

To: Vermont Criminal Justice Council
Fr: Kim McManus, Assoc. General Counsel
Re: Review of FIP Subcommittee's Proposed Fair and Impartial Policing Policy
Date: March 2023

I. Introduction

Vermont's Statewide Fair and Impartial Policing (FIP) Policy is an anti-bias policing policy that contains within its text specific sections that address the intersection of bias policing and immigration status. Simply put, when and how may a law enforcement officer in Vermont inquire about a person's immigration status, when may an officer factor that information into a law enforcement decision, and under what circumstances may state and local municipalities and federal agents coordinate efforts in terms of investigating, enforcing, or aiding in the process of federal civil or criminal immigration enforcement. The FIP subcommittee was tasked by this Council to review and propose updates to the immigration sections within the policy.

The Statewide FIP policy is the baseline of the Council's expectations for how Vermont's law enforcement officers conduct themselves and perform their duties in a non-discriminatory, non-biased manner. The FIP policy's governing statute, 20 V.S.A. § 2366¹, states that all agencies within the State **must** adopt the Statewide policy. 20 V.S.A. § 2366 then allows individual communities to provide additional restrictions "on agency members' communication and involvement with federal immigration authorities or communications regarding citizenship or immigration status." 20 V.S.A. § 2366(a)(1).

¹ 20 V.S.A. § 2366 (a)(1): "On or before March 1, 2018, every State, county, and municipal law enforcement agency and every constable who exercises law enforcement authority pursuant to [24 V.S.A. § 1936a](#) and who is trained in compliance with [section 2358](#) of this title shall adopt a fair and impartial policing policy that includes each component of the Criminal Justice Council's model fair and impartial policing policy. Such agencies and constables may include additional restrictions on agency members' communication and involvement with federal immigration authorities or communications regarding citizenship or immigration status. Agencies and constables may not adopt a policy that allows for greater communication or involvement with federal immigration authorities than is permitted under the model policy."

The FIP subcommittee's proposed policy changes are primarily located in Section V and Section VI, with some additional recommendations in Section II. While working on its revisions, the subcommittee reorganized the policy. It is important to note that the policy had undergone a few proposed edits while worked on by the Ad-Hoc Committee prior to the Subcommittee's work. These edits were never presented to the Council for a vote. In the accompanying mark-up of the policy, I note any changes to the substantive language of the 2017 version of the FIP policy, highlight sections that have remained the same but may have moved within the policy, and note where within the policy the FIP subcommittee's five recommended changes are located.

Below I review the five proposed recommended changes to the policy, some requiring more discussion than others, for the purpose of informing the Council to legal issues within the recommendations.

II. The Three Proposed Recommendations Reached by Subcommittee Consensus.

- A. Explicitly stating that immigration status shall not be a factor in a Rule 3 determination, section II (d), Proposed FIP Policy, pg.5.
 - i. This language strengthens and clarifies the premise that was in the 2017 policy that the knowledge of a person's undocumented status should not be used to presume "flight risk" when making a Rule 3 determination to cite a person or arrest them for a nonwitnessed misdemeanor offense. 2017 FIP policy, VIII(f).
 - ii. This addition does not contradict V.R.Cr.P. 3(c).
- B. Language detailing when law enforcement agencies may investigate potential violations of federal *criminal* immigration law, section V(b) and V(c), Proposed FIP Policy, pg.7.
 - i. This section combines and streamlines sections VIII and IX of the 2017 policy. While extensively edited, much of this section is similar to sections found in the 2017 policy with an emphasis on clarifying the difference between federal civil immigration law and federal criminal immigration law.

- ii. The policy states that while state or local law enforcement officers have the authority to enforce federal criminal law, the enforcement of federal criminal immigration is “generally not a priority for [agency].” V.(b) In keeping with this concept, the policy provides guidance as to what circumstances would permit a local or state law enforcement officer to become involved with enforcing federal criminal immigration law.
- iii. V.(c) states that “on their own” the listed attributes in this section do not establish reasonable suspicion.

C. When and how law enforcement agencies may grant access to individuals in state or local custody to federal immigration agencies. VI(a) and VI(b), Proposed FIP Policy, pg. 9.

- i. The 2017 policy disallowed local law enforcement from granting federal agents access to individuals in local law enforcement custody unless federal agents had a judicially-issued criminal warrant or a “legitimate law enforcement purpose exclusive of the enforcement of civil immigration laws.” 2017 policy, section XI(d).
- ii. Section VI(a) in the proposed policy expands on this concept to include limiting federal immigration officials from “otherwise restricted areas” and restricting immigration authorities use of an agency’s facilities “for investigative interview.”
- iii. This section **does not** ban federal immigration agents from a state or local law enforcement facility. The comment within VI(a) raises the issue of how a local community might react to seeing the presence of federal agents at its local police department or nearest State barracks, but it does not state that federal immigration agents cannot be in or near a local law enforcement facility.
- iv. Section VI(b) in the proposed policy expands on the 2017 principle that LEO should not prolong lawful stops to facilitate the enforcement of civil immigration laws. 2017 policy, section VIII(c)

III. The Two Proposed Recommendations that the Subcommittee Approved without Consensus (reviewed out of order).

The last two recommendations contain the legal issues that the Council has previously heard discussion on concerning federal law and state policy. The State-wide Model Policy should not conflict with federal law. By doing so, the policy, at least the offending sections, will not withstand scrutiny on either the federal or state level. The Vermont legislature has codified that any section of a fair and impartial policing policy that conflicts with 8 U.S.C. §§ 1373 and 1644² will be considered abolished. 20 V.S.A. 2366(f) (“Nothing in this section is intended to prohibit or impede any public agency from complying with the lawful requirements of [8 U.S.C. §§ 1373](#) and [1644](#). To the extent any State or local law enforcement policy or practice conflicts with the lawful requirements of 8 U.S.C. §§ 1373 and 1644, that policy or practice is, to the extent of the conflict, abolished.”)

It is my understanding that the term “lawful requirements of 8 U.S.C. §§ 1373 and 1644” was chosen very carefully at the time of adoption as there were rumblings across the United States as to whether 8 U.S.C. §§ 1373 and 1644 were constitutional, whether they would remain lawful. If the federal statutes in question were deemed unlawful then the restriction to comply with the statute would be lifted. While there remains a dispute within our federal courts as to the constitutionality of the two federal statutes, the Second Circuit Court of Appeals, our circuit, has held firmly that the federal statutes are constitutional, that they are lawful.

Under current law, both state and federal, this Council cannot mandate a policy that conflicts with 8 U.S.C. §§ 1373 and 1644. At a minimum, the state-wide policy may not restrict state and local law enforcement agencies from receiving or sending **immigration or citizenship information** with federal agents. The policy may restrict Vermont law enforcement officials

² “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.” 8 U.S.C. § 1373(a)

“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.” 8 U.S.C § 1644.

from sharing other information with federal agents. It may restrict law enforcement officers from being involved in federal immigration raids, investigations, or sweeps. It may restrict law enforcement officers as to what the officers inquire about during an interaction with a person in Vermont. But the policy cannot state that Vermont law enforcement officers **shall not communicate** with federal agents but for the exceptions outline in the proposed policy.

A. Provisions regarding the standard for permissible communication with federal immigration agencies.

i. The primary clause of the proposed language **conflicts with federal law**. The AGO’s amended language in the updated FIP report would ameliorate this issue.

a. FIP Subcommittee proposed language for V.(c):

“In addition, [agency members] shall not:

(7) **Share any information** about an individual with federal immigration authority, unless...”

b. AGO’s proposed language for V.(c):

“In addition, [agency members] shall not:

(7) **Share any information, if other than citizenship or immigration status,** about an individual with federal immigration authority, unless...”

ii. The proposed exceptions within VI(c)(7) and the AGO’s counter proposal for the exceptions is not a legal issue. Either set of exceptions or a combination of the two proposed lists of exceptions are legally permissible.

a. The proposed policy exception language:

a. necessary to an ongoing investigation of a felony, for which there is probable cause, and the investigation is unrelated to the enforcement of federal civil immigration law, or

- b. with the consent of the individual, for the purposes of obtaining a U, S, or T visa.

b. The AGO's proposed policy exception language (amended post-working group):

- a. public safety or officer safety (imminent risk³ of physical injury to subject, officer, or third party), and state and local authorities are unable to provide urgent assistance in time; or
- b. law enforcement needs that are not related to the enforcement or federal civil immigration law (e.g., individual may be a human trafficking victim, a crime victim, or witness entitled to a T, U, or S visa.

Prior to providing such information [agency members] shall consult with a supervisor, unless doing so would unreasonably extend the individual's custodial detention.

- iii. Numerous voices from the law enforcement community, predominantly from municipalities that are at or near the border, argue that they need the public safety exception – that federal agents are often their closest law enforcement back-up when needed. Supporters of the FIP Subcommittee proposed language argue that the “public safety” exception creates a loophole, and that this loophole is exploited and utilized in a biased manner by some law enforcement individuals and/or agencies. The reality of many of Vermont's smaller agencies, at or near the border, is that federal agents are often the closest, most accessible option for back-up. The AGO's

³ “Imminent risk” is not defined currently in the Fair and Impartial Policing Policy. The term is defined and well known by officers in the context of lethal force in the Statewide Use of Force Model Policy. Imminent risk is: “Based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity and apparent intent to immediately cause death or serious bodily injury to the law enforcement officer or another person. An imminent threat is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of harm, but is one that, from appearances, must be immediately addressed and confronted.” Non-lethal force requires an “immediate risk” rather than an imminent risk as a factor within the totality of the circumstances.

proposed language limits the public safety exception by requiring an imminent risk to be present and that assistance from a local law enforcement is unavailable. Providing further guidance to officers as to what defines “imminent risk” would benefit officers and assist the Council in holding officers accountable in the future if an officer is using “public safety” as a pretext for involving federal immigration officials unnecessarily in a local or state law enforcement action. This guidance could either be within the policy or be part of training to the policy.

B. Language regarding federal policy.

- i. The Winooski model suggestion of simply stating in the Purpose section on page one: “Nothing in the [Agency] policy is intended to violate federal law.” does not violate federal law. There is nothing legally speaking that requires that the FIP statewide policy reference the federal statutes.
- ii. However, I would suggest that the AGO’s proposal provides clarity and additional guidance as to where the line is between state policy and federal law. I do not think that the federal statutes need to be continuously referenced. In the accompanying mark-up of the proposed policy, I note when I think it is needed or appropriate to insert the AGO’s proposed language. Most importantly, if the Council adopts the AGO’s recommendation regarding communication with federal agents discussed in the previous section, then the AGO’s proposed language for this section underscores that it is lawful to interpret §§ 1373 and 1644 as narrowly as the Council may like – that an agency may not prohibit or in any way restrict sending to or receiving from INS information regarding “**citizenship or immigration status**” – nothing more, nothing less.
- iii. If the “Winooski Model” is adopted, and there is no reference to the federal statutes within the policy, I would advise, at a bare minimum, that the savings clause is re-inserted at the end of the policy.

IV. Liability Issues

A. Lawsuits

- i. Supporters of the Winooski Model note that there have not been any lawsuits in Vermont since the nine municipalities have adopted the more restrictive policy. While this is an accurate statement, I cannot advise that this is a reasonable basis for the Council to knowingly adopt a policy that conflicts with federal law.
- ii. The greatest exposure to the Council would likely be lawsuits emanating from state or local law enforcement agencies who will protest being mandated to adopt a policy if it, on its face, conflicts with federal law.
- iii. The Attorney General's office has cautioned that it may not be able to defend this policy if adopted in its current form.

B. Insurance

- i. According to the Office of Risk Management, "The State excess liability insurance policies have an exclusion for a claim or suit asserting that any act or omission by the State of Vermont alleges violation of a state or federal law." While we would not know until the facts and circumstances presented themselves, it is possible that the State's liability insurance policy would not cover the Council (the State) if sued.
- ii. A similar concern was raised by the Vermont League of Cities and Towns. The exposure potentially created for local municipalities increases the likelihood that local agencies may push back on the implementation of this proposed policy through legal recourse.

C. Professional Regulation

- i. If a professional regulation complaint is based on an officer sharing information with a federal agent that is contrary to policy but possibly invalid due to the conflict with federal law, the Council will have a difficult time holding that officer responsible for the unprofessional conduct specific to that information sharing. The Council would still be able to hold an officer accountable for other unprofessional conduct that may have occurred contiguous to the information sharing.

V. The Council's task at the upcoming meeting

The Council needs to:

- A. review and vote on each of the proposed five recommendations,
- B. review and vote on any edits to the document outside of the five recommendations, and
- C. review and vote on whether to accept the policy reflective of any changes to the policy because of the decisions rendered in A and B.