



MEMORANDUM

Date: March 20, 2018

To: Terrance Cheung
Program Manager

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to read "CHH", is written over the printed name "C.H. Huckelberry".

Re: **Comments from the American Civil Liberties Union (ACLU) Regarding the Sheriff's Rules and Regulations on Immigration Matters and Border Patrol**

Please see the attached March 20, 2018 letter from the ACLU. It would be appropriate to receive any comments the Sheriff may have regarding the letter.

This letter should be included as information to the Community Law Enforcement Partnership Commission.

CHH/anc

Attachment

c: The Honorable Chairman and Members, Pima County Board of Supervisors



Via Email

March 20, 2018

Sheriff Mark Napier
Pima County Sheriff Office
1750 E. Benson Highway
Tucson, AZ 85714
Mark.Napier@sheriff.pima.gov

**Re: Pima County Sheriff's Office Forthcoming Rules and Regulations
Related to Immigration Matters and Border Patrol**

AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
OF ARIZONA
P.O. BOX 17148
PHOENIX, AZ 85011-0148
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Dear Sheriff Napier:

As you know, on February 20, 2018 the Pima County Board of Supervisors required the Pima County Sheriff's Office (PCSO) to develop a written policy "guiding all interactions with deputies, Border Patrol and Customs and Immigration officials" as a condition of the 2018 disbursement of Operation Stonegarden funding. This mandate was welcome news to the ACLU of Arizona, as PCSO is possibly the largest Arizona law enforcement agency lacking any written policy related to immigration matters.¹ Without a written policy, deputies are without any guidance as to which actions are permissible and which actions may subject a deputy to discipline.

Immigration law has sometimes been called the most complex area of law other than taxes. With this in mind, it is important that any written policy clearly articulate with specificity which practices and behaviors are prohibited by deputies. As outlined in more detail below, it is equally important that any immigration-related policy mandate the collection of data about law enforcement encounters resulting in ICE or Border Patrol interaction.

Recordkeeping and Data

Recordkeeping is an important function of any effective immigration-related policy. Currently, PCSO has no way of tracking which traffic stops or other law enforcement encounters result in a deputy calling ICE or Border Patrol.

¹ The following Arizona law enforcement agencies have written internal policies related to immigration matters: City of Flagstaff, City of Phoenix, Maricopa County Sheriff's Office, Arizona Department of Public Safety, City of Tucson, City of South Tucson, City of Tempe, Town of Florence, Town of Marana, Town of Oro Valley, City of Mesa.

By contrast, at least four Arizona law enforcement agencies require their sworn officers to internally report stops that result in ICE or Border Patrol involvement (regardless of whether such involvement is part of Operation Stonegarden).² There is good precedent for this in Arizona. The Tucson Police Department, Phoenix Police Department, Maricopa County Sheriff's Office, and the Arizona Department of Public Safety all require some additional internal recordkeeping when an officer develops reasonable suspicion that an individual lacks lawful immigration status. For example, these policies require officers to record the basis for believing a person is undocumented, the steps the officer took to inquire about immigration status, and whether ICE or Border Patrol were contacted during the course of the stop. It is not sufficient that such recordkeeping be done through Computer-Aided Dispatch (CAD). Rather, it should be maintained through an independent proprietary database program such as Spillman or TraCs.

Developing Reasonable Suspicion of Unlawful Immigration Status

Any new rules or regulations should clarify that PCSO employees are prohibited from considering certain factors when developing reasonable suspicion to believe an individual is without lawful immigration status. It is widely understood that race and ethnicity are never to be used as factors. However, law enforcement officers routinely rely upon other factors that are closely associated with race, ethnicity, and economic status. Reliance on such factors should be prohibited in Pima County. For example, the new policy should prohibit deputies from considering the following factors, in addition to race/ethnicity:

1. Mode of dress/clothing
2. Difficulty speaking English
3. Speaks English with a foreign accent
4. Inability to provide a residential address
5. Existence of a Spanish-sounding surname

Lastly, any new rule or regulation should specify that – with the sole exception of admissions by the subject himself – no single factor constitutes reasonable suspicion of unlawful status. In other words, in the absence of an admission, deputies should be prohibited from developing reasonable suspicion based upon only one factor. Even the subject's use of a foreign passport, for example, should not – by itself – establish reasonable suspicion of unlawful status.

² City of Phoenix, City of Tucson, Maricopa County Sheriff's Office, and Arizona Department of Public Safety

Suspected Violations of 8 USC § 1325 and 8 USC § 1326

Any new rules and regulations should clarify that PCSO employees are prohibited from asking questions intended to discover violations of the federal crimes of illegal entry (8 USC § 1325) and illegal re-entry (8 USC § 1326). There is a clear distinction between the civil offense of being in the United States without lawful immigration status and the federal crime of illegally entering the United States. While SB 1070 (codified as A.R.S. § 11-1051) requires PCSO in some circumstances to ask individuals about immigration or citizenship status, there is no statutory mandate for PCSO to ask about the federal crimes found in 8 USC § 1325 and 8 USC § 1326. We therefore recommend that deputies be prohibited from asking about how an individual entered the United States, with limited exceptions for when there is reasonable suspicion or probable cause to believe the individual committed or is committing a state crime inherently connected with our proximity to the international border (ie, drug importation).

Suspected Violations of A.R.S. § 13-2319

Any new rules and regulations should clarify that PCSO employees are prohibited from investigating suspected violations of A.R.S. § 13-2319, a state law that once criminalized the “smuggling of human beings for profit or commercial purpose”, but is now permanently enjoined. United States v. Arizona, 119 F. Supp. 3d 955, 961 (D. Ariz. 2014). As Sheriff Napier frequently points out, the U.S. Border Patrol employs a large number of federal agents within Pima County to investigate violations of the federal crime of smuggling. The new internal rule and regulation should clarify that PCSO employees are not prohibited from sending tips or sharing information with federal agents regarding suspected human smuggling activities. Nevertheless, the new rules and regulations should:

1. Prohibit PCSO from conducting joint operations with Border Patrol for the purpose of investigating suspected human smugglers; and
2. Prohibit PCSO employees from independently investigating suspected human smuggling; and
3. Prohibit PCSO employees from arresting, transporting, or otherwise detaining individuals who are suspected of human smuggling.

Consensual Contacts with Members of the Public

Any new rules and regulations should clarify that PCSO employees are prohibited from making immigration status inquiries during consensual contacts with members of the public, including with witnesses, victims, and bystanders. Nothing in SB 1070 requires local law enforcement to inquire about immigration status in such circumstances. Immigration status inquiries should be permitted

only if a consensual contact evolves into a custodial arrest or if probable cause of a state crime develops from the initial consensual contact.

Furthermore, studies indicate that public safety is enhanced when witnesses and victims are confident in the belief that they will not be subject to deportation merely because they reported a crime or cooperated with law enforcement investigations. Since the enactment of SB 1070, the Tucson Police Department, Phoenix Police Department, and Mesa Police Department have issued written guidance prohibiting their officers from asking about immigration status in these circumstances.

Manner in Which Deputies Contact ICE and Border Patrol

Any new rules and regulations should prohibit deputies in the field from unilaterally deciding to contact ICE or Border Patrol. An effective immigration-related policy will require that a deputy contact either a supervisor, the records department, or central dispatch prior to contacting ICE/Border Patrol. In Arizona, it has become common practice for local law enforcement officers to effectuate contact with federal immigration agencies only after consulting either a supervisor or a central office. The Phoenix Police Department, for example, requires officers to contact a desk sergeant for approval. The Arizona Attorney General recently upheld this provision of the Phoenix policy as fully compliant with SB 1070. Similarly, the Arizona Department of Public Safety requires its troopers to contact their Operational Communications department prior to contacting ICE or Border Patrol.

Furthermore, any new rules and regulations should prohibit deputies from using their personal cell phones or company-issued cell phones to contact ICE or Border Patrol for the purpose of verifying one's immigration status. Contact with ICE or Border Patrol for these purposes should be effectuated exclusively through NLETS (the National Law Enforcement Telecommunications System), a secure web-based portal accessible to all local and federal law enforcement agencies (including Pima County).

Spanish Language Interpretation

Any new rules and regulations should prohibit PCSO deputies from contacting Border Patrol for the purpose of assisting with language interpretation. Such a practice undermines confidence in the community and creates the public perception that PCSO and Border Patrol are indistinguishable. Other county departments regularly rely upon professional, 24/7 phone interpretation services. There is no reason why PCSO cannot do the same without undermining their law enforcement objectives. Indeed, there is one such company with a national reputation that is headquartered right here in Tucson.

PCSO has the opportunity to improve its public perception among community members and simultaneously support the local Tucson economy.

Use of Sheriff Deputies at Border Patrol Immigration Checkpoints

Any new rules and regulations should prohibit PCSO deputies from posting up at any of the four Border Patrol checkpoints located in unincorporated Pima County. As detailed in my February 19, 2018 letter and based upon public records made available to the ACLU of Arizona, it has become apparent that PCSO deputies routinely park at Border Patrol checkpoints. In particular, this phenomenon has been well-documented at the Route 86 checkpoint near Robles Junction. As explained in my February 19 letter, this practice is most likely unconstitutional under several U.S. Supreme Court and Ninth Circuit decisions. It should be prohibited.

PCSO Use of Border Patrol-Issued Radios

Any new rules and regulations should prohibit the use of Border Patrol-issued radios. Recent public records from the Ajo Substation reveal that virtually all of the local deputies in Ajo are assigned a Border Patrol radio. While open communication with law enforcement partners is important to fighting crime, this recent revelation shows an unnecessary blurring of the two agencies in Ajo. It is important that the two agencies maintain independent identities, both functionally and by appearance. PCSO can communicate with its Border Patrol partners without literally tuning into Border Patrol's own radios. Such a practice also undermines transparency and recordkeeping goals by allowing PCSO deputies to make immigration inquiries via Border Patrol-issued radios rather than through established protocols.

PCSO Practices on School Grounds and Interactions with Minors

Any new rules and regulations should prohibit PCSO employees from inquiring into immigration status on school grounds. This is the practice implemented by the Mesa Police Department, Tucson Police Department, and Phoenix Police Department. In fact, the Arizona Attorney General recently upheld this provision of the Phoenix policy as fully compliant with SB 1070. Similarly, any new rules and regulations should prohibit deputies from asking minors about immigration status unless in the presence of a parent, guardian, or attorney.

CONCLUSION

I look forward to discussing this matter with you further and working together to ensure that PCSO immigration-related policies achieve necessary law

enforcement goals while simultaneously instilling trust in our immigrant community.

Sincerely,

A handwritten signature in black ink that reads "Billy Peard". The signature is written in a cursive, flowing style.

Billy Peard
Staff Attorney, ACLU of Arizona

Cc: Ally Miller, Bd. of Supervisors
Steve Christy, Bd. of Supervisors
Ramon Valadez, Bd. of Supervisors
Richard Elias, Bd. of Supervisors
Sharon Bronson, Bd. of Supervisors
Chuck Huckelberry, Pima County Administrator
Wendy Petersen, Pima County Deputy Administrator
Andrew Flagg, Pima County Attorney's Office
Sean Holguin, Pima County Attorney's Office
Byron Gwaltney, Pima County Sheriff's Office
Karl Woolridge, Pima County Sheriff's Office