

FAQ on Federal Grant Conditions and Cooperation with Immigration Enforcement



1. What is the Department of Justice saying about applicants for federal criminal justice grants, including SCAAP and Byrne JAG grants?

The Department of Justice (DOJ) has added language to various federal criminal justice grants regarding the requirement for grant recipients to certify compliance with all applicable federal laws. DOJ also sent an email to grantees mentioning this requirement and discussing an inquiry from Members of Congress about “sanctuary policies” and the possibility of non-compliance with 8 USC § 1373, a federal law that prohibits local and state law enforcement from restricting the sharing of immigration status information with federal authorities.¹ DOJ stated that if the Office of Justice Programs receives information that a grant applicant is in violation of 8 USC § 1373, or other federal laws, the applicant may be referred to the Office of Inspector General and may be subject to penalties. The letter suggests, but makes no actual claim, that there may be a connection between “sanctuary” policies and violations of 8 USC § 1373. In fact, few, if any, so-called sanctuary policies actually conflict with this statute. Moreover, federal law does not provide for any financial penalties for non-compliance with 8 USC § 1373.

2. Why did DOJ add these notices?

DOJ’s actions were taken in order to satisfy certain members of Congress who oppose laws or policies that put any limits on local law enforcement agencies’ ability to engage in immigration enforcement. These Congress members are seeking ways (without providing additional funding) to force localities to cooperate with Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP)’s efforts to apprehend and deport individuals who come in contact with local and state law enforcement.

To the extent that the announcement threatens penalties for jurisdictions that have so-called sanctuary policies, it is misleading. Nothing in federal law requires localities to comply with immigration detainers or requests for notice of release from ICE. Although this announcement is new, the language in the notice from DOJ does not necessarily indicate any underlying change in policy or grant requirements.

¹ See <https://www.bja.gov/funding/8uscsection1373.pdf>;
http://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf.

3. What is 8 USC § 1373?

8 USC § 1373 is a federal statute that prohibits local and state governments and agencies from enacting laws or policies that limit communication with DHS about “information regarding the immigration or citizenship status” of individuals. The statute prohibits such policies, but does not contain any requirement for specific action. The full text of 8 USC § 1373 is attached as Appendix A.

4. How does 8 USC § 1373 affect local jurisdictions and policies?

- 8 USC § 1373 does not require any action from local or state agencies, officers, or governments. It does not compel compliance with ICE detainers or requests for notification of release dates. It only prohibits the enactment of certain policies about sharing immigration status information. It does not cover, include or mention information about criminal case information, custody status, or release dates of prisoners.
- 8 USC § 1373 does not impose any affirmative obligation to share information or to collect information. It only prohibits *limitations* on sharing immigration status information.
- 8 USC § 1373 does not prohibit enactment of a local policy against informing ICE about the release dates of inmates from jail. Criminal case information, such as a person’s custody status or release date, is different from citizenship or immigration status, and is not mentioned in the statute at all.
- 8 USC § 1373 does not bar a local policy stating or affirming that employees are *not required* to share information about immigration status.

5. Do Sanctuary Policies violate 8 USC § 1373 or other federal laws?

Usually not. There are many varieties of local policies that might be considered “sanctuary policies.” Unless these policies limit communication with DHS about individuals’ citizenship or immigration status, they do not violate 8 USC § 1373. Cities and counties around the country have policies against local officials questioning individuals about their immigration status; such rules do not conflict with 8 USC § 1373 unless they limit communication with DHS about immigration status.

Policies that limit or prohibit compliance with immigration detainers and requests for notice of release dates do not violate 8 USC § 1373. Immigration detainers are explicitly not mandatory and so electing not to respond to them is entirely within the discretion of local law enforcement. See *Galarza v. Szalczuk*, 745 F.3d 634, 645 (3d Cir. 2014). Moreover, nothing in federal law requires localities to enforce the Immigration and Nationality Act and regulations; to the contrary, immigration regulation and enforcement are federal functions. See *Arizona v. United States*, 132 S.Ct. 2492 (2012). There is no violation of federal law in declining ICE detainers, and therefore the certification requirement for DOJ grants can be met without any compliance with immigration detainer requests or notification requests.

For further information, contact:

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6. Can the federal government require local police or jails to help with immigration enforcement or comply with immigration detainers?

No. The Tenth Amendment precludes federal government from from coercing state or local governments to use their resources to enforce a federal regulatory program, like immigration. *See Printz v. United States*, 521 U.S. 898, 923-24 (1997). Immigration holds and requests for notice of release dates are not mandatory, because requiring states or localities to comply with detainers would violate this separation of powers. The federal government may not force state officers to assist in immigration enforcement via immigration detainers or other requests. Likewise 8 USC § 1373 does not and could not require such assistance.

7. Can a city or county with a sanctuary policy certify to DOJ that it is in compliance with all federal grants and still receive BJA funding?

Yes. Unless the city or county specifically restricts communication between local government agencies and DHS about individuals' immigration or citizenship status, it is not in violation of 8 USC § 1373. Federal law does not require any affirmative actions or assistance in enforcement of immigration law. Therefore non-participation is a valid choice that does not violate federal law or jeopardize DOJ funding. Such policies do not affect a jurisdiction's certification of compliance with applicable federal laws as required for Byrne Grants in 42 USC § 3752(5)(D).

SUMMARY: Jurisdictions that have chosen not to comply with immigration detainer requests or other requests for notice of release dates of immigrants are not in violation of any federal law. These jurisdictions can certify their compliance with federal laws and continue to seek federal Byrne Justice Assistance Grants and SCAAP grants without penalty.

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APPENDIX A

8 U.S. Code § 1373 - Communication between government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

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