



## CITY OF PHILADELPHIA

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October 27, 2017

### VIA ELECTRONIC AND U.S. MAIL

Alan Hanson  
Acting Assistant Attorney General  
Office of Justice Programs  
United States Department of Justice  
810 Seventh Street, N.W.  
Washington, D.C. 20531

Dear Acting Assistant Attorney General Hanson,

The City of Philadelphia (“the City”) submits this letter in response to the letter of October 11, 2017 from the United States Department of Justice’s Office of Justice Programs, providing its “preliminary assessment” of the City’s compliance with 8 U.S.C. § 1373. In that letter, the Department conveyed that it has determined that the City “appears to have laws, policies, or practices that violate 8 U.S.C. § 1373.” It cited two of the City’s policies in that regard. In addition, the Department stated that it found that three other aspects of the City’s laws, policies and practices “may violate 8 U.S.C. § 1373,” depending on how Philadelphia interprets and effectuates those provisions. As set forth below, the City disputes the Department’s findings, and it submits the following points for the Department’s consideration.<sup>1</sup>

### The Department’s Determination that Two of Philadelphia’s Policies “Violate” Section 1373

The Department preliminarily concluded that two provisions in the City’s “laws, policies or practices” in fact “violate” Section 1373. First, the Department found that Section 1 of Executive Order No. 5-16, which sets forth the City’s policies on complying with ICE requests for advance notification of release, is inconsistent with Section 1373. Letter, at 1. Second, the Department found that Section 3C of Police Memorandum No. 01-06, which states that

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<sup>1</sup> Philadelphia’s submission of this letter in no way constitutes a waiver or relinquishment of its argument that the Attorney General’s imposition of the new condition—requiring the City to certify compliance with Section 1373 in order to receive its FY2016 JAG grant—was itself unlawful. Philadelphia continues to reserve that argument. *See* June 22, 2017 Certification, at 13-15 (“Although Philadelphia submits the present certification in good faith, it reserves the argument that this certification requirement itself . . . constitutes unlawful agency action[.]”).

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“immigrants who are victims of crimes will not have their status as an immigrant transmitted,” violates Section 1373 because there are “instances” where a victim may be “both a perpetrator and a victim.” *Id.* at 1-2.

As set forth in greater detail in the City’s recently-filed reply brief in *City of Philadelphia v. Sessions*, the City contests the Department’s preliminary assessment. *See* Reply in Supp. of Mot. for Prelim. Inj., at 12-13, *City of Philadelphia v. Sessions*, No. 17-3894 (E.D. Pa. Oct. 19, 2017) (Dkt. No. 46) (hereinafter “Philadelphia Reply Br.”). Neither determination has any basis in fact or in law. The City’s notification policy—which the Department points out only allows for advance notice of a person’s “pending release” from City custody if an ICE “detainer is supported by a judicial warrant”—has no relationship to Section 1373 whatsoever. Section 1373 does not cover the exchange of information about a person’s detention, release, or physical location—it covers what its text describes, which is “information regarding the citizenship or immigration status . . . of any individual.” 8 U.S.C. § 1373(a). Although the Department now takes an astonishingly expansive reading of Section 1373, claiming that it includes information regarding whether an alien is “in a certain place and not elsewhere,” *see* Opp. to Mot. for Prelim. Inj., at 38 n. 11, *City of Philadelphia v. Sessions* (Dkt. No. 28), the City maintains that such a reading finds no support in the statute’s plain text.

The Department’s second ground for finding that Philadelphia’s policies and practices do not comply with Section 1373 is equally without support in the law. The Department said that it is concerned that the protection afforded to crime victims in Section 3C of Memorandum 01-06, while not necessarily problematic in and of itself, could trigger concerns with the City’s compliance with Section 1373 because some victims might also be “perpetrator[s].” Letter, at 1-2. The Department’s concern is unfounded. Section 3A of Memorandum 06-01 instructs, in indubitably clear terms, that “police personnel will transmit” immigration-status information “to federal immigration authorities” when “[t]he immigrant is suspected of engaging in criminal activity.” Section 3C of Memorandum 06-01 directs that City officers shall continue to follow ordinary law enforcement protocols, including cooperating with federal authorities, “in investigating and apprehending immigrants suspected of criminal activities.” The notion that Memorandum 01-06 affords protection to “perpetrators” of crimes is therefore false. When a person is a criminal suspect—even if he or she may be a victim in the same matter or in a separate matter—Philadelphia’s policies call for the unfettered exchange of information about that individual with the federal government.

#### The Department’s Determination That Three of Philadelphia’s Policies “May Violate” Section 1373

The Department’s letter cited three additional provisions in the City’s laws, policies and practices that it found “may violate 8 U.S.C. § 1373,” and invited the City to respond. Specifically, the Department requested that the City “certify that it interprets and applies” each of the three

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provisions “to not restrict Philadelphia officers” from either “requesting” or “sharing” information regarding immigration status with “federal immigration officers,” and that the City provide such certification to the Department by October 27. Letter, at 2-3.

The Department’s “may violate” findings are each flawed either as a factual matter, as a legal matter, or both.

The first provision that the Department said “may violate” Section 1373 is Section 2B of Executive Order 8-09, which instructs that Philadelphia police officers “shall not . . . inquire about a person’s immigration status” unless certain exceptions apply. Letter, at 2. The Department expressed concern that this provision “bar[s] Philadelphia officers from requesting information regarding immigration status from federal immigration officers,” and thereby conflicts with Section 1373(b). *Id.* The City hereby certifies that Section 2 of Executive Order 8-09 does not regulate—or impose limits upon—inquiries made by City officers or employees of federal officials about immigration or citizenship status. Rather, Section 2 restricts such inquiries when made of private *individuals*. This reading is clear from the Order’s “whereas” clauses, which demonstrate that the purpose of the Order is to promote the “utilization of [City] services by all City residents and visitors . . . including immigrants,” and to enable “all individuals . . . [to] know that they may seek and obtain the assistance of City departments and agencies regardless of their personal status.”<sup>2</sup>

The second and third provisions of the City’s policies that the Department said “may violate” Section 1373 are Section 3 of Executive Order 8-09, and Section 3A of Memorandum 01-06, both of which provide that Philadelphia officers and employees shall not “disclose” or transmit immigration status information to third parties, except for in select circumstances. Letter, at 2-3. The Department related that “[i]n order to comply with 8 U.S.C. § 1373, the Department has determined that Philadelphia would need to certify that it interprets and applies [each provision] to not restrict Philadelphia officers [and employees] from sharing information regarding immigration status with federal immigration officers.” *Id.* Philadelphia has described its interpretation and application of its policies, and their relationship to Section 1373, in its June 22,

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<sup>2</sup> In addition, Section 2 contains explicit exemptions for inquiries made by City officers or employees “for the determination of program, service or benefit eligibility or the provision of services,” and for criminal investigations where immigration “status itself is a necessary predicate of [the] crime” or where “status is relevant to identification of a person who is suspected of committing [the] crime.” Executive Order 8-09, §§ 2(A)(1), B(2). Given that Section 2 does not apply to inquiries made of federal officials altogether, inquiries made of federal officials in the above circumstances are doubly-permitted by the policy—and Philadelphia employees and officers generally would have no reason to request immigration status information in any other context. The City is prepared, however, to notify its Police officers that the Order does not restrict them from inquiring about immigration-related information from the federal government.



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2017 certification memorandum. As explained therein, both Executive Order 8-09 and Memorandum 01-06 provide several exceptions for disclosures of immigration-status information—most important, if the individual has authorized the disclosure in writing, or if the individual is suspected of engaging in a criminal act. Those exceptions bring the City’s non-disclosure rules safely within the bounds of Section 1373. The City maintains that when read in light of the Constitution’s Tenth Amendment, federalism-based limitations, and Spending Clause, Section 1373 cannot be interpreted to demand more from Philadelphia beyond what it already discloses, especially when imposed as a condition of a Byrne JAG grant. *See* June 22, 2017 Certification at 6-12; *see also* Philadelphia Reply Br. at 13-15.

The above questions of law and fact concerning the City’s compliance with Section 1373—and more significantly, questions concerning the Department’s authority to impose the condition of compliance with Section 1373 in connection with Byrne JAG grants in the first place—will continue to be litigated in the *City of Philadelphia v. Sessions* lawsuit. The City therefore requests that the Department not withhold its FY 2017 JAG award on the basis of non-compliance with Section 1373 until the many issues in that lawsuit are resolved. The City also reserves the right to submit additional certifications or responses to the Department, as may be necessary or appropriate, following the resolution of that litigation (and any appeals) and based on the final judgments of the courts.

Sincerely,



Sozi Pedro Tulante  
City Solicitor