

City of Takoma Park

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Media Advisory

TAKOMA PARK CITY ATTORNEY REAFFIRMS LEGALITY OF CITY'S IMMIGRANT SANCTUARY LAW

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TAKOMA PARK, Md., July 20, 2007 – At the direction of the City Council, the City of Takoma Park released a legal analysis concerning the City's immigrant sanctuary law, which went into effect in 1985. In a memorandum dated July 17, 2007, City Attorney Susan Silber and Assistant City Attorney Kenneth Sigman advised the Takoma Park City Council that "...the sanctuary law is a valid law that is not superceded by state or federal statute and that it broadly prohibits cooperating with or assisting federal immigration officials with the investigation or arrest of persons accused of immigration violations." They further stated, "There is no law requiring police officers in Maryland to make arrests pursuant to immigration warrants."

Chief Ronald A. Ricucci, who assumed leadership of the Takoma Park Police Department in February 2007, requested the legal analysis from Silber and Sigman. His request was prompted by the inclusion of criminal or civil deportation orders in the National Crime Information Center database, which began in December 2001. Ricucci inquired about the applicability and the legality of the City's immigration sanctuary law.

Mayor Kathy Porter stated, "In light of recent actions taken by other jurisdictions in the metropolitan area, the Takoma Park City Council felt it was important that we make the City's legal analysis public. We wanted to make sure that everyone knows that the City's sanctuary law is still in effect. The City's position has been and continues to be that we will not enforce federal immigration law."

Takoma Park's sanctuary law was enacted in 1985 to protect numerous refugees from El Salvador and Guatemala from being deported to their homelands, which were in a state of civil war. In accordance with the City's sanctuary law, the Takoma Park Police Department neither inquires nor records information about individuals' immigration status. The sanctuary law does not restrict officers from arresting individuals who are suspected of criminal activity or who have an outstanding non-immigration related criminal warrant, even if the person is also identified as an immigration violator in the National Crime Information Center database.

Ricucci recently issued a directive to his staff, reaffirming the provisions of the City's sanctuary law. In accordance with the directive, Takoma Park officers do not serve orders, detainers, or warrants for violations of immigration or naturalization laws issued by Immigration and Customs Enforcement.

Ricucci has requested that the Takoma Park City Council review the current across-the-board prohibition on cooperation in the enforcement of immigration laws, citing public safety concerns. He stated, 'The inclusion of immigration warrants in the National Crime Information Center database represents a major shift since the City's adoption of the sanctuary law. As currently worded, the law may have the unintended consequence of preventing the removal of convicted felony offenders which puts both the community and our police officers in danger.'

Ricucci is working with the City Attorney's Office in drafting an amendment to the City's sanctuary law to address these concerns. It is anticipated that the amendment will be presented for the consideration of the Takoma Park City Council in September, following the Council's summer recess.

Ricucci commented, "I recognize and appreciate the objectives of the City in adopting the sanctuary law in 1985. Like the City Council, I want all members of our community to feel comfortable interacting with the Takoma Park Police Department, whether reporting a crime or cooperating with police investigations."

A copy of the July 17, 2007 memorandum written by Silber and Sigman may be found on the City's website, www.takomaparkmd.gov.

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MEMORANDUM

To: Mayor and Council

Via: Barbara Matthews, City Manager

Cc: Ronald Ricucci, Chief of Police

From: Susan Silber, City Attorney
Kenneth Sigman, Asst. City Attorney

Subject: The City of Takoma Park's immigrant sanctuary policy and the National Criminal Information Center database.

Date: July 17, 2007

Background

A June 13, 2007, *Washington Post* article publicized a TPPD officer's arrest of a Guatemalan man pursuant to an ICE warrant and the fact that the National Crime Information Center ("NCIC") database, a database maintained by the federal government that is routinely accessed by local law enforcement officers, includes an ever-increasing number of ICE violation records, including civil warrants. In the article, Montgomery County Police Chief J. Thomas Manger took the position that his department was "duty-bound" to enforce all warrants in the NCIC database, including the ICE warrants. As a result of the article, Chief Ricucci inquired about the applicability and legality of the City's immigration sanctuary law, section 9.04.010 of the *Takoma Park Code*. In addition, the article has made the issue of local enforcement of immigration laws a topic of much public debate in the region.

The City enacted its sanctuary law in 1985 to protect refugees from Guatemala and El Salvador from being deported to their countries, which were in a state of civil war. The law provides as follows:

9.04.010 No City enforcement of immigration laws.

A. No agent, officer or employee of the City, in the performance of official duties, shall assist or cooperate with the Immigration and Naturalization Service of the United States in the investigation or arrest of any persons for civil or criminal violation of the immigration and nationality laws of the United States.

B. Except for subsection (A) of this section, this chapter does not prohibit the Takoma Park Police Department from carrying out its mandated duty to apprehend violators of the criminal law, nor does it prohibit police contact with any Federal agency other than the Immigration and Naturalization Service in connection with criminal or suspected criminal activity.

9.04.020 No inquiries into citizenship.

No agent, officer or employee of the City, in the performance of official duties, shall make any inquiry about citizenship or residency status of any person seeking to enforce rights or obtain benefits or discriminate in the enforcement of rights or the granting of benefits on such bases, unless Federal or Maryland law so requires for the determination of eligibility of benefits. The City administers no program which requires such inquiry.

9.04.030 No release of information about citizenship status.

No agent, officer or employee of the City, in the performance of official duties, shall release to the Immigration and Naturalization Service any information regarding the citizenship or residency status of any City resident.

The Immigration and Naturalization Service ("INS") is now called the Bureau of Immigration and Customs Enforcement ("ICE") and is part of the Department of Homeland Security.

Takoma Park police officers, like other state and local law enforcement officers, frequently access the NCIC database in the course of their duties, including when making routine traffic stops. In December 2001, the INS began including aliens subject to criminal or civil deportation orders in the NCIC database.

Currently, the NCIC database includes three categories of immigration violators: (1) persons who have been convicted of a felony and deported, (2) persons who are the subject of an Administrative Warrant of Removal from the United States for civil or criminal violations of the Immigration and Nationality Act ("INA"), commonly referred to as "absconders," and (3) violators of the National Security Entry/Exit Registration System (NSEERS), which is system that facilitates the monitoring of individuals deemed to present an elevated national security concern.

The presence of a previously convicted and deported felon in the United States constitutes a felony punishable by up to 20 years in prison. There may or may not be a criminal warrant issued for such a person. The warrants issued for absconders can be either criminal warrants or civil warrants. The warrants issued for NSEERS violators are civil warrants. Civil warrants are issued by ICE officials, rather than by independent judges.

Prior to December 2001, TPPD officers had only to avoid questioning individuals about their immigration status and avoid acting on any information regarding an individual's immigration status to comply with the City's sanctuary law, as they were not privy to immigration violation records. According to the *Washington Post*, there are now approximately 250,000 immigration warrants on the NCIC database, and that number is expected to increase as the NCIC enters a backlog of immigration warrants into the database.

There is no law requiring police officers in Maryland to make arrests pursuant to immigration warrants. The legality of including immigration warrants in the NCIC database and the authority of local police officers to make arrests pursuant to federal immigration warrants is the subject of much debate.

This office advised the Police Chief that the TPPD must not arrest individuals based solely on the existence of an immigration warrant, explaining that the sanctuary law is a valid law that is not superceded by state or federal statute and that it broadly prohibits cooperating with or assisting federal immigration officials with the investigation or arrest of persons accused of immigration violations.

In light of the change in circumstances locally and internationally since the enactment of the sanctuary

law in 1985, and the recent and rapidly increasing inclusion of immigration warrants in the NCIC database, along with the legal issues such inclusion creates, we believe that the Council should be aware of the issue so that it can make an informed decision as to whether to reconsider its sanctuary policy.

Discussion

At the outset, we note that Takoma Park police officers undoubtedly have the authority to arrest individuals who are the subject of non immigration related criminal warrants or who are suspected of criminal activity, regardless of whether the individual is also identified as an immigration violator by the NCIC database. Takoma Park police officers can and should take such individuals into custody based on the criminal warrant or suspected criminal activity, regardless of any immigration data provided by the NCIC. The following discussion addresses only situations where officers have an individual in custody who is identified as an immigration violator on the NCIC database but whom the officers have no other basis to continue to detain, e.g., when an officer has stopped an individual for a minor traffic violation and issued a citation.

Authority of MD police to make arrests.

Criminal violations of immigration law.

Several sources indicate that federal law does not prohibit local police officers from making arrests for criminal immigration violations. However, no federal law requires local police to enforce immigration laws, and even express grants of authority are subject to any limitations imposed by state and local law.

First, three federal statutes expressly authorize state police officers to make arrests for criminal immigration violations. As noted above, under 8 U.S.C. §1252c, local police may arrest individuals who have been convicted of a felony and deported and have reentered the country. Under 8 U.S.C. § 1357(g), authorizes specially trained local law enforcement officers whose agencies have entered into a written agreement with the United States Attorney General (“USAG”) to investigate immigration violations and make arrests. Under 8 U.S.C. § 1103(a)(8), the USAG may authorize local officers to act with all the authority of federal immigration officers in the event of an emergency.

Second, some federal courts have indicated that the absence of an express prohibition upon local enforcement in all federal statutes establishing criminal immigration violations means that federal law does not prohibit such enforcement.

Finally, the Department of Justice, since the Carter administration, has consistently taken the position that local law enforcement agencies have the authority to enforce criminal immigration laws.

However, several advocacy groups argue that the express authorization for local enforcement of deported felon warrants in 8 U.S.C. §1252c, coupled with the absence of such an express authorization in other criminal immigration statutes, demonstrates that section 1252c creates a limited exception to the general rule that local police may not enforce criminal immigration statutes. This argument is persuasive.

The *Maryland Code* does not expressly grant law enforcement officers the authority to make arrests pursuant to federal criminal warrants. However the inherent authority of local police officers to make arrests pursuant to federal warrants is well established and not subject to doubt. As the *Maryland Code* does not limit police officers’ authority to make arrests pursuant to federal warrants, Maryland officers can make arrests pursuant to any federal criminal warrant not prohibited by federal law. The *Maryland Code* authorizes a police officer to make warrantless arrests of persons who commit a felony or misdemeanor in the officer’s presence or whom the officer reasonably believes has committed a crime in his or her presence. A police officer may make

a warrantless arrest of a person whom the officer has probable cause to believe has committed a *felony* whether or not the felony was committed within the presence of the officer.

But for the prohibitions in the Takoma Park sanctuary law, TPPD police officers clearly have the authority to arrest individuals identified as previously convicted and deported felons with or without a warrant, as such arrests are authorized by federal statute and are permitted under Maryland law—either because the officer is serving a criminal warrant or because the officer has probable cause to believe that the individual has committed a felony.

Also, but for the prohibitions in the Takoma Park sanctuary law, TPPD police officers also may¹ have the authority to make arrests pursuant to criminal absconder warrants. However, our research indicates that the NCIC database does not distinguish between criminal and civil warrants, and, as discussed below, TPPD police officers do not have the authority to make arrests pursuant to civil warrants. Therefore, the City should not permit TPPD officers to arrest absconders.

Civil violations of immigration law.

The legal authority in support of the proposition that local police officers may make arrests pursuant to civil immigration warrants is sparse and is not persuasive.

There is no express authorization for local police to enforce civil immigration laws in the *United States Code*. Until September 11, 2001, the Department of Justice had consistently taken the position that local police do not have the authority to enforce civil immigration laws. Shortly thereafter, the Department of Justice's Office of Legal Counsel, in a confidential memorandum, reversed the Department's position on the issue and opined that local police could enforce civil immigration warrants to the extent permitted by state law, citing the inherent authority of one sovereign to assist another sovereign in the enforcement of its laws. This change in opinion led to the inclusion of absconder warrants on the NCIC database. However, the opinion of the Office of Legal Counsel is not binding.

Courts that have considered related issues have indicated that federal law preempts local police from making arrests pursuant to civil immigration warrants.

No courts have addressed this specific issue. To our knowledge, the authority of local enforcement officers to make arrests pursuant to civil immigration warrants has only been raised in one case, which was dismissed for lack of standing because none of the plaintiffs in the suit had been arrested under a civil immigration warrant—rather, they asserted that, as immigrants, they feared being improperly arrested based on information in the NCIC database.

Even if federal law does not preempt state enforcement of civil immigration warrants, local police officers may only make arrests pursuant to such warrants to the extent permitted by Maryland law. The *Maryland Code* does not expressly grant or deny police officers the authority to make arrests pursuant to civil warrants. However, unlike the well established inherent authority to make arrests pursuant to criminal warrants, there has been no recognition by the Maryland courts of any authority of police officers to make arrests pursuant to civil warrants (although the courts have not expressly stated that no such authority exists).

¹As discussed, Maryland law generally permits local police to make arrests pursuant to federal criminal warrants, but the Immigration and Nationality Act may preempt arrests based on criminal immigration violations not specifically authorized by the Act.

Therefore, TPPD officers do not appear to have the authority to make arrests pursuant to civil immigration warrants. However, many jurisdictions throughout the region and the country detain individuals based solely on civil immigration warrants, without apparent consequence.

Several jurisdictions have adopted policies that authorize varying degrees of cooperation with ICE. For example, some jurisdictions, including Howard County, Maryland, and Miami, Florida, notify ICE when they have an immigration “hit” on the NCIC database, but do not detain the person any longer than is necessary to complete any business related to the enforcement of state law—such as issuing a traffic citation. Chapel Hill, North Carolina, requires police officers to notify the Chief of Police whenever they have an immigration hit. The Chief then contacts ICE to determine whether the underlying violation is civil or criminal. If the underlying violation is criminal, then it contacts the U.S. Attorney’s office to ask whether it intends to prosecute the violation. If the U.S. Attorney promises to prosecute the violation and obtain an order of detainer, then the police department will hold the person for up to 48 hours. Houston, Texas, has a formal Memorandum of Understanding with the U.S. Attorney’s office under which the police department must notify the U.S. Attorney of any immigration hits and hold the individual for up to 24 hours, and the U.S. Attorney must review all cases to determine whether it can file a criminal charge against the individual and must prosecute any such criminal charges.

The Police Department has significant concerns regarding the public safety impacts of the current across-the-board prohibition upon cooperation in the enforcement of immigration laws, as it may result in the police releasing dangerous and difficult to locate individuals that they have in their custody back into the community and may prevent the permanent removal from the community of recidivists, such as MS13 gang members—a growing source of criminal activity in the City. Immigrant advocacy organizations and law enforcement organizations such as the Major Cities Chiefs Association argue that the enforcement of immigration laws by local police departments prevents immigrants from reporting crimes and cooperating with police investigations.