

# County of Santa Clara County Counsel



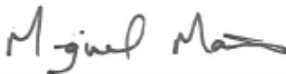
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DATE: December 2, 2010

TO: Supervisor George Shirakawa, Chairperson  
Supervisor Donald F. Gage, Vice Chair  
Public Safety & Justice Committee

FROM:   
Miguel Marquez  
County Counsel

SUBJECT: U.S. Immigration and Customs Enforcement's Secure Communities Program

## **RECOMMENDED ACTION**

Accept report relating to options with respect to participation in the Secure Communities program. (Referral from Board of Supervisors on August 10, 2010, Item No. 15.)

Possible future action by the Board of Supervisors:

- a. Direct Administration to ensure that, except as required by law, no County funds are used to provide unreimbursed assistance to U.S. Immigration and Customs Enforcement, including assistance requested through immigration detainers.

## **FISCAL IMPLICATIONS**

Approving the recommended action may have a positive impact on the General Fund by eliminating immigration-enforcement-related expenditures that are not required by law or reimbursed by ICE.

## **REASONS FOR RECOMMENDATION**

On August 10, 2010, the Board asked County Counsel to report to the Public Safety and Justice Committee on the County's options regarding participation in the Secure Communities program operated by U.S. Immigration and Customs Enforcement (ICE).

The Secure Communities program creates an automated information-sharing program through which fingerprint data collected at local correctional facilities is run through ICE's database in an effort to apprehend noncitizens who are subject to deportation. ICE activated the program in Santa Clara County in May 2010 without approval from the Board of Supervisors or any other County official.

On September 1, 2010, County Counsel provided a detailed report to the Committee describing, based on the information available to us as of that date, (1) how the Secure Communities program operates at the local level, (2) the extent of the County's obligation to participate in Secure Communities, (3) the availability of federal or state funds to reimburse the County for detaining individuals of interest to ICE, and (4) the process by which the County might opt out of the Secure Communities program.

Based on this information and testimony from the public, the Committee recommended that the Board of Supervisors direct the County Executive and County Counsel to take all necessary actions to opt out of the Secure Communities program.

The Committee also requested that the Administration report to the Committee at a later date on whether the Board should consider directing Administration to ensure that County funds are not used to comply with requests from ICE where compliance is not required by law and where the County will not be reimbursed for funds expended in complying with requests.

On September 28, 2010, the Board voted unanimously to direct the County Executive and County Counsel to opt out of the Secure Communities program. Pursuant to that direction, the County Executive and County Counsel informed ICE of the County's desire to opt out, and pursued all avenues for ensuring that its opt out request was granted. Despite the fact that ICE had informed the County in writing that the County and ICE could "come to a resolution, which may include . . . removing the [County] from the [Secure Communities] deployment plan," ICE has backtracked on its written word and has now made clear that it will not allow Santa Clara County – or any local government – to opt out of the program. The County cannot opt out of the program on its own, as the sharing of fingerprints collected in the County with ICE is determined by the state and federal governments.

While it appears that the County will remain an activated jurisdiction in the Secure Communities program, the Board retains the authority to limit the use of County funds to comply with requests from ICE that the County is not required by law to perform, are not reimbursed by ICE, and that are generated through the County's involuntary participation in the Secure Communities program.

## **BACKGROUND**

Secure Communities is a federal program initiated and implemented by ICE, an agency of the U.S. Department of Homeland Security. The program creates an automated information-sharing mechanism through which fingerprints collected by local law enforcement officers at arrest and booking are submitted by the California Department of Justice to the FBI, which in turn shares those fingerprints with ICE. ICE then compares these fingerprints with its civil immigration status database (IDENT) in an effort to apprehend noncitizens who may be subject to deportation.

According to official ICE descriptions, the program is aimed at apprehending aliens convicted of serious criminal offenses. However, the Director of the Secure Communities program and the Director of the regional ICE office that oversees deportation proceedings in Northern California recently confirmed that their practice is to initiate deportation proceedings against *every* noncitizen identified through Secure Communities who may be subject to deportation.

ICE began activating the Secure Communities program on a county-by-county basis in California after the California Department of Justice entered into a Memorandum of Agreement with ICE in May 2009. The County of Santa Clara learned of Secure Communities in October 2009, when the Department of Correction (DOC) received an informational packet that included a set of Standard Operating Procedures for the program and a questionnaire regarding current booking practices in the County jail. Based on the understanding that the program was voluntary, the County did not take any action or complete and return the questionnaire. Nonetheless, in April of 2010, ICE decreed that it was going to activate Secure Communities in Santa Clara County. When notified that the Board of Supervisors had not approved participation in this program, ICE stated that Board approval was not necessary. ICE activated the program in our County on May 4, 2010. The County is one of 38 California counties in which the program now operates.

On September 1, 2010, this Committee accepted County Counsel's report regarding the Secure Communities program and recommended that the Board of Supervisors direct the County Executive and County Counsel to take all necessary actions to opt out of the program. The Board of Supervisors unanimously approved this recommendation on September 28, 2010. Pursuant to the Board's direction, the County Executive and County Counsel have taken all possible steps to remove the County from the Secure Communities program. However, despite prior statements to the contrary, ICE has now made clear that it will block the County's efforts to do so.

The Committee also asked County Counsel to return at a future meeting with further information regarding a second possible action by the Board: directing Administration to ensure that, except as required by law, no County funds are used to provide unreimbursed assistance to U.S. Immigration and Customs Enforcement, including assistance requested through immigration detainees. If approved by the Board, this action would limit County departments' involvement in the aspects of Secure Communities that are voluntary, including the provision of certain information to ICE officials and

holding individuals beyond their criminal custody at ICE's request. Since County Counsel's last report, ICE has confirmed that these aspects of the program are voluntary.

**I. ICE's Refusal to Allow the County to Opt Out of Secure Communities**

Just before the September 28, 2010 Board of Supervisors meeting, County Counsel received a letter from the Director of the Secure Communities program that appeared to clarify the process for opting out of the program. In response to County Counsel's inquiry regarding the opt-out mechanism, the Director stated that the County could write a letter to ICE and the California Department of Justice requesting an opt-out, after which ICE would call a meeting with the County and the State to address concerns and "come to a resolution, which may include . . . removing the [County] from the [Secure Communities] deployment plan." Federal officials made similar statements in letters to Congresswoman Zoe Lofgren and to the public.

Following the Board's vote directing the County Executive and County Counsel to take all necessary actions to opt out of the Secure Communities program, we sent a letter to ICE and to the California Department of Justice requesting to opt out of the program. On November 9, 2010, the Director of the Secure Communities program, the Director of the regional ICE office, and a representative from the California State Attorney General's office came to the County Government Center to meet with County Counsel, purportedly to discuss the process for the County to opt out of the Secure Communities program.

At the November 9th meeting, County Counsel was told that no counties will be allowed to opt out of the program. The Director of Secure Communities claimed that a local opt-out had never been a possibility, refusing to acknowledge that this was a clear departure from his earlier written communications with the County.

It appears that ICE is taking this position in its dealings with localities nationwide; the San Francisco Sheriff's Department and the County Manager of Arlington County, Virginia, received the same response to their efforts to opt out of the program. While the Director of the Secure Communities program suggested that the Attorney General, on behalf of the State, could limit the State's voluntary participation in Secure Communities, he refused to delay the activation of Secure Communities in Santa Clara County so we could work with the new California Attorney General on this issue. He further confirmed that whether or not the County consents, Secure Communities will continue to operate in the County and will be deployed nationwide by 2013. Further, although states like New York have reached agreements with ICE to implement Secure Communities county-by-county only with local consent (an "opt-in" process), the Director of Secure Communities insisted that all counties nationwide would be activated in the program by 2013.

If ICE had respected the Board's policy decision regarding local public safety issues and had allowed the County to opt out of Secure Communities, then no County funds would be used to support the program. However, because ICE has backtracked on what it previously had said about the process to opt out, this no longer appears to be an option. Nonetheless, County departments and employees will continue to receive requests from ICE for assistance in implementing the program.

## **II. Individuals Apprehended and Deported by ICE Through Secure Communities in Santa Clara County**

The County has received further data regarding the people whom ICE has arrested and deported in Santa Clara County through the Secure Communities program. This information, which was provided by ICE, separates individuals by "levels" of convictions intended to reflect the severity of those individuals' criminal records. The Director of ICE recently re-defined the categories as follows:

- Level 1 offenders: aliens convicted of "aggravated felonies," as defined in § 101(a)(43) of the Immigration and Nationality Act, or two or more crimes each punishable by more than one year, commonly referred to as "felonies";
- Level 2 offenders: aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors"; and
- Level 3 offenders: aliens convicted of crimes punishable by less than one year.

The Director of ICE stated that ICE's highest civil enforcement priority is the removal of "[a]liens who pose a danger to national security or a risk to public safety," and defined the categories above stating that for the purposes of setting priorities in the Secure Communities program, "ICE personnel should refer to the . . . new offense levels . . . with Level 1 and Level 2 offenders receiving principal attention." However, he also explicitly acknowledged that "the definition of 'aggravated felony' includes serious, violent offenses and less serious, non-violent offenses. . . ." Thus, even individuals categorized as Level 1 offenders in ICE's data may not be serious, violent offenders or people who pose national security risks.

The final category, Non-Criminals, includes anyone with no past or present criminal convictions. These individuals would only be subject to deportation on the basis of violating civil immigration law.

When ICE identifies individuals through Secure Communities who are in local correctional facilities, it issues an "immigration detainer" through which it asks the local facility to hold the individual for up to 48 hours (not including weekends and holidays) after the individual's criminal custody is over. These extended detentions are designed to give ICE officers the opportunity to come to the facility to arrest the individual for booking into ICE custody.

The following table reflects individuals administratively arrested or booked into ICE custody through the Secure Communities program, from initial activation through September 30, 2010:

<b>Table 1. Individuals Administratively Arrested/Booked into ICE Custody through Secure Communities</b>			
	Santa Clara County since May 4, 2010	California since May 26, 2009	Nationwide since October 27, 2008
Non-Criminals	133 (25%)	11,674 (26%)	33,188 (27%)
Level 1 Offenders	161 (31%)	13,283 (30%)	30,967 (25%)
Level 2 Offender	209 (40%)	15,844 (26%)	46,390 (38%)
Level 3 Offenders	20 (4%)	3,720 (8%)	11,173 (9%)
Total	523	44,521	121,718

Following an administrative arrest or booking into ICE custody, some individuals are removed or returned to other countries almost immediately. This can be accomplished through a prior "removal order," in which an immigration judge may have instructed ICE to deport someone *in absentia* if the person did not appear at his or her immigration hearing; persuading the individual to accept "stipulated removal" from the country and waive his or her right to fight deportation charges; or using special ICE processes such as "expedited removal" that bypass review by an immigration judge without the consent of the individual in some circumstances.

The other individuals arrested by ICE are put into general removal proceedings, through which they can challenge the basis for their deportability and assert defenses that may be available, such as claims for asylum, adjustment of status through a U.S. citizen spouse, etc. These proceedings take place in front of an administrative law judge hired by the U.S. Department of Justice, and do not involve a right to counsel or other protections available in criminal trial. The right to appeal orders of deportation to a federal court (rather than just the federal agency) is also limited.

Many individuals in removal proceedings are detained by ICE in federal detention facilities, local contract facilities, or private prisons, while others are released on bond, under electronic monitoring, or on their own recognizance. Some immigration statutes prohibit certain immigrants from receiving bond, requiring their detention while their cases are pending. A series of recent reports by the Transactional Records Access Clearinghouse (TRAC) show that the majority of immigrants detained by ICE are transferred to different facilities during their detention (including out-of-state facilities); that the backlog for immigration judges to reach decisions on removal is growing (with California immigration courts taking an average of 526 days per case in FY 2010, higher than any other state); and that 1 out of 3 people ICE seeks to deport win their cases and remain in the country when this lengthy process draws to a close.

Because of these issues, the rates of removals and returns that ICE reports from the Secure Communities program may not fully reflect the people who are affected by ICE's deportation efforts. Individuals who are still in the removal

process, or who are detained for months before ultimately prevailing, would not be counted in these numbers. The following table reflects individuals removed or returned by ICE through the Secure Communities program from initial activation through September 30, 2010:

<b>Table 2. Individuals Removed or Returned through Secure Communities</b>			
	Santa Clara County since May 4, 2010	California since May 26, 2009	Nationwide since October 27, 2008
Non-Criminals	81 (34%)	6,086 (27%)	17, 174 (27%)
Level 1 Offenders	60 (25%)	6,450 (28%)	14,020 (22%)
Level 2 Offenders	91 (38%)	8,230 (36%)	25,619 (40%)
Level 3 Offenders	9 (4%)	2,084 (9%)	7,259 (11%)
Total	241	22,850	64,072

Notably, though ICE reports its rates of arrests and removals based on the Level 1, 2, and 3 priority categories, both the Director of Secure Communities and the Director of the regional ICE office responsible for deportations from Northern California told County Counsel that as long as they have sufficient resources, they do not prioritize arresting or removing serious criminal aliens over other immigrants, including non-criminals, who are subject to deportation. The statistics above demonstrate this policy by showing that at the County, state, and national levels, between 70% and 80% of individuals arrested and removed are not classified as Level 1 Offenders, and between 25% and 35% have no criminal convictions at all.

Despite requests to ICE, we have been unable to obtain more specific information on the nature of the charges or on the immigration status of the individuals apprehended through Secure Communities in Santa Clara County. As noted above, some individuals classified as Level 1 Offenders may have convictions for non-violent or less serious offenses. Additionally, individuals with Lawful Permanent Resident status ("green cards") may be subject to deportation based on certain offenses, while undocumented immigrants could be deported without any showing of a criminal history. The information we have been able to obtain from ICE regarding the individuals they apprehend is limited to the tables provided above.

To the extent there is a concern that there are some individuals with convictions for serious, violent offenses who are identified and arrested by ICE in Santa Clara County through Secure Communities, those persons are usually transferred to California State prison. Most individuals convicted of serious criminal offenses or of recidivist offenses are transferred from the County jail to state prison, rather than released to the community from County custody. In such cases, ICE does not assume custody of the individual until completion of the criminal sentence in state prison. Additionally, while immigration detainers issued often ensure that individuals stay in County custody rather than posting bail while criminal proceedings are pending, the bail process in criminal court itself should ensure that individuals with serious criminal charges or histories, or with a serious risk of flight, are not released into the community.

Permitting individuals with lower charges to post bail when a criminal court deems it appropriate could save the County the costs of detaining those individuals while their criminal cases are pending. In a recent study of New York City inmates by Justice Strategies, researchers controlling for race and offense level found that noncitizens with an

immigration detainer spent on average 73 days longer in jail before being discharged than those without an immigration detainer. While the County can recover some reimbursement through the State Criminal Alien Assistance Program (SCAAP) for people held in the jail who meet certain criteria, the reimbursement is limited and many individuals do not meet the criteria for reimbursement.

Should the Committee wish to consider an approach that allows use of County funds to assist ICE in some cases, but not in others, it may also direct County Counsel to work with the Administration, the Department of Correction, the District Attorney's Office, the Public Defender's Office, the Sheriff and other law and safety agencies to determine potential ways to distinguish between cases on the basis of criminal severity.

### **CONSEQUENCES OF NEGATIVE ACTION**

Failure to accept the report will result in the Committee not receiving the information requested. A decision not to authorize the possible action would mean that the County will continue to expend resources to comply with requests from ICE to detain individuals at the County jail and to otherwise comply with ICE's requests without reimbursement to the County for costs incurred in doing so.