of Immigrants with No Criminal Convictions Rises: Report*, TheHill.com, May 18, 2018, <https://bit.ly/2rSjwmK>; Assoc. Press, *Deportation Officers Are Increasingly Arresting People with No Crime Records*, Feb. 26, 2018, <https://nbcnews.to/2Clh3bn>; Niraj Warikoo, *Michigan Non-Criminal Immigrant Arrests, Deportations Soar Under Trump*, Detroit Free Press, Mar. 20, 2018, <https://on.freep.com/2DEhxxj>.

brothers, sisters, grandmothers and grandfathers—instilling fear in already scared communities and undermining the trust and cooperation that are essential for effective policing.

When Ottawa County chooses to comply with ICE detainers, it risks undermining community trust by transforming local law enforcement, in the eyes of the community, into proxy immigration enforcers. This creates a disincentive to report crimes and undermines the goodwill toward officers that we know you have worked hard to obtain. In contrast, by drawing clear lines to avoid the entanglement of your officers with federal *civil* immigration enforcement, you can build relationships with the community and make everyone safer.

We urge you to join the growing number of localities around the country that no longer detain people based on ICE detainer requests. Only a policy that requires a judicial finding of probable cause in order to deprive someone of their liberty will meet the minimum requirements of the Constitution.

Holding people on ICE detainers exposes you to legal liability

Federal courts have consistently held that local agencies and officials can be sued for complying with ICE detainers. First, courts agree that extending a person’s detention based on an ICE detainer constitutes a new arrest.¹⁵ Second, courts agree that a local agency violates the Fourth Amendment when it makes a detainer arrest without sufficient probable cause.¹⁶ Third, courts agree that because detainers are fully voluntary, local officials can be held liable for damages when they effectuate a detainer without probable cause.¹⁷ As a result, police and sheriffs across the country have paid millions of dollars in damages, settlements, and attorney fees for detainer arrests.

The threat of liability is just as serious. Detainer-related lawsuits have continued to impose major legal costs in the past two years.¹⁸ And the federal government has consistently refused to reimburse these costs. The administration has made several changes to its detainer policies, but none of these changes eliminate the financial risks local officials face when they hold people on ICE detainers, as described below. Regardless of ICE’s new policies, local officials can still be

¹⁵ *Morales v. Chadbourne*, 793 F.3d 208, 217-18 (1st Cir. 2015); *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *9-10 (D. Or. Apr. 11, 2014); see also *Lunn v. Massachusetts*, 477 Mass. 517 (2017).

¹⁶ *Morales*, 793 F.3d at 217 & n.3 (explaining that “courts have uniformly held that probable cause is required” to hold someone a detainer).

¹⁷ *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (explaining that the county “was free to disregard the ICE detainer” and was therefore liable for its own actions); *Miranda-Olivares*, 2014 WL 1414305, at *4-8 (same).

¹⁸ For a small sample of recent cases, see *Roy v. County of Los Angeles*, No. 12-cv-9012, 2018 WL 914773 (C.D. Cal. Feb. 7, 2018) (ruling in favor of a class of thousands of noncitizens held on detainers seeking damages against Los Angeles County, which had paid \$255,000 to settle one named plaintiff’s detainer claim); *Goodman v. Arpaio*, 2:16-cv-04388 (D. Ariz. settled 2018) (Maricopa County settles detainer lawsuit for \$30,750 in damages and \$50,000 in attorney’s fees); *Cisneros v. El Paso County*, No. 18-cv-30549 (Colo. D. Ct. Mar. 19, 2018) (ruling that county sheriff had no authority under state law to arrest based on civil immigration detainer); *Palacios-Valencia v. San Juan County*, No. 14-cv-1050 (D.N.M. settled 2017) (San Juan County pays \$350,000 to settle detainer class action lawsuit, pays named plaintiffs \$25,000 and \$15,000 to settle their claims); *Gomez-Maciell v. Coleman*, No. 17-cv-292 (E.D. Wash. settled 2017) (City of Spokane settles detainer lawsuit for \$49,000); *Figuroa-Zarceno v. City and County of San Francisco*, No. 17-cv-229 (N.D. Cal. settled 2017) (San Francisco pays \$190,000 settlement to person unlawfully turned over to ICE); *Lunn*, 477 Mass. 517 (holding that police had no authority under state law to hold people on ICE detainers). See also American Civil Liberties Union, Recent ICE Detainer Damages Cases (2018), <https://www.aclu.org/fact-sheet/recent-ice-detainer-damages-cases-2018>.

held liable under the Fourth Amendment any time they extend a person's detention without a judicial finding of probable cause. Moreover, the time period in which a person is detained via such a request is not reimbursed by the federal government.

Intergovernmental Service Agreements (IGSAs) do not eliminate liability

There have been inaccurate suggestions in the press and elsewhere that the existence of Intergovernmental Service Agreements (IGSAs or IGAs) cure the legal and constitutional problems with detainers. They do not.

IGSAs are contracts under which ICE and other federal agencies rent bed space to house federal prisoners in local jails. ICE uses IGSAs to pay for the costs of renting jail space, which include "clothing, medical care, necessary guard hire," "construction, physical renovation," and similar expenses.¹⁹ In other words, under an IGSA, a local jail may house persons for ICE who were previously arrested by ICE and placed in ICE custody.

Under an IGSA contract, ICE uses Form I-203 (Order to Detain/Release) to keep track of its prisoners who are held in local jails. These I-203s simply register the date and time that inmates are either booked into or released from rented jail space; they are used to keep track of prisoners and determine reimbursement amounts.

IGSA contracts do not provide additional authority to arrest for immigration violations and they do nothing to limit liability for effectuating detainers. Neither IGSA contracts themselves nor the statutes authorizing them say anything about arrest authority. With or without an IGSA, when you hold a person on a detainer, you are making a new arrest under the Fourth Amendment because you are the officer ensuring that the detainee is "not free to leave."²⁰ You, therefore, remain liable if you comply with an ICE detainer without probable cause. Neither an IGSA nor an I-203 changes this.

In fact, the federal government agrees that IGSAs do not authorize local officers to make immigration arrests. As ICE recently explained in a legal filing, a prisoner is only held pursuant to an IGSA "after ICE takes physical custody." If ICE seeks an individual set to be released from state charges, it can only book him into IGSA custody "after ICE effects [the] arrest."²¹ In other words, according to ICE itself, the IGSA does not give you any authority to detain a person on your own. An internal ICE policy document submitted in court filings says the same thing.²²

¹⁹ 8 U.S.C. § 1103(a)(11)(A)-(B); 18 U.S.C. § 4013; Department of Justice Appropriation Acts of 2001, Pub. L. No. 1106-553, § 119.

²⁰ *United States v. Mendenhall*, 446 U.S. 544, 554 (1984) (characterizing an arrest as an action that leads "a reasonable person" to believe "that he was not free to leave"); see *California v. Hodari*, 499 U.S. 621, 626 (1991) (emphasis omitted) (arrest occurs either through the "application of physical force to restrain movement" or an arrestee's "submission to the assertion of authority").

²¹ Statement of Interest of the United States, *Tenorio-Serrano v. Driscoll*, No. 3:18-cv-8075, Dkt. 41, at 7, 32-33 (D. Ariz. filed May 19, 2018) (emphasis altered).

²² 17 See Supplemental Exhibit G, *Cisneros v. Elder*, No. 2018-cv-30549 (El Paso D. Ct., Colorado) (filed March 19, 2018) (explaining that an ICE agent must be "physically present" "onsite at a jail" to effect an immigration arrest and book a detainee back into jail pursuant to an IGSA bed rental agreement); *id.*

Request for records pursuant to the Freedom of Information Act

This letter also constitutes a request for records on behalf of the American Civil Liberties Union of Michigan (“ACLU”) and the Michigan Immigrant Rights Center (“MIRC”) made pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* We request the public records listed below.

Unless otherwise specified, the requests are for the time period from January 1, 2018 through the present.

1. All detainers (“Form I-247”) Immigration and Customs Enforcement (“ICE”) issued to Ottawa County agencies and detention facilities (e.g., jails, prisons) since January 1, 2018, including but not limited, to:
 - a. Detainers issued by the Detroit ICE field office;
 - b. Detainers issued by other ICE field offices;
 - c. Detainers issued by ICE’s Law Enforcement Support Center; and
 - d. Detainers issued for subjects against whom no state or municipal criminal charges are pending.
2. All records generated since January 1, 2018 indicating how many detainers have been issued by ICE to Ottawa County;
3. All records of communication generated since January 1, 2018 between ICE and Ottawa County and detention facility pertaining to individuals suspected of being non-citizens, including but not limited to immigration status verification requests;
4. All records generated since January 1, 2018 of U.S. citizens who have been referred to ICE by state, county, and/or municipal law enforcement agencies or detention facilities;
5. All policies adopted since January 1, 2018 and guidance provided to Ottawa County by ICE regarding how detainers are to be processed.
6. All internal policies since January 1, 2018 by Ottawa County regarding protocols for handling detainer requests from ICE.

The term “public records,” as used above, is intended to be the broadest interpretation of that term defined in MCL 15.232. The term includes documents and communications in all forms, including, but not limited to: memoranda, written reports, emails, recordings, computer disks, investigative records, videotapes, digital video discs, correspondence, memoranda, court documents and records, purchase orders, invoices, transcripts, telephone logs, photographs, news clippings and other preserved media reports, complaint forms, e-mail messages, activity logs, incident reports, and daily reports.

The ACLU of Michigan and the Michigan Immigrant Rights Center (MIRC) request limitation and waiver of fees pursuant to FOIA which provides for such limitation and waiver where searching for or furnishing the records can be considered as primarily benefiting the general public because it is likely to contribute to public understanding and is not in the commercial interests of the ACLU or MIRC. See MCL 15.234(2). If this request for waiver of fees is denied and it will cost more than \$100 to process the request, please contact the undersigned before proceeding. Please respond within the time period mandated by the statute. If the request is denied in whole or part please justify all deletions by reference to specific exemptions under FOIA. Separate any

exempt material from non-exempt material and make the non-exempt material available. Please direct all inquiries and responses to Monica Andrade-Fannon at mandrade@aclumich.org or 313.578.6807.

Thank you in advance of your cooperation.

Sincerely,



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