

THE TOWN OF



MORRISTOWN

200 South Street, P.O. Box 914
Morristown, NJ 07963-0914

Donald Cresitello
Mayor
Tel.: (973) 292-6629

September 10, 2007

Anne Milgram, Attorney General
Office of the Attorney General
Hughes Justice Complex
P.O. Box 112
25 West Market Street
Trenton, New Jersey 08625

Re: Law Enforcement Directive No. 2007-3

Dear Attorney General Milgram:

I am writing on behalf of the Town of Morristown, New Jersey to request clarification on Law Enforcement Directive No. 2007-3. As Attorney General you are certainly empowered to compel local police to enforce the law by making immigration related inquiries, see N.J.S.A. 52:17B-112b(police required to cooperate with the Attorney General), and I applaud you and the Governor to the extent this directive requires all officers to enforce the law by making immigration related inquiries of all persons arrested for indictable offenses and driving while intoxicated. I must question, however, whether you are empowered to prohibit local police from either enforcing the law or lawfully using due diligence to discover and report crime to an appropriate authority.

Although Directive No. 2007-3 does not expressly prohibit police from asking immigration related questions on motor vehicle stops and non-indictable arrests, I have been told that a spokesperson for your Office stated that the directive prohibits such inquiries. If that report was not accurate, please advise. Otherwise, I respectfully believe that such inquiries are important to identify illegal immigrants who have prior convictions for indictable offenses or DWI's even if the present situation does not rise to that level.

New Jersey's Supreme Court has stated that "[o]ne of the fundamental duties of a police department, from chief of police to patrolman, is to be on the lookout for infractions of the law and to use due diligence in discovering and reporting them, and in a proper case arresting the perpetrator and lodging and prosecuting a proper complaint." State v. Donovan, 132 N.J.L. 319 (Sup. Ct. 1945). The United States Supreme Court has since held that local police can "generally ask questions..." of a detained person about their "name, date and place of birth, or immigration status", so long as the detention is not unreasonably prolonged to account for this questioning. Muehler v. Mena, 544 U.S. 93, 101, 125 S.Ct. 1465 (2005). Thus, local police are arguably duty-bound to use due diligence and make immigration inquiries during encounters that do not involve an indictable arrests or DWI.

Directive No. 2007-3 is silent on this issue and on its face appears to preserve the discretion individual officers and agencies have regarding such matters. I hope that is the case. If the

media reports that such inquiries are prohibited, however, that proscription amounts to a form of "amnesty" for illegal aliens with prior convictions. That is because local police would be prevented from asking immigration questions or sharing information with federal authorities though an illegal alien arrested for a disorderly persons arrest had prior felony convictions. Therefore I respectfully request that your Office confirm the State's policy on this matter in writing.

Immigration related inquiries should be made on all routine motor vehicle stops, detentions for ordinance violations, or on arrests for disorderly and petty disorderly persons offenses for the purpose of identifying for deportation illegal immigrants who have prior convictions for indictable offenses or DWIs. I believe the inquiries are necessary on all stops to prevent racial profiling.

A policy that prohibits local law enforcement from voluntarily aiding federal authorities may be unlawful. See City of New York v. United States, 179 F.3d 29, (2nd Cir. 1999), cert. denied, 528 U.S. 1115, 120 S.Ct. 932 (2000)("states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs"). See also Lewis v. City of Kimball, 2006 WL 2375479 (D.Neb.2006)(city police officer § 1983 conspiracy claim for being terminated for assisting immigration officials with investigations that led to the deportation of undocumented workers survived dismissal motion). That is because police have a general public duty to investigate, detect, and deter crimes as well as to report the commission of crimes of which they have knowledge. See State v. Winne, 12 N.J. 152, 163 (1953); State v. McFeely, 136 N.J.L. 102, 108 (Sup. Ct. 1947)(the duties of public officials may be prescribed by municipal ordinance, municipal charter, state statute, or the very nature of the office itself); State v. Donovan, 132 N.J.L. 319 (Sup. Ct. 1945)(see above); State v. Fisher, 94 N.J.L. 12 (Sup. Ct. 1945).

A police officer may be prosecuted for official misconduct if he "knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office." N.J.S.A. 2C:30-2b. See e.g., State v. Marchese, 14 N.J. 16 (1953)(police lieutenant's conviction affirmed for "failing to use all proper, reasonable and effective means and all lawful means within his power and diligence for the detection, apprehension, arrest and conviction" of persons engaged in gambling); State v. Fisher, 94 N.J.L. 12 (Sup. Ct. 1945)(Police chief committed misconduct by failing to seek a warrant to arrest persons who confessed to statutory rape); State v. Donovan, 132 N.J.L. 319 (Sup. Ct. 1945)(mayor and certain public officials prosecuted for failing to report criminal offenses); and State v. Steensen, 112 N.J. Super. 103, 112 (App. Div. 1955)(an officer's failure to report a crime he observed may subject him to indictment). Furthermore, federal law expressly prohibits state and local officials from interfering with communications between local law enforcement officials and federal immigration authorities. See 8 U.S.C. § 1373(No Federal, State, or local government entity or official may 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). Thus, the aforementioned authority

suggests that state and local officials may not prohibit local police from enforcing constitutionally valid laws.

For the foregoing reasons, I respectfully request clarification regarding the State's policy regarding the applicability, if any, of Directive No. 2007-3 to whether immigration inquiries can be made during routine motor vehicle stops, detentions for ordinance violations, or on arrests for disorderly and petty disorderly persons offenses.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Donald Cresitello", with a long horizontal flourish extending to the right.

Donald Cresitello,

cc: Police Chief Peter Demnitz