

HENNEPIN COUNTY ATTORNEY'S OFFICE
Civil Division

M E M O R A N D U M TO: Michael O. Freeman, Hennepin County Attorney

FROM: Jim Keeler, Assistant Hennepin County Attorney

RE: ICE Detainers

DATE: June 11, 2014

In response to a change in interpretation of a federal regulation and several federal court decisions, a growing number of state and local governments are refusing to honor U.S. Immigration and Customs Enforcement (ICE) detainers. These recent and significant legal developments require a reevaluation of past legal advice and current HCSO policy regarding honoring ICE detainers.

ICE Detainers An Immigration Detainer – Notice of Action or DHS Form I-247 (“ICE Detainer”) is a request to a state or local law enforcement agency (LEA) to maintain custody of an individual for a period not to exceed 48 hours (excluding Saturdays, Sundays and federal holidays) after such individual would otherwise be released to give ICE time to assume custody on the individual for further investigation. The governing authority for ICE detainers appears in 8 CFR §287.7 (the “Regulation”) and reads in relevant part as follows:

(a) Detainers in general: Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form 1-247 Immigration Detainer – Notice of Action, to any other Federal, State or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to the release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible. * * * *

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays and holidays in order to permit assumption of custody by the Department. (emphasis added).

ICE issues detainers in cases where it has reason to believe that a person may be subject to removal from the United States. ICE detainers arose out of a federal information-sharing partnership between ICE and the FBI. When a person is arrested and booked into the system, the local law enforcement agency (“LEA”) shares the arrested person’s fingerprints with the FBI to see if the person has a criminal record. The FBI automatically shares these fingerprints with ICE to check against its immigration databases. In addition, pursuant to the Criminal Alien Program (CAP) ICE agents interrogate foreign-born inmates in local jails. Based on the information ICE is able to collect, if ICE believes a person could be deported, the agency issues a detainer to facilitate their arrest.

Based on what appears to be the mandatory language of 8 CFR §287.7(d) (“shall maintain custody”) and ICE’s previous construction of this statute, the HCSO’s policy to date has been to honor ICE detainers and detain individuals for up to an additional 48 hours after other state or federal holds on the individuals have terminated.

The Changed Landscape Over the past several months, the legal landscape has changed dramatically. First, several court decisions have held that that what appears to be a mandatory requirement to hold individuals subject to an ICE detainer in 8 CFR §287.7(d) is not mandatory, but rather merely a request to a local agency. See, e.g. *Galarza v. Szalczyk*, 745 F.3d 634 (3rd Cir. 2014); *Morales v. Chadbourne*, 2014 WL 554478 (D. RI 2014); *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 *1 (D. Or., April 11, 2014). Second, ICE has changed its interpretation of 8 CFR 287.7.

In a February 25, 2014 letter to Representative Keith Ellison (D-MN5), the Acting Director of ICE clarified that immigration detainers are not mandatory “as a matter of law.” ICE confirmed this construction. In a May 22, 2014 voice mail message, local ICE Chief Legal Counsel Jennifer Longmeyer-Wood said that the detainer form is in fact a “request” and Hennepin County may choose how to respond to that “request.”

This is a significant change from ICE’s previous communications to the HCAO regarding these detainers.

HCAO Recommendation

There is no controlling precedent in the Eight Circuit. However, the recent federal court rulings and change in ICE policy lead to only one logical conclusion: ICE detainers are requests rather than mandatory orders. In other words, an ICE detainer or DHS Form I-247 without more is not legally sufficient to hold an individual in custody. ICE detainers alleging that DHS has merely “determined there is reason to believe the individual is an alien subject to removal . . .” should no longer be relied upon by the HCSO to hold an individual in custody.