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VIA EMAIL (*judy.preston@usdoj.gov*)

Judy Preston
Deputy Chief
Special Litigation Section
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, DC 20535

Re: MCSO's Cooperation with DOJ's Title VI National Origin Discrimination
Investigation

Dear Judy:

This letter is in response to our meeting of August 24, 2010 regarding the U.S. Department of Justice's ("DOJ") Title VI investigation of the Maricopa County Sheriff's Office ("MCSO") and your letter of August 25, 2010. As discussed in our meeting, MCSO has sought clarity from DOJ with regard to the scope and nature of the investigation. Our meeting of this week was a first step toward providing some clarity regarding the focus of DOJ's investigation, and I found the point-by-point discussion of DOJ's Request for Documents and Information (the "Request") informative. As such, on behalf of MCSO, I want to clearly state that MCSO is committed to cooperating with DOJ's Title VI investigation into national origin discrimination. In this regard, MCSO will identify the numerous responsive documents already in DOJ's possession and will take reasonable steps to search for and produce additional relevant, responsive documents to the extent DOJ does not have them. Furthermore, to the extent that no responsive documents exist for a given request, MCSO will so state. Based upon my understanding of DOJ's investigative focus as articulated during our meeting, MCSO will initially focus its use of resources on identifying and producing responsive documents that could be relevant to allegations of racial profiling, discriminatory policing in traffic stops, and employer sanctions investigations, which are topics that I understand to be of principle concern for DOJ.

I am glad we met on Tuesday and thought we made good progress on the issues. Despite our differences in our respective views of the scope of DOJ's authority under Title VI, my hope is that we can move forward cooperatively. One of the benefits of meeting face to face is to avoid posturing and the exchange of "lawyer's letters" where

one side purports to “confirm” that the other agrees with its legal positions and statements. Unfortunately, your letter of Wednesday evening seems a step backwards in that process. Given that it was sent however, I will summarize MCSO’s position on the matter generally and then move on to the document production issues.

Putting aside the issue of DOJ’s Title VI investigation into Limited English Proficiency (“LEP”) issues in MCSO jails, only recently has DOJ taken the position that its police practices investigation of MCSO was also undertaken pursuant to Title VI. At our meeting, for the first time, DOJ identified for MCSO that its investigation was focused on alleged discrimination in police practices against people of Hispanic origin. While the police practices investigation had not previously been identified as a Title VI investigation, I acknowledged that, if characterized as such, the DOJ could, pursuant to Title VI, undertake a police practices investigation to the extent that the investigation focused on alleged national origin discrimination. Specifically, I acknowledged that allegations of “racial profiling” or other discrimination based on national origin would be appropriate under Title VI, but that policing issues unrelated to national origin discrimination (e.g., use of force, firearms training, overtime policies) would not be proper subjects of a Title VI investigation. Thus, from my (and MCSO’s) perspective, many of the documents sought are unrelated to any allegations of national origin discrimination,¹ and, therefore, the scope of the DOJ’s requests are overbroad in the context of a Title VI investigation. Moreover, in my view, to the extent DOJ is investigating “racial profiling” allegations, the thousands of documents it already has, including years of data on MCSO traffic stops, volumes of training materials squarely addressing MCSO training on the issues of racial profiling, cultural sensitivity, and detention and arrest procedures, and other materials related to crime suppression sweeps and human smuggling enforcement, should provide a sufficient base of information for the DOJ to begin to evaluate whether MCSO is complying with Title VI. Although I expressed these positions clearly at the meeting, I did not assume that you agreed with them, nor will I purport to “confirm” that any of the seven DOJ representatives present at the meeting agreed with me.

Contrary to my position, you and your team made clear that DOJ views its authority in a Title VI investigation as essentially unlimited. That is, although Title VI is technically limited to issues of racial or national origin discrimination, because any police policy or procedure might conceivably be applied in a discriminatory manner, any police practice issue could be framed as an issue of national origin discrimination. Thus, in a two hour meeting, you and your team would not acknowledge that *any* issue was beyond the scope of DOJ’s Title VI investigation, from issues of use of force, to discipline of Sheriff’s Deputies, to uniform and dress policy, because, until DOJ reviewed such

¹ It is my understanding that, despite numerous requests by MCSO, DOJ still refuses to disclose the specific allegations under investigation. In this regard, I would like to reiterate MCSO’s request that DOJ provide MCSO with specific information about the allegations that form the basis for this investigation. As I am sure you can appreciate, to the extent that DOJ has received allegations of intentional discrimination, MCSO takes such matters very seriously and would like to take immediate steps to investigate such allegations and address any underlying conduct as appropriate. Obviously, DOJ’s continued refusal to identify any specific allegations of alleged national origin discrimination in MCSO’s police practices makes it impossible for MCSO to take any action to address such allegations.

policies (and all actions taken under such policies) it would be unable to assess whether or not MCSO was engaged in national origin discrimination. Thus, it appears that, in DOJ's view, every document typically requested in a general police practices investigation, for which DOJ has no subpoena power, is also relevant to a Title VI investigation limited to issues of national origin discrimination. Obviously, as stated above, MCSO does not agree with this expansive interpretation of Title VI.

My goal in requesting our meeting was not to resolve our vastly different views of the law in this area—indeed, should this matter need to be litigated, there will be other issues about which we will have legal differences (including whether or not DOJ's disparate impact regulations under Title VI are even valid in light of the fact that Title VI only prohibits intentional discrimination as discussed in *Alexander v. Sandoval*, 532 U.S. 275 (2001))—but to approach the question practically and discuss what documents DOJ truly needed in light of the scope of its Title VI concerns, to explain what documents were already in the possession of DOJ, and to convey that, notwithstanding our position that many of the requested documents were well beyond the scope of DOJ's authority to request in this context, MCSO would produce or make available additional documents once we understood the purpose behind each request in order to construe each request reasonably in that light, rather than technically, which would result in an unreasonably burdensome production of a voluminous set of wholly irrelevant documents.

To move on to the substance of the issues surrounding documents, as discussed in our meeting, DOJ is in possession of all documents produced in the *Melendres* litigation relating to allegations of racial profiling. The *Melendres* documents consist of almost 100,000 pages of documents and include information related to all "crime suppression" operations from 2007 to 2009, MCSO policies, and importantly, data on all MCSO traffic stops from 2006 to mid-2009 on one CD (note that this CD includes a huge number of records and yet is only one "document" for purposes of the production). In addition, 21 deposition transcripts and videos from the *Melendres* depositions have already been provided to the DOJ. I must say I was surprised at the apparent lack of command that any members of the DOJ team had over these documents. Indeed many of the items your team claimed to need are among those documents that DOJ currently has and has had for quite some time. As a courtesy to DOJ, and in the spirit of cooperation, MCSO will review all of the *Melendres* documents and provide DOJ with a list detailing which documents are responsive to which of DOJ's requests. Indeed, this process has already begun. As such, within the hour, MCSO will send DOJ an initial list categorizing some of the *Melendres* documents within the framework of DOJ's document requests. Obviously, MCSO's review and categorization of *Melendres* documents will be ongoing, and MCSO will keep you updated as the process continues.

Should DOJ have concerns about employer sanctions enforcement by MCSO, MCSO is willing to produce the documents from the *Mora* case (also filed by the ACLU and addressing enforcement of this law) to the extent the ACLU has not already provided them to DOJ. This production consists of over 21,000 pages. Additionally, 11 depositions have been taken in this case, and transcripts of those depositions can be

produced upon request. Please confirm whether DOJ has a copy of the *Mora* production. If it does not, these can also be made available.

Finally, as you are aware, Immigration and Customs Enforcement (“ICE”) conducted audits of MCSO under the section 287(g) program, and the Department of Homeland Security (“DHS”) Inspector General conducted a 287(g) review at the request of Congress. Both of these inquiries involved allegations of “racial profiling.” To the extent that DOJ does not have the documents produced to these agencies by MCSO, MCSO will provide those documents to DOJ upon request.

Additionally, by this letter, I confirm that MCSO will produce documents reasonably responsive to your other requests, as I understand them based on our discussion of each individual request, as expeditiously as we can. If we find that no reasonably responsive documents exist or that a response would be so voluminous as to be unreasonably burdensome, we will confirm such non-existence or contact you to discuss how best to proceed. As I have already noted, in light of my understanding of DOJ’s investigative focus, MCSO will prioritize identification and production of responsive documents that could be relevant to allegations of racial profiling, discriminatory policing in traffic stops, and employer sanctions investigations. Should there be other discrete topics that DOJ considers to be a higher priority than those that I have just listed, please do not hesitate to identify those topics so that MCSO can deploy its resources most effectively.

As discussed above, we will continue to review all documents produced in *Melendres* in order to categorize those documents for DOJ. We will do likewise for *Mora* once you confirm whether you have, or want, these documents. Of course, as I suggested in our meeting, DOJ should also undertake its own review of the *Melendres* and, if appropriate, the *Mora* documents to determine responsiveness as DOJ is the party with the knowledge of the extent of the investigation.

With respect to the deadline set forth in your letter, we did not agree to a September 10, 2010 deadline at our meeting, and we cannot agree to one now. As I am sure you are aware, MCSO, like many other state and local governmental agencies, has limited resources, which cannot be deployed indiscriminately without a potentially negative impact on MCSO’s ability to perform its primary functions of enforcing the law and protecting the citizens of Maricopa County. However, MCSO will certainly prioritize the allocation of its available resources to identify responsive documents already in DOJ’s possession and to produce additional responsive documents as quickly as reasonably possible, with highest priority being given to documents relevant to the three topics discussed above. We can advise you of timing more specifically as matters progress.

We also certainly did not agree that every document DOJ requested is required to be produced in a Title VI investigation. Rather, our legal position is set forth above. MCSO’s obligation is to comply with Title VI, and to respond to reasonable requests from DOJ so it can complete a Title VI investigation. DOJ’s current position—that it is

entitled to any document it wants, to access any facility it wishes, and to interview any witness it wants, without limitation, merely because it is undertaking a Title VI review related to alleged national origin discrimination—is simply unreasonable. Notwithstanding this fact, as already discussed, MCSO is willing to go beyond what it believes is required by Title VI in order to demonstrate its willingness to cooperate with DOJ's investigation. In the same spirit, MCSO sincerely hopes that DOJ will agree to act reasonably in conducting its investigation.

What is reasonable is to proceed by identifying specific topics or people you would like to interview, and allowing MCSO to respond. For example, on the LEP jail issue, you have identified the facilities you wish to visit and we will get in touch with you shortly to work out scheduling and logistics. Similarly, we will be in touch regarding the scheduling of MCSO jail personnel for interviews once the appropriate people are contacted to determine their availability. As with documents, MCSO will not agree in advance that every request the DOJ might conceivably have will be reasonable or authorized in the context of its Title VI investigation into national origin discrimination, but MCSO will work with you to schedule visits and interviews as they are requested. In that regard we expect that we will have a member of the Command staff available to provide an overview of the MCSO and will be in touch regarding his or her availability shortly. We will not agree in advance that DOJ is entitled to interview whoever it wants whenever it wants for whatever reason it wants. When you have reasonable additional requests for interviews, please let me know.

Lastly, the DOJ has repeatedly stated that it seeks voluntary cooperation. As demonstrated by the commitments made herein, MCSO is seeking to cooperate in this manner. If DOJ seeks to dictate every deadline and maintain the position that it, in its sole discretion, can determine what it wants and when, without any reasonable limitations on scope and without any input from MCSO, what DOJ truly seeks is compelled or coerced compliance. MCSO is committed to providing DOJ with a reasonable amount of information and documents based upon which DOJ can investigate allegations of national origin discrimination.

We appreciate your cooperation in this matter and look forward to working towards resolving this matter.

Sincerely,



Robert N. Driscoll

cc: Eric Dowell, Asheesh Agarwal