

Department of Homeland Security **Office of Inspector General**

Communication Regarding Participation
in Secure Communities





Homeland
Security

March 27, 2012

Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the Department.

This report addresses how the United States Immigration and Customs Enforcement communicated the intent and requirements for participation in Secure Communities to States and local jurisdictions. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents.

The recommendations herein have been developed to the best knowledge available to our office, and have been discussed in draft with those responsible for implementation. We trust this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

A handwritten signature in black ink that reads "Charles K. Edwards". The signature is written in a cursive style with a large initial "C".

Charles K. Edwards
Acting Inspector General

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Abbreviations

DHS	Department of Homeland Security
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FY	fiscal year
IAFIS	Integrated Automated Fingerprint Identification System
ICE	United States Immigration and Customs Enforcement
IDENT	Automated Biometric Identification System
MOA	memorandum of agreement
OIG	Office of Inspector General

OIG

*Department of Homeland Security
Office of Inspector General*

Executive Summary

The Department of Homeland Security (DHS), United States Immigration and Customs Enforcement (ICE), is responsible for identifying, detaining, and removing deportable aliens from the United States. In 2008, it implemented Secure Communities to enhance its ability to identify criminal aliens nationwide. The key component of Secure Communities is interoperability, or automated information sharing, between DHS and the Federal Bureau of Investigation within the Department of Justice.

In April 2011, Representative Zoe Lofgren (California) requested that the DHS Office of Inspector General (OIG) conduct an investigation to determine whether false and misleading statements may have been made intentionally, while others were made recklessly during the Secure Communities implementation. This report covers one of two OIG reviews initiated in response to this request. The objective of our evaluation was to assess whether ICE clearly communicated to States and local jurisdictions the intent of Secure Communities and their expected participation.

We did not find evidence that ICE intentionally misled the public or States and local jurisdictions during implementation of Secure Communities. However, ICE did not clearly communicate to stakeholders the intent of Secure Communities and their expected participation. This lack of clarity was evident in its strategic plan, its outreach efforts, memorandums of agreement signed by States, and its responses to inquiries regarding participation. ICE senior leadership also missed opportunities to provide clear direction to its officials implementing Secure Communities. As a result, 3 years after implementation began; Secure Communities continues to face opposition, criticism, and resistance in some locations.

We made three recommendations intended to ensure that participation is clearly communicated for Secure Communities and future ICE programs. ICE concurred with the recommendations.

Background

United States Immigration and Customs Enforcement (ICE) is responsible for identifying, detaining, and removing deportable aliens from the United States. ICE's Enforcement and Removal Operations Programs enforce United States immigration laws by identifying and apprehending removable aliens. In addition to Secure Communities, ICE has three programs to identify and apprehend criminal aliens: the Criminal Alien Program, 287(g) Program, and National Fugitive Operations Program. Appendix D contains a description of these programs.

In the fiscal year (FY) 2008 *Consolidated Appropriations Act, 2008* (Public Law 110-161), Congress appropriated \$200 million¹ for ICE to "improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable." Within 90 days of enactment, Congress required DHS to submit a plan describing ICE's intended use of the appropriated funds, including a strategy to identify every incarcerated criminal alien, and a methodology to identify and prioritize for the removal of criminal aliens convicted of violent crimes.

In April 2008, ICE submitted to Congress *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens*. According to the strategic plan, Secure Communities would initially focus on removing high-risk removable criminal aliens from the United States, including those convicted of major drug offenses and violent offenses such as murder, manslaughter, rape, robbery, child molestation, and kidnapping, as well those who posed a risk to national security. This plan was updated in 2009 and 2010 to revise and add some information on Secure Communities.

ICE's strategic plan proposed leveraging the existing information-sharing network between State and local law enforcement agencies and the Federal Bureau of Investigation (FBI). This network was already used to notify the FBI about new arrests and detentions and match identities through fingerprints. Under Secure Communities, ICE planned to automatically share information between the FBI's

¹ From FY 2008 to FY 2011, Congress appropriated \$750 million to ICE for Secure Communities.

Integrated Automated Fingerprint Identification System (IAFIS)² and the DHS Automated Biometric Identification System (IDENT).³

Information-sharing initiatives to integrate IAFIS and IDENT began in 1998 and were later mandated by Congress. *The USA PATRIOT Act of 2001* (Public Law 107-56) required federal agencies to create a fully interoperable cross-agency electronic system to share law enforcement and intelligence information to confirm the identity of persons applying for a United States visa. It further required that the system be readily and easily accessible to federal law enforcement and intelligence officers responsible for investigating aliens. *The Enhanced Border Security and Visa Entry Reform Act of 2002* (Public Law 107-173), which amended *The USA PATRIOT Act of 2001*, required that immigration authorities have access to relevant information in federal law enforcement agencies' databases to determine whether to issue a visa or to determine the admissibility or deportability of an alien.

Under Secure Communities, when a local law enforcement agency arrests and books an individual into a local police station or jail, the agency sends the arrestee's fingerprints and booking information to the FBI to determine whether the arrestee is wanted by other law enforcement agencies or has a criminal history. The FBI, through IAFIS, can automatically share the fingerprints with DHS, which then checks them against IDENT. Interoperability allows ICE, if necessary, to request that the criminal alien be detained rather than released from the custody of the local law enforcement agency.

Secure Communities' use of interoperability first began in Harris County, Texas, in October 2008. According to one ICE official, the agency continued implementation in jurisdictions it determined had the greatest density of criminal aliens. As of December 28, 2011, ICE reported interoperability had been implemented in 2,027 jurisdictions in 44 States, or 64% of the Nation's 3,181 jurisdictions. ICE anticipates automated information sharing between IAFIS and IDENT throughout the United States by the end of 2013.

² IAFIS is a national fingerprint and criminal history system that provides automated fingerprint search capabilities, latent search capability, electronic image storage, and electronic exchange of fingerprints and responses. This national system is designed to provide automated criminal history record information and is run by the FBI within the Department of Justice.

³ IDENT is the primary DHS-wide system to collect and process biometric and limited biographic information for DHS' mission-related functions such as national security, law enforcement, immigration, and intelligence.

In April 2011, Representative Zoe Lofgren (California) requested that the OIG conduct an investigation into “any misconduct, including possible violations of criminal law” connected with the implementation of Secure Communities. Specifically, the congresswoman was interested in DHS’ responses to inquiries regarding whether participation in Secure Communities was mandatory or local jurisdictions could opt out. She asserted that some of DHS and ICE personnel’s “false and misleading statements may have been made intentionally, while others were made recklessly, knowing that the statements were ambiguous and likely to create confusion.” Appendix C contains the text of Representative Lofgren’s letter.

In response to the congresswoman’s request, OIG initiated two reviews of Secure Communities. The first review is to determine whether Secure Communities was effective in identifying criminal aliens and prioritizing cases for action. The second review is to determine whether ICE clearly communicated to stakeholders the intent of Secure Communities and the expectation of States’ and local jurisdictions’ participation. This report addresses the second part of the request. A separate report will address the effectiveness of Secure Communities.

Results of Review

Communication and Guidance Regarding Participation in Secure Communities

We did not find evidence that ICE intentionally misled the public or States and local jurisdictions during implementation of Secure Communities. However, our review revealed that ICE failed to clearly communicate the intent and expectation of participation. As required by Congress, ICE’s strategic plan included goals, but did not specify whether participation would be mandatory and did not communicate statutory or other legal support for nationwide implementation. ICE’s outreach presentations to stakeholders included conflicting information, and memorandums of agreement (MOA) signed by participating States were also inconsistent and confusing. ICE’s responses to stakeholders’ inquiries regarding participation in Secure Communities were unclear. Finally, ICE senior leadership missed opportunities to clarify the expectation of stakeholder participation and did not provide support, direction, and guidance to ICE officials who were implementing Secure Communities.

Secure Communities Strategic Plan

ICE did not include any information related to participation by States and local jurisdictions in its strategic plan for Secure Communities. Additionally, ICE's plan did not provide the statutory or other legal authority to support its intent to implement Secure Communities' use of interoperability throughout the United States. According to ICE officials, the 90-day timeframe set by Congress to submit a plan made it difficult to develop a comprehensive and detailed strategy.

Through the *Consolidated Appropriations Act, 2008* (Public Law 110-161), enacted on December 26, 2007, Congress provided ICE with \$200 million to improve and modernize efforts to identify incarcerated criminal aliens. According to the Act, no funds would be obligated until Congress received a plan for expenditures prepared and submitted by the Secretary for DHS within 90 days. The plan was to include the following:

- 1) A strategy for ICE to identify every criminal alien, at the prison, jail, or correctional institution in which they are held;
- 2) The process ICE, in conjunction with the Department of Justice (DOJ), will use to make every reasonable effort to remove, upon their release from custody, all criminal aliens judged deportable;
- 3) A methodology ICE will use to identify and prioritize for removal criminal aliens convicted of violent crimes;
- 4) Activities, milestones, and resources for implementing the strategy and process described in items (1) and (2); and
- 5) Program measurements for progress in implementing the strategy and process described in items (1) and (2).

To meet the congressional requirement, ICE developed *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens*. The April 2008 plan listed strategic goals such as identifying and processing all criminal aliens amenable for removal while in federal, State, and local custody; enhancing current detention strategies to ensure no removable criminal alien is released into the community due to a lack of detention space or an appropriate alternative to detention; implementing removal initiatives that shorten the time that criminal aliens remain in ICE custody prior to removal; and maximizing cost-effectiveness and long-term success through deterrence and reduced recidivism of criminal aliens returning to the United States. The plan focused on

the availability of resources and described the proposed approach for implementing interoperability.

The strategic plan submitted to Congress did not address whether ICE's use of interoperability would be mandatory for all States or local jurisdictions. Further, it did not include any statutory or other legal requirements for participation in Secure Communities at the State and local levels. Although the plan described ICE's intent to roll out interoperability nationwide to participating jails and prisons, it did not indicate whether participation was required. The lack of information addressing these aspects of Secure Communities left ICE unready to respond to the growing number of questions regarding both intent and participation requirements from States and local law enforcement agencies as Secure Communities' use of interoperability was implemented in more jurisdictions.

Outreach and Communication

Outreach Presentations

ICE's outreach presentations during implementation did not identify whether participation in Secure Communities was mandatory or voluntary. ICE personnel from the Secure Communities program office briefed ICE field offices, State identification boards, and local law enforcement agencies. These presentations and scripted messages were used to train and inform stakeholders about the technical aspects of interoperability. According to a member of the program office, ICE had two goals for initial briefings: to provide information on Secure Communities to State and local law enforcement agencies and to identify volunteer State governments or law enforcement agencies to participate.

These presentations focused on the technical aspects of setting up interoperability, such as an explanation of how fingerprints would be routed and shared; as well as program statistics, including the number of people who had been identified because of Secure Communities. The presentation material discussed the "need for information sharing," but the mandates behind sharing of information were not mentioned. The Secure Communities program office also acknowledged that the term "volunteer" caused confusion among stakeholders.

Word choices ICE used in the outreach presentations could lead localities to believe they had a choice to participate. For example,

charts used in 2009 required law enforcement agencies to read a set of standard operating procedures and, if in agreement, send a response to ICE affirming that they would adhere to the principles in the procedures on use of biometric (fingerprint) identification. Because agencies appeared to be able to decide whether to adhere to the standard operating procedures principles, they might have been led to believe that they could choose to participate.

The Secure Communities program office explained that, although it planned to implement interoperability nationwide by 2013, it sought out jurisdictions interested in participating and activated those first. Jurisdictions that did not wish to be activated at that time would be moved toward the end of the activation list, with the intent to have all jurisdictions activated by 2013.

Memorandums of Agreement

The use of MOAs generated questions as to whether participation in Secure Communities was voluntary or mandatory. According to current and former ICE personnel, the agency chose to use MOAs because they had been used in past enforcement and removal programs, such as the 287(g) Program, to establish the responsibilities of ICE and States or local jurisdictions. However, the 287(g) Program was a voluntary program.

Under the 287(g) Program, a State or local law enforcement entity may enter into a partnership with ICE under an MOA and be delegated authority for immigration enforcement within their jurisdiction.

Source: ICE

The 2008 Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens defines three levels of crimes:

Level 1 – Individuals who have been convicted of major drug and violent offenses such as murder, manslaughter, and rape.

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

Level 3 – Individuals who have been convicted of other offenses.

Source: ICE

ICE used MOAs to set forth its responsibilities and those of the States in the automated sharing of information on criminal aliens under Secure Communities. The MOAs were based on a template used in prior programs and, according to ICE officials, were modified for each State. In general, they included ICE's goals for Secure Communities and

described the risk-based approach to sharing information. The risk-based approach uses a three-level hierarchy of crimes to determine how criminal aliens are prioritized for detention and removal. The MOAs further noted that States were responsible for electronically submitting fingerprints of arrested individuals during book-in to the FBI to search through IAFIS. The fingerprints would then be automatically crosschecked by DHS in the IDENT system.

In the 42 MOAs we reviewed, we noted changes related to ICE's goals for Secure Communities. For example, the first MOA with California, signed in April 2009, stated that the goal was "to identify, detain, and remove aliens who have been convicted of and incarcerated for a priority Level 1 offense and who are therefore amenable to removal." An MOA with Rhode Island signed in January 2011 did not have a section with goals, but instead noted that as part of its responsibilities, "ICE will process an alien for removal proceedings, and take the alien into custody after completion of the alien's criminal sentence or when the alien is released from local custody."

All 42 MOAs we reviewed included a modification and termination clause that may have added to the confusion regarding participation in Secure Communities. The clause stated that "either party, upon 30 days' written notice to the other party, may terminate the MOA at any time. A termination notice shall be delivered personally or by certified or registered mail and termination shall take effect 30 days after receipt of such notice." Because it allows for unilateral termination, a State could interpret the language of this clause to mean it could choose not to submit fingerprints to DHS and to end its participation in Secure Communities.

In August 2011, ICE recognized that its MOAs had caused confusion among local jurisdictions that wanted to opt out. Therefore, the ICE Director issued letters to Governors in States with Secure Communities MOAs, terminating all existing MOAs. In the letter, the Director explained that ICE had determined that MOAs were not required to activate or operate Secure Communities' use of interoperability in any jurisdiction. The letter further explained that once a State or local law enforcement agency voluntarily submitted fingerprints to the federal government, no agreement with the State was legally necessary for one part of the federal government to share the information with another part. For this reason, ICE officials stated that MOAs were simply used to

communicate with partners outside DHS and were intended only as a vehicle to pass information and were never binding.

Responses to Inquiries

In answering inquiries during the implementation of Secure Communities in 2009 and 2010, ICE, and in one instance DHS, provided unclear and inconsistent responses. Inquiries from congressional leaders, States, local governments, nongovernmental organizations, and the media focused on whether participation in Secure Communities was mandatory or voluntary. They also asked whether DHS had misled States and local jurisdictions by changing which aspects of Secure Communities were mandatory. Internal and external correspondence prepared in response to such inquiries showed that ICE had not clearly defined or agreed on participation in Secure Communities.

In general, stakeholders identified four main concerns regarding implementation of Secure Communities. They indicated that it was not focused on serious criminals. Further, they explained it could strain community-police relations, inadvertently lead to racial profiling, and result in wrongful detention of those not convicted of a criminal offense.

Internal and External Correspondence

Our review of internal and external correspondence showed that ICE had not clearly defined or agreed on whether the participation in Secure Communities was mandatory or voluntary. We reviewed correspondence that included definitions of participation, such as letters to stakeholders, as well as ICE interoffice emails, presentations, talking points, and public affairs guidance. These documents revealed that, from August 2009 through August 2010, the definition of participation changed five times. Two other definitions were included in a letter from the Secretary in September 2010 and in analysis completed by ICE's Office of the Principal Legal Advisor in October 2010. Appendix E presents a timeline that includes a summary of these changes.

An August 2009 *Frequently Asked Questions* document explained that ICE was not requiring any entity to participate in information-sharing technology at the State or local levels. The document further noted that ICE would enter into an agreement with each

State identification bureau⁴ to oversee the sharing of information between ICE and the State. Each agreement would include a clause allowing either side to suspend or terminate the use of information-sharing technology with 30 days' written notice.

In March 2010, ICE public affairs guidance stated that all jurisdictions were expected to be part of Secure Communities by 2013 to comply with a congressional mandate. However, ICE did not specify which mandate. Further, the guidance noted that if a jurisdiction did not want fingerprints checked against IDENT, it would have to coordinate with the State to ensure that fingerprints were not submitted to DOJ.

An April 2010 *Frequently Asked Questions* document again stated that all jurisdictions were expected to be part of Secure Communities by 2013 to comply with a congressional mandate. A jurisdiction could choose not to receive immigration-related information on a fingerprinted individual, but that information would still be provided to ICE.

In July 2010, an email from ICE to a congressman's office explained that jurisdictions had three options for participating in Secure Communities. The Secure Communities program office defined these options as follows:

- Full participation – Law enforcement agencies would send fingerprints of every individual taken into custody to the FBI, which would forward them to DHS. DHS would then send ICE and the law enforcement agency results of the immigration check.
- Limited participation – Law enforcement agencies would send fingerprints of every individual taken into custody to the FBI, which would forward them to DHS, but the law enforcement agency could choose not to receive the results of the DHS immigration check.
- Postpone participation until 2013 – Law enforcement agencies would send fingerprints to the FBI, but the fingerprints would not be shared with DHS until nationwide implementation in 2013.

⁴ Each State has a State identification bureau that is the repository of State biometric and criminal history data and acts as the intermediary between local law enforcement agencies and IAFIS.

In August 2010, the program office again attempted to clarify participation in Secure Communities by releasing *Setting the Record Straight*. This document contained information on Secure Communities, including an explanation as to how jurisdictions could choose not to participate. It explained that if a local jurisdiction did not wish to activate information sharing on its scheduled date, it would have to formally notify the State identification bureau and ICE in writing. ICE would then discuss the jurisdiction's concerns and reach a resolution, which could include adjusting the activation date or removing the jurisdiction from the implementation plan. Although the document was intended to clarify participation in Secure Communities, it was confusing since it implied that local jurisdictions could choose not to participate.

Senior Leadership Direction, Support, and Guidance

Although it had opportunities to do so, ICE senior leadership did not provide direction, support, or guidance to ICE officials to address concerns about Secure Communities, especially whether participation was mandatory. This lack of direction and guidance from senior leadership led ICE, and in one instance DHS, to provide unclear and inconsistent information to stakeholders.

The 2009 *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens* stated that ICE intended to form an Executive Steering Committee, consisting of senior ICE leaders, to discuss, review, and approve Secure Communities initiatives and performance. However, the Executive Steering Committee was dissolved in 2010, terminating its oversight mission. An ICE program official explained that the new ICE Director chose not to use this method of oversight.

In November 2009, the Secure Communities program office drafted a memorandum for signature by the ICE Director. Its intent was to reach consensus in ICE on whether participation in Secure Communities was voluntary. The memorandum, "Clarification of Voluntary Interoperability," acknowledged that Secure Communities had stated in various forums, including Congress, that State and local participation in IAFIS/IDENT information sharing was voluntary. Further, it noted that by electing not to participate, jurisdictions could infer that IAFIS/IDENT interoperability would not be activated. Jurisdictions might then assume that fingerprints sent by nonparticipants to the FBI would not be submitted to DHS' IDENT

system. The memo stated that the FBI had indicated to the Secure Communities program office that interoperability would be fully in place by 2013. For these reasons, the program office sought to clarify the definition of voluntary participation by States and local jurisdictions.

This memorandum was never provided to the ICE Director for review and approval. According to senior ICE officials, they did not fully understand its intent or what the program office was trying to clarify, but they did not contact the program office for clarification. One senior official explained that since ICE senior leadership did not fully understand the intent of the memo, they did not submit it to the Director for review. Instead, the memorandum was marked for information only and was never signed by the ICE Director. Consequently, ICE senior leadership lost an opportunity to provide clear direction to the Secure Communities program office.

In September 2010, DHS attempted to address participation in Secure Communities. A member of Congress wrote to the Secretary of DHS, requesting a clear explanation of how local law enforcement agencies might opt out of Secure Communities by having fingerprints checked against criminal, but not immigration, databases. The Secretary responded in writing that a local law enforcement agency that did not wish to participate in Secure Communities implementation had to notify the Secure Communities program office and the State. The letter also explained that if a law enforcement agency chose not to be activated during Secure Communities implementation, the agency would be responsible for notifying its local ICE field office of suspected criminal aliens. This response conflicted with other ICE statements regarding participation.

In September 2010, the ICE Director and senior officials recognized that the agency had not prepared a thorough analysis to support the agency's position that participation in Secure Communities would be mandatory by 2013. They requested that ICE's Office of the Principal Legal Advisor prepare an analysis of opting out. The draft analysis, completed in October 2010, provided arguments supporting a position that participation in Secure Communities would be mandatory by 2013.

However, ICE officials acknowledged that, to date, this information has not been incorporated into recent communications or a single comprehensive Secure Communities document,

including the August 2011 letter from the ICE Director canceling the MOAs.

Conclusion

We did not find evidence that ICE intentionally misled the public during Secure Communities implementation. However, confusion within the agency regarding intent and participation led ICE to misinform and confuse stakeholders and the media. Initial confusion may have stemmed from the short timeframe to implement Secure Communities' use of interoperability, coupled with the assumption that prior congressional mandates for interoperability supported the current effort. However, once questions and concerns arose, senior leadership within ICE and in one instance the Department continued to exacerbate the problem by providing unclear and conflicting responses to inquiries and concerns. As a result, Secure Communities continues to face opposition, criticism, and resistance in some locations.

Recommendations

We recommend the Director, United States Immigration and Customs Enforcement:

Recommendation #1: Immediately compose and release thorough guidance and criteria that specifically outline the intent and expectations of Secure Communities. The guidance should specify which aspects of Secure Communities are optional for States and local law enforcement agencies.

Recommendation #2: Coordinate with the Department of Homeland Security to establish protocols to ensure that the Department and United States Immigration and Customs Enforcement senior leadership provide the necessary direction, guidance, oversight, and support for the intent and implementation of new immigration enforcement programs.

Recommendation #3: Generate a lessons learned document and plan for the Department of Homeland Security to use when guiding future immigration and enforcement program development and implementation.

Management Comments and OIG Analysis

ICE concurred with the recommendations. A copy of the comments in their entirety is in appendix B. We summarize and address these comments below.

Response to Recommendation #1

ICE Concurred: ICE explained that the agency has taken steps to clarify confusion surrounding whether an MOA is required for Secure Communities to operate in a State or local jurisdiction. In August 2011, ICE sent letters to the States with existing MOAs to explain that MOAs were not necessary for one part of the federal government to share fingerprint data with another.

As Secure Communities activations continue, ICE is providing briefings to law enforcement agencies in States that are capable of receiving information about identifications resulting from fingerprints processed through DHS' databases. However, in States that are not capable of receiving this information, briefings are conducted on an as-needed basis. Additionally, ICE continues to provide briefings upon request in States that have already been activated.

ICE also explained that the agency updated its website page to increase information sharing. Updates include information on how Secure Communities works, frequently asked questions, new ICE policies, the Secure Communities complaint protocol, and training materials for State and local law enforcement agencies. ICE announced the creation of a Public Advocate. This position will serve as the agency's point of contact for individuals in immigration proceedings, non-governmental organizations, and advocacy groups that have concerns, questions, recommendations, or other issues they would like to raise.

OIG Analysis: ICE's response to the recommendation included efforts to help clarify the intent and expectations of Secure Communities. However, during fieldwork, the ICE Director explained that the agency was composing a single document that outlines participation requirements for Secure Communities, such as statutory or other legal support for nationwide implementation. The agency did not fully address the intent of the recommendation. This recommendation is open and unresolved until ICE provides a

formal, publicly available document that outlines participation requirements for Secure Communities.

Response to Recommendation #2

ICE Concurred: In June 2011, ICE issued two prosecutorial discretion memorandums to provide direction and guidance on Secure Communities and ICE’s Civil Immigration Enforcement Priorities. The first memorandum, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” provided guidance to ICE law enforcement personnel and attorneys on their authority to exercise discretion when appropriate.

The second memorandum, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,” directed the exercise of prosecutorial discretion to ensure that victims and witnesses of crimes are properly protected. In addition to issuing the prosecutorial discretion memorandums, ICE launched a comprehensive training program on the appropriate use of both memorandums. As of January 2012, all Enforcement and Removal Operations management and ICE attorneys nationwide have completed scenario-based prosecutorial discretion training.

OIG Analysis: ICE’s response to this recommendation did not fully address the issue of establishing protocols to ensure that DHS and ICE senior leadership provide the necessary direction, guidance, oversight, and support for the intent and implementation of new immigration enforcement programs. The two memorandums that ICE cited provide guidance to ICE field personnel on applying existing immigration programs. They do not address how the Department and agency can improve internal communication to minimize the issuance of unclear or inconsistent information to stakeholders.

This recommendation will remain unresolved until ICE provides its plans for developing protocols outlining procedures, roles, and responsibilities and the names of the responsible officials. The recommendation will remain open until ICE provides a copy of the final approved protocols.

Response to Recommendation #3

ICE Concurred: The ICE Office of Policy will work with agency program offices and DHS to develop a lessons learned document to use to plan future enforcement programs, priorities, and implementation.

OIG Analysis: This recommendation is unresolved until ICE provides milestone dates for the completion of the lessons learned document and names of the responsible officials. The recommendation will remain open until ICE provides a copy of the final lessons learned document.

Appendix A

Purpose, Scope, and Methodology

Our objective was to determine whether ICE clearly communicated the intent of Secure Communities and the expectation of stakeholder participation to States and local jurisdictions.

We interviewed officials from various ICE headquarters offices, including the Office of the Director; Office of the Principal Legal Advisor; Enforcement and Removal Operations; Office of Public Affairs; Office of State, Local, and Tribal Coordination; and Office of Congressional Relations. We also interviewed field office officials in Phoenix, Arizona; San Francisco, California; and Washington, DC.

We reviewed prior audit and evaluation reports, relevant laws, regulations, strategic plans, standard operating procedures, policies, and ICE's organizational charts. We reviewed memorandums of agreement, public release statements, media reports, outreach documents, legal analyses, talking points, opt-out requests, and other documents released to the public through the *Freedom of Information Act*.

We also reviewed ICE interoffice communications, which consisted of emails, presentations, talking points, and public affairs guidance. The correspondence included discussions within ICE and outside of the agency to stakeholders dating from February 2009 through June 2011.

Appendix A

Purpose, Scope, and Methodology

We selected nine locations to visit, including three State identification bureaus and seven local law enforcement agencies.⁵ We chose to visit States and local law enforcement agencies that are participating through Secure Communities, as well as those that have requested to opt out of Secure Communities. We visited the following:

Arizona	<ul style="list-style-type: none">• Maricopa County Sheriff's Office• Tucson Police Department
California	<ul style="list-style-type: none">• California Department of Justice• San Francisco Sheriff's Department• San Mateo County Sheriff's Office• Santa Clara County Sheriff's Office
District of Columbia	<ul style="list-style-type: none">• Metropolitan Police Department of the District of Columbia
Virginia	<ul style="list-style-type: none">• Arlington County Police Department• Virginia State Police

We conducted this review under the authority of the *Inspector General Act of 1978*, as amended, and according to the *Quality Standards for Inspections, January 2011*, issued by the Council of the Inspectors General on Integrity and Efficiency.

⁵ The Metropolitan Police Department of the District of Columbia is both the State identification bureau and the local law enforcement agency.

Appendix B
Management Comments to the Draft Report

Office of the Chief Financial Officer

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536



**U.S. Immigration
and Customs
Enforcement**

February 23, 2012

MEMORANDUM FOR: Charles K. Edwards
Acting Inspector General
Office of Inspector General

FROM: *for Martin H. Sabelstein*
Radha C. Sekar
Chief Financial Officer

SUBJECT: Communication Regarding Participation in Secure
Communities -- OIG Project No. 11-141-AUD-ICE

U.S. Immigration and Customs Enforcement (ICE) is pleased to provide a response to the draft report for this subject audit. ICE concurs with the three recommendations and our comments are attached.

If you have any questions, please contact Michael Moy, OIG Portfolio Manager, at 202-732-6263, or via email at Michael.Moy@dhs.gov.

Attachments

Appendix B

Management Comments to the Draft Report

Recommendation 1: Immediately compose and release thorough guidance and criteria that specifically outline the intent and expectations of Secure Communities. The guidance should specify which aspects of Secure Communities are optional for states and local law enforcement agencies.

Response: U.S. Immigration and Customs Enforcement (ICE) concurs with this recommendation. As stated in the draft report, ICE has taken steps to clarify any confusion surrounding whether a memorandum of agreement (MOA) is required for Secure Communities to operate in a state or local jurisdiction. Because ICE determined that an MOA is not required, ICE terminated all existing MOAs in 2011. This determination is based on a 2002 congressional mandate for federal law enforcement agencies to share information that is relevant to determine the admissibility or deportability of an alien. See 8 U.S.C. § 1722(a)(2).

In August 2011, ICE sent letters to the states that had existing Secure Communities MOAs to explain the determination that MOAs were not necessary to operate the program. The letter informed states that “ICE has determined that an MOA is not required to activate or operate Secure Communities for any jurisdictions. Once a state or local law enforcement agency voluntarily submits fingerprint data to the federal government, no agreement with the state is legally necessary for one part of the federal government to share it with another part.”

The information-sharing partnership between the U.S. Department of Homeland Security (DHS) and the Federal Bureau of Investigation (FBI), which serves as the cornerstone of Secure Communities, is mandated by federal law. As a result, Secure Communities is mandatory in that, once the information-sharing capability is activated for a jurisdiction, the fingerprints that state and local law enforcement voluntarily submit to the FBI for criminal justice purposes to be checked against the Department of Justice’s (DOJ) biometric identification system for criminal history records are automatically sent to DHS’ biometric system to check against its immigration and law enforcement records. The United States government has determined that a jurisdiction cannot choose to have the fingerprints it submits to the federal government processed only for criminal history checks. Further, jurisdictions cannot demand that the identifications that result from DHS’ processing of the fingerprints not be shared with local ICE field offices in that jurisdiction. It is ICE, and not the state or local law enforcement agency, that determines what immigration enforcement action, if any, is appropriate. As Secure Communities activations continue, ICE is providing briefings to law enforcement agencies in states that are capable of receiving information about identifications that result from processing fingerprints through DHS’s databases. However, in states that are not capable of receiving this information, briefings are conducted on an as needed basis. Additionally, ICE continues to provide briefings upon request in states that have already been activated.

ICE has further clarified the intent and expectations of Secure Communities through expanded outreach efforts with key stakeholders at the national, state, and local levels, involving both government offices and community groups. During 2011, ICE conducted

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more than 730 in-person or telephonic meetings and presentations regarding Secure Communities with various law enforcement agencies, the general public, congressional representatives, immigration advocates, and foreign embassy representatives. ICE officials also attended several official government meetings and public town halls. These meetings served as an opportunity to clarify the goals and objectives of Secure Communities and explain the responsibilities of all of the participants involved. In addition, in October 2011, Secretary Napolitano and Director Morton spoke with state and local law enforcement agencies at the International Association of Chiefs of Police (IACP) Conference about ICE's enforcement priorities and efforts, including issues related to Secure Communities.

ICE updated the ICE.gov Secure Communities webpage (http://www.ice.gov/secure_communities/) to provide additional transparency and increased information sharing. These updates include information on how Secure Communities works, frequently asked questions, new ICE policies, the Secure Communities complaint protocol, and training materials for state and local law enforcement agencies. ICE and the DHS Office of Civil Rights and Civil Liberties partnered to develop the training and awareness briefings primarily for use by front line state and local law enforcement agency personnel during daily muster or roll call briefings.

Furthermore, in February 2012, ICE announced the creation of the Public Advocate. This new senior agency position will serve as a point of contact for individuals, including those in immigration proceedings, non-governmental organizations and other community and advocacy groups, who have concerns, questions, recommendations or other issues they would like to raise. This individual will build constructive relationships with the community and help resolve problems or concerns.

ICE requests this recommendation be considered Resolved and Closed, based on actions already taken to clarify the intent of Secure Communities.

Recommendation 2: Coordinate with the Department of Homeland Security to establish protocols to ensure the Department and United States Immigration and Customs Enforcement senior leadership provide the necessary direction, guidance, oversight, and support for the intent and implementation of new immigration enforcement programs.

Response: ICE concurs with this recommendation. In fiscal year 2011, DHS and ICE senior leadership made significant efforts to provide the necessary direction and guidance on Secure Communities and ICE's Civil Immigration Enforcement Priorities. On June 17, 2011, Director Morton issued two memoranda; the first, titled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (hereafter "June 17, 2011 Prosecutorial Discretion memorandum"), provides guidance to ICE law enforcement personnel and attorneys regarding their authority to exercise discretion when appropriate. This authority is designed to help ICE better focus its enforcement activities

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on meeting the priorities of the agency and to use limited resources to target criminals and those that put public safety at risk, as well as repeat immigration law violators, recent border crossers, and immigration fugitives. The second memorandum, titled "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," also directs the exercise of prosecutorial discretion to ensure that victims of and witnesses to crimes are properly protected. These memoranda are not only applicable to current ICE enforcement programs, but serve as the parameters for any new immigration enforcement programs.

On September 29, 2011 and October 24, 2011, Secretary Napolitano met with supervisory ICE Enforcement and Removal Operations (ERO) officers and ICE attorneys to discuss the agency's enforcement priorities and the importance of these initiatives. During the past several months, ICE Director Morton, along with other members of ICE's senior leadership team, traveled around the country to personally instruct ERO officers and ICE attorneys on the appropriate use of prosecutorial discretion.

In addition, on November 17, 2011, ICE launched a comprehensive training program on the appropriate use of both prosecutorial discretion memoranda. This program consists of scenario-based training that emphasizes how the prosecutorial discretion memoranda should be utilized in order to focus immigration enforcement resources on ICE priorities. This comprehensive training program was built upon training that had already occurred after the issuance of the June 17, 2011 Prosecutorial Discretion memorandum. As of January 2012, all ERO management and ICE attorneys nationwide have completed scenario-based prosecutorial discretion training.

Furthermore, ICE senior leadership are providing oversight and support to ICE attorneys nationwide that are reviewing all incoming cases in immigration court. The review is based on the prosecutorial discretion memorandum, and guided by a set of more focused criteria. This review will help reduce inefficiencies that delay the removal of criminal aliens and other priority cases by preventing new low priority cases from clogging the immigration court dockets.

DHS and ICE will utilize similar outreach and training efforts for future immigration enforcement programs, thus ensuring DHS and ICE senior leadership provide the necessary direction, guidance, oversight, and support for implementation of new immigration enforcement programs.

ICE requests this recommendation be considered Resolved and Closed, based on the actions already taken to provide direction and guidance on ICE's immigration enforcement programs.

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Recommendation 3: Generate a lessons learned document and plan for Department of Homeland Security to use when guiding future immigration and enforcement program development and implementation.

Response: ICE concurs with this recommendation. The ICE Office of Policy will work with the program offices and DHS to develop a lessons learned document that will be used to plan for future enforcement programs, priorities, and implementation.

ICE requests this recommendation be considered Resolved and Open pending completion of the lessons learned document. ICE estimates that this document will be completed in fiscal year 2012.

Appendix C

Representative Lofgren Request Letter

COMMITTEE ON THE JUDICIARY
• RANKING MEMBER — SUBCOMMITTEE ON IMMIGRATION, POLICY AND ENFORCEMENT
• SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION, AND THE INTERNET

COMMITTEE ON HOUSE ADMINISTRATION
• RANKING MEMBER — SUBCOMMITTEE ON OVERSIGHT

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
• SUBCOMMITTEE ON ENERGY AND ENVIRONMENT
• SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

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CO-CHAIR, CONGRESSIONAL CAUCUS ON
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CO-CHAIR, CONGRESSIONAL HAZARDS CAUCUS

April 28, 2011

Charles K. Edwards
Acting Inspector General
U.S. Department of Homeland Security
245 Murray Drive, SW, Bldg. 410
Washington, DC 20528

Timothy Moynihan
Assistant Director
Office of Professional Responsibility
Immigration and Customs Enforcement
P.O. Box 144755
Pennsylvania Ave. NW
Washington, DC 20044

Dear Inspector General Edwards and Assistant Director Moynihan:

In recent months, it appears that Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) personnel and contract staff may have made false and misleading statements to local governments, the public, and Members of Congress in connection with the deployment of the Secure Communities program. In response to a Freedom of Information Act request, ICE and the Federal Bureau of Investigations (FBI) have released many thousands of pages of documents, including internal e-mails and memoranda. Having conducted with my legal staff an initial review of the documents that have been made public, I believe that some of these false and misleading statements may have been made intentionally, while others were made recklessly, knowing that the statements were ambiguous and likely to create confusion. I now write to request that your offices conduct thorough investigations into any misconduct, including possible violations of criminal law, revealed by the documents. As the identities of many persons were redacted from publicly available documents and some documents were withheld entirely or have yet to be made public, it is important that you review the conduct of all relevant persons in order to determine who bears responsibility for any misconduct that you find.

The statements in question deal primarily with the issue of whether Secure Communities is a mandatory program that all states and localities must participate in or whether localities may be permitted to “opt out” of the program out of a concern that participation will present a barrier to community policing efforts and will make it more difficult to implement a law enforcement strategy that meets public safety needs. Under the Secure Communities program, fingerprints collected by local law enforcement

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agencies upon booking that are routinely submitted to State Identification Bureaus (SIBs) in order to be checked by the FBI Criminal Justice Information Services Division (CJIS) Integrated Automated Fingerprint Identification System (IAFIS) are now checked against immigration databases and provided to ICE for purposes of immigration enforcement. Some localities have asked that fingerprints submitted to their SIBs be checked against criminal, but not immigration, databases, and Members of Congress and their offices have sent letters, asked questions for the record, and held briefings on that topic.

According to a recent statement by a DHS official, "Secure Communities is not voluntary and never has been." (Lee Romney, *Congresswoman Calls for Investigation of Enforcement Program That Screens for Illegal Immigrants in Jails*, LOS ANGELES TIMES, April 22, 2011). Unfortunately, this statement cannot be reconciled with many of the public and private statements made by DHS and ICE personnel over the past two years. For instance, more than two years ago, ICE responded to a written question for the record posed by then-Chairman David Price that "ICE does not require any entity to participate in the information sharing technology at the state or local level."¹ Similarly, in an August 26, 2009, e-mail exchange specifically on the topic of whether Secure Communities is mandatory or voluntary, one ICE official wrote that Secure Communities "will remain voluntary at both the State and Local level. . . . Until such time as localities begin to push back on participation, we will continue with this current line of thinking."² A memorandum prepared in 2009 for ICE Director John Morton on the topic of voluntariness acknowledges that "[t]o date, Secure Communities has stated in various arenas, including Congress, that state and local participation in IDENT/IAFIS Interoperability is voluntary."³

In order to clarify significant confusion about the program, I wrote to DHS Secretary Janet Napolitano on July 27, 2010, specifically asking "how local law enforcement agencies may opt out of Secure Communities by having the fingerprints they collect and submit to the SIBs checked against criminal, but not immigration, databases." In her response, Secretary Napolitano described what steps must be taken by a locality "that does not wish to participate in the Secure Communities deployment plan" and explained that "[i]f a local law enforcement agency chooses not to be activated in the Secure Communities deployment plan, it will be the responsibility of that agency to notify its local ICE field office of suspected criminal aliens." This response clearly indicated to me that localities were permitted to opt out of the program in the manner described in my original letter. And according to one recently released e-mail by an FBI/CJIS employee, my conclusion should have come as a surprise to no one; commenting on an earlier, but nearly identical, draft of the Secretary's response to my letter, the FBI employee wrote: "reading the response alone would lead one to believe that a site can elect to never participate should they wish (at least it reads that way on my small [Blackberry] screen)."⁴

One issue at the heart of any deceptive statements by DHS or ICE personnel appears to be ICE's decision to adopt a counterintuitive and misleading definition of the term "opt out" to refer only to the ability of localities to avoid receiving the results of immigration checks conducted on fingerprints submitted to the SIBs, but not the use of

Appendix C

Representative Lofgren Request Letter

fingerprints to check immigration databases. According to one e-mail exchange, this decision was approved by unnamed ICE front office personnel orally, rather than in writing, in order to give officials “plausible deniability.”⁵

It is unacceptable for government officials to essentially lie to local governments, Members of Congress, and the public. Unfortunately, my review of the e-mails that have been made public suggests that some government personnel have been less than completely honest about this program over the last two years. It is critically important that you thoroughly investigate this matter and that any misconduct result in real consequences. I am available if you have any questions or would like to discuss this matter in greater detail. Thank you for your prompt attention to this matter.

Sincerely,



Zoe Lofgren
Ranking Member

Subcommittee on Immigration Policy and Enforcement

¹ ICE FOIA 10-2674.001832.

² ICE FOIA 10-2674.001831.

³ ICE FOIA 10-2674.0007299.

⁴ FBI-SC-1719.

⁵ ICE FOIA 10-2674.0007174.

Appendix D
ICE Enforcement and Removal Programs

ICE’s Enforcement and Removal Operations Programs enforce United States immigration laws by identifying and apprehending removable aliens. In addition to Secure Communities, ICE has three programs to identify criminal aliens.

The Criminal Alien Program

The Criminal Alien Program identifies, processes, and removes criminal aliens incarcerated in federal, State, and local prisons and jails throughout the United States, preventing their release into the general public by securing a final order of removal prior to the termination of their sentences.

**Delegation of Immigration Authority Section 287(g)
*Immigration and Nationality Act (The 287(g) Program)***

The 287(g) Program allows States and local law enforcement agencies to enter into partnerships with ICE through bilateral memorandums of agreement under which they are delegated authority for immigration enforcement in their jurisdictions.

National Fugitive Operations Program

The National Fugitive Operations Program identifies, locates, and arrests fugitive aliens who have been previously removed from the United States; removable aliens who have been convicted of crimes; and aliens who enter the United States illegally or otherwise defy the integrity of United States immigration laws and border control efforts.

Appendix E

Timeline of Events and Communication Related to Secure Communities

<p>October 2001</p>	<p>The <i>USA PATRIOT Act of 2001</i> requires federal agencies to create a cross-agency electronic system to share law enforcement and intelligence information necessary to confirm the identities of persons applying for a United States visa and to be accessible to all officers responsible for investigating aliens.</p>
<p>May 2002</p>	<p>The <i>Enhanced Border Security and Visa Entry Reform Act of 2002</i> requires, upon implementation of the plan required by 8 USC §1721(c), that the President develop and implement an interoperable electronic data system that provides current and immediate access to information in databases of federal law enforcement agencies and the intelligence community that is relevant to determine the admissibility or removability of an alien.</p>
<p>December 2007</p>	<p>Congress appropriates \$200 million to ICE to improve and modernize the identification and removal of aliens convicted of a crime, sentenced to imprisonment, and subject to removal.</p>
<p>April 2008</p>	<p>ICE submits to Congress a strategic plan to leverage existing technology that shares law enforcement data among federal, State, and local law enforcement agencies.</p>
<p>October 2008</p>	<p>Secure Communities is first implemented in Harris County, Texas.</p>
<p>August 2009</p>	<p>ICE receives a media inquiry related to Philadelphia, Pennsylvania, asking whether a municipality can opt out of Secure Communities.</p> <p>The Secure Communities program office discusses whether participation is voluntary and whether Secure Communities is focusing on the most serious criminals sentenced to imprisonment and subject to removal.</p> <p><u>First participation definition</u> – Secure Communities <i>Frequently Asked Questions</i> document explains that DHS does not require any entity to participate in information-sharing technology at the State or local level. The document further explains that MOAs between ICE and the States include a clause allowing either side to suspend the use of information-sharing technology with 30 days’ written notice. In these cases, ICE would still receive immigration status information on criminal aliens sentenced to imprisonment and subject to removal.</p>
<p>November 2009</p>	<p>A decision memo is sent from the Secure Communities program office to the ICE Director in an attempt to clarify the agency’s position on voluntary participation. The ICE Director does not sign the memo.</p>
<p>March 2010</p>	<p><u>Second participation definition</u> – Public affairs guidance states that all jurisdictions are expected to be part of Secure Communities by 2013 to comply with a congressional mandate. It also states that if a jurisdiction does not want fingerprints checked against DHS’ database, it needs to coordinate with the State so that fingerprints are not submitted to the DOJ criminal history database. ICE does not specify the source of the mandate.</p>

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Timeline of Events and Communication Related to Secure Communities

April 2010	<u>Third participation definition</u> – ICE <i>Frequently Asked Questions</i> document states that all jurisdictions are expected to be part of Secure Communities by 2013 to comply with a congressional mandate. A jurisdiction can choose not to receive immigration-related information on a fingerprinted individual, but that information will still be provided to ICE. ICE does not announce the source of the mandate in its outreach documents.
July 2010	<u>Fourth participation definition</u> – ICE provides information to a congressman’s office explaining that participation in Secure Communities can be full, partial, or postponed until 2013. Representative Lofgren writes to Secretary Napolitano for clarification on whether participation in Secure Communities is voluntary.
August 2010	<u>Fifth participation definition</u> – ICE issues <i>Setting the Record Straight</i> , which indicates that if a jurisdiction does not wish to activate on its scheduled date in the Secure Communities implementation plan, it must formally notify its State identification bureau and ICE in writing. ICE would request a meeting with federal partners, the jurisdiction, and the State to discuss any issues and come to a resolution, which could include adjusting the jurisdiction’s activation date or removing the jurisdiction from the implementation plan.
September 2010	<u>Sixth participation definition</u> – Secretary Napolitano issues a response to Representative Lofgren explaining that a local law enforcement agency that does not wish to participate in Secure Communities must formally notify the Assistant Director for Secure Communities and the appropriate State identification bureau. If a local law enforcement agency is not activated, it will be that agency’s responsibility to contact a local ICE field office of suspected criminal aliens.
October 2010	<u>Seventh participation definition</u> – The ICE Office of the Principal Legal Advisor prepares a draft legal analysis that supports a position that Secure Communities will be mandatory by 2013.
June 2011	The ICE Director issues two memos reiterating actions that can be taken to ensure that ICE immigration enforcement resources are focused on its enforcement priorities for detention and removal of criminal aliens. These memos note that ICE has prosecutorial discretion to decide whether to detain and initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.
August 2011	The ICE Director cancels MOAs, citing that they are not necessary to activate Secure Communities.

Appendix E

Timeline of Events and Communication Related to Secure Communities

September 2011	The Homeland Security Advisory Council's Task Force on Secure Communities, created in June 2011, issues its report on Secure Communities. The report recommends that ICE clarify the goals and objectives of Secure Communities and accurately relay this information to participating jurisdictions, future participating jurisdictions, and the communities they serve.
November 2011	The ICE website explains that when State and local authorities arrest and book an individual into prison or jail, they routinely submit fingerprints to the FBI. The FBI then automatically shares these fingerprints with ICE to check against immigration databases.

Appendix F
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Appendix G
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