

# **MEMORANDUM OF AGREEMENT/JOINT POWERS AGREEMENT**

## **BETWEEN**

### **U.S. DEPARTMENT OF HOMELAND SECURITY IMMIGRATION AND CUSTOMS ENFORCEMENT**

## **And**

### **SOUTH DAKOTA OFFICE OF ATTORNEY GENERAL**

#### **I. PURPOSE**

The purpose of this Memorandum of Agreement/Joint Powers Agreement (MOA) is to set forth the responsibilities of the Department of Homeland Security (DHS) Immigration and Customs Enforcement located at 500 12<sup>th</sup> Street, SW, Washington, DC 20536 (ICE) and the South Dakota Attorney Generals Office which includes the Division of Criminal Investigation and Bureau of Criminal Statistics, located at 1302 East Highway 14, Suite 5, Pierre, South Dakota 57501-8501 (State Identification Bureau "SIB") regarding implementation of the Secure Communities (SC) initiative related to biometric interoperability. SC is a comprehensive ICE initiative that focuses on the identification and removal of aliens who are convicted of a serious criminal offense and are subject to removal, including the utilization of advanced biometric and communications technology to share information among law enforcement agencies (LEAs) to identify, detain and remove from the United States aliens who have been convicted of a serious criminal offense and are subject to removal.

#### **II. AUTHORITY**

Immigration and Nationality Act (INA) provisions regarding identification, detention, arrest and removal of aliens (8 USC §1226(c); 8 USC §1226(d); 8 USC §1226(e); 8 USC §1227(a) (2); and 8 USC §1228); the INA provision regarding liaison activities with internal security officers and data exchange (8 USC §1105); and FY 2008 DHS Appropriations Act (Pub. L. No. 110-161, 121 Stat. 1844, 2365 (2007)); and SDCL chapters 1-24, 23-3, 23-5 and 23-6.

#### **III. THE GOALS OF SECURE COMMUNITIES**

ICE is committed to improving community safety by transforming the manner in which the federal government cooperates with state and local LEAs to identify, detain and remove aliens convicted of a serious criminal offense. ICE utilizes advanced technology to improve information sharing among LEAs and will apply a risk-based methodology to focus resources.

To accomplish this goal, ICE leverages business and technical agreements between the DHS United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program's Automated Biometric Identification System (IDENT) and the Federal Bureau of Investigation's (FBI) Criminal Justice Information Services (CJIS) Division Integrated Automated Fingerprint Identification System (IAFIS). The combined biometric and communications technology is known as IDENT/IAFIS Interoperability.

For the purpose of SC, the SIB and the state and local LEAs will continue to operate pursuant to the FBI CJIS Division's established policies and agreements. This MOA does not affect a state's existing relationship with the FBI CJIS Division. Rather, the MOA builds on and enhances that relationship. Neither the SIB nor any state or local LEA that is subject to this MOA will be responsible for determining an individual's immigration status or whether a particular conviction renders an individual removable pursuant to the INA.

- A. The SC initiative focuses on three objectives:
  - i. Identify aliens in federal, state and local custody charged with or convicted of a serious criminal offense who are subject to removal and those aliens who have prior convictions for serious criminal offenses and are subject to removal who are currently at large;
  - ii. Prioritize enforcement actions to ensure apprehension and removal of aliens convicted of serious criminal offenses; and,
  - iii. Transform criminal alien enforcement processes and systems to achieve lasting results.
  
- B. ICE will employ a risk-based approach to identify aliens charged with or convicted of a serious criminal offense and incarcerated in jails and prisons throughout the United States who are eligible for removal based on the severity of their offenses. The risk basis for determining the threat to community safety relies on a three-level hierarchy of aggravated felonies and other serious offenses. Appendix A contains a description of the state and federal criminal offenses that comprise Levels 1, 2 and 3.
  - i. This approach will build on the ICE Criminal Alien Program (CAP), which is currently in use in all federal and state prisons.
  - ii. The SC risk-based approach classifies aliens convicted of a criminal offense into three levels, starting with those who present the greatest threat:

**Level 1:** Individuals who have been convicted of major drug offenses, national security crimes, and violent crimes such as murder, manslaughter, rape, robbery and kidnapping;

**Level 2:** Individuals who have been convicted of minor drug and property offenses such as burglary, larceny, fraud and money laundering; and

**Level 3:** Individuals who have been convicted of other offenses.

- iii. ICE is committed to identifying aliens convicted of serious criminal offenses who are subject to removal in all three category levels, with a priority assigned on the basis of risk to individuals convicted of Level 1 offenses. ICE continues to exercise discretion through its field offices in taking enforcement action in cases of aliens convicted of Level 2 and 3 offenses as each situation demands. At no time shall this MOA be construed to limit the discretion of ICE in managing detention resources.
- C. To facilitate the goals of SC, ICE is partnering with DHS components, including U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP) and the US-VISIT Program. ICE federal interagency partners include the Department of State, Department of Justice (DOJ), Bureau of Prisons, Executive Office for Immigration Review, Executive Office of United States Attorneys, U.S. Marshals Service and FBI CJIS Division. Appendix B contains acronyms and abbreviations frequently used in the SC initiative.

#### **IV. STATE IDENTIFICATION BUREAU (SIB) RESPONSIBILITIES**

- A. The SIB responsibility under this MOA begins when the LEA submits a Criminal Answer Required (CAR) request, as appropriate according to CJIS procedure, to SIB of the state in which the individual is being booked. SIB will then electronically send the fingerprints to the FBI CJIS Division. Receipt of the CAR will initiate a search of both IAFIS and US-VISIT IDENT. However, National Fingerprint File (NFF) states send fingerprints to the FBI CJIS Division only at the time of the initial arrest. Second or subsequent criminal bookings in the NFF states result in a Criminal Print Ident (CPI) file maintenance message to the FBI CJIS Division. In the case of a subsequent arrest for a National Fingerprint File (NFF) state, SIB will forward a CPI file maintenance message instead of a CAR to FBI CJIS Division. There is no change in IAFIS processing.
- B. If there is a match in IDENT, and the SIB has the technical capabilities to receive the response message, CJIS transmits the search results in a joint IDENT Data Response (IDR) and Immigration Alien Response (IAR) to the SIB. The SIB will in turn relay that response to the local LEA. If the SIB does not have the technical capability to receive or relay the response message, CJIS, at the request of the SIB, will not send the SIB a match

message. A “no match IDR” will be generated when a match is not found in IDENT and routed in the same manner as an IDR and IAR.

## **V. ICE RESPONSIBILITIES**

ICE will prioritize the processing of aliens convicted of Level 1 offenses. ICE will detain and seek to remove Level 1 offenders after the completion of the individual’s sentence. For those aliens who have prior Level 1 convictions that are discovered during the booking process, ICE will initiate steps to take such individuals into custody for removal based on their prior Level 1 conviction(s) as well as current charges, once the charges have been adjudicated.

- A. Once fingerprint information is received by IAFIS, it will be cross-checked against the DHS US-VISIT IDENT system.
- B. Upon receipt of an Immigration Alien Query (IAQ) from the FBI CJIS Division that there has been a match with the subject’s fingerprint in IDENT, ICE Law Enforcement Support Center (LESC) will conduct an immigration status determination.
- C. When an alien is identified as having prior Level 1 convictions and is subject to removal or is currently charged with a Level 1 offense and is subject to removal, ICE will take the alien into custody after completion of the individual’s sentence or when released from local custody and will institute removal proceedings, as necessary.
- D. ICE will rely on establishing in the field a “24/7” IDENT/IAFIS Interoperability response capability and may utilize video conferencing (VTC) to streamline the process of identifying and removing aliens convicted of a serious criminal offense.

## **VI. PERIOD OF AGREEMENT**

This MOA shall be effective upon signing by both parties and will remain in effect until terminated by either party in accordance with the Section (below): MODIFICATIONS AND TERMINATION.

## **VII. DISPUTE RESOLUTION**

The parties agree that, should any disagreements arise as a result of this MOA, the first attempt at resolution shall occur at the program office level with the area(s) of disagreement reduced to writing and submitted to the appropriate program office point of contact (POC). If a resolution cannot be reached at this level, the disagreement will be raised to the agency level in accordance with component procedures. If, after good faith

attempts to resolve, the disagreement continues, either party may terminate this MOA under the terms provided in Paragraph VIII.

## **VIII. MODIFICATIONS AND TERMINATION**

This MOA may be modified at any time by mutual written consent of both parties.

This MOA will remain in effect from the date of signing until it is terminated by either party. Either party, upon 30 days written notice to the other party, may terminate the MOA at any time. A termination shall take effect 30 days after receipt of such notice.

Either party, upon written or oral notice to the other party, may temporarily suspend activities under this MOA when resource constraints or competing priorities necessitate. Notice of termination or suspension by ICE shall be given to the SIB POC. Notice of termination or suspension by the SIB shall be given to the ICE POC. The temporary suspension of activities will take effect immediately upon receipt of such notice.

Notwithstanding any other provision, this SIB's activities under this MOA depend upon the continued availability of appropriated funds and expenditure authority for the purposes contemplated herein. This MOA will be terminated by the SIB if the South Dakota Legislature fails to appropriate funds or grant expenditure authority or if there is a lack of sufficient appropriated funds or lack of expenditure authority available to the SIB to perform its obligations under this MOA, whether due to lack of appropriations by the respective Legislature or otherwise. Once the determination of funding insufficiency is made, the SIB will provide written notice of such funding insufficiency and the effective date of the termination of the MOA based upon such insufficiency.

Use of IDENT/IAFIS for the purposes of racial and/or ethnic profiling or other activity in violation of the Fourth Amendment of the United States Constitution is not permitted and may result in the suspension of the local jurisdiction engaged in the improper activity. ICE reserves the right to take appropriate remedial action if necessary.

## **IX. COSTS, EXPENDITURES AND SOVEREIGNTY**

Parties to this MOA are responsible for their own costs associated with carrying out activities under this MOA. Nothing in this MOA is intended to imply that either Congress or state or local legislatures will appropriate funding for activities under this MOA.

Both parties to this MOA recognize the sovereignty of the other and the immunities inherent with such sovereignty. Nothing in this MOA shall be construed as an indemnification by one party or the other for the liabilities, acts, or omissions of the other party or third persons arising out of this agreement. Liability for the acts or omissions of the parties, their employees, agents, contractors, assigns, or other third persons arising out of and during this MOA shall be determined according to applicable law, subject to all available defenses and immunities.

## **X. RELEASE OF INFORMATION TO THE MEDIA AND OTHER THIRD PARTIES**

SIB may, at its discretion, communicate the substance of this MOA to law enforcement professional organizations expressing an interest in the law enforcement activities to be engaged in under this MOA. It is ICE practice to provide a copy of this MOA to requesting media outlets only after both parties have signed the MOA. Local LEAs are authorized to do the same. However, the release of statistical information regarding the SC initiative will be coordinated with the ICE Public Affairs Office POC identified in Appendix D.

SIB hereby agrees, to the extent authorized by law, to coordinate with ICE regarding information to be released to the media regarding actions taken under this MOA. The POCs for ICE and the SIB for this purpose are identified in Appendix C.

## **XI. GENERAL ADMINISTRATIVE PROVISIONS**

The parties declare that no specific entity is being created to implement this MOA, and that the parties shall administer through their authorized designees the cooperative undertaking herein described. The authorized designees shall be the Director of the South Dakota Criminal Investigation for SIB and the Executive Director of Secure Communities for ICE, or such authorized designees as either party may from time to time designate in writing.

All notices or communications herein shall be in writing and shall be sufficiently given and shall be deemed given as delivered, if delivered by personal delivery to the persons identified above or their authorized designees, or if delivered by mail, shall be sent by first class, postage prepaid at the addresses set forth above. The parties, by giving notice hereunder, may designate any further or different addresses to which subsequent notices, certificates, and other communications shall be sent.

The parties acknowledge that a true and correct copy of this MOA will be filed with the South Dakota Office of Attorney General and the Legislative Research Council within 14 days of its final execution pursuant to SDCL 1-24-6.1.

## **XII. SUMMARY OF ICE AND STATE LAW ENFORCEMENT AGENCY RESPONSIBILITIES**

This MOA does not, nor is it intended to, nor shall be construed to create any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal.

By signing this MOA, each party represents it is fully authorized to enter into this MOA and accepts the terms, responsibilities, obligations and limitations of this MOA.

Date: 6.15.10

Date: 6-9-10



*for* David J. Venturella  
Executive Director, Secure Communities  
Immigration and Customs Enforcement



Marty J. Jackley  
Attorney General



Bryan Gortmaker, Director  
Division of Criminal Investigation

APPENDIX A

*Secure Communities Levels and Offense Categories by NCIC Code*

| Level 1 Crimes<br>(NCIC Code)                   | Level 2 Crimes<br>(NCIC Code)           | Level 3 Crimes<br>(NCIC Code)           |
|---|---|---|
| National Security* (0101-0199, 1602, 5204-5299) | Arson (2001-2099)                       | Military (0201, 2099)                   |
| Homicide (0901-0999)                            | Burglary (2201-2299)                    | Immigration (0301-0399)                 |
| Kidnapping (1001-1099)                          | Larceny (2301-2399)                     | Extortion (2102-2199)                   |
| Sexual Assault (1101-1199)                      | Stolen Vehicles (2401-2411, 2499)       | Damage Property (2901-2903)             |
| Robbery (1201-1299)                             | Forgery (2501-2599)                     | Family Offenses (3801, 3804-3899)       |
| Aggravated Assault (1301-1399)                  | Fraud (2601-2699)                       | Gambling (3901-3999)                    |
| Threats (1601)                                  | Embezzlement (2701-2799)                | Commercialized Sex Offenses (4001-4099) |
| Extortion –Threat to Injure Person (2101)       | Stolen Property (2801-2899)             | Liquor (4101-4199)                      |
| Sex Offenses (3601-3699)                        | Damage Property w/Explosive (2904-2906) | Obstructing the Police (4802-4899)      |
| Cruelty Toward Child, Wife (3802, 3803)         | Traffic Offenses (5402-5499)            | Bribery (5101-5199)                     |
| Resisting an Officer (4801)                     | Smuggling (5801-5899)                   | Health and Safety (5501-5599)           |
| Weapon (5201-5203)                              | Money Laundering (6300)                 | Civil Rights (5699)                     |
| Hit and Run (5401)                              | Property Crimes (7199)                  | Invasion of Privacy (5701-5799)         |
| Drugs (Sentence >1 year)                        | Drugs (Sentence < 1 year)               | Elections Laws (5999)                   |
|   |   | Conservation (6201-6299)                |
|   |   | Public Order Crimes (7399)              |

\***National Security** violations include the NCIC coded offenses of Sabotage, Sedition, Espionage and Treason (0101-0199); Terrorist Threats (1602); and Weapons, Arson/Incendiary Devices and Bombing offenses (5204-5299).



## APPENDIX B

### *Acronyms and Abbreviations*

| Acronym/Abbreviation | Definition  |
|----------------------|---|
| CAP                  | Criminal Alien Program  |
| CAR                  | Criminal Answer Required  |
| CJIS                 | Criminal Justice Information Services                           |
| CPI                  | Criminal Print Identification                                   |
| DHS                  | Department of Homeland Security                                 |
| DOJ                  | Department of Justice   |
| DRO                  | Detention and Removal Operations                                |
| FAQ                  | Frequently Asked Questions                                      |
| FBI                  | Federal Bureau of Investigation                                 |
| IAFIS                | Integrated Automated Fingerprint Identification System          |
| IAQ                  | Immigration Alien Query   |
| IAR                  | Immigration Alien Response                                      |
| ICE                  | Immigration and Customs Enforcement                             |
| IDENT                | US-VISIT Automated Biometric Identification System              |
| IDR                  | IDENT Data Response   |
| LEA                  | Law Enforcement Agency  |
| LESC                 | Law Enforcement Support Center                                  |
| MOA                  | Memorandum of Agreement   |
| OI                   | Office of Investigations  |
| ORI                  | Originating Agency Identifier                                   |
| POC                  | Point of Contact  |
| SC                   | Secure Communities  |
| SIB                  | State Identification Bureau                                     |
| SOP                  | Standard Operating Procedures                                   |
| US-VISIT             | United States Visitor and Immigrant Status Indicator Technology |

**APPENDIX C**

***Points of Contact***

The ICE and SIB points of contact for purposes of implementation of this MOA are:

**For the SIB:**

[REDACTED] b6  
ID Administrator  
South Dakota Division of Criminal Investigation  
1302 E Highway 14, Suite 5  
Pierre, SD 57501  
(605) 773- [REDACTED] b6  
[REDACTED] b6

**For ICE Detention and Removal Operations (DRO):**

Scott Banieceke  
Field Office Director  
Detention and Removal Operations  
2901 Metro Drive  
Bloomington, MN 55425  
(952) 853- [REDACTED] b6  
[REDACTED] b6

**For ICE Office of Investigations (OI):**

Claude Arnold  
Special Agent in Charge  
Office of Investigations  
2901 Metro Drive  
Bloomington, MN 55425  
(952) 853- [REDACTED] b6  
[REDACTED] b6

## **APPENDIX D**

### ***Public Information Points of Contact***

Pursuant to Section X. of this MOA, RELEASE OF INFORMATION TO THE MEDIA AND OTHER THIRD PARTIES, the signatories will coordinate with the ICE Public Affairs Office regarding release of any information about Secure Communities and/or IDENT/IAFIS Interoperability and agree to coordinate appropriate release of subsequent information to the media regarding actions taken under this MOA. The points of contact for coordinating such activities are:

#### **For the SIB:**

Paige Wilbur  
Press Secretary  
South Dakota Attorney General's Office  
1302 E Highway 14, Suite 1  
Pierre, SD 57501

#### **For ICE:**

Tim Counts  
2901 Metro Drive  
Bloomington, MN 55425  
(952) 853-2602  
[tim.counts@dhs.gov](mailto:tim.counts@dhs.gov)