



City of Seattle

Jenny A. Durkan, Mayor

Peter S. Holmes, City Attorney

December 8, 2017

Alan Hanson,
Acting Assistant Attorney General
Office of Justice Programs
U.S. Department of Justice

Dear Mr. Hanson,

The City of Seattle (“the City”) hereby submits the following response to your letter of November 15, 2017. In that letter, you asked the City to “address[] whether Seattle has laws, policies, or practices that violate” 8 U.S.C. § 1373. Pursuant to your request, Seattle has conducted a preliminary review of its laws and policies to assess their consistency with Section 1373.

The short answer is that Seattle is in full compliance with Section 1373. Consistent with Section 1373, the City does not prohibit its employees from sharing immigration information with federal officials. Moreover, to the extent that Seattle’s laws and policies could be read to conflict with Section 1373, they are subject to a savings clause that would limit their operation. Seattle is, therefore, wholly compliant with Section 1373, and will continue to comply with Section 1373 in fiscal year 2017.

In your letter, you also asserted that the City’s “FY 2016 Byrne JAG grant award required [it] to comply with” Section 1373. That is incorrect. As courts have held, the federal government does not, and could not, require cities like Seattle to comply with Section 1373 as a condition of receiving funding under the Byrne JAG grant program. Indeed, a federal district court in Washington recently denied the federal government’s motion to dismiss the City’s lawsuit challenging the legality of Executive Branch attempts to punish so-called “sanctuary cities” by denying them any or all of the federal grants to which they are entitled by law. And other courts have squarely held that the federal government’s efforts to deny sanctuary cities federal grants in general, and Byrne JAG grants in particular, are unlawful. Consequently, the evident premise of your letter—that the City’s receipt of federal

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grants may be conditioned on its compliance with the Justice Department's current reading of Section 1373—is incorrect.

We address each of these points in turn.

I. The City Complies With Section 1373.

The City's policies comply with Section 1373 for two independent reasons. *First*, the municipal policies identified in your letter do not prohibit the City's employees from sharing immigration information with federal officials—which is all that Section 1373 purports to require. And *second*, those policies are subject to a savings clause that prevents any potential conflict with federal law.

A. The City's policies do not prohibit its employees from sharing immigration information with federal officials.

In your letter, you identified Section 1373(b) as a provision that the City's policies may violate. That subsection provides:

Additional authority of government entities

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 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.

By its plain terms, this statute “prohibits local governments from restricting government officials or entities from communicating immigration status information to ICE.” *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 509-10 (N.D. Cal. 2017), *reconsideration denied*, 2017 WL 3086064 (N.D. Cal. July 20, 2017). Contrary to what your letter appears to assume, the statute does *not* require the *collection* by state or local officials of information regarding citizenship or immigration status, but instead purports only to bar policies that preclude local entities or individuals from sending such information already in their possession to federal officials.

That common-sense understanding of the statutory text and purpose is consistent with past guidance from the Office of Justice Programs. On July 7, 2016,

the Office explained that “Section 1373 does not impose on states and localities the affirmative obligation to collect information from private individuals regarding their immigration status, nor does it require that states and localities take specific actions upon obtaining such information.” Office of Justice Programs, *Guidance Regarding Compliance with 8 U.S.C. § 1373*, at 1 (July 7, 2016), <https://goo.gl/YPD1Li>. “Rather, the statute prohibits government entities and officials from taking action to prohibit or in any way restrict the maintenance or intergovernmental exchange of such information, including through written or unwritten policies or practices.” *Id.*¹

In your letter, you identified two City policies that “may violate Section 1373.” Both, however, are wholly consistent with the above interpretation of Section 1373—an interpretation that, as we have described, is required by Section 1373’s text and your Office’s past guidance.

First, you identified Municipal Code § 4.18.015. That section provides:

A. Notwithstanding Seattle Municipal Code Section 4.18.010, unless otherwise required by law or by court order, no Seattle City officer or employee shall inquire into the immigration status of any person, or engage in activities designed to ascertain the immigration status of any person.

B. Seattle Police officers are exempt from the limitations imposed by subsection A, above, with respect to a person whom the officer has reasonable suspicion to believe: (1) has previously been deported from the United States; (2) is again present in the United States; and (3) is committing or has committed a felony criminal-law violation.

Relatedly, Municipal Code § 4.18.010 provides:

City officers and employees are directed to cooperate with, and not hinder, enforcement of federal immigration laws.²

¹ On May 31, 2016, then-Inspector General Michael E. Horowitz agreed that Section 1373 “does not ‘require’ the disclosure of immigration status information; rather, it provides that state and local entities shall not prohibit or restrict the sharing of immigration status information with ICE.” Memorandum from Michael E. Horowitz, Inspector General, to Karol V. Mason, Ass’t Att’y Gen., Office of Justice Programs (May 31, 2016), at 5-6 n.7, <https://goo.gl/7bhFHd>.

² Seattle Ordinance 121063, promulgated in 2003, generally instructs City employees to refrain from inquiring about the immigration status of any person; an exception is

As is evident from their text, neither provision bars City employees from sharing immigration information with federal authorities in violation of Section 1373. To the contrary: Section 4.18.010 requires City employees *to cooperate* with federal authorities. Section 4.18.015, meanwhile, simply restricts City employees from collecting immigration information by asking City residents and visitors intrusive questions about their immigration status—while *allowing* police officers to do so in specified circumstances, consistent with the City’s self-imposed responsibility to cooperate with federal authorities.

As should be evident from the terms of these provisions, neither bars City employees from “[s]ending such information [regarding immigration status] to [federal authorities],” “[m]aintaining such information,” or “[e]xchanging such information with any ... Federal, State, or local government entity.” That is all that Section 1373 purports to require.

Second, you identified Seattle Executive Order 2016-08 as potentially problematic. Section 1 of that Order provides:

City employees will not ask about immigration status.

Executive Order 2016-08 does not depart from Section 1373 for the same reasons that are described above. Indeed, the order simply reiterates the policy set forth in Seattle Ordinance 121063, which enacted Municipal Code § 418.015: it assures that City employees may share immigration information with federal authorities, providing only that they may not question City residents and visitors regarding their immigration status.

These policies serve essential City interests and objectives. As the City recently reaffirmed, “Seattle benefits tremendously from the large number of diverse immigrants and refugees who contribute to the development of a culturally and economically diverse and enriched community.” *Welcoming Cities Resolution*, Seattle City Council (Jan. 30, 2017), <https://goo.gl/IFpFln>. The City has concluded that a rule precluding inquiry into immigration status furthers public safety and health: such an approach encourages members of immigrant communities both to cooperate with law enforcement personnel in preventing and solving crime, and to seek health assistance when necessary. As you doubtless know, such policies are overwhelmingly supported by local law enforcement personnel across the Nation. See, e.g., M.C.C. Immigration Committee Recommendation for Enforcement of Immigration Laws by Local Police Agencies: Adopted by MCC June 2006, at 5-6, <https://goo.gl/SvTaAC>.

In sum, neither of the City policies identified in your letter violates Section 1373(b). Cf. *City of Philadelphia v. Sessions*, 2017 WL 5489476, at *22, *56-58, *62 (E.D. Pa. Nov. 15, 2017) (“[T]he Court finds that the City is in substantial compliance

made for police officers who have a reasonable suspicion that a person is committing or has committed a felony criminal-law violation.

with the Challenged Conditions for the FY 2017 Byrne JAG grant and that it can certify its compliance with Section 1373.”). We are not aware of any other City policies that may conflict with Section 1373.

B. The City’s savings clause prevents any conflict with federal law.

Moreover, even if it is assumed (counter-factually)—as your letter suggests—that these policies “appear[]” to restrict compliance with Section 1373(b), the savings clause you identify would prevent any such conflict and ensure that Seattle operates well within the letter of federal law. Municipal Code § 4.18.015 states that the limitations it places on the collection of immigration-status information apply “*unless otherwise required by law or by court order.*” (emphasis added). If Section 1373(b) is determined by a court to conflict with Seattle’s policy and require such inquiries, and if this reading is determined to be constitutionally permissible, the savings clause would operate to limit the application of the City’s policy and ensure compliance with the federal law. Likewise, if a court were to order activity that conflicts with the restrictions in the Municipal Code, the savings clause would mandate adherence to any such lawful court order. This reasoning applies with equal force to Executive Order 2016-08, which reiterates the policy established in Municipal Code § 4.18.015. There can be no conflict with federal law because both the Municipal Code and, by extension, the Executive Order explicitly recognize the supremacy of federal law.

As previously noted, there is no basis in the text of Section 1373(b) or past federal guidance regarding that statute to create a requirement that state or local officials collect information regarding citizenship or immigration status. But if Section 1373 is authoritatively read in such a manner—at odds with its plain meaning and historical understanding—Seattle’s policy *still* complies thanks to operation of the savings clause.

II. The Federal Government May Not Condition Byrne JAG Funding On Compliance With Section 1373.

Although the City thus submits this letter in response to your inquiry and certifies that it complies with Section 1373, the City also must express its emphatic view that the Justice Department may *not* condition Byrne JAG funding on compliance with Section 1373. Your contrary suggestion is inconsistent with both the relevant statutory provisions and the U.S. Constitution.

A. There is no statutory authority for conditioning Byrne JAG funding on compliance with Section 1373.

At the outset, your letter fails to identify any statutory authority for conditioning Byrne JAG funds on compliance with Section 1373. Although you have previously identified two sources of statutory authority for your request, neither is apposite.

First, you have pointed to your authority to “exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants.” 34 U.S.C. § 10102(a)(6). But this catch-all provision cannot be stretched to authorize the placement of conditions on Byrne JAG funding. For starters, Section 10102(a)(6)’s “grant of authority to the [Assistant Attorney General] is located in a different subchapter from the Byrne Program” and “does not state that it applies . . . to the rest of the chapter, let alone [to] the Byrne JAG Program.” *City of Philadelphia v. Sessions*, 2017 WL 5489476, at *26 (E.D. Pa. Nov. 15, 2017). In addition, Congress exercised care in determining who may place conditions on the disbursement of specified federal funds, thus indicating that Congress’s failure to assign such express authorization to your office is a sign that the office lacks this authority. *See id.* (“[I]f 34 U.S.C. § 10102(a)(6) were to apply to the Byrne Program, it would render superfluous the explicit statutory authority Congress gave the Director of the Bureau of Justice Assistance (‘BJA’) on other BJA grants.”); *id.* (“Congress delegated authority to impose conditions on other grants in the same chapter, and did so clearly.”). “Thus, it is clear that § 10102(a)(6) was not intended to confer upon the Attorney General the authority to impose” these conditions. *Id.* at *27.

Second, you have referenced 34 U.S.C. § 10153(a)(5)(D), which provides that Byrne JAG fund applicants “will comply with all provisions of this part and all other applicable Federal laws.” Because “Section 1373 is not contained within the same Part as 34 U.S.C. § 10153(a)(5)(D),” your assertion of “Congressionally-delegated authority turns on the phrase, ‘all other applicable Federal laws.’” *City of Philadelphia*, 2017 WL 5489476, at *29. But you have failed to explain why Section 1373 is an “applicable Federal law[].” And given that the Byrne JAG program “supports state and local law enforcement efforts by providing additional funds for personnel, equipment, training, and other criminal justice needs,” *City of Chi. v. Sessions*, 2017 WL 4081821, at *1 (N.D. Ill. Sept. 15, 2017), it strains credulity to claim that a provision of federal immigration law is “applicable” or related to those goals.³

³ In addition, the Justice Department may also be estopped from asserting that the City’s policies preclude Seattle from receiving grants under the Byrne JAG program. “Equitable estoppel prevents a party,” even the federal government, “from assuming inconsistent positions to the detriment of another party.” *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 96 (9th Cir. 1970). The municipal policies mentioned in your letter date back to 2003—when Seattle Ordinance 121063 enacted Municipal Code § 4.18.015—yet the City has received Byrne JAG grants for years without any suggestion that Seattle might be ineligible for them. The Justice Department may not change course now, after the City has structured its finances and programs in reliance on the availability of Byrne JAG grants.

B. Conditioning Byrne JAG funding on compliance with Section 1373 violates the Constitution.

In addition to lacking statutory authorization to condition Byrne JAG funding on compliance with Section 1373, the imposition of such a condition by the Executive Branch would run afoul of both the Tenth Amendment's anti-commandeering principle and the U.S. Constitution's Spending Clause.

It is well established that, under the Tenth Amendment, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997); see also *New York v. United States*, 505 U.S. 144, 188 (1992). "That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 533 (N.D. Cal. Apr. 25) (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) ("*NFIB*"). This "anti-commandeering principle" prohibits the federal government from forcing a State or municipality to make a change in policy or even to make a policy determination. See, e.g., *Printz*, 521 U.S. at 925-28.

Yet that is exactly what conditioning Byrne JAG funding on compliance with the Justice Department's current reading of Section 1373 would purport to accomplish. By threatening to cut federal funds if the City does not certify compliance with your interpretation of Section 1373, your request would be designed to force the City to change its longstanding policing practices and to undermine its management of municipal personnel, impermissibly undermining local policy determinations. Such an action is proscribed by the Tenth Amendment's anti-commandeering principle. See *Santa Clara I*, 250 F. Supp. 3d at 525-26; *City of Seattle v. Trump*, 2017 WL 4700144, at *7-8 (W.D. Wash. Oct. 19, 2017) (denying government's motion to dismiss as to anti-commandeering claim).

Your request also runs afoul of the Spending Clause, which provides that Congress may expend funds to "provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Although Congress "may fix the terms on which it shall disburse federal money," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), the federal government's discretion is cabined in two significant ways. Even if it is assumed that Congress authorized the condition of Byrne JAG awards on compliance with Section 1373, both of those federalism protections would be violated by such a condition.

First, conditions on federal funds must be stated "unambiguously" so that states and localities may "exercise their choice knowingly, cognizant of the consequences of their participation." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst*, 451 U.S. at 17); see also *NFIB*, 567 U.S. at 577 ("The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract.") (internal quotation marks and citations omitted). But federal law nowhere unambiguously states

compliance with the Justice Department's current reading of Section 1373 as a condition for receiving (or losing) Byrne JAG funds.

Second, any conditions on the receipt of federal funds "must . . . bear some relationship to the purpose of the federal spending." *New York*, 505 U.S. at 167. Without such a "nexus," the attachment of conditions could nullify the Constitution's protections of federalism. *Id.* But as one court properly has explained, "the Byrne JAG statute is clearly designed for the purpose of enhancing *local* criminal justice" and thus "the argument that enforcement of federal immigration laws is related to this objective is unsustainable." *City of Philadelphia*, 2017 WL 5489476, at *48. The City spends its grant funds on the Seattle Police Department's crime prevention coordinators who work with community members to decrease crime by developing, implementing, and coordinating a variety of crime prevention programs.


For these reasons, conditioning Byrne JAG funding on compliance with Section 1373 would violate the Spending Clause. *See id.* at *48-52 (concluding that conditioning of Byrne JAG funds on compliance with Section 1373 likely violates the Spending Clause); *see also City of Seattle*, 2017 WL 4700144 at *8-9 (denying government's motion to dismiss as to Spending Clause claim); *Santa Clara*, 250 F. Supp. 3d at 532-33 (granting preliminary injunction on Spending Clause grounds).

* * * *

In sum, having reviewed the relevant provisions of Seattle law, we are confident that all of the City's policies are wholly consistent with Section 1373. Having said that, we also believe that any attempt to deny Seattle the Byrne JAG funding to which it otherwise is entitled for asserted noncompliance with Section 1373 would be both insupportable as a matter of federal statutory law and inconsistent with the U.S. Constitution.

Should you or your office have any questions about this or wish to discuss it further, please do not hesitate to contact us.

Sincerely,

/s/ 
Jenny A. Durkan
Mayor, City of Seattle

/s/ 
Pete Holmes
City Attorney, City of Seattle