GEORGE JEPSEN
ATTORNEY GENERAL

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Office of the Attorney General
State of Connecticut

August 24, 2017

Jeff Sessions
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530

Tracey Trautman
Acting Director
Bureau of Justice Assistance
Office of Justice Programs
U.S. Department of Justice
810 Seventh Street, NW
Washington, DC 20531

VIA ELECTRONIC MAIL
(Tracey.Trautman@usdoj.gov)

Re: Edward Byrne Memorial Justice Assistance Grant Program
FY 2017 State Solicitation

Dear Attorney General Sessions and Acting Director Trautman:

I am writing to seek clarification of certain new conditions imposed on applicants for grants under the U.S. Department of Justice (DOJ) Edward Byrne Memorial Justice Assistance Grant Program (JAG) as set forth in DOJ's State Solicitation for fiscal year 2017 released July 25, 2017 (Solicitation). The State of Connecticut (State) intends to seek a grant under the JAG program. To that end, I am requesting clarification about (1) the new requirement that I, as the chief legal officer of the State, provide a certification of compliance with 8 U.S.C. § 1373 (Certification Requirement); (2) the new grant condition that the State would be required to permit personnel of the U.S. Department of Homeland Security (DHS) to access any correctional or detention facility in order to meet with an alien (or individual believed to be an alien) and inquire as to his or her right to be or remain in the United States (Access Condition); and (3) the new grant condition that the State would be required to provide at least 48 hours' notice to DHS regarding the scheduled release date and time of an alien in the State's custody when DHS requests such notice in order to take custody of the alien (Notice Condition).

The new Certification Requirement provides that, as Attorney General, I would certify, subject to possible criminal prosecution or civil penalties, among other things:

> (6) As of the date of this certification, neither the jurisdiction nor any entity, agency, or official of the jurisdiction has in effect, purports to have in effect, or is subject to or bound by, any prohibition or any restriction that would apply to the "program or activity" to be funded in whole or in part under the FY 2017 OJP

> Program (which, for the specific purpose of this paragraph 6, shall not be understood to include any such "program or activity" of any subrecipient at any tier), and that deals with either – (1) a government entity or -official sending or receiving information regarding citizenship or immigration status as described in 8 U.S.C. § 1373(a); or (2) a government entity or -agency sending to, requesting or receiving from, maintaining or exchanging information of the types (and with respect to the entities) described in 8 U.S.C. § 1373(b).

According to the Solicitation, the failure to provide this certification will result in a denial of the JAG grant.

It is my view that the State is in compliance with 8 U.S.C. § 1373. You have previously received a letter from Karen K. Buffkin, General Counsel to Governor Malloy, dated January 20, 2017 (copy attached). In it, she discusses § 54-192h of the Connecticut General Statutes, which establishes procedures for state and local law enforcement officers when they are presented with civil immigration detainers for persons in their custody. The letter demonstrates that § 54-192h does not prohibit or in any way restrict the sending or receiving information regarding citizenship or immigration status of any individual to or from federal officers. I fully concur in this analysis. It is my understanding that DOJ has not responded to the letter.

In addition, the State has issued guidance to state and local law enforcement officials on how to respond to requests from federal officers for assistance in federal immigration enforcement. A copy of that memorandum, entitled "State Guidance for Law Enforcement in Connecticut" issued by Governor Dannel P. Malloy, Commissioner Dora Schriro and Commissioner Scott Semple and dated August 22, 2017 (State Guidance), is attached. It is my view that nothing in the State Guidance prohibits or in any way restricts the sending or receiving information regarding citizenship or immigration status of any individual to or from federal officers and therefore the State Guidance is compliant with § 1373. Instead, the Guidance simply articulates State policy with regard to requests for assistance in federal immigration enforcement based on what federal law does and does not require of state and local officers. However, based on available public information, it is unclear what is DOJ's understanding of the requirements of 8 U.S.C. § 1373 and this Certification Requirement.

The newly announced Access Condition and Notice Condition also are in some important ways vague and uncertain as to what may be required of grant recipients. This lack of clarity places grant applicants in the position of not knowing what they may be consenting to by accepting a grant award and potentially placing them at risk of taking illegal or unconstitutional actions. For example, the Access Condition does not specify the nature of the access to correctional and detention facilities that would be required. Similarly, the Notice Condition raises numerous practical and legal questions relating to the timing of the receipt of a notice and scheduled releases. In particular, the 48 hour notice requirement cannot itself lawfully compel continued detention when there is no longer another state law or constitutional basis to detain the person.

Finally and most fundamentally, it is unclear what authority DOJ has for imposing on grant applicants the Certification Requirement, the Access Condition or the Notice Condition. The legislation establishing the JAG program does not authorize DOJ to impose these conditions. Instead, it requires grant recipients to "comply with all provisions of this part and all other

applicable Federal laws." 42 U.S.C. § 3752(a)(5)(D). It is my view that § 1373 does not come within the meaning of "all other applicable Federal laws." Moreover, there simply is no authority for the imposition of other new substantive conditions. Only Congress has such authority, and imposing such conditions in the absence of statutory authority violates the separations of powers doctrine. Finally, the new conditions themselves exceed the constitutional limits under the Spending Clause and the Tenth Amendment.

Because of these serious legal uncertainties, I request clarification on the following questions:

(1) Does DOJ disagree with my conclusion that the State Guidance complies with 8 U.S.C. § 1373 such that it would not constitute a "prohibition" or "restriction" within the meaning of the Certification Requirement? If so, why?

(2) What is the legal basis for imposing the Certification Requirement?

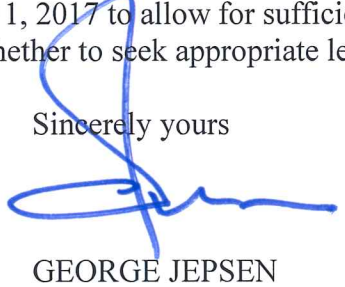
(3) What is the precise nature of access to correctional and detention facilities that would be required under the Access Condition?

(4) Does the Notice Condition apply to circumstances in which the scheduled release date and time is less than 48 hours from the receipt of DHS's request for notice of such date and time? Similarly, does the Notice Condition apply to circumstances when the release of an inmate for whom the state has received a request for notice from DHS is ordered by a court or otherwise required by law or the Constitution to occur within less than 48 hours from the time the court order or other legal circumstance takes effect? If so, is it DOJ's view that the Notice Condition would require the State to delay the scheduled release until at least 48 hours from receipt of DHS's request?

(5) What is the legal basis for imposing the Access Condition and the Notice Condition?

It is my understanding that the certifications required by the Solicitation do not have to be submitted with the grant application which are due August 25, 2017, but can be submitted later but prior to any disbursement of any grant award. Nonetheless, I respectfully request a response to these questions no later than September 1, 2017 to allow for sufficient time to evaluate your responses and to consider, if necessary, whether to seek appropriate legal remedies.

Sincerely yours



GEORGE JEPSEN
ATTORNEY GENERAL

Karen K. Buffkin
GENERAL COUNSEL
OFFICE OF THE GOVERNOR
STATE OF CONNECTICUT

VIA ELECTRONIC MAIL

January 20, 2017

Tracey Trautman
Deputy Director
Bureau of Justice Assistance
United States Department of Justice

RE: Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients Dated September 23, 2106 (as corrected).

Dear Deputy Director Trautman:

The Department of Justice has required a grant recipient, in this case the State of Connecticut, to provide a legal opinion that such recipient is in compliance with the requirements of federal statute 8 U.S.C. § 1373, more particularly subsections (a) and (b) of such act. Connecticut law complies with the requirements of subsections (a) and (b) of Section 1373 as it does not prohibit or in any way restrict state or local authorities from sending to, receiving, exchanging or maintaining information from the Immigration and Naturalization Service (INS) about the immigration status of an individual. In fact, Connecticut's statute affirmatively requires notification to INS when a civil immigration detainer has been requested.

This opinion is in response to guidance from Department of Justice that the grant recipient is required to provide compliance validation, including a legal opinion with supporting analysis of such compliance. Such guidance is provided in response to a memorandum of the Office of the Inspector General, dated September 23, 2016 titled, *Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients*. This opinion letter serves as the requisite compliance validation.

Section 8 U.S.C. § 1373 specifically provides in subsection (a) that,

> ...a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Further, subsection (b) provides:

> Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from

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doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
(2) Maintaining such information.
(3) Exchanging such information with any other Federal, State, or local government entity.

The memorandum prepared by the Office of the Inspector General contains a citation to the legislative history of Section 1373. It states that Section 1373 was intended "to give State and local official the authority to communicate with the Immigration and Naturalization Service (INS) ...[and was] designed to prevent any State or local law, ordinance, executive order, policy, ... that prohibits or in any way restricts communication between State and local officials and the INS." (Memorandum at p. 3, internal citations omitted)

Connecticut law complies with 8 USC § 1373 because it both specifically authorizes state and local law enforcement to communicate with INS and does not "prohibit or in any way restrict" the sending or receiving of information from INS regarding the immigration status of an individual. In 2013, the Connecticut Legislature adopted public act 13-155, codified as Section 54-192h of the Connecticut General Statutes, in order to establish required procedures for state and local law enforcement officers when presented with a civil immigration detainer for a person in custody. Prior to the adoption of this act Connecticut did not have a uniform policy for its state and local law enforcement on the handling of such matters.

Section 54-192h of the Connecticut general statutes provides,

(a) For the purposes of this section:

(1) "Civil immigration detainer" means a detainer request issued pursuant to 8 CFR 287.7;

(2) "Convicted of a felony" means that a person has been convicted of a felony, as defined in section 53a-25, pursuant to a final judgment of guilt entered by a court in this state or in a court of competent jurisdiction within the United States upon a plea of guilty, a plea of nolo contendere or a finding of guilty by a jury or the court notwithstanding any pending appeal or habeas corpus proceeding arising from such judgment;

(3) "Federal immigration authority" means any officer, employee or other person otherwise paid by or acting as an agent of United States Immigration and Customs Enforcement or any division thereof or any officer, employee or other person otherwise paid by or acting as an agent of the United States Department of Homeland Security who is charged with enforcement of the civil provisions of the Immigration and Nationality Act; and

(4) "Law enforcement officer" means:

(A) Each officer, employee or other person otherwise paid by or acting as an agent of the Department of Correction;
(B) Each officer, employee or other person otherwise paid by or acting as an agent of a municipal police department;
(C) Each officer, employee or other person otherwise paid by or acting as an agent of the Division of State Police within the Department of Emergency Services and Public Protection; and
(D) Each judicial marshal and state marshal.

(b) No law enforcement officer who receives a civil immigration detainer with respect to an individual who is in the custody of the law enforcement officer shall detain such individual pursuant to such civil immigration detainer unless the law enforcement official determines that the individual:

(1) Has been convicted of a felony;
(2) Is subject to pending criminal charges in this state where bond has not been posted;
(3) Has an outstanding arrest warrant in this state;
(4) Is identified as a known gang member in the database of the National Crime Information Center or any similar database or is designated as a Security Risk Group member or a Security Risk Group Safety Threat member by the Department of Correction;
(5) Is identified as a possible match in the federal Terrorist Screening Database or similar database;
(6) Is subject to a final order of deportation or removal issued by a federal immigration authority; or
(7) Presents an unacceptable risk to public safety, as determined by the law enforcement officer.

(c) Upon determination by the law enforcement officer that such individual is to be detained or released, the law enforcement officer shall immediately notify United States Immigration and Customs Enforcement. If the individual is to be detained, the law enforcement officer shall inform United States Immigration and Customs Enforcement that the individual will be held for a maximum of forty-eight hours, excluding Saturdays, Sundays and federal holidays. If United States Immigration and Customs Enforcement fails to take custody of the individual within such forty-eight-hour period, the law enforcement officer shall release the individual. In no event shall an individual be detained for longer than such forty-eight-hour period solely on the basis of a civil immigration detainer.

Subsection (c) of Section 54-192h clearly requires a law enforcement officer, upon determining whether or to detain or release an individual, to *immediately notify* the United States Immigration and Customs Enforcement (ICE). *54-192h(c)*. The notification is required regardless of whether the individual is to be detained or released. The provisions of this subsection not only specifically authorize communication with INS; it requires it. Further, the statute complies with Section 1373 because there is no provision of Connecticut's statute that in any manner prohibits or restricts sending or receiving information from ICE regarding the immigration status of an individual. The obligations of the statute are unambiguous.

It is also important to note that in accordance with Connecticut law where "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra textual evidence of the meaning of the statute shall not be considered." Section 1-2z, Connecticut General Statutes. In this particular instance the intent of the statute is clear law enforcement officers are required to communicate with ICE. In such circumstances a review of the legislative history would not be warranted; however, in this instance the legislative history sheds important light on the purpose behind the act and the intent of the Legislature in its adoption. The following excerpt from the transcript of the debate is illustrative of both the purpose and operation of public act 13-155:

> REP. REBIMBAS (70th):
> Thank you, Mr. Speaker.
> And just to further clarify, *this amendment requires that a police department contact ICE if there's any type of civil immigration detainers*, whether or not the police department decides to release or detain an individual. Is that correct?
> Through you, Mr. Speaker.
>
> SPEAKER SHARKEY:
> Representative Holder-Winfield.
>
> REP. HOLDER-WINFIELD (94th):
> Yes. Through you, Mr. Speaker.
> Upon detention of one of these individuals, that would be correct.
> Through you, Mr. Speaker.
>
> SPEAKER SHARKEY:
> Representative Rebimbas.
> REP. REBIMBAS (70th):
> Thank you, Mr. Speaker.
> And I think that's one of the most important parts of this amendment. Where the underlying bill was preventing a police department from making any notification to the appropriate department, ICE in this particular occasion. *When it comes to civil immigration detainers, what the amendment actually does is encourages that and mandates that they do contact ICE, so that they are properly notified when there is an individual that has a civil immigration detainer.* At that moment in time, they will then be able to inform the department of what type of action that they may or may not take.
> They may, at that time, indicate to the department that they have no interest in the person and then, if the department, under the factors that have been enumerated in this amendment, if there's no pending charges or investigations and things of that nature, everything that's enumerated here, then the police department, after 48 hours, would then release the person.
> But certainly, and again, for clarification purposes, if the factors in this amendment is found and the police department, then does have the ability to detain the individual past 48 hours. Is that correct?
> Through you, Mr. Speaker.

SPEAKER SHARKEY:
Representative Holder-Winfield.

REP. HOLDER-WINFIELD (94th):
Through you, Mr. Speaker.
That would be correct.

...

REP. REBIMBAS (70th):
Thank you, Mr. Speaker.
Mr. Speaker, as I indicated earlier, I do rise in support of this amendment. I think, again, we were void of having any type of guidelines. Without this amendment, any police department could have taken it upon their individual selves to make the decision of during a stop or if they were arresting someone, if they found out that there was a civil immigration detainers, that police department had the opportunity to say, well I'm not going to contact ICE. I prefer not to. There's no charges we're going to proceed here in the State of Connecticut. I know there's a civil immigration detainer. I'm going to unilaterally decide I'm not going to contact ICE.
What this amendment actually does, is require that the police department contact ICE. ICE will then, in turn, let the police department know what their intentions are. At that moment in time, they can say we have no intent to follow up on this immigration detainer. Therefore, the police department could release them.
If the police department wanted to detain them, they can only detain them for 48 hours, but again, it has that open line of communication. Because unfortunately, without an amendment like this or a guideline, what we have is some police departments not following up with ICE on these immigration detainers and then others, unfortunately, holding people back, as a result of the civil immigration detainer for days and/or weeks or more, waiting for potentially ICE to come, where, in fact, they may never come.

(Session Transcript, Connecticut House of Representatives, May 22, 2013)(Emphasis added).

The legislative history of Public Act 13-155 makes clear that the intent of the law was to provide uniform guidelines that Connecticut law enforcement officials were required to follow and specifically mandate communication with ICE. The only restrictions in the statute on law enforcement with respect to the handling of civil detainers are not restrictions encompassed by or enumerated in 8 USC § 1373.

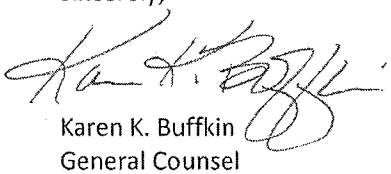
The Office of the Inspector General's original memorandum dated May 31, 2016 contained an incorrect citation of Connecticut law. It cited to an earlier version of House Bill 6659. House Bill 6659 was amended on the floor of the House of Representatives, an amendment that removed any prohibition on law enforcement communication with ICE. The Inspector General on September 23, 2016 corrected its citation of Connecticut law, but specifically indicated that despite the removal of a prohibition on communication by law enforcement its analysis of Connecticut's law had not changed. The Office of Inspector General's analysis appears to result from a misreading of Connecticut's law.

The legislative history provided above clearly supports the conclusion that the Inspector General's analysis is incorrect. As Representative Rebimbas clearly stated in the debate on the bill, "...Where the underlying bill was preventing a police department from making any notification to the appropriate department, ICE in this particular occasion. *When it comes to civil immigration detainers, what the amendment actually does is encourages that and mandates that they do contact ICE, so that they are properly notified when there is an individual that has a civil immigration detainer.*" (*Session Transcript, Connecticut House of Representatives*, May 22, 2013)(Emphasis added).

In conclusion, section 54-192h of the Connecticut General Statutes (Public Act 13-55) specifically requires notification to ICE, nor does it prohibit or in any way restrict sending or receiving information from INS, maintaining such information or exchanging information with federal, state or local law enforcement organizations. Connecticut law does not contradict or contravene 8 USC § 1373.

I trust this satisfies the compliance validation relative to Connecticut's compliance with applicable federal law.

Sincerely,



Karen K. Buffkin
General Counsel

Dannel P. Malloy
GOVERNOR
STATE OF CONNECTICUT

To: All Heads of Local Enforcement Agencies, All Municipal Police Departments and Constabularies, State Police in the Department of Emergency Services and Public Protection, the Department of Correction, and Post-Secondary Education Campus Security

From: Governor Dannel P. Malloy, Commissioner Dora B. Schriro, and Commissioner Scott Semple

Date: August 22, 2017

Subject: State Guidance for Law Enforcement in Connecticut **(Clarifies and Supersedes State Guidance issued February 2017)**

In light of President Donald Trump's Executive Order, dated January 25, 2017, entitled, *Enhancing Public Safety in the Interior of the United States,* and subsequent Department of Homeland Security (DHS) implementation memos (2/20/17 and 2/21/17), law enforcement agencies across Connecticut are seeking guidance on the impact that this Executive Order may have on their operations, statutory obligations, and access to federal funds. Law enforcement agencies are also seeking guidance on how to respond if called upon to assist federal law enforcement in carrying out the order. The Executive Order provides broad policy direction but contains few of the specifics that jurisdictions are seeking to inform their decision-making. The additional guidance from DHS promises updated regulations, procedures and forms, however, as of this date, no further guidance has been issued and a great deal of uncertainty remains. It is clear that direction in this area will continue to evolve.

In February, Commissioner Dora B. Schriro of the Department of Emergency Services and Public Protection directed that any sworn State Police personnel who receive requests from federal law enforcement to take action outside of their customary and routine state law enforcement duties, should ensure that any such request be referred first up the chain of command for evaluation.

Additionally, Commissioner Scott Semple of the Department of Correction issued a directive aimed at ensuring compliance with all state and federal laws, directed that any

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requests from federal law enforcement personnel that are outside the ordinary and routine assistance provided to such agencies be forwarded up the chain of command for review.

The International Association of Chiefs of Police released a statement on January 30, 2017, to oppose any initiative that would mandate state or local law enforcement involvement in the execution of federal immigration law, and that their involvement in immigration law should be determined at a local level.

It is never the intention of law enforcement in Connecticut to impede federal enforcement activity. It is always our duty to ensure the protection of the rights guaranteed by the Constitutions of the United States and the State of Connecticut. We encourage all law enforcement agencies in Connecticut to plan for potential requests by our federal partners to perform, or assist in, immigration enforcement duties and to enact policies and procedures that will provide clear direction to officers if the need should arise.

State and local law enforcement agencies are not required to engage in the enforcement of federal immigration law. Section 287(g) of the Immigration and Nationality Security Act is *strictly voluntary* and the Executive Order and implementation memos do not require state or local law enforcement agencies to submit to the authority of Immigration and Customs Enforcement (ICE). State and local law enforcement agencies have an obligation to comply with the Connecticut Trust Act with respect to the detention of individuals within their custody. Beyond that, however, we encourage all of Connecticut's law enforcement agencies not to participate voluntarily in assisting federal immigration enforcement efforts. Our policies should enable every crime victim and witness to a crime, whether or not lawfully present, to come forward to report that crime without fear of referral to ICE. The willingness of all of our residents to engage with law enforcement strengthens police and community relations and helps to sustain the historically low rates of crime that we enjoy today.

Additionally, we believe that information clarifying the duties and responsibilities of state and local law enforcement[1] in responding to requests from the DHS, which includes Immigration and Customs Enforcement (ICE) as well as providing information to residents of our state is important and promotes the goals of public safety.

In 2013, Connecticut passed the Connecticut Trust Act, Sec. 54-192h of the Connecticut General Statutes, which defines the circumstances under which a prisoner in the custody of state or local police or corrections may be held in custody solely because of an ICE detainer request.

Under the Trust Act, Connecticut law enforcement can *only* detain an individual who is already in custody beyond the time of their scheduled release in the following circumstances following a determination that the individual:

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[1] Law enforcement for this purpose means the Division of the State Police in the Department of Emergency Services and Public Protection, all municipal police departments and constabularies, campus police departments, the Department of Correction, and judicial and state marshals.

(1) Has been convicted of a felony;

(2) Is subject to pending criminal charges in this state where bond has not been posted;

(3) Has an outstanding arrest warrant in this state;

(4) Is identified as a known gang member in the database of the National Crime Information Center or any similar database or is designated as a Security Risk Group member or a Security Risk Group Safety Threat member by the Department of Correction;

(5) Is identified as a possible match in the federal Terrorist Screening Database or similar database;

(6) Is subject to a final order of deportation or removal issued by a federal immigration authority; or

(7) Presents an unacceptable risk to public safety, as determined by the law enforcement officer.

If an individual is detained pursuant to an ICE detainer request, he or she cannot be held for greater than 48 hours, not including weekends and holidays, beyond the time they would normally be released; i.e. sentence finished, posted bail, charges dropped or the conditions for their release satisfied, in order to satisfy a detainer request. ICE civil immigration detainers are not warrants for the arrest of an individual, but rather constitute a request for cooperation as it relates to a particular individual.

Further, to protect the rights of Connecticut residents, local law enforcement should consider implementing the following policies:

1. Law enforcement should not take action that is solely to enforce federal immigration law, except to the limited extent as may be required by the Connecticut Trust Act. The federal government cannot mandate states to investigate and enforce actions that have no nexus to the enforcement of Connecticut law or local ordinances, nor can they commandeer state and local law enforcement agencies for that purpose.

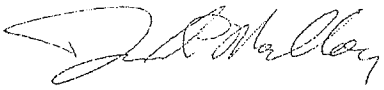
2. As noted above, ICE detainer requests are *requests*, they are not warrants or orders and thus should only be honored as set forth in Connecticut law (described above), unless accompanied by ***a judicial warrant.***

3. There is no requirement that law enforcement provide access to individuals who are in law enforcement custody for purposes of questioning by ICE and any such request, as noted above, should be referred up the chain of command for evaluation. ICE or federal agents should be required to identify themselves and be required to

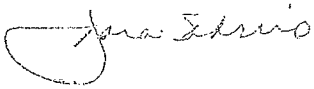
state the purpose of their request for access to any individual in law enforcement custody. Individuals in custody should be afforded the opportunity to decline to be questioned by ICE or to do so only in the presence of their attorney.

4. Law enforcement is not required, except as necessary to comply with Connecticut's Trust Act, to collect or provide information on an individual's immigration status.

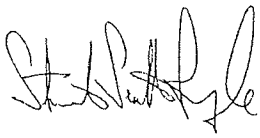
5. Attorneys are reminded they must inform criminal defendants of the immigration consequences of pleading guilty; see *Padilla v. Kentucky* (USSC, 2010).



Governor Dannel P. Malloy
Governor



Dora B. Schriro
Commissioner
Department of Emergency
Services and Public Protection



Scott Semple
Commissioner
Department of Correction