

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

Ordinance amending the Administrative Code by adding Chapter 12I to prohibit law enforcement officials from detaining individuals on the basis of an 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 12I, Sections 12I.1 through 12I.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.

1 Our federal immigration system is in dire need of comprehensive reform. The federal
2 government should not shift the burden of federal civil immigration enforcement onto local law
3 enforcement by requesting that local law enforcement agencies continue detaining persons based on
4 non-mandatory civil immigration detainers. It is not a wise and effective use of valuable City resources
5 at a time when vital services are being cut.

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

19 Given that civil immigration detainers are issued by immigration officers without judicial
20 oversight, and the regulation authorizing civil immigration detainers provides no minimum standard of
21 proof for their issuance, there are serious questions as to their constitutionality. Unlike criminal
22 warrants, which must be supported by probable cause, there is no such requirement for the
23 issuance of a civil immigration detainer. ~~Unlike criminal detainers, which are supported by a~~
24 ~~warrant and require probable cause, there is no requirement for a warrant and no established~~
25 ~~standard of proof, such as reasonable suspicion or probable cause, for issuing an requesting~~

1 ~~a civil immigration detainer request.~~ At least one federal court in Indiana has ruled that because
2 civil immigration detainers and other ICE "Notice of Action" documents are issued without probable
3 cause of criminal conduct, they do not meet the Fourth Amendment requirements for state or local law
4 enforcement officials to arrest and hold an individual in custody.

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

19 According to Section 287.7 of Title 8 of the Code of Federal Regulations, the City is not
20 reimbursed by the federal government for the costs associated with civil immigration detainers alone.
21 The full cost of responding to a civil immigration detainer can include, but is not limited to, extended
22 detention time, the administrative costs of tracking and responding to detainers, and the legal liability
23 for erroneously holding an individual who is not subject to a civil immigration detainer. Compliance
24 with civil immigration detainers and involvement in civil immigration enforcement diverts limited local
25 resources from programs that are beneficial to the City.

1 The City seeks to protect public safety, which is founded on trust and cooperation of community
2 residents and local law enforcement. However, civil immigration detainers undermine community trust
3 of law enforcement by instilling fear in immigrant communities of coming forward to report crimes and
4 cooperate with local law enforcement agencies. A 2013 study by the University of Illinois, entitled
5 “Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement,”
6 found that at least 40 percent of Latinos surveyed are less likely to provide information to police
7 because they fear exposing themselves, family, or friends to a risk of deportation. Indeed, civil
8 immigration detainers have resulted in the transfer of victims of crime, including domestic violence
9 victims, to ICE. According to a national 2011 study by the Chief Justice Earl Warren Institute on Law
10 and Social Policy at UC Berkeley, entitled “Secure Communities by the Numbers: An Analysis of
11 Demographics and Due Process” (“2011 Warren Institute Study”), ICE has falsely detained
12 approximately 3,600 U.S. citizens as a result of S-Comm. Thus, S-Comm leaves even those with legal
13 status vulnerable to civil immigration detainers issued without judicial review or without proof of
14 criminal activity, in complete disregard for the due process rights of those subject to the civil
15 immigration detainers.

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

24 The City has enacted numerous laws and policies to prevent its residents from becoming
25 entangled in the immigration system. But, the enforcement of immigration laws is a responsibility of

1 the federal government. A December 2012 ICE news release stated that deportations have hit record
2 figures each year. According to the Migration Policy Institute's 2013 report, entitled "Immigration
3 Enforcement in the United States: The Rise of a Formidable Machinery," the federal government
4 presently spends more on civil immigration enforcement than all federal criminal law enforcement
5 combined. Local funds should not be expended on such efforts, especially because such entanglement
6 undermines community policing strategies.

7
8 **SEC. 12I.2. DEFINITIONS.**

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

11 (1) All criminal charges against the individual have been dropped or dismissed.

12 (2) The individual has been acquitted of all criminal charges filed against him or her.

13 (3) The individual has served all the time required for his or her sentence.

14 (4) The individual has posted a bond, or has been released on his or her own recognizance.

15 (5) The individual has been referred to pre-trial diversion services.

16 (6) The individual is otherwise eligible for release under state or local law.

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

22 "Convicted" means state of having been proved guilty in a judicial proceeding, unless
23 the convictions have been expunged or vacated pursuant to applicable law. The date that an
24 individual is Convicted starts from the date of release.

1 “Firearm” means a device, designed to be used as a weapon, from which is expelled
2 through a barrel, a projectile by the force of an explosion or other form of combustion as
3 defined in Penal Code Section 16520.

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

8 “Violent Felony” means any crime listed in Penal Code Section 667.5(c); human
9 trafficking as defined in Penal Code Section 236.1; felony assault with a deadly weapon as
10 defined in Penal Code Section 245; any crime involving use of a firearm, assault weapon,
11 machinegun, or .50 BMG rifle, while committing or attempting to commit a felony that is
12 charged as a sentencing enhancement as listed in Penal Code Sections 12022.4 and
13 12022.5.

14
15 **SEC. 12I.3. RESTRICTIONS ON LAW ENFORCEMENT OFFICIALS.**

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

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

22 (1) The individual has been Convicted of a Violent Felony in the seven years
23 immediately prior to the date of the civil immigration detainer; and

1 (2) A magistrate has determined that there is probable cause to believe the
2 individual is guilty of a Violent Felony and has ordered the individual to answer to the same
3 pursuant to Penal Code Section 872.

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

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

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

18
19 **SEC. 12I.4. PURPOSE OF THIS CHAPTER.**

20 The intent of this Chapter is to address requests for non-mandatory civil immigration
21 detainers requests. Nothing in this Chapter shall be construed to apply to matters other than those
22 relating to federal civil immigration detainers. In all other respects, local law enforcement agencies
23 may continue to collaborate with federal authorities to protect public safety. This collaboration
24 includes, but is not limited to, participation in joint criminal investigations that are permitted under
25

1 local policy or applicable city or state law that are permitted under local policy or applicable
2 city or state law.

3
4 **SEC. 12I.5. ANNUAL REPORT.**

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

12
13 **SEC. 12I.65. SEVERABILITY.**

14 If any section, subsection, sentence, clause, phrase, or word of this Chapter 12I, or its
15 application, is for any reason held to be invalid or unconstitutional by a decision of any court of
16 competent jurisdiction, such decision shall not affect the validity of the remaining portions of this
17 Chapter 12I. The Board of Supervisors hereby declares that it would have passed this Chapter 12I and
18 each and every section, subsection, sentence, clause, phrase, and word not declared invalid or
19 unconstitutional without regard to whether any other portion of this Chapter 12I would be subsequently
20 declared invalid or unconstitutional.

21
22 **SEC 12I.76. UNDERTAKING FOR THE GENERAL WELFARE.**

23 In enacting and implementing this Chapter 12I, the City is assuming an undertaking only to
24 promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an
25

1 obligation for breach of which it is liable in money damages to any person who claims that such breach
2 proximately caused injury.

3
4 Section 2. Effective Date. This ordinance shall become effective 30 days after
5 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
6 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
7 of Supervisors overrides the Mayor's veto of the ordinance.

8
9 Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors
10 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,
11 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal
12 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment
13 additions, and Board amendment deletions in accordance with the "Note" that appears under
14 the official title of the ordinance.

15
16 APPROVED AS TO FORM:
17 DENNIS J. HERRERA, City Attorney

18 By: _____
19 ALICIA CABRERA
Deputy City Attorney

20 n:\legana\as2013\1400139\00873746.doc
21
22
23
24
25