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ATTORNEY GENERAL OPINION NO. 2026-2

The Honorable Jay Armbrister
Douglas County Sheriff
111 E. 11th St.
Lawrence, KS 66044

Re: Cities and Municipalities—Miscellaneous Provisions—Certain Actions by Municipalities Prohibited and Declared Null and Void Relating to Restricting Local Officials from Actions Regarding Information of Citizenship

Cities and Municipalities—Miscellaneous Provisions—Municipalities Prohibited from Limiting or Restricting Enforcement of Federal Immigration Laws

Synopsis: K.S.A. 12-16,140 and 12-16,141 obligate state and local law enforcement officers to cooperate with federal immigration officials and to honor ICE detainer requests on the basis of such cooperation. State and local law enforcement officers are also authorized to arrest illegal aliens in cooperation with federal immigration officials. Cited herein: K.S.A. 12-16,140; 12-16,141.

* * *

Dear Sheriff Armbrister:

As Sheriff of Douglas County, you have asked two questions concerning Kansas law enforcement cooperation with federal immigration enforcement:

1) Do K.S.A. 12-16,140 and K.S.A. 12-16,141 require Kansas cities and counties to honor ICE detainer requests, which ask local law enforcement to communicate with ICE and, if necessary, to hold an individual for up to 48 hours to facilitate a transfer of custody to ICE?

2) When requested by federal law enforcement, are Kansas law enforcement officers authorized to arrest suspected illegal aliens for violation of federal immigration law in cooperation with federal immigration enforcement?

Background

United States Immigration and Customs Enforcement (ICE) is the main investigative arm of the Department of Homeland Security (DHS). ICE is tasked with enforcing federal immigration laws.[1] ICE agents are authorized to issue detainer requests to local law enforcement.[2] When this occurs, agents serve detainer requests to state and local law enforcement agencies using DHS Form I-247A.[3] These requests (1) advise that ICE seeks custody of a removable alien for the purpose of arrest and removal and (2) ask the recipient agency to notify ICE as early as possible before releasing the removable alien and to hold the alien for up to 48 hours beyond the time the alien would otherwise be released in order to facilitate a transfer of custody to ICE. Under ICE policy, detainer requests are issued only upon a finding of probable cause that the subject of the request is an alien who is removable from the United States.[4]

In response to your questions, and to clarify how state and local law enforcement must respond to ICE detainer requests, we offer the following opinion.

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[1] *See* 6 U.S.C. § 252 *et seq*.
[2] 8 C.F.R. § 287.7.
[3] *See Immigration Detainer - Notice of Action, Sample Form*, available through DHS at https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.
[4] ICE, *Issuance of Immigration Detainers by ICE Immigration Officers*, Policy No. 10074.2 (Mar. 24, 2017), available at https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf. The probable cause determination is made via an accompanying Form I-200, Warrant for Arrest of Alien, or Form I-205, Warrant of Removal/Deportation. Form I-200 contains the grounds for the officer's probable cause determination; Form I-205 declares that the alien is subject to removal on the basis of a final order by an immigration judge, a designated official, the Board of Immigration Appeals, or a U.S. District Court or Magistrate judge. A sample Form I-200 is available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF; a sample Form I-205 is available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF.

Answer to Question 1

K.S.A. 12-16,140 and 12-16,141 require Kansas municipalities to comply with ICE detention requests.

ICE detainer requests are requests for state and local cooperation.[5] Kansas law requires state and local law enforcement cooperation. K.S.A. 12-16,140 provides that a municipality shall not:

> enact, implement or enforce an ordinance, resolution, rule or policy that prohibits or in any way restricts a law enforcement officer, local official or local government employee, from taking the following actions with regard to information of the citizenship or immigration status, lawful or unlawful, of an individual:
>
> (1) Communicating or cooperating with federal officials;
>
> (2) sending to or receiving information from the United States department of homeland security;
>
> (3) obtaining or maintaining information; or
>
> (4) exchanging information with another federal, state, or local government entity.

Furthermore, under K.S.A. 12-16,141, "[a] municipality shall not limit or restrict the enforcement of federal immigration laws."

State law expressly and unequivocally prohibits cities and counties from, among other things, maintaining any policy that would prohibit law enforcement from communicating or cooperating with federal officials. And cities and counties may not limit or restrict the enforcement of federal immigration laws. Accordingly, any oral, written, or course-of-conduct de facto policy to prevent communication or cooperation is illegal under K.S.A. 12-16,140 and 12-16,141. Because ICE is the federal agency tasked with enforcing federal immigration laws, and its agents are federal officials, cities and counties must communicate and cooperate with ICE. And cities and counties may not limit or restrict ICE's immigration enforcement operations.

For the purposes of K.S.A. 12-16,140, "communicating" entails all communications necessary to effectuate the transfer of custody that is requested in the Form I-247A. Thus, a city or county shall not prohibit its employees from notifying ICE when the

[5] *See Galarza v. Salczyck*, 745 F.3d 634, 640 (3rd Cir. 2014) (noting that "[a]ll Courts of Appeals to have commented on the character of ICE detainers refer to them as 'requests,'" and collecting cases).

subject of the detention request will be released or from communicating any relevant details about the place and manner of release from state custody.[6]

"Cooperating" is not defined in K.S.A. 12-16,139. It should therefore be understood in terms of its usual, commonly understood definition: "to act or work with another or others; act together or in compliance."[7] Municipalities that cooperate with ICE work with ICE and act together to comply with lawful federal requests.

Cooperation, in the context of K.S.A. 12-16,140, entails performing all other actions, in addition to communication, that are reasonably necessary to effectuate a direct transfer of custody. If ICE is not available to take custody at the time the subject alien is scheduled to be released, this includes maintaining custody for up to 48 hours pursuant to the detainer request and federal law, until such time that ICE agents become available for a direct transfer. Adopting or enforcing a policy of refusing such cooperation would violate K.S.A. 12-16,140.

Refusing to honor ICE detainer requests also would violate K.S.A. 12-16,141. This statute prohibits municipalities from "limit[ing] or restrict[ing] the enforcement of federal immigration laws." It is commonly understood that "limit" generally means "to confine within bounds; set a limit to; restrict; curb"[8] and "restrict" generally means "to keep within certain limits; put certain limitations on; confine."[9]

When ICE agents issue a detainer request, the agents are, of course, attempting to enforce federal immigration laws because they seek to detain a removable alien. A municipality's failure to honor such a request would, at a minimum, curb, restrict, or otherwise limit the ability of ICE agents to enforce federal immigration law.[10] Detainer requests are issued to ensure that an ICE agent is able to apprehend a removable alien. In other words, these requests are issued when ICE *needs* assistance. In the absence of such assistance, ICE officers would be impeded in their ability to enforce federal immigration law. The failure to honor a detainer request may ultimately prevent ICE from enforcing federal immigration law as it relates to the specific individual at issue. Accordingly, municipalities that refuse to honor detainer requests limit or restrict the enforcement of federal immigration laws.

In sum, both K.S.A. 12-16,140 and 12-16,141 prevent municipalities from refusing to honor ICE detainer requests.

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[6] Because the requirements of K.S.A. 12-16,140 and 12-16,141 apply to cities and counties, county sheriffs who operate county facilities or supervise other county operations are also subject to those requirements. *See* K.S.A. 19-811 ("The sheriff shall have the charge and custody of the jail of his county.").

[7] *Cooperate*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/cooperate.

[8] *Limit*, *Webster's New World College Dictionary* 845 (2020 5th ed.).

[9] *Restrict*, *id.*, 1239.

[10] *See also Curb*, *id.*, 363 (defining "curb" as "to restrain; check; control").

Answer to Question 2

Kansas law enforcement officers are authorized to arrest illegal aliens.

You ask whether Kansas law enforcement officers are authorized to arrest suspected illegal aliens.[11] In most cases where this question arises, the Kansas law enforcement officers are operating pursuant to communication with ICE, confirming that the relevant alien is unlawfully present in the United States and that ICE wishes to remove the alien from the country. Indeed, the Law Enforcement Support Center was created for this purpose.

Under the collective-knowledge doctrine, state and local law enforcement are imputed to have the knowledge of the ICE agent who issued the request. Collective-knowledge applies when "one officer acts based on the instructions from another officer. Under the doctrine, the instructing officer need not share all of the underlying facts that form the basis for the instruction; it's enough that some officer has that information."[12] Accordingly, law enforcement officers may make such arrests based on the probable cause determination made by the ICE agent, even when those officers do not personally know the specific facts that established probable cause of removability.[13]

Federal law recognizes that states may make immigration arrests in cooperation with federal immigration officers without any formal agreement. 8 U.S.C. § 1357(g)(10)(B) provides:

> [n]othing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State . . . otherwise to *cooperate* with the Attorney General in in the identification, *apprehension*, detention, or removal of aliens not lawfully present in the United States.

[11] To be clear, we do not believe that honoring ICE detainer requests constitutes a new arrest. After all, the individual is already in custody. *See* K.S.A. 22-2202(e) (defining "[a]rrest" to mean "the taking of a person into custody in order that the person may be forthcoming to answer for the commission of a crime"). Your second question goes beyond detainer requests, so we consider more broadly whether Kansas law enforcement officers may cooperate with federal officials to arrest illegal aliens.

[12] *State v. Miller*, 49 Kan. App. 2d 491, 497, 308 P.3d 24 (2013).

[13] In *United States v. Salinas-Calderon*, for example, the United States Court of Appeals for the Tenth Circuit invoked the collective-knowledge doctrine when, during a traffic stop, a Kansas state trooper contacted an agent with the Immigration and Naturalization Service (a predecessor of ICE), who advised the trooper to bring the car's occupants to a sheriff's office so the agent could speak with them. 728 F.2d 1298, 1300–02 (10th Cir. 1984)

Federal appellate courts have approved state cooperation with immigration enforcement, including by making immigration arrests.[14] The Tenth Circuit has held "that state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws."[15] And Kansas law permits city and county law enforcement officers to make arrests generally for federal felonies and misdemeanors, including immigration offenses.[16]

Finally, it should be pointed out that the Office of Legal Counsel (OLC) of the U.S. Department of Justice has issued an opinion addressing this very issue. In that opinion, the OLC concluded: "States have inherent power, subject to federal preemption, to make arrests for violation of federal law," and that includes immigration law—which is an area where such arrest authority has not been preempted.[17]

In sum, Kansas law enforcement officers are authorized to arrest suspected illegal aliens for violation of federal immigration law in cooperation with federal immigration officials.

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ James R. Rodriguez

James R. Rodriguez
Assistant Attorney General

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[14] *See, e.g.*, *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164–65 (8th Cir. 2014) (recognizing that "no written agreement is required for a state official to cooperate with the Attorney General in identifying, apprehending, and detaining any individual unlawfully present in the United States" so long as the actions are "not unilateral").

[15] *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999); *see also Salinas-Calderon*, 728 F.2d at 1301 (noting that a Kansas "state trooper has general investigatory authority to inquire into possible immigration violations").

[16] K.S.A. 22-2401(c)(1), (c)(2)(A).

[17] *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179 (2006). The OLC memo is available at https://perma.cc/83D8-YWKK.