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Washington State Senate

Senator Mike Padden
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April 14, 2017

Attorney General Bob Ferguson
1125 Washington Street SE
Olympia, WA 98504-0100

Re: Guidance Concerning Immigration Enforcement

Dear Attorney General Ferguson,

As I am sure you are aware, as chair of the Senate Law and Justice committee, I have been concerned with the recent conflict between our state and the federal government with regard to the enforcement of federal immigration law. In particular, I am concerned that the decision of some jurisdictions within our state to adopt policies of non cooperation with the US Immigration and Customs Enforcement agency (ICE) may lead to public safety risks, liability, and potential reductions of federal funding. The Senate Law and Justice committee recently held a work session on this topic in which the Governor's general counsel testified. We discussed a case in Snohomish county. In that case, an ICE agent was attacked after the local jail allegedly refused to allow access to an illegal alien who had committed a crime and was in the process of being released. At a minimum, this is a complicated issue that involves public safety and respect for law.

This leads me to express my concern regarding the document entitled "Guidance Concerning Immigration Enforcement" that was promulgated by your office on April 6, 2017. I understand from the description of the document contained on page 1, that its purpose is to provide guidance for local government agencies and other entities in Washington state to "understand the legal landscape governing immigration enforcement." However, this document is far from neutral in tone and appears to me to be an attempt by your office to impose by fiat a narrow interpretation of the obligations of a state or local agency or private employer to cooperate with the federal government on enforcement of immigration law. It is, in essence, a "how-to guide" to circumvent the efforts of ICE to enforce federal law. It interjects agencies that you are obligated to represent into an on-going legal dispute with the federal government that could result in serious consequences for those entities. Based on a cursory review of the 104 page document, there are many concerns.

First, given the complexity of this issue and the sweeping scope of the document to provide guidance to local agencies, law enforcement, hospitals, schools, colleges, and private employers, one might expect that your office would ensure that those entities had an opportunity to review or even have input into the development of the recommendations especially as they relate to "best practices." However, it appears that the document was developed without any consultation whatsoever from any of the affected agencies, industries, or their representatives. Your office apparently only consulted with advocates for undocumented persons such as the ACLU and the Northwest Immigrant Rights Project. While I do not suggest it is improper to take their views into account, I do think it is myopic to only consider this issue from their perspective and not from the representatives of all of the various entities that are impacted by this review.

It seems odd that as the constitutional officer charged with representing state agencies, you would not consult with your clients before issuing guidance that could potentially be used as the basis for a lawsuit against those entities. To ensure I have all information regarding who your office consulted with in the development of the Guidance Concerning Immigration Enforcement document, please consider this letter a public records request for any and all communications (including letters, emails, notes or drafts) either sent to or received by any employee of the Attorney General's office regarding the document. I will be surprised to learn if the opinions of legislators, the Association of Washington Businesses, the Washington Association of Prosecuting Attorneys, ICE, the Washington Medical Association, Office of the Superintendent of Public Instruction or any other state agency that your office represents were consulted in its development. All these are impacted by the guidance you provided, yet were not to my knowledge given an equal voice in its creation.

Second, I am concerned about the actual policy that your office advocates in the document. It reads more like an advocacy piece than a reasoned and measured legal analysis of a complex social, political, and jurisprudential issue. The most troubling parts are the "Best Practices" sprinkled throughout the document that would serve to make government entities, school districts and even public utility districts, accomplices to those who wish to obstruct federal law-enforcement agency efforts. These include:

- A reference on page 4 that local governments generally have discretion to decide to what extent they will assist the federal government in enforcement of federal immigration laws;
- A "best practice" on page 8 that advocates weighing the benefits of adopting policies that limit the role of local officials in enforcing federal immigration policy;

- Encouragement on page 10 that a local government should carefully review its records retention schedule to determine whether information regarding citizenship, place of birth or immigration status should be kept or destroyed;
- A note on page 21 that law enforcement agencies should develop policies and procedures that direct when officers should notify ICE that a subject has committed serious crimes which were limited by example to "terrorism related crimes." The passage goes on to warn local law enforcement agencies that they should be aware that when they provide information to other federal criminal investigative agencies, those agencies will provide relevant information to ICE;
- A "best practice" on page 27 that indicates that immigration detainers are not mandatory and should generally not be used to hold people in jail longer than necessary and noting that "potential liability" should inform whether a local law enforcement agency voluntarily agrees to assist ICE by honoring an immigration detainer;
- A "best practice" on page 30 that the court should request ICE to abstain from coming onto court property for the sole purpose of enforcing federal immigration laws;
- Another "best practice" indicates the court should allow the use of pseudonyms upon the request of parties and witnesses or use technology as means of increasing accessibility to members of the public who may fear physically appearing in court "based on ICE presence."
- K-12 schools are encouraged if/when ICE seeks access to campus, to request that they leave and not re-enter the campus without a judge-signed warrant;
- K-12 schools are encouraged on page 39 to distribute and make available an immigrant safety plan for youth and children with a link to the Legal Counsel Youth and Children webpage. This also includes link to a fundraising appeal from that organization. It is unclear why your office feels it is appropriate for schools to use public funds to promote fundraising for a non-profit organization.
- Employers are encouraged on page 44 to have bond request forms readily available in case of an ICE raid because, as noted in the report, a bond request form may allow the delay of a deportation hearing.

These are just a few examples. Is this really "legal guidance" or rather a detailed and comprehensive scheme to assist those who are seeking to evade federal law and to frustrate the efforts of those sworn to enforce it?

It is not lost on me that the policy advocated in this guidance document has the potential to become enforceable law in a number of ways. I recall that guidance from the Federal Department of Justice office of civil rights was used as a partial justification for the state Human

Rights Commission to promulgate rules related to transgender access to facilities. I understand that those documents were also cited in lawsuits from the ACLU and others who sought to enforce the former federal Attorney General's interpretation of discrimination law. While I do not wish to debate the merits of that policy here, I can easily see other agencies that you advise feeling obliged to take similar action with regard to immigration issues.

Similarly, this document circumvents the legislature in its role as the policymaking entity for the state and allows the Attorney General to govern by guidance, rule-making, law suit and consent decree.

This document creates a "Catch 22" for state agencies. If they fail to follow or adopt the very detailed policies you outlined, they risk suit by some of the very groups you worked with to create it. If they do follow your guidance to obstruct federal law enforcement in its lawful role, they subject themselves to potential criminal or civil liability from the federal government or (as your document indicates) loss of federal funding.

I hope you can respond promptly to my records request and the concerns outlined in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Padden". The signature is fluid and cursive, with a large loop at the end of the last name.

Senator Mike Padden

CC: Mike Webb