



VIA ELECTRONIC MAIL

April 12, 2018

Sheriff David Livingston
Contra Costa County Sheriff's Office
651 Pine Street
Martinez, CA 94553

RE: Lack of Compliance with the California Values Act (SB 54)

Dear Sheriff Livingston:

I am writing to inform you about the Contra Costa County Sheriff's Office's ("CCCSO") lack of compliance with the California Values Act (SB 54)¹, which went into effect in January 2018. In December 2017, several civil rights and immigrant rights organizations, including my own, sent CCCSO a letter detailing the parameters of the Values Act. However, when we received a copy of CCCSO's revised policy on immigration² in late January 2018, we identified several areas where your Policy did not comply with the Values Act. This letter lays out where the CCCSO Immigration Policy is in violation of the Values Act.

I. The Sheriff's Office May Not Use Immigration Status as a Basis for Detention or Arrest

The CCCSO Immigration Policy states that "[a] Deputy's suspicion about any person's immigration status shall not be used as a sole basis to initiate contact, detain, or arrest that person *unless such status is reasonably relevant to the investigation of a crime, such as trafficking, smuggling, harboring, and terrorism.*" CCCSO Immigration Policy, section IV.B.1 (emphasis added).

Under section 7284.6(a)(1)(A) of the Values Act, state or local law enforcement officers may not ask an individual about his or her immigration status. State or local law enforcement also may not arrest, detain, or investigate someone for violations of *civil immigration law or criminal immigration law* that penalizes a person's presence in, entry, or reentry to, or employment in, the United States, with a narrow exception for someone who has reentered the United States after being deported for an aggravated felony conviction (discussed below in Part II). Cal. Gov't Code §§ 7284.6(a)(1), (b)(1).

¹ California Values Act ("Values Act" or "Act"), S.B. 54 (De León), signed Oct. 5, 2017, codified at Cal. Gov't Code §§ 7282 *et seq.*

² Contra Costa County Office of the Sheriff, "Immigration Status," Policy No. 1.02.28 (revised Dec. 20, 2017) (hereinafter "CCCSO Immigration Policy" or "Policy").

Several of the offenses listed in the CCCSO Immigration Policy, including smuggling (8 U.S.C. § 1324(a)(1) and (2)) and harboring (8 U.S.C. § 1324), are violations of criminal immigration law, meaning that *but for* the person's immigration status, the offense would not constitute a crime. Because the CCCSO Immigration Policy allows for deputies to detain or arrest someone for a criminal immigration violation premised on immigration status, this Policy violates the Values Act's prohibition on using local law enforcement's resources to investigate, detain, or arrest someone for immigration enforcement purposes. *See* Cal. Gov't Code §§ 7284.6(a)(1).

Accordingly, CCCSO must change its Policy to remove reference to authorizing deputies to engage in detention or arrest of individuals based on suspicion of immigration status for criminal immigration offenses.

II. The Sheriff's Office's Policy Misstates the Exception for Investigation, Detention, or Arrest for Unlawful Reentry

The CCCSO Immigration Policy states that "Sheriff's Personnel may investigate, enforce, or detain upon reasonable suspicion of, or arrest for a violation of 8 USC 1326(a) [illegal reentry by a previously deported or removed alien] that is detected during an unrelated law enforcement activity." CCCSO Immigration Policy, section III.A.1.

Under the Values Act, state or local law enforcement may not arrest, detain, or investigate someone for federal criminal immigration violations, except for the federal criminal offense of unlawful reentry under 8 U.S.C. § 1326(a), if the reentry is detected during an unrelated law enforcement activity *and* the person was previously convicted of an aggravated felony under 8 U.S.C. § 1326(b)(2). Cal. Gov't Code § 7284.6(b)(1). Even then, transfers to immigration authorities are prohibited unless they fall within the exceptions listed under section 7282.5. *Id.*

Importantly, this narrow exception for an arrest under 8 U.S.C. § 1326(a) applies only when the person has been previously convicted of an "aggravated felony" as referenced in 8 U.S.C. § 1326(b)(2). "Aggravated felony" is a term of art in immigration law, defined at 8 U.S.C. § 1101(a)(43), which lists dozens of common-law terms and references to federal statutes. Both federal and state offenses can be aggravated felonies and the law surrounding which state offenses may trigger aggravated felonies is nuanced, complex, and ever-changing. For example, certain California offenses are only considered aggravated felonies on a case-by-case basis, assessed by reviewing the individual's "record of conviction" for the presence of specified elements. Adding another layer of analysis, the record of conviction carries its own definition in immigration law. Because of these nuances, even among immigration attorneys, the analysis of what is an aggravated felony is often reserved for experts well-versed in the intersection between immigration and criminal law. Without such an expert available to know if an aggravated felony is at play, the likelihood of 8 U.S.C. § 1326(a) arrests or detentions violating the Act (because an aggravated felony is not in fact present), is high.



Moreover, law enforcement agencies could incur liability if they erroneously detain someone who cannot be deported. Such examples include U.S. citizens who were erroneously deported in the past³ or individuals who legally reenter the country (either with a visa or a waiver) after a deportation for an aggravated felony.

To comply with the Values Act, at a minimum CCCSO must clarify in its Policy that the Values Act only permits the investigation, detention, or arrest of individuals on suspicion of unlawful reentry under 8 U.S.C. § 1326(a) if the reentry is detected during an unrelated law enforcement activity *and* the person was previously convicted of an aggravated felony under 8 U.S.C. § 1326(b)(2). Cal. Gov't Code § 7284.6(b)(1). Given the nuances mentioned above in accurately determining what constitutes an "aggravated felony," a safer route to ensure that CCCSO personnel do not violate the Values Act is to adopt a bright line rule where CCCSO does not engage in 8 U.S.C. § 1326(a) investigations, arrests, or detentions.

III. The Sheriff's Office's New Practice of Posting Release Information to Its Website Runs Contrary to the Values Act and the Attorney General's Guidance

Recently, the East Bay Times reported that your office began posting release information of all individuals in Contra Costa County jails on the CCCSO website as a single list.⁴ The article reported that CCCSO has posted this information on its website since February 16, 2018.⁵

The Values Act prohibits the use of state or local law enforcement resources for immigration enforcement purposes, including the disclosure of certain non-public information to federal immigration officers. Cal. Gov't Code §§ 7284.6(a)(1)(C), (D). Notwithstanding the exceptions for certain criminal history, the Act prohibits law enforcement from sharing information related to an individual's release date if that information is not already public. Cal. Gov't Code § 7284.6(a)(1)(C).

Because the Act prohibits state or local law enforcement agencies from expending moneys or personnel on providing release dates for immigration enforcement unless that information is public, these agencies may not expend resources to make release information public for the purposes of immigration enforcement. Thus, if a state or local law enforcement agency began posting all release information on a publicly-accessible website to get around the general prohibition on responding to notification or transfer requests, that action would violate the Act. *See* Cal. Gov't Code §§ 7284.6(a)(1), (C). The Attorney General's guidance on the Values Act reiterates this stance, stating that available to the public "refers to information where

³ Researchers estimate that in 2010 alone, over 4,000 U.S. citizens were mistakenly deported. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deported U.S. Citizens as Aliens*, Virginia Journal of Social Policy & the Law (Spring 2011).

⁴ Aaron Davis and Nate Gartrell, "Experts concerned Contra Costa sheriff tipping off ICE by posting release dates of detained immigrants," East Bay Times (Mar. 29, 2018), *available at* <https://www.eastbaytimes.com/2018/03/29/experts-concerned-contra-costa-sheriff-tipping-off-ice-by-posting-release-dates-of-detained-immigrants/>.

⁵ *Id.*



a law enforcement agency has a practice or policy of making such information public, such as disclosing the information on its website . . .”⁶

Prior to February 16, 2018, CCCSO did not have a policy or practice of publicly posting release information on its website. In order to create the list of people and release information, CCCSO must expend agency resources. Given the timing of this change—a mere six weeks after the Values Act went into effect—there are serious concerns that CCCSO’s purpose of posting release information on its website is to allow ICE access to release information of individuals who would otherwise be protected from notification under the Values Act. Moreover, because CCCSO did not have a policy or practice of posting release dates prior to the Values Act going into effect, your agency could face liability for violating the Values Act’s prohibition on expending agency resources to engage in immigration enforcement. Cal. Gov’t Code §§ 7284.6(a)(1). CCCSO should remove release information from its website.

IV. Public Records Act Request

As per the Public Records Act, California Government Code §§ 6250 – 6276.48, please provide me with an updated copy of any policies, memorandum, guidance, or forms that CCCSO adopts related to the implementation of the Values Act after receiving this letter.

Although I am available to provide assistance as you work to update your Policy, given the long-standing community concerns about your implementation of the Values Act, I urge you to meet with community members to listen to these concerns and work toward a collective solution.

You can reach me at sairah@advancingjustice-alc.org or (415) 848-7707 if you have further questions.

Sincerely,

/s/ Saira Hussain

Saira Hussain
Staff Attorney, Criminal Justice Reform

CC: County Counsel Sharon L. Anderson
Supervisor Candace Andersen
Supervisor Diane Burgis
Supervisor John M. Gioia
Supervisor Federal D. Glover
Supervisor Karen Mitchoff
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⁶ Information Bulletin from Xavier Becerra, Att’y Gen., Cal. Dep’t of Justice, to Executives of State and Local Law Enforcement Agencies, *Responsibilities of Law Enforcement Agencies Under the California Values Act, California TRUST Act, and the California TRUTH Act*, at 3, No. DLE-2018-01 (Mar. 28, 2018).

