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FREQUENTLY ASKED QUESTIONS RELATIVE TO PROPOSED ORDINANCE ON CITY SERVICES RELATED TO IMMIGRATION STATUS AND GUIDANCE FROM MASS. ATTORNEY GENERAL

What does the Ordinance actually state?

The ordinance provides that:

- City services shall be available to all residents regardless of status, unless prohibited by law. City employees, except police officers, shall not ask for information regarding immigration status, unless required to do so by law.
- The police department policy is separate and apart from the ordinance.
- Public safety personnel shall prioritize the safety and protection of residents and visitors regardless of their country of origin.
- Public safety personnel recognize that open communication is the most effective way to ensure the safety of the community.
- The City reaffirms its compliance with federal immigration law (IRCA) in its hiring practices.
- The ordinance is consistent with the City's obligations under *Plyler v. Doe*, 457 U.S. 202 (1982) which prohibits municipalities from denying funding for education to undocumented children.
- Should any provision of the ordinance be deemed unlawful, it shall be struck, but the remaining sections shall remain in place.

Is the City in jeopardy of losing Federal grants pursuant to President Trump's Executive Order 13768 by passing the proposed Ordinance?

- The President's Executive Order defines a sanctuary city as one that willfully refuses to comply with 8 U.S.C. 1373 which prohibits local governments from restricting the sharing of information with the Immigration and Naturalization Service. The Order further states that a sanctuary city may be ineligible for Federal funds. Attorney General Sessions reiterated this definition in a memorandum he issued in May 2017.
- The proposed City Ordinance does not prohibit or restrict the sharing of information with the Immigration and Naturalization Service. As such Salem will not meet the definition of a sanctuary city subject to the withholding of Federal funds.
- Since the final passage of the Ordinance, a federal district court judge issued a temporary ruling in a San Francisco and Santa Clara County lawsuit over Executive Order 13768 targeting so-called sanctuary cities. A nation-wide injunction will stay in place while the lawsuit moves through Court. The Judge found that the Counties were able to show that they are likely to face immediate and irreparable harm absent an injunction, that the balance of harms and public interest weighs in their favor and that they are likely to succeed on the merits of their case which challenges the Executive Order on multiple grounds and that the Counties were likely to succeed on the merits on all of its challenges:

Separation of Powers. The Court ruled "that the Executive Order is unconstitutional because it seeks to wield powers that belong exclusively to Congress, the spending powers." By granting authority to the Attorney General and Secretary of Homeland Security to determine jurisdictions' eligibility for grants, the Order, the Court ruled, "runs afoul of these basic and fundamental constitutional structures."

Spending Clause Violations. The Counties argued that even if the President has the power to condition spending, the Order violates the Tenth Amendment. Recognizing that the Supreme Court has permitted Congress to place conditions on state funding, provided that certain requirements are met, the Court found the Order "likely violates at least three of these restrictions: (1) conditions must be unambiguous and cannot be imposed after funds have already been accepted; (2) there must be a nexus between the federal funds at issue and the federal program's purpose; and (3) the financial inducement cannot be coercive."

Tenth Amendment Violations. The Court found the Counties likely to succeed on the merits of this claim because the Order violates Supreme Court precedent from New York which provides, "The Federal Government may not compel the States to enact or administer a federal regulatory program." The Court held that to the extent the Executive Order seeks to condition all federal grants on honoring civil detainer requests, it is likely unconstitutional under the Tenth Amendment because it seeks to compel the states and local jurisdictions to enforce a federal regulatory program through coercion.

Fifth Amendment Void for Vagueness. A law is unconstitutionally void for vagueness under the Fifth Amendment: "if it fails to make clear what conduct it prohibits and if it fails to lay out clear standards for enforcement." The Order, Judge Orrick found, does not describe "what conduct might subject a state or local jurisdiction to defunding or enforcement action, making it impossible for jurisdictions to determine how to modify their conduct, if at all, to avoid the Order's penalties."

Fifth Amendment Procedural Due Process Violations. The Court found that because the Executive Order would jeopardize the Counties' eligibility to receive the funds they are entitled to without any administrative or judicial procedure, the Counties were likely to succeed on the merits in demonstrating that the Order violates the Due Process requirements.

Must the police department comply with a Federal Detainer?

- Complying with Federal detainers is a voluntary act. The title of the Department of Homeland Security form (I-247D) is "Request for Voluntary Action." Detainers must be voluntary otherwise they would run afoul of the 10th Amendment.
- Courts have ruled that the 10th Amendment to the U.S. Constitution prevents the Federal government from commandeering state and local officials to do the work of the Federal government. In *Galarza v. Szalcyk*, 745 F.3d 634 (3d Circ. 2014), the Third Circuit held that immigration detainers do not and cannot compel a state or local law enforcement agency to detain immigrants who may be subject to removal. Similarly, the Supreme Court, in *Printz v. United States*, 521 U.S. 898 (1997), found that the Federal government cannot force local law enforcement agencies to conduct background checks on prospective gun purchasers and struck down portions of the Brady Act.
- Failure of the Salem Police Department to adhere to Federal constitutional requirements under the 4th Amendment and the Due Process Clause could open Salem up to civil rights liability. In March 2017, Attorney General Maura Healey's office filed a brief in *Commonwealth v. Lunn* contending that there is no authority under state law to detain individuals solely on the basis of an ICE detainer.

Is being undocumented a felony?

Improper Entry - Under Federal criminal law, on a first offense, it is misdemeanor for an alien to:

- Enter or attempt to enter the United States at any time or place other than designated by immigration officers;
- Elude examination or inspection by immigration officers; or
- Attempt to enter or obtain entry to the United States by willfully concealing, falsifying, or misrepresenting material facts.
- The punishment under this Federal law is no more than six months of incarceration and up to $250 in civil penalties for each illegal entry. Improper entry must be proven beyond a reasonable doubt in order to convict.

Unlawful Presence **-** Many individuals enter the U.S. on a valid work or travel visa, but fail to leave the U.S. before their visa expires.

- Mere unlawful presence in the country is not a crime. It is a violation of Federal immigration law to remain in the country without legal authorization. Absent a previous removal order and unauthorized entry, this violation is punishable by civil penalties, not criminal.

On March 28, the City received the following additional guidance from Joanna Lydgate, Deputy Attorney General, Office of Massachusetts Attorney General Maura Healey

8 U.S.C 1373:

- The Federal law that AG Sessions relied on in his comments yesterday simply says that a state or municipality can't create policies that prohibit information-sharing with the Federal government regarding citizenship or immigration status.
- The connection he attempts to make to so-called “sanctuary” cities is confusing and, we believe, misguided.
- Municipalities across Massachusetts automatically share fingerprint information with the Federal government upon arrest.
- Becoming a "sanctuary" or "trust" city does not change that established process. So it's unclear what funding, if any, would be at risk.
- AG Healey has described AG Sessions' comments as scare tactics, and has suggested that he doesn't seem to understand the many ways in which state and local law enforcement work hand in hand with the feds to collaborate and share information when necessary to protect public safety.
- But protecting public safety also means making sure people trust the police, and that victims and witnesses feel comfortable coming forward to report crime. That's why we believe these decisions should be made at the local level.

Threat of defunding:

- While it's not clear how funding could be at risk based on AG Sessions' statements yesterday, there will definitely be litigation if the Federal government actually takes steps to defund any of our cities and towns.
- As you probably know, certain municipalities in MA have already filed a legal challenge to the executive order, as have others outside MA.
- Mayor Walsh has also made clear that the City of Boston will be prepared to take legal action against the order if necessary.
- While we do not comment on potential litigation, AG Healey has already stated that she is prepared to stand with those cities and towns and to do what's necessary to support them.

ICE detainers:

- ICE detainers are voluntary requests (DHS acknowledges this).
- That means it's lawful for a city or town to choose not to automatically honor detainers.
- In fact, in a case currently pending before the Supreme Judicial Court (*Commonwealth v. Lunn*), the AGO and others have taken the position that Massachusetts law does not authorize law enforcement agencies to hold a person pursuant to an ICE detainer alone.
- To be honored, an ICE detainer needs to be issued with a warrant or some other showing of probable cause, as it constitutes a new arrest.