

## PRELIMINARY BRIEFING GUIDE: NEWLY RELEASED DOCUMENTS CHRONICLE AGENCY'S DECEPTION ABOUT OPTING-OUT OF "SECURE COMMUNITIES" PROGRAM

*"Secure Communities" (S-Comm) is a federal immigration enforcement program that automatically forwards the fingerprints of all people arrested by local police from routine Federal Bureau of Investigation (FBI) criminal background checks to Department of Homeland Security (DHS) immigration databases at booking.<sup>1</sup> Immigration and Customs Enforcement (ICE) then uses the fingerprints to target people for detention and deportation. This flawed design puts states and local police agencies at the center of federal immigration enforcement. The federal government now takes the position that participation in S-Comm is or will be "mandatory" for localities. But the basis of this policy is more complex.*

*In December, pursuant to litigation by the National Day Laborer Organizing Network, Center for Constitutional Rights and Cardozo Law School Immigration Justice Clinic, a court ordered federal agencies to release documents relating to the issue, leading to the disclosure of over 15,000 pages of documents.*

*This guide provides a glimpse into the contents of some of these documents and the story they tell about the federal government's confused and, at times, deceptive efforts to expand S-Comm nationwide over the past two years, in spite of doubts, questions and local objections. The guide also contains an update about the most recent S-Comm statistics available. Above all, the documents and data reveal a clear dissonance between DHS's public representations about the program and the way it has been implemented in practice.*

### ICE WAS VAGUE AND MISLEADING ABOUT ITS DEFINITION OF "VOLUNTARY" AND "OPT-OUT" IN ORDER TO SPREAD S-COMM BEFORE EXPECTED "PUSH-BACK" AGAINST CONTROVERSIAL PROGRAM

- As early as the Fall of 2009, ICE adopted a misleading definition of "voluntary," seemingly as part of a strategy to discourage state and local resistance to the program.<sup>2</sup> This definition of "voluntary" or

<sup>1</sup> All documents obtained through the Freedom of Information Act lawsuit NDLON et al. v. ICE, 10-CV-3488 and referenced in this briefing are available at: <http://ndlon.org/feb/>.

<sup>2</sup> See Email from Randi Greenberg, Secure Communities Program Outreach and Communication Director to various ICE officials, Aug. 26, 2009, Subject: SC Guidance Voluntary/Mandatory Question, ICE FOIA 10-2674.00018-0001832 ("[t]he SC initiative will remain voluntary at both the State and Local level. Once activated, 30-days written notice will be required in order to suspend or terminate the information-sharing. *Until such time as localities begin to push back on participation, we will continue with this current line of thinking.*") (emphasis added). See also Email from Dan Cadman, ICE, to Marc Rapp, Acting Director, Secure Communities, ICE Nov. 9-Nov. 12, 2010, Subject: Strategy for difficult interoperability deployment locales, ICE FOIA 10-2674.001811-1812. In response to inquiry from ICE official about what "voluntary participation" and "opting out" of S-Comm mean, Marc Rapp, Acting Director of S-Comm says: "SC defines voluntary strictly as the ability to receive the immigration response. If the local jurisdiction elects not to receive the immigration response they will not be routed back. This does not invalidate the requirement for CJIS to deploy interoperability by 2013. *Id.* As you know certain jurisdictions have not been overly receptive to attending our outreach meetings and some states are even hesitant to sign the MOA. It is these locations that the strategy

“opting out” required participation in S-Comm—i.e.—allowed local agencies to “opt-out” of one minor aspect of the program—the ability for local law enforcement agencies to receive messages about an individual’s immigration status, but required participation in the more meaningful stage—giving ICE automatic access to all fingerprints to use for immigration enforcement purposes.

- From late 2009 through October 2010, ICE represented that S-Comm was “voluntary” and localities could “opt-out” without explaining its non-intuitive internal definitions of those terms.<sup>3</sup> Instead, ICE deceptively continued to imply to the public, state and local officials, and Congress that the program was truly voluntary and that opting-out of sending fingerprints to ICE was possible.<sup>4</sup>
- This double-speak was confusing to ICE’s own employees, leading one to write in June 2010:

*“I’m totally confused now. I’ve got so many versions of the opt-out language I don’t know what’s current and what’s not. It seems like we have different language for different purposes and it’s confusing.”*<sup>5</sup>

**BY THE FALL 2010, FACED WITH NUMEROUS OPT-OUT REQUESTS, ICE DECIDED TO FINALLY ANNOUNCE PUBLICLY THAT S-COMM WOULD BE A “MANDATORY” PROGRAM, BUT APPEARS TO HAVE REMAINED UNCLEAR ABOUT LEGAL BASIS FOR SUCH A POLICY**

- August 2, 2010: “[a]s we continue to refine our implementation strategy, Mr. Venturella has asked us to look into a legal mandate, provision, law, etc. that would allow ICE/DHS to request fingerprint information from the FBI for law enforcement and/or criminal justice purposes, regardless of whether states and locals can opt in or out.”<sup>6</sup>
- September 2010: With approval from the FBI, ICE adopts new position on opt-out, to make SC mandatory by 2013. While this new position was not yet public,<sup>7</sup> it appears that doubts about it lingered.

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needs to address.” *Id.*

<sup>3</sup> See e.g., ICE, Setting the Record Straight, August 17, 2010.

<sup>4</sup> See e.g., Email from Randi Greenberg, Secure Communities Program Outreach and Communication Director to various ICE officials [names unredacted], Aug. 26, 2009, Subject: SC Guidance Voluntary/Mandatory Question, ICE FOIA 10-2674.0001831-0001832 (attaching response to Congressman David Price, Chairman of the Subcommittee on Homeland Security that “opt-out” is allowed). Also, at a meeting in October 2010 between the House Judiciary Committee staff and Secure Communities leadership, David Venturella, Marc Rapp, and Randi Greenberg the Judiciary Committee staff-member stated: “We’ve met and made inquiries over the past several months about SC and a jurisdiction’s ability to opt out. Out of the blue there is an article in the Washington Post today on this very topic and “it really upsets us.” For “months we’ve been told there’s a process” to opt out, the S1 [Napolitano] letter to Lofgren implies there is a process to opt out (we’ll talk to DHS Office of Legislative Affairs about this) ...”. Email [sender and recipient redacted], Oct. 8, 2010, Subject: FW: Notes from HJC, ICE FOIA 10-2674.0005876-0005882 (notes from House Judiciary Committee meeting following Secretary Janet Napolitano’s October 6, 2010 statement that localities cannot “opt-out” of S-Comm).

<sup>5</sup> Email, [sender and recipient redacted], June 23, 2010, Subject: FAQ and LEA Script, ICE FOIA 10-2674-0004154-0004156.

<sup>6</sup> Email from Randi Greenberg, Secure Communities, Director of Outreach and Communications, ICE to [recipient redacted], Aug. 2, 2010, Subject: SC Assistance Needed, Importance: High, ICE FOIA 10-2674.0011149-0011151.

<sup>7</sup> Email, [sender and recipient redacted], Sept. 9, 2010, Subject: IO schedule review weekly meeting notes, ICE FOIA 10-2674.0011203 (noting that a new “opt out” policy has been adopted” by ICE).

- An attachment to an email dated September 20, 2010, expresses concerns about the constitutionality of making S-Comm mandatory: *“Even though ICE may not truly consider SC a ‘program’ in the same manner as, e.g. CAP, a court may find the SC’s infrastructure, purpose, and activities mark it a program, and thus, could find that ICE cannot compel LEAs to participate.”*<sup>8</sup>
- September 30, 2010: ICE states in response to inquiry that while there is legislation requiring information-sharing between DHS and the FBI, there is *“no legislation that makes SC mandatory”*<sup>9</sup>
- On October 6, 2010, DHS Secretary Janet Napolitano stated that she does not see S-Comm as an “opt-in, opt-out” program and localities that want to opt-out have not been able to do so. Nevertheless, to this day, ICE has not disclosed the legal analysis underlying their new position that the *S-Comm* program (not just the part of the program that involves interoperability information-sharing) is, or will be, “mandatory” for localities. Advocacy groups are still attempting to obtain this memo through litigation so that states and localities can understand the federal government’s basis for forcing or coercing participation in S-Comm.<sup>10</sup>

**DOCUMENTS INDICATE THAT IT IS, IN FACT, TECHNOLOGICALLY POSSIBLE FOR STATES AND LOCALITIES TO OPT OUT**

- An email inquiry on behalf of Karl Wilmes, Deputy Director of the Colorado Bureau of Investigation, dated August 23, 2010 asks whether it was possible for the State Identification Bureau and FBI CJIS to cease the transmission of a local jurisdiction’s fingerprints to ICE. An unidentified employee responds: *“Under our current infrastructure it is technologically possible for a SC participating site (ORI) to be deactivated from the search of IDENT (although no participating site has officially requested to do so.”*<sup>11</sup>
- In an proposed response to the House Appropriations Committee’s questions, an S-Comm employee writes the following statement to Deputy Director Marc Rapp: *“There is currently no technical limitation that would prevent ICE from filtering out records from a particular jurisdiction.”*<sup>12</sup>

**DESPITE CONCERNS, S-COMM CONTINUES TO OPERATE AS AN OVERBROAD DRAGNET**

<sup>8</sup> See Quick Overview of SC, 9.16.2010, attached to email from [sender and recipient redacted], Sept. 20, 2010, Subject: FW SC Info, ICE FOIA 10-2674-0002912-2976, at 2927.

<sup>9</sup> See Email from Randi Greenberg, ICE to [recipient redacted], Sept. 30, 2010, ICE FOIA 10-2674.0010212-0010216 (9/30/2010) Randi Greenberg admits no legislation making SC mandatory but rather “there is legislation (in various forms) that makes interoperability mandatory;” Email chain between Beth Gibson and David Venturella and unknown ICE officials from Sept. 29-Oct. 4, Subject: SC and SCAAP issue about opting out, ICE FOIA 10-2674.0002997-0003001.

<sup>10</sup> See e.g., Memorandum for Beth Gibson, Assistant Deputy Director, ICE, from [redacted] re Secure Communities – Mandatory in 2013, attached to email from [sender and recipient redacted], Oct. 8, 2010, 10-2674.0002997-0003001.

<sup>11</sup> See Email [sender and recipient redacted], Aug. 23, 2010, Subject: Secure Communities, ICE FOIA 10-2674.0007487-0007489. See also FBI 2169-171

<sup>12</sup> Email from [redacted] to Marc Rapp, Acting Director, Secure Communities, ICE, Oct. 4, 2010, Subject: House Appropriations Request, ICE FOIA 10-2674.0005783-0005784.

- Despite the narrow Congressional mandate for S-Comm to target serious convicted criminals—the “worst-of the-worst”<sup>13</sup> since the outset, and despite DHS’s own public representations that the program is designed to achieve that mandate, the vast majority of people—approximately **78% of people ICE has deported through S-Comm are non-criminals or low-level offenders**.<sup>14</sup>
- Approximately **28% of people ICE has deported through S-Comm are non-criminals**<sup>15</sup>
- Documented cases of crime victims erroneously placed into the deportation proceedings as a result of S-Comm tragically illustrate how overly broad and flawed the program is.<sup>16</sup>

*The overbroad program raises serious concerns about its implications for civil liberties and public safety. ICE has attempted to avoid transparency and public scrutiny about many aspects of the program, but particularly its the fast-paced and, at times, coercive deployment across the country. The over 15,000 documents shed some light on ICE’s secretive policies and deployment process.*

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<sup>13</sup> Department of Homeland Security, Immigration and Customs Enforcement, Secure Communities: Quarterly Report, Fiscal Year 2009 Report to Congress, Third Quarter, August 27, 2009, ICE FOIA 10-2674.000277 - ICE FOIA 10-2674.000317, at ICE FOIA 10-2674.000279 (noting the congressional mandate to prioritize those individuals convicted of crimes, prioritizing those convicted of serious crimes); Department of Homeland Security, Immigration and Customs Enforcement, 1st Quarterly Status Report (April – June 2008) for Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens, August 2008, ICE FOIA 10-2674.000095 - ICE FOIA 10-2674.000133, at ICE FOIA 10-2674.000097 (noting that congress allocated funds for ICE to “improve and modernize efforts to identify aliens convicted of a crime [and] sentenced to imprisonment.”).

<sup>14</sup> Immigration and Customs Enforcement, Nationwide Interoperability by Conviction, Monthly Statistics Through Nov. 30, 2010. [http://www.ice.gov/doclib/foia/secure\\_communities/nationwide\\_interoperability\\_conviction-nov10.pdf](http://www.ice.gov/doclib/foia/secure_communities/nationwide_interoperability_conviction-nov10.pdf). Low-level offenders include ICE Levels 2 and 3.

<sup>15</sup> *Id.*

<sup>16</sup> San Francisco Examiner, “Abuse Victims Face Deportation if Found in San Francisco’s ICE Database,” January, 24, 211; See also: Washington Post, “Call for Help Leads to Possible Deportation of Hyattsville Mother,” November 1, 2010.