



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>INVESTIGATIVE REPORT</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>October 16, 2017</p>	<p>No. 17-002</p> <p>Re: City of Phoenix Police Operations Order 4.48</p>
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To: The Honorable Doug Ducey, Governor of Arizona
The Honorable Steve Yarbrough, President of the Arizona Senate
The Honorable J.D. Mesnard, Speaker of the Arizona House of Representatives
The Honorable John Kavanagh, Requesting Member of the Arizona Legislature
The Honorable Michele Reagan, Secretary of State of Arizona

I. Summary

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 41-194.01, the Attorney General’s Office (“Office”) has investigated the City of Phoenix’s (“City”) Police Operations Order 4.48, as amended in July 2017 (“Operations Order”). Based on a review of relevant authorities and materials during the limited 30-day period in § 41-194.01(B), the Attorney General has determined that the Operations Order **does not** violate state law.

II. Background

A. The Office's Investigation

On September 15, 2017, the Office received a request for legal review of the Operations Order pursuant to A.R.S. § 41-194.01 from Senator John Kavanagh (“Request”).¹ The Office asked the City to provide a voluntary response. The City cooperated with the Office’s review by providing a voluntary response and responding to a public records request from the Office. In performing the required investigation during the limited 30-day period, the Office reviewed relevant materials and authorities.

The Office’s legal conclusions are set forth below. The facts recited in this report serve as a basis for those conclusions, but they are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. § 41-194.01.

B. Relevant State Law

In 2010, the Arizona Legislature enacted the Support Our Law Enforcement and Safe Neighborhoods Act, often referred to as S.B. 1070, which amended several A.R.S. titles with the self-stated intent to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” Among the statutes enacted by S.B. 1070 was A.R.S. § 11-1051, which (pertinent to present purposes) mandates that “[n]o official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.” *See* Ariz. Sess. Laws ch. 113, § 2 (2nd Reg. Sess.); Ariz. Sess. Laws ch. 211, § 3 (2nd Reg. Sess.). While certain provisions resulting from S.B. 1070 have been held

¹ The Request was submitted outside normal business hours on Thursday, September 14, meaning it was received for purposes of the statutory scheme on the following business day, Friday, September 15.

to be preempted by federal law, A.R.S. § 11-1051 has been held to be not facially preempted. *See, e.g., Arizona v. United States*, 567 U.S. 387, 415 (2012).

C. Phoenix’s Operations Order

The Operations Order was issued in July 2017 at the direction of the Phoenix City Council. On April 19, 2017, at a duly scheduled Council meeting, and after hearing testimony and debate, the Phoenix City Council adopted by a vote of 6-3 a recommendation of a Mayor-initiated Council subcommittee, which included the following instruction:

That the City Manager direct the Police Department to modernize Phoenix Police Operations Order 4.48 to align with the policies outlined in Mesa Police Department Policy Manual 2.4.35, Tucson Police Department General Order 2300, and Maricopa County Sheriff’s Office Policies EB-1, EB-2, and EA-11. Additionally, Operations Order 4.48 should be in compliance with recent court decisions.

City of Phoenix City Council Formal Meeting 4/19/2017 Agenda Item No. *137.2 at Attachment A; *see also* City Council Formal Meeting Minutes April 19, 2017 at 140-1; City Council Formal Meeting Results April 19, 2017, at 17. The April 19 Council proceedings confirm that the April 19, 2017 vote was understood to be directory and reflect the policy intent of the City Council, the governing body of the City. *See, e.g.,* Testimony of City Manager Zuercher (City Council was “directing” issuance of Police Operations Order and direction “is a statement by the Council” of its “policy intent”); City Council Formal Meeting Minutes April 19, 2017 at 133, 136, 138-40 (understanding of members of the City Council and Mayor Stanton).

III. Analysis

The Request raises concerns that the Operations Order limits or restricts information sharing relating to immigration status and “the enforcement of federal immigration laws to less than the full extent permitted by federal law” in violation of A.R.S. § 11-1051, but the Operations Order affirms (and is not contrary to) S.B. 1070. The Operations Order confirms a

role for the Phoenix Police Department in immigration enforcement in partnership with ICE (U.S. Immigration and Customs Enforcement). It mandates that officers reach out to ICE. *See, e.g.*, Operations Order at 3, Sections 4-5. It repeats the legislature’s instructional language from A.R.S. § 11-1051(L), making plain that “all immigration enforcement activities” shall be conducted “in a manner consistent with federal and state laws regulating immigration.” *Id.* at 1, Section 1. And, echoing A.R.S. § 11-1051(A), the Operations Order affirms that “[t]his policy will not limit the enforcement of federal and state immigration laws to less than the full extent permitted by law.” *Id.* Moreover, it bears mention that the Operations Order followed the City Council’s February 2017 refusal (by a 7-2 vote) to become a “sanctuary city” and affirmation of the City’s immigration enforcement role under S.B. 1070.²

The Request’s contents fall into two categories: (1) concerns regarding the presence (or lack) of certain language in parts of the Operations Order; (2) concerns regarding certain routine procedural parameters that are to be applied in connection with police enforcement duties under S.B. 1070 and other state laws outside the context of stops, detentions, or arrests.

A. The Language Of Sections 1.E, 1.J, And 5.A Of The Operations Order, Which In Large Part Repeats Or Restates Relevant Statutory And Opinion Language, Does Not Conflict With State Law

The Request identifies Operations Order Sections 1.E, 1.J, and 5.A as potentially conflicting with A.R.S. § 11-1051 based on the exclusion (or inclusion) of certain statutory language from these Sections. Read as a whole, the language of these sections does not conflict with state law. *First*, Operations Order Section 1.J details circumstances when officers may transport persons in custody to ICE. This is consistent with the discretionary language of A.R.S. § 11-1051(D), which does not require transport, but instead provides that “a law enforcement

² *See* David Schwartz, “Phoenix city council rejects bid to become ‘sanctuary city,’” *Reuters*, February 15, 2017, <https://www.reuters.com/article/us-arizona-sanctuarycity/phoenix-city-council-rejects-bid-to-become-sanctuary-city-idUSKBN15V085>.

agency *may* securely transport an alien who the agency has received verification is unlawfully present in the United States.” (Emphasis added).³ *Second*, Operations Order Section 5.A, which provides that “[i]f a person is detained for a violation of any law and during this detention an officer develops reasonable suspicion the detained person is unlawfully present in the U.S., the officer shall make a reasonable attempt to contact ICE and verify the person's immigration status (ARS 11-1051.B),” is consistent with the language of A.R.S. § 11-1051(D). Section 5.A’s use of the overarching phrase “any law” does not conflict with Section 11-1051(D)’s use of “any other law or ordinance of a county, city, or town.” *Third*, the related notation in Operations Order Section 1.E of “two situations where officers are mandated by Arizona Revised Statute (ARS) 11-1051 to contact the federal government [U.S. Immigration and Customs Enforcement (ICE)] to verify a person’s immigration status” also is not in conflict with state law. Section 1.E identifies the two mandatory situations (which are also covered by Sections 4 and 5) as follows:

- (1) A person is under ARREST based on probable cause (adult or juvenile) (see section 4 of this order for more information).
 - This means ALL persons ARRESTED regardless of lawful status in the United States (U.S.), race, color, national origin, OR presumptive ID; the arrestee shall have their immigration status verified by the federal government prior to release of the arrestee.
- (2) When a person is lawfully stopped/detained for a state or local crime AND only when the officer develops further reasonable suspicion the detained person is unlawfully present in the U.S. (see section 5 of this order for more information).

Although ambiguously drafted, noting two examples in which immigration inquiries are mandated by A.R.S. § 11-1051 does not cabin mandatory inquiries solely to criminal offenses. Because Section 5’s use of “any law” includes mandatory reporting for civil violations when

³ See *State v. Lewis*, 224 Ariz. 512, 515 ¶17 (App. 2010) (“A general principle of statutory construction is that the use of the word ‘may’ generally indicates a permissive provision.”).

reasonable cause is present, Section 1.E is best understood as illustrating two examples of many possible mandatory reporting situations.⁴

B. The Procedural Parameters Set Forth In Sections 1 And 2 Of The Operations Order Do Not Conflict With State Law

The procedural parameters set forth in Operations Order Sections 1.D, 1.H, 2, and 4.A(3), like Sections 1.F and 1.G, apply outside the context of stops, detentions, or arrests and do not represent restrictions in violation of A.R.S. § 11-1051. These parameters explain procedures for how officers should contact ICE, and they furthermore govern everyday officer conduct on school grounds and during traffic enforcement in connection with the fulfillment of an officer’s duties under A.R.S. § 11-1051. Critically, these routine parameters give way when officers encounter the specific, mandatory circumstances set forth in Sections 1.E, 4, and 5. The Operations Order is explicit that: (1) “all immigration enforcement activities” shall be conducted “in a manner consistent with federal and state laws regulating immigration”; (2) “[t]his policy will not limit the enforcement of federal and state immigration laws to less than the full extent permitted by law”; and (3) there are situations where “officers are mandated to contact the federal government [U.S. Immigration and Customs Enforcement].” Operations Order at 1, Sections 1.B and 1.E; *see also id.* at 3-4, Sections 4 and 5 (further detailing situations in which “persons ... shall have their immigration status verified” and officers “officer[s] shall make a reasonable attempt to contact ICE”). These specific provisions apply in each of the procedural circumstances covered generally by Sections 1.D, 1.F, 1.G, 1.H, and 2. Where the circumstances set forth in Sections 1.E, 4, and 5 are triggered, officers are under an obligation to carry out their mandatory duties under state law, regardless of whether they are on school grounds, involved in traffic enforcement, or otherwise.

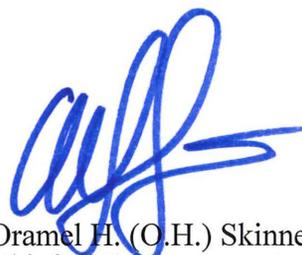
⁴ Whether these or any other sections of Operations Order may be susceptible to misinterpretation by officers is beyond the scope of this report.

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The Operations Order affirms the effective provisions of S.B. 1070 as well as a role for the Phoenix Police Department in immigration enforcement in partnership with ICE. Notwithstanding the inclusion of aspirational language in the Operations Order and its presentation by Members of the City Council as a “welcoming” outreach, the Operations Order’s operative provisions do not on their face rescind any duties imposed by A.R.S. § 11-1051. Whatever gloss has been placed on it by local elected officials, the Operations Order by its terms does not conflict with state law or appear to put the City in conflict with the federal government. Indeed, the U.S. Department of Justice, led by Attorney General Jeff Sessions, has not included the City in its recent “last chance” warning over “sanctuary city” laws.⁵ Whether the City’s practice proves to be consistent with the terms of the Operations Order is a separate question, one doubtless subject to the continued vigilance of the U.S. Department of Justice. Regardless, this investigation and report are constrained by A.R.S. § 41-194.01(A) to “official action adopted or taken by the government body,” and on that basis there is no state law violation here.

IV. Conclusion

The Office concludes under A.R.S. § 41-194.01(B) that the Operations Order **does not** violate state law.



Oramel H. (O.H.) Skinner
Chief of Government Accountability
& Special Litigation Unit

⁵ See Department of Justice, “Justice Department Provides Last Chance for Cities to Show 1373 Compliance,” October 12, 2017, <https://www.justice.gov/opa/pr/justice-department-provides-last-chance-cities-show-1373-compliance>.