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REPORT NO. R17-0167

MAY 18 2017

REPORT RE:

SANCTUARY CITY LITIGATION AND POLICIES RELATING TO THE CITY'S UNDOCUMENTED IMMIGRANT POPULATION

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Council File No. 16-1320

Honorable Members:

We are pleased to transmit this report summarizing guidance this Office has given to general managers of City departments to assist them in responding to requests by U.S. Immigration and Customs Enforcement ("ICE") for access to City facilities and/or information for immigration enforcement purposes. The report also discusses this Office's participation in litigation challenging President Trump's Executive Order No. 13768 ("EO 13768" or the "Order") concerning "sanctuary jurisdictions." Finally, this report addresses two of the City's immigrant-related policies, Los Angeles Police Department Special Order 40 and Mayor Garcetti's Executive Directive 20 ("ED 20"), in light of the Executive Order and federal law.

I. Guidance Regarding ICE Access to City Facilities and Information

Following recent press reports about ICE immigration enforcement activities in or near public spaces – such as courthouses and public schools – this Office has developed and provided guidelines to City department heads regarding how to respond to potential enforcement activities by ICE agents on City property, including requests by ICE to gain entry into areas of City facilities not open to the general public and requests

for information and records.[1] This Office's memorandum to City of Los Angeles department heads, entitled "Guidelines on ICE Access to City Facilities and Information" is attached to this report.

In general, the guidance regarding ICE access to City facilities mirrors the pronouncement in ED 20 that, if a City facility (or portion thereof) is not open to the general public, then the City is not required to grant access to ICE absent a warrant or court order. Therefore, City personnel who receive a request by an ICE agent to gain entry into an area of City property not open to the general public without a warrant or court order should advise the agent of that policy, and should immediately notify his or her supervisor who should report the incident to this Office. If an ICE agent presents a warrant or court order to gain entry to an area not open to the general public, then the City employee should obtain a copy of the warrant or order and request that the ICE agent wait outside the area while the employee consults with a supervisor and legal counsel.

On the other hand, ICE agents generally have the right to be present in a City facility (or portion of a facility) open to the general public — such as the reception areas and public counters of most city buildings — and can engage in investigatory encounters and enforcement activities with persons present within those premises. However, pursuant to a 2011 ICE policy concerning "sensitive locations," ICE agents are discouraged from taking enforcement actions on or near any public area deemed to be a "sensitive location," which includes facilities that provide childcare, educational programs, vocational training, and health care-related programs or services. Accordingly, City departments that provide such services should maintain copies of and be aware of the "sensitive locations" policy, and document any perceived violation by ICE agents of that policy. City employees should also document the date, time, location, and details of any ICE encounter on public City property, and report such encounters to his or her supervisor, who should report the incident to this Office.

An ICE agent may request City records and information regarding citizenship and immigration status of any individual. Under 8 U.S.C. Section 1373 ("Section 1373"), the City may not restrict a City employee from providing ICE with existing City records specifically responsive to such a request. However, before an employee responds in any way to an ICE request for citizenship and immigration status of an individual, the employee and his or her supervisor are asked to seek legal guidance from this Office.

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[1] This Office's guidance regarding City facilities not open to the general public is similar to the advice provided by legal counsel for the City of New York. However, guidance relating to public schools, including for example LAUSD and the New York City public schools, will differ from guidance provided to municipalities because school campuses are typically not open to the general public, whereas significant portions of a municipality's property and facilities, such as those of the City of Los Angeles, are open to the general public.

If an ICE agent makes a request for records and documents not specific to the citizenship and immigration status of an individual, the request will be considered under the California Public Records Act ("CPRA") and the ICE agent is entitled to receive a written response and disclosure of any public, non-confidential, or non-exempt responsive records in the City's possession. If, however, an ICE agent seeks access to non-public records or public records that the City determines are confidential or exempt from disclosure under the CPRA, City departments are entitled to withhold such documents from ICE, unless the agent presents to the department a warrant or court order directing the relevant City department to provide such records to ICE. All requests for records from ICE should be reported to an employee's supervisor, who should report the request to this Office.

The guidance from this Office does not prohibit City personnel from exchanging with ICE records and information already in the City's possession that are specific to the citizenship or immigration status of any individual. Therefore, this Office's guidance to City department heads is consistent with the City's obligations under Section 1373, a federal statute that prohibits state and local entities from restricting the exchange of immigration status information with federal immigration authorities. It is important to note, however, that Section 1373 does not require those entities to collect immigration status information in the first instance. *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999); *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407 (2009).

II. The President's Executive Order on "Sanctuary Jurisdictions" and Pending Litigation Challenging the Executive Order

A. "Sanctuary Jurisdiction" Provisions of EO 13768

President Trump's Executive Order No. 13768 was signed on January 25, 2017. Among other things, it purports to impose certain obligations on "sanctuary jurisdictions" upon pain of losing federal funding and the risk of unspecified federal enforcement action. EO 13768 sets forth the Trump administration's policy regarding immigration enforcement and directs the Attorney General and Secretary of Homeland Security ("Secretary") to take the following actions. (EO 13768, Sec. 9, *Sanctuary Jurisdictions*).

First, EO 13768 directs the Attorney General and Secretary to ensure that states and their political subdivisions are complying with Section 1373. If a jurisdiction "willfully refuse[s] to comply" with Section 1373, the Attorney General and Secretary are authorized to ensure that it is not eligible to receive federal grants.

Second, the Order authorizes the Secretary to designate a jurisdiction as a "sanctuary jurisdiction," according to "his discretion and to the extent consistent with

law." Although EO 13768 does not explicitly define "sanctuary jurisdiction"[2] and does not provide any criteria that the Secretary is required or permitted to consider in making such a designation, the Order suggests that, at a minimum, a "sanctuary jurisdiction" is one that willfully refuses to comply with Section 1373.

Third, EO 13768 authorizes the Attorney General to "take appropriate enforcement action" against a jurisdiction that violates Section 1373, or which has any law, policy, or practice "that prevents or hinders the enforcement of Federal law." The Order does not specify what type of "enforcement action" the Attorney General is permitted to take, nor what it means to "prevent or hinder" the enforcement of federal law, apart from willfully violating Section 1373.

Fourth, the Order directs the Secretary to publish, on a weekly basis, a report listing jurisdictions that have ignored or failed to honor Immigration and Customs Enforcement ("ICE") detainers. An ICE detainer is a request from ICE to a local law enforcement agency asking the local agency to voluntarily hold an arrestee in custody based on his or her immigration status for an additional 48 hours after the individual would otherwise be released.

B. Status of Pending Litigation

To date, three lawsuits in California, one lawsuit in Washington, and one lawsuit in Massachusetts have been filed in federal district court challenging the constitutionality of EO 13768. Two of the California cases – filed in late January and early February of 2017 by the City and County of San Francisco, and the County of Santa Clara, respectively – are pending in the Northern District of California and have been deemed "related" so that they can be heard by the same judge, the Honorable William Orrick. The third California lawsuit was filed in late March 2017 by the City of Richmond, also in the Northern District, and was also deemed "related" to the San Francisco and Santa Clara actions before Judge Orrick. This Office has participated in an *amicus curiae* capacity in both the San Francisco and Santa Clara actions.[3]

The San Francisco lawsuit alleges that San Francisco is a "Sanctuary City" with "Sanctuary City laws" and policies that generally prohibit its employees from using city funds or resources to assist in the enforcement of federal immigration law, unless required by state and federal law – such as Section 1373, which San Francisco alleges it complies with. The complaint further alleges that San Francisco's policies prohibit its law enforcement officers from cooperating with ICE detainer requests, and that the

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[2] Indeed, there is no federal legal definition, as far as this Office is aware, of the terms "sanctuary jurisdiction" and "sanctuary city."

[3] The Office's decision to participate as *amicus curiae* and not file an independent action was predicated on several factors, which the Office can discuss in closed session upon the City Council's request.

federal government might interpret EO 13768 as providing that Section 1373 requires San Francisco to comply with ICE detainers, thereby subjecting it to a risk of losing federal funds.[4] The complaint seeks an order declaring both EO 13768 and Section 1373 unconstitutional under the Tenth Amendment, which prohibits the federal government from "commandeering" state and local entities to enforce federal programs.

The Santa Clara lawsuit alleges that, in 2010 and 2011, Santa Clara adopted a series of policies designed to prohibit its law enforcement officers from (i) initiating an inquiry or enforcement action based solely on an individual's immigration status, (ii) honoring ICE detainer requests, and (iii) transmitting to ICE information collected by Santa Clara in the course of providing social services. The lawsuit further alleges that the Order seeks to compel Santa Clara and the State of California to rescind their immigration-related policies and to require them to participate in federal immigration enforcement, which puts at jeopardy the $1 billion in federal funds Santa Clara receives each year.[5] Santa Clara alleges that EO 13768 is unconstitutional in numerous respects. For example, the lawsuit alleges that the Order is unconstitutionally vague because, among other things, it fails to provide a definition for the term "sanctuary jurisdiction," and gives the Secretary unfettered and standardless discretion to designate which jurisdictions are "sanctuary jurisdictions." The lawsuit also alleges that, to the extent the Order purports to be able to strip *all* federal funds from a "sanctuary jurisdiction," it improperly purports to vest the Executive with legislative spending powers that even Congress does not have, and also violates the Tenth Amendment commandeering prohibition. The lawsuit further alleges that the Order violates due process, in that it does not provide any mechanism by which a state or local government agency may review, challenge, or even obtain notice that it has been designated a "sanctuary jurisdiction" subject to a loss of federal funds and unspecified enforcement action.

In late March 2017, this Office joined two *amicus curiae* briefs filed by more than thirty cities in support of Santa Clara and San Francisco's requests for a preliminary nationwide injunction. The *amicus* briefs, which were signed by an assortment of cities – some that consider themselves to be "sanctuaries," and others that do not – argue that EO 13768 is unconstitutional in three respects. First, the briefs argue that the Order violates the Tenth Amendment in that it threatens to place conditions on federal

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[4] In the lawsuit, San Francisco alleges that it receives $1.2 billion annually in federal funds, which comprises 13 percent of its annual budget. The complaint also alleges that only a small percentage of those federal funds received relate to immigration or law enforcement. The lawsuit further alleges that the Order's threat to cut federal funds impairs San Francisco's ability to properly prepare a budget for the next fiscal year.

[5] Santa Clara alleges that this funding represents about 15 percent of its $6 billion annual budget, and that only a small fraction of these federal funds relate to immigration or law enforcement. It further alleges that much of its federal funding is received indirectly through the State of California.

funding to coerce state and local entities to participate in the enforcement of federal immigration law. Second, the briefs charge that the Order is unconstitutionally vague because, among other things, it does not identify what specific conduct is prohibited by its pronouncement that the Attorney General shall "take appropriate enforcement action" against any entity that "has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." Third, the briefs contend that the Order violates procedural due process, because it purports to empower the executive branch to arbitrarily label jurisdictions as "sanctuary jurisdictions" without providing those jurisdictions with notice of the designation or an opportunity to be heard to challenge the designation.

On April 14, 2017, a hearing on the plaintiffs' requests for a preliminary injunction was held before Judge Orrick. At the hearing, the U.S. Department of Justice ("DOJ") attorney arguing in support of the Order conceded that the Order "does not rewrite the law," "does not create new law," "does not invoke new powers," and "does not instruct the Department of Justice or Department of Homeland Security to engage in unconstitutional activity." The DOJ argued that the Order should be read narrowly, to avoid constitutional problems, and suggested that the Order did nothing more than reflect the Trump administration's policy regarding immigration enforcement priorities. The DOJ attorney maintained that the financial impact of the Order was limited to federal grants issued by the Department of Homeland Security and the Department of Justice that are expressly conditioned on compliance with Section 1373.[6] The DOJ attorney also suggested that the Order does not provide any direct monetary or other consequences that might flow from the designation of a jurisdiction as a "sanctuary jurisdiction." With respect to ICE detainer requests, the DOJ attorney represented that "[t]he federal government has acknowledged repeatedly that the requests are not mandatory; that they're voluntary" and that local governments routinely do not comply with such requests.

On April 25, 2017, Judge Orrick granted the plaintiffs' motions for a nationwide preliminary injunction, enjoining enforcement of Section 9(a) of the Order. Noting that it was "heartening that the Government's lawyers recognize that the Order cannot do more constitutionally than enforce existing law," Judge Orrick nevertheless found that the Order by its plain terms attempted to reach all federal funding, and that the President and Attorney General have made various public comments confirming that they have a broad interpretation of the Order that renders it unconstitutional. Nevertheless, the Court clarified that the Order does not affect the federal government's ability to use lawful means to enforce existing conditions of federal grants, nor its ability

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[6] On April 21, 2017, the DOJ sent letters to nine local agencies – California Department of Corrections, Chicago Police Department, City of New Orleans, City of Philadelphia, Clark County, Miami Dade County, Milwaukee County, and the City of New York – demanding that they confirm compliance with Section 1373 in connection with Justice Assistance Grants ("JAG") they had received from the DOJ. The City of Los Angeles was not among those jurisdictions.

to develop regulations or guidance defining what a sanctuary jurisdiction is or designating a jurisdiction as such.

Since the issuance of the nationwide preliminary injunction, the DOJ has announced that the Trump administration intends to release interpretive guidelines relating to the Order. The Office will continue to monitor developments in this litigation, including any action by the relevant federal agencies to issue or publish interpretive guidelines regarding the Order.

III. Special Order 40

Special Order 40 refers to a Los Angeles Police Department ("LAPD") policy – adopted by the Los Angeles Board of Police Commissioners and signed by former Chief of Police Daryl Gates in 1979 – that restricts an officer from initiating a police action with the objective of discovering a person's immigration status, and also prohibits arrests based solely on civil immigration status. Special Order 40 added Section 1/390 (Undocumented Aliens) to the LAPD Manual, and amended Section 4/264.50 (Enforcement of United States Immigration Laws).

Section 1/390 provides generally that "[u]ndocumented alien status in itself is not a matter for police action" and proclaims that LAPD personnel are required to enforce the law and serve members of the public equally without regard to immigration status. Section 1/390 also recognizes that participation by undocumented persons in police activities and investigations increases the LAPD's ability to protect and serve the entire community.

Section 4/264.50 provides that "[o]fficers shall not initiate police action where the objective is to discover the alien status of a person." This section also provides that "[o]fficers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry)."

The LAPD policies that were promulgated by Special Order 40 are compliant with Section 1373. Indeed, in the 2009 case *Sturgeon v. Bratton*, the California Court of Appeal confirmed that when it decided a legal challenge to Special Order 40 – as set forth in Section 4/264.50 of the LAPD manual – alleging that the language of the policy conflicted with Section 1373 and should therefore be invalidated. The Court of Appeal held that because the language of Special Order 40 does not address the issue of communications with ICE, but rather prohibits police officers from initiating police action regarding immigration status and making arrests for illegal entry, the policy does not conflict with (nor violate) Section 1373.

IV. Executive Directive No. 20

Signed by Mayor Eric Garcetti on March 21, 2017, Executive Directive No. 20

("ED 20") sets forth various policy pronouncements for how City employees are to interact with undocumented immigrants and federal immigration enforcement authorities. At its core, ED 20 prohibits City employees from taking action to assist federal agencies with federal immigration enforcement.

Among its more key provisions, ED 20 prohibits City employees from collecting personal information from individuals — including information about citizenship or immigration status — unless that information is necessary for the performance of the employee's duties. However, it does not prohibit City employees from providing ICE with immigration status information which the City has obtained and has in its possession. Thus, ED 20 is compliant with Section 1373 while limiting the amount of immigration status information that comes within the City's possession. In effect, ED 20 reduces the volume of information that the City might have to provide to ICE pursuant to a request for immigration status information under Section 1373.

ED 20 also recognizes that there may be limited circumstances in which other legal mandates may override its policy pronouncements. For example, in prohibiting City employees from collecting immigration status information "unless legally required to do so or mandated," ED 20 acknowledges that there are situations — such as when the LAPD assists immigrants in obtaining T- or U-Visas for victims of trafficking and other crimes — when program participation requirements may require City personnel to collect and/or provide information about a person's immigration status as a condition of program eligibility. Similarly, in prohibiting City employees from granting federal immigration agents access to private City facilities "unless such access is legally required," ED 20 recognizes that there may be situations when the City may not have the authority to exclude agents from those areas, such as when an agent presents a valid search warrant signed by a judicial officer.

If you have any questions regarding this matter, please contact Deputy City Attorney Mike Dundas at (213) 978-8130.

Very truly yours,

MICHAEL N. FEUER, City Attorney

By Leela Kapur
LEELA KAPUR
Chief of Staff

LK:pj
Attachment

MICHAEL N. FEUER
CITY ATTORNEY

To: Department Heads, City of Los Angeles

From: Office of the Los Angeles City Attorney

Subject: Guidelines on ICE Access to City Facilities and Information

Date: May 18, 2017

This memorandum contains general guidelines for City departments and their employees regarding potential enforcement activities by Immigration and Customs Enforcement (ICE) agents on City property, and requests for information by ICE.

A. ICE Seeking Access to City Facilities Not Open to the General Public

- If a City facility is *not open to the general public* – such as areas restricted to City employees or City offices and meeting rooms where only invited members of the public may enter – then the City is not required to grant an ICE agent entry to that facility absent a warrant or court order.

- An employee who receives a request by an ICE agent to gain entry into an area of a City facility not open to the general public should tell the ICE agent that the area is not open to the general public and access is not allowed without a warrant or court order. If the ICE agent still seeks entry but has no warrant or court order, the employee should request the name and badge/ID number of the ICE agent and purpose of the visit and ask the ICE agent to wait outside the area until the employee can consult with his or her supervisor and legal counsel. The employee should immediately notify his or her supervisor and together contact this Office by calling the phone number listed at the end of this guidance memo. If the ICE agent refuses to wait until the employee consults with the supervisor and our Office, the employee should make clear his or her objection to the ICE agent's conduct but should not attempt physically to prevent entry. The employee should document the incident and immediately inform his or her supervisor, this Office and the LAPD's Security Services Division.

- If an ICE agent presents an employee with a warrant or court order to gain entry into an area of a City facility not open to the general public, the employee should obtain a copy of the warrant or order and request that the ICE agent wait outside the area until the employee can consult with his

or her supervisor and legal counsel. The employee should immediately notify the supervisor and together contact this Office by calling the phone number listed at the end of this guidance memo. If the ICE agent insists on entering the area without waiting for the employee to consult with the supervisor and this Office, the employee should make clear the objection to the ICE agent's conduct but should not attempt physically to prevent entry. The employee should immediately inform his or her supervisor, this Office and the LAPD's Security Services Division along with documenting the incident.

- If a City department has a general question about whether an area or room in a City facility is open to the general public, the department's general manager or designee should contact the Deputy City Attorney who regularly advises the department.

B. ICE Enforcement Activities in City Facilities Open to the General Public

- As a general matter, if a City facility, or portion of the facility, is *open to the general public,* an ICE agent has the right, in that public area, to initiate a consensual encounter with a person; to question the person and ask for identification; to conduct an investigatory stop pursuant to a reasonable suspicion of criminal activity; and to surveil, question, serve papers on, and even arrest a person.

- If a City employee observes an ICE agent engaging in enforcement activities at a City facility, the employee should document the date, time, location, and details of the encounter.

- The City employee should immediately report the incident to a supervisor. The same day, the supervisor should report the incident to the attorney who regularly advises the department.

- The City employee should not attempt to impede or interfere with an ICE agent engaged in immigration enforcement activity.

- City departments that provide childcare, educational, vocational training, or health care-related programs and services, or which otherwise serve vulnerable populations – children, pregnant women, victims of crimes or abuse, individuals with mental or physical disabilities, or senior citizens – should be made aware and maintain copies of ICE's "sensitive locations" policy, which discourages ICE enforcement actions in sensitive locations or where services are provided to vulnerable groups. If any ICE enforcement activity takes place in a sensitive location, the department should document and report the incident, as above, with a notation that the incident occurred in a sensitive location.

C. ICE Requests for City Records Regarding Citizenship and Immigration Status

- ICE may request City records regarding citizenship and immigration status of an individual. Under 8 U.S.C. Section 1373, the City may not restrict a City employee from providing ICE with existing City records responsive to such a request. However, before an employee responds in any way to such a request, the employee and his or her supervisor should seek legal guidance from this Office by contacting this Office at the phone number listed at the end of this guidance memo.

D. ICE Requests for City Records Not Regarding Citizenship or Immigration Status

- If ICE seeks access to City records that do not directly concern the citizenship or immigration status of an individual, the request will be considered under the California Public Records Act (CPRA). ICE is entitled to receive a response and a production of public, non-exempt records, just like any other person who requests records under the CPRA. However, if ICE seeks non-public records, public records exempt under the CPRA, or other confidential information maintained by a City department, the record should only be provided if ICE has a warrant or court order directing the City department to provide ICE access to such information. The department should obtain a copy of the warrant or court order and before complying contact this Office by calling the phone number listed at the end of this guidance memo.

- If ICE seeks confidential, non-public, or non-exempt City records without a warrant or court order, the department should inform ICE that before access to the records can be provided, the department must first obtain advice from its legal counsel. The department should immediately report the ICE request to this Office by calling the phone number listed at the end of this guidance memo.

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Where this guidance memo requests that City department personnel contact this Office, please call (213) 978-8100, identify yourself and the department you work for, and ask for the Deputy City Attorney on duty for client department immigration advice.