March 7, 2024

10:00 AM

Zoom Meeting

**Members in Attendance Public Session:**

William Sorrell, Chair – Governor Appointed

Brian Searles – Governor Appointed

Karim Chapman (Life Intervention) – Governor Appointed

Scott LaValley - Governor Appointed

Shawn Pratt (Bennington Martens) - Governor Appointed

Daniel Guerra - Governor Appointed

Jennifer Morrison, Commissioner, Dept. of Public Safety

James Whitcomb –Proxy for Commissioner Jennifer Morrison, Dept. of Public Safety

Glenn Boyde – Proxy for Commissioner Nick Deml, Dept. of Corrections

Justin Stedman – Proxy for Commissioner Christopher Herrick, VT Fish & Wildlife

Erin Jacobsen – Proxy for Attorney General Charity Clark

Lori Vadakin – Proxy for Commissioner Emily Hawes, Department of Mental Health

Xusana Davis –Executive Director, Office of Racial Equity

Kelly Price (982 iPhone 12)– Vermont State Employees Association

Mike O’Neil – VT Troopers Association

Tom Chenette – Vermont Police Association

Jennifer Frank – VT Chiefs Association

Trevor Whipple – VT League of Cities and Towns

Karen Tronsgard Scott – Executive Director, VT Network DOMV/Sexual Violence

Sadie Donovan – Proxy for Jennifer Poehlmann, Center for Crime Victim Services

Cassandra Burdyshaw – VT Human Rights Commission

**Other Attendees:**

Christopher Brickell – Vermont Criminal Justice Council

Kim McManus – Vermont Criminal Justice Council

Lindsay Thivierge – Vermont Criminal Justice Council

Jamielee Bedard – Vermont Criminal Justice Council

Brock Marvin – Vermont Criminal Justice Council

Kenneth Hawkins – Vermont Criminal Justice Council

Dan Pennington – Vermont Criminal Justice Council

Jennifer Hier – Vermont Criminal Justice Council

Austin Bach – Vermont Criminal Justice Council

Will Lambek – Migrant Justice

Matthew Birmingham – Colonel, Vermont State Police

Stephen Laroche – Chief of Police, Milton Police Department

Ann Schroeder

Kevin Lane

**Call to Order:**  VCJC Chair Bill Sorrell 10:00

**Additions or Deletions to the Agenda:** Proposed addition to welcome the newest member of the Council, Tom Chenette. Proposed change to the Executive Directors Report by Heather Simons will be done by Deputy Director Chris Brickell. Lastly, FIP legal overview will be done by Kim McManus and not Bill Sorrell.

*Bill Sorrell moved to approve the agenda with suggested amendments, second by Karen Tronsgard Scott, no discussion, all in favor.*

**Welcome New Council Member:** Tom Chenette is the new representative from the Vermont Police Association. Tom gave a brief introduction and background. Chair Sorrell thanked him and welcomed him to the Council.

**Approval of Meeting Minutes:** *Brian Searles made a motion to accept the minutes from the January 12, February 7, and February 20 meeting minutes of 2024, second by Cassandra Burdyshaw, thanks were given for the information contained in the minutes, all in favor.*

**Executive Director Updates:** *Deputy Director Chris Brickell*

* Week five of the academy - four employees are out with the flu but no recruits. They persevered through the week and now everyone is back and there is no one out with illness this week.
* FIP and anti-bias work – we have contracted with Tabitha Moore who will be working on the onboarding and readiness for the two new FIP positions. We are very conscious of employee retention, especially in the first year. The attrition rates in state government are 40% in the first year. This is something we take into account when we are looking to hire for new positions.
* K9 Update – We are contracting for an assessment of the canine program. This contractor will be here April 1st to assess the grounds, buildings, safety, policies, training, and strategies we have in place now. We will also be contracting for the specific training that is on our website now.
* DV Training – Committee work has been ongoing for the training plan; the dates will be announced soon. The dates for the mandated training are anticipated to be late June. This training will be available in person, online and at various times to ensure everyone is able to attend the training. We expect that by the end of December 2024 agencies will have all of the specified mandated trainings ahead of time so they can schedule that.
* Training will also be provided soon for the LEAB Domestic Violence policy. All agencies are required to adopt that policy in July of this year. The Chair of the DV subcommittee and a member of staff are recording that training now. Although it is not mandated training, because agencies have to adopt that policy by July, we wanted to make that available.
* Kevin Lane will be giving an update on the job task analysis. He is the contractor working on coordinating that effort. We had very dismal participation from law enforcement on completing the survey.
* Moving forward Executive Director Updates will be in writing so that council members will have time to review and ask any questions or request agenda items.

*Discussion Ensued:* These written updates will also be going to agencies. Feedback from agencies has been that they would prefer more communication rather than less.

*Discussion on the Street Cop Training* – *Chair Sorrell* - encouraged council members to read the link sent from the Executive Director on Street Cop Training.

*Lt. Col. Whitcomb* - requested clarity as to the context surrounding the article.

*Chair Sorrell* - expressed the need for continued commitment to what the Council has been charged with doing and underscored the importance of taking a hard look at our training. (Unsure as to the extent of whether or not the street cop training was offered in Vermont.)

*Lt. Col. Whitcomb* - stated that Vermont State Police (VSP) is reviewing their previous trainings but currently shows no record of officers attending any of these trainings. VSP actively engages with law enforcement across the nation to identify best practices training that is appropriate. *Commissioner Morrison* - stated that it is important for agencies to do their due diligence to identify training that is consistent with their core values and the principles of what we know to be the expectation of policing in Vermont. The Commissioner wanted to point out that for members that are not from law enforcement reading this article without context implies that a lot of Vermont agencies are using this type of training. In an initial check, VSP does not believe they have sent anyone on these trainings. The other two agencies Commissioner Morrison has been in leadership positions with are two of the largest municipal police agencies in the state in Burlington and Colchester and they report having sent 2 to 4 officers, one time, to this training. It is believed it was a free in-state training and neither of them recommended continuing or sending more people to the subsequent training which indicates that Vermont law enforcement has the ability to discern what is training that matches the values of Vermont policing and training. This type of story about this company is totally inconsistent with how Vermont polices and is important as a jumping off point as we consider revamping the curriculum. It is important to realize that the vast majority of VT police agencies are not sending their people to street cop and embracing those values.

*Deputy Director Brickell* – Training outside of the academy that agencies choose is driven by what their communities want or feel that they need from their police agencies. Some of the initial concerns from this company was that unconstitutional tactics were being taught. Some instructors were using discriminatory and harassing language that was found to be unacceptable by a lot of trainees that went to this training. There are a lot of agencies in VT that do not utilize this company, but we have had requests from at least two agencies for us to advertise a training that they were hosting by this company. We often advertise trainings that are available around the state for all law enforcement. We do have a process here we screen as best we can what a company is providing if their mission aligns with the Council. Some companies I have reviewed some of the training actually looks good but the content of their merchandising or language does not align with the Councils mission so we will not advertise. The agencies can still choose to advertise and host that training on their own. After the JTA and curriculum review what we accept for training as part of law enforcement annual training may look a little different on what is acceptable training.

**Legislative Updates**: *Vermont Criminal Justice Council Deputy Director Chris Brickell and Associate General Counsel Kim McManus*

* *Chris Brickell –* H626 – Bill would require DPS to create a division of Animal Welfare. Testified that statutorily we are required to teach animal welfare investigation for four hours (mandated two) to Level II and III officers. Different levels of investigation training were reviewed. There is an Animal Cruelty Advisory Board that is supposed to update curriculum but has not. The bill contemplates a very large and complex reorganization of the advisory board.
* *Kim McManus* –House Judiciary H655 is the sealing and expunging of criminal records. The issue for the Council is specific to the professional regulation committee in that if an officer has been involved in criminal behavior or an officer is the arresting officer in a criminal case and that case is expunged or sealed and there is a conduct complaint (for the officer as the arresting officer or the officer as the person who’s committed the criminal behavior) those records are currently lost to the council. We reached out to House Judiciary to inform them that we would like to be listed as an excepted agency that would be able to have access for the professional regulation subcommittee.

*Discussion ensued:* How far the access goes could be up for discussion. DPS and many other partners do not agree with expungement as a concept. DPS would like the legislature to move away from expungement and towards a universal sealing scheme so that people that need legitimate access to those records have them. Additional concern was expressed that the primary goal of criminal history record sealing is to help people get jobs, housing, education and to contribute to their communities. That leads to better public safety outcomes, which means there is still value in expungement. H655 is trying to take all different interests and needs into account while also meeting the primary goal.

* *Kim McManus* –Miscellaneous House Judiciary bill - they want to codify the use of security officers in the courthouse. They have court security officers who are not law enforcement, they also have deputy sheriffs who work within the courthouses. The judiciary wants to fine tune the roles and responsibilities of these court security officers and train these officers as employees of the Judiciary. If these are court security officers, they cannot be expected to perform law enforcement functions. That term is very specific, and it falls under the council to train and certify. The draft has been amended to be more in line with court security officer so that there is a clear distinction. Deputy Director Brickell spoke to the individuals involved and they shared those changes with the judiciary committee to clear up the law enforcement role.
* *Kim McManus* – House Gov Ops has drafted a bill with the Act 56 working group recommendations about changes to Category B definition.

**FIP Legal Review**: *Vermont Criminal Justice Council Associate General Counsel Kim McManus*

*Bill Sorrell –* Summary of FIP policy and the historical timeline since 2021.

*Kim McManus – Overview of legal issues at heart of the FIP policy discussion that is scheduled to occur during the April council meeting.*

* The FIP subcommittee has been working on the policy and there were three out of five areas where they found consensus and they do not conflict with state or federal law. In April the Council will need to decide if you agree with the direction that the subcommittee is suggesting being the statewide policy.
  + 1. Removing immigration status as a factor in a rule 3 determination.
  + 2. Under what circumstances law enforcement agencies may investigate suspected violations of a federal criminal immigration law.
  + 3. When law enforcement agencies in Vermont may grant access to individuals within their custody to federal agencies.
* The FIP subcommittee had two areas out of the five where they did not achieve consensus. However, they did vote these recommendations out with a plurality.
  + 1. Language acknowledging federal law.
  + 2. Sections of the policy that outline the permissible communication with federal immigration agencies which is potentially most problematic with federal law.

Lastly, the 2017 version of the policy has undergone other edits, mostly structural. The revision proposed by the FIP Subcommittee is very similar to the 2017 policy except that it has been rearranged and restructured. The council will have to accept or reject those changes and vote on whether to approve this as the new statewide policy with the changes.

The subcommittee has formed a working group to review the feedback that is outside of these five recommendations. This working group may suggest changes to the subcommittee and so the FIP subcommittee may be sending the Council a revised draft policy before the April meeting.

Next month the Council will need to make a choice between the two models or find some middle ground as a council. A final markup version will be given to the Council prior to the April meeting and highlighted issues of concern from legal counsel. Today is only a legal review of the issues not legal recommendations.

*Review was given on the 10th amendment of the constitution, state powers vs. federal powers, dual court system and legal precedent, the dispute between US Circuit courts regarding the 8 USC 1373 and 1644 and the 10th amendment, what if the FIP policy or portions of the policy violate federal law then what, questions to consider when reviewing the FIP draft policy revisions.*

* The 10th amendment – any powers that are not mentioned in the Constitution as belonging to the federal government, belong to the states themselves. The Federal government can assert a lot of power and influence over the states through grants and mandates (money). *e.g. increasing drinking age.*
  + Anti-commandeering principle – which prohibits the federal government from compelling the states to enact or administer a federal regulatory program.
* Review of exclusive vs. concurrent state and federal powers–Exclusive federal powers include establishing rules of naturalization. Although there are concurrent (overlapping) powers; the constitution lays out that when federal and state laws clash, federal law wins. This is in the supremacy clause. States generally speaking cannot conflict with federal law, this matters in our FIP discussions because in 1996 the Federal Government passed 8 USC 1373 and 8 USC 1644.
* (Title 8 governs immigration law). 8 USC 1373 and 8 USC 1644– essentially say the same thing – 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. *You cannot prohibit communication between a state and local government entity and a federal agent and vice versa.* This legislation has had a lot of litigation, due to the federal government tying money to cities and states to demand compliance with having states support federal civil immigration actions (Burn Justice Assistance Grant Program).
* In 2016 the Department of Justice issued guidance that said 1373 and by reference 1644 does not require the states to do something but rather prohibits states from taking actions to restrict the exchange of immigration information with federal authorities. (In summary the DOJ said that because we are not asking the states to engage then 1373 is ok and is not violating the 10th amendment or anti-commandeering principle).
* Litigation came about because in 2017 the Trump administration issued an executive order and letter to a number of cities and local governments saying that we think your statutes and/or policies are in violation of federal law and if you don’t comply, we will cut off your money. All these cases went through federal court.
  + Multi-layered government = multi-layered court system – We do not have an intermediate appellate court system in Vermont. State issues go through the state court system. Federal issues go through the federal system, eventually everything can wind up at the US Supreme Court. When Mr. Lambeck and Attorney Jacobsen were discussing the differences in their opinion through the language proposed in the revision they were talking about pieces from different areas of the country. In Vermont our legal precedents are set by the Vermont state courts and the US Supreme Court. If it’s a state issue we would look to neighboring states for precedents, if it were federal we would look to the second circuit of the US Court of Appeals.
    - The Vermont Supreme Court is bound by the US Supreme Court not by the Second Circuit. But the second circuit decisions are highly persuasive. If a Vermont Supreme Court has to make a decision about a federal issue and the issue will be appealed, it would work its way to the second circuit and the US District courts (which needs to follow the second circuit).
* With the lawsuits came different decisions across the country. The decisions that resulted were not all centered around whether 8 USC 1373 and 1644 were unconstitutional but the question began to appear of whether or not section 1373 and 1644 are in violation of the anti-commandeering principle of the 10th amendment (*Is the Federal government over-reaching by telling the states what they can’t do)*.
  + 9th, 7th, and 3rd U.S. Circuits have come out and said that they think 1373 and 1644 are unconstitutional utilizing the Murphy decision. The 2nd circuit states that the statutes are not unconstitutional and that their sister circuits are using the Murphy case incorrectly. Immigration is a federal government power not a state power.
    - Mr. Lambek from Migrant Justice has made the argument that there are circuits saying the federal statutes are unconstitutional therefore we do not need to follow them or have them weigh on our state policy. But the 2nd circuit decided differently.
* *If the Council adopts a policy that, in whole or in part, contradicts Federal law, what could happen?* We don’t know, no one has been sued yet in the State of Vermont for adopting the Winooski Model (language proposed – “To the extent that any State or local law enforcement policy or practice conflicts with the lawful requirements of 8 USC 1373 and 8 USC 1644, that policy or practice is, to the extent of the conflict, abolished.”).
* *Do we think the Federal Government would take special interest in the policy and would they sue the Vermont Criminal Justice Council?* There are plenty of examples out there of states that have laws or policies that conflict with federal law. The federal government can choose when they want something to be a priority and when they do not. If the federal government decided to challenge the policy, towns, or cities, under current law the federal government would win given the 2nd circuit decision and the Federal law from 1996. The likelihood that the federal government would be interested varies widely dependent on the administration.
* In our state statute it is codified that our policy cannot conflict with the federal statutes and if it does those sections then need to be considered abolished. It is more likely that if this council passed a policy that has sections that conflict with 8 USC 1373 or 1644, we would be sued by a local agency or other state agency within the State of Vermont rather than the federal government.
  + Towns and cities may have insurance coverage issues if the policy is found to violate state or federal law or towns/cities may need to litigate whether the statewide policy violates state or federal law.

*Can the Council mandate that local agencies assume this potential risk, even if it’s only potential?*

*If the Council adopts a policy that in whole or in part contradicts Federal law, what could happen?*

* Difficulties with Professional Regulation cases – if a case came before us that was a FIP policy violation and the offending action is within one of the clauses of the policy that may violate federal law (depending on the facts and circumstances of the conduct), the clause could be abolished by state law and then the VCJC could not hold that officer accountable for the offending behavior.

*In summary – questions to consider when reviewing the proposed revision and the report supporting the proposed revision.*

* For the first three recommendations (pgs. 5-6 FIP report), there are no conflicts with Federal or state law.
  + Does the council support the amended language?
  + Does the council find that the policy language provides clear guidance to law enforcement officers?
* For proposal #4 language regarding federal policy (pgs. 6-7 FIP report). The Winooski model language does not violate federal law.
  + Does the Winooski model language provide clear guidance to officers as to where state and federal law meet?
  + Does the removal of any reference to the federal statutes provide clarity or confuse officers?
* For proposal #5, provisions regarding the standard permissible communication with federal immigration agencies (pgs. 7-8 FIP report) subsection 7 bans the sharing of “all information about an individual with federal immigration authorities unless…” then there are two proposed list of exceptions to this communication ban.
  + Does the overarching ban on all communication violate 8 USC 1377 and/or 1644?
  + Would adding a reference to the federal statutes balance this concern?
  + Which of the two exception proposals does the council accept? Or could the two options be blended together?

*Discussion ensued:* Chair Sorrell thanked Associate General Counsel McManus for the thorough overview and encouraged the council members to read through the documents. If you are a council member that is representing an organization, please check in with the council member you represent.

Kim McManus offered to meet with any council members that had additional questions after reviewing the policy.

The legal recommendation will be provided the week before after the working group meetings, so that council members have an opportunity to digest the information provided.

VLCT has concerns about the impact of local municipal insurance policy coverages if it is determined that the policy violates federal law and maybe that municipality X or Y would run the risk of not being covered in the event of litigation. Attorney McManus will look into state liability insurance coverage to determine whether there is any potential negative impact on state liability coverage should a decision by the council result in litigation.

**IADLEST JTA Update**: *Vermont Criminal Justice Council Contractor Kevin Lane*

Kevin Lane gave a brief history of the JTA project, and the levels of law enforcement in Vermont. Statewide Average 78.8% of all sworn officers are Level III certified.

* Project Goals are to increase the number of highly skilled law enforcement officers in Vermont with job specific training; self-sustaining, redesigned, basic patrol officer course (all new curriculum developed and implemented), working toward national accreditation of the Vermont Police Academy).
* Job Task Analysis – survey with 18 categories and 878 job tasks identified. All certified law enforcement officers in the state were invited to participate. Opened Jan 17-March 1. Takes about 3-4 hours to complete and has been difficult for agencies to complete as departments are very under-staffed.
* Convened an expert panel to have respected law enforcement officers come to the academy to complete the survey and they will complete as one voice to use and compare against the answers from all officers that were completed.
* Participation varied across the state. 11% completed in its entirety. National comparison is 40% so Vermont is a bit lower.
* IADLEST final report is projected for May 1st. Full Curriculum Review and Development begins June 1, 2024, and complete by December 31, 2026. Third phase is piloting the new curriculum which is done through two Level III classes.
* Final report of JTA in May will be an appropriate time for the Council to have a discussion.
* *Discussion ensued:* Tom Chenette – survey was extremely tedious and quantitative in nature, would have liked to see a section for opinion or feedback. Where was the panel derived from? Kevin Lane invited Tom Chenette to join the panel.

*Bill Sorrell moves to adjourn, seconded by Justin Stedman, no discussion, all in favor.*

Meeting adjourned: 12:29