November 7, 2023

8:00 AM

Zoom Meeting

**Members in Attendance:**

Amanda Garces – Chair – Human Rights Commission

Gregg Jager – South Burlington Police Department

Glenn Boyde – Department of Corrections

Justin Stedman – Department of Fish and Wildlife

 *Proxy – Jason Gravelle – Department of Fish and Wildlife*

Karen Tronsgard Scott – Vermont Network for DOMV/Sexual Violence

Xusana Davis – Office of Racial Equity

Tim Lueders-Dumont – Department of State’s Attorney and Sheriff’s

Barb Kessler – Vermont State Police

 *Proxy – Dan Bennett, Vermont State Police*

 *Proxy – Lance Burnham, Vermont State Police*

Tabitha Moore –

Other Attendees:

Erin Jacobsen – Attorney Generals’ Office

Will Lambek – Migrant Justice

Abel Luna – Migrant Justice

Enrique Balcazar - Migrant Justice

Rossy Alfaro J. M. - Migrant Justice

Chris Brickell – Vermont Criminal Justice Council

Ann Schroeder

Charlotte Oliver – Community News Service

Ellen Schwartz – Resident of Brattleboro

iPhone (Emilio) - Migrant Justice

Zoom User

Justin’s iPhone - Department of Fish and Wildlife

Daoudi

Kim McManus – Vermont Criminal Justice Council

**Call to Order:**  Fair and Impartial Policing Chair, Amanda Garces 8:05 AM

**Introductions:** All members and participants on the call introduced themselves.

**Additions or Deletions to the Agenda:** None

**Public Comment:** *Ellen Schwartz – Resident of Brattleboro –* In support of the changes to the Fair and Impartial Policing Model Policy being proposed by Migrant Justice and is encouraged to see that the subcommittee is making progress on three of them. Would specifically like to comment on the loophole in the current policy that allows for unrestricted communication with Federal agents (Statutes 1373 and 1644). In support of the language in the Winooski policy, which was also adopted by other jurisdictions, including Brattleboro, that have amended their policies and were found to be in compliance with the model policy. The language that says, *“nothing in the agencies’ fair and impartial policing policy is intended to violate federal law.”* This language provides legal protection for the law enforcement authority without telling officers that they can’t be restricted from communicating with federal immigration authorities.

*Ann Schroeder –*After all of the long delays I think the right thing to do for our undocumented sisters and brothers would be to vote to pass Migrant Justice’s suggestions for the two remaining items. Number four was – ‘*when can law enforcement communicate with federal immigration agents?’* Migrant justice would like this statement *“No information about an individual shall be shared with federal immigration authorities unless necessary to an ongoing investigation of a felony for which there is probably cause and investigation is unrelated to the enforcement of federal civil immigration law.”* The fifth item Migrant Justice would just like the statement *“nothing in the agencies fair and impartial policing policy is intended to violate federal law.”* Other than Brattleboro there were eight other jurisdictions policies that were found to be in compliance that had these two statements.

**FIP Policy – AG’s office, ACLU, and Migrant Justice, Recommendations**

Erin from AG and Will from Migrant Justice have been working together to create consensus on this policy.

*Will Lambek –* Last time the committee met in August there were three provisions that you voted on. The AG’s office made adjustments that offer greater protections and in the interest of consensus Migrant Justice cosigned, even though as an organization we felt that it doesn’t provide the ideal level of clarity and protection we were hoping for. The committee in August approved the AG’s proposal in 1, 2, and 3.

The two outstanding questions relate to provisions on which the AG’s office and Migrant Justice cannot reach consensus despite years of negotiation.

Migrant Justice will present the language from the Winooski Model (third column on screen) which has been adopted by the Winooski PD and 8 other jurisdictions around the state.

Erin from the AG’s office will present language in the 4th column (on screen) – language that roughly conforms to the current model policy that was developed in 2017. The language adds new additional context and definition onto the 2017 provisions.

*First question- when can law enforcement officers communicate with federal immigration agents?* What are the standards that determine when communication is permitted and when prohibited. The committee has to decide on a standard on when communication is permitted.

*Second Question: Will information regarding immigration or citizenship be included within the standard just set in #4.* This question has implications in federal law in 8 - 1373 and 1644. These statutes refer to just that term *“information regarding citizenship or immigration status”* they don’t refer to communication on any subject or topic. The subcommittee needs to decide if the standard set in #4 should apply to all information or all information except that information regarding citizenship or immigration status.

The subcommittee needs to determine the standard for when law enforcement officers can communicate with federal immigration agents. This question does not directly implicate federal law. You can determine the standard for when communication is permitted without any impact on the question of compliance with those federal statutes that were mentioned. That’s why in the Winooski model you will see a phrase that is bracketed in red that *says [other than information related to citizenship or immigration status]*. It is bracketed because you can hold off on the decision. If you accept the Winooski model in question 4 then when you debate question 5 you can decide whether that applies to all information or to insert that bracketed language to carve out language regarding citizenship or immigration status.

*Erin Jacobsen* – This has been a long and important road to be traveling. It has been a very productive, constructive, respectful process. My gratitude goes out to Migrant Justice, all those that Migrant Justice is advocating for, to the ACLU, to Amanda, and all those involved behind the scenes at the AG’s office including David Scherr, Julio Thompson, folks from criminal division and AG Clark herself. We have worked hard to bring forth a proposal that our office feels goes as far as it possibly can in protecting our non-citizen neighbors in Vermont while still being within the bounds of federal and state law. And we have to be very mindful of federal and state law because we are Vermont’s lawyer.

*Tim Lueders Dumont-* As laws and language change, we will be seeing each other again. In summary, people should be able to interact with law enforcement without being in fear, we all agree on that. Also, we should make sure that all law enforcement officers understand the policies that they are supposed to follow. I appreciate everyone’s work. I think my comments are out there for the record, but I will let the conversation move forward and thank you for indulging my comments.

**Conversation on provisions 4 and 5:**

*Will Lambek presentation of Migrant Justice position* – In 2017 the VCJC updated its model policy and created three carveouts for when information sharing is allowed – public safety, officer safety, and law enforcement needs unrelated to the enforcement of federal civil immigration law.

Far right column (onscreen) is the update from the AG’s office, listening to input from ACLU, Migrant Justice, and other stakeholders. This update has defined those terms more narrowly, given examples and has added the requirement that agency members should consult with a supervisor before sharing such information with certain exceptions. These tighten up the loopholes and make the policy stronger, but we don’t believe they go far enough to ensuring that this policy meets the articulated goals of ensuring that immigration communities can interact with law enforcement without fear that they are going to be turned over to ICE, or border patrol for detention, deportation, or separation from their families.

That’s why Migrant Justice is advocating the Winooski model which has been implemented in Winooski and 8 other jurisdictions (7 municipal and 1 sheriff) this advances a more stringent standard. You can’t share information about an individual unless 1 of 2 conditions is met: 1) if its necessary to the ongoing investigation of a felony for which there is probable cause, and the investigation is unrelated to the enforcement of federal civil immigration law. *Example given*. 2) Second (in red) is with the consent of the individual, for the purposes of obtaining a U, S, or T visa. This statement exists elsewhere in the policy, but it was placed here to holistically see it, there are instances where information sharing may be in the interests of individuals who are applying for certain types of visas. They may request a law enforcement officer provide information about them to a federal immigration agency.

**The main thing is the difference between public safety, officer safety, and law enforcement needs versus serious criminal investigations where information sharing is necessary if probable cause exists.**

We recommend very strongly the more protective language in the Winooski model.

*Erin Jacobsen presentation on Attorney General’s position* – Though it is true that the AG office has signed off on those jurisdictions that have adopted the Winooski policy signing off on them is not the same as an endorsement because of the savings clause that is also a part of the Winooski model which says, *“nothing in the [agency] fair and impartial policing policy is intended to violate federal law.”* Because that was in the Winooski model the Attorney General’s office could sign off because it technically is a policy that does not violate federal law. At the same time, the Attorney General’s office does not feel as though the Winooski policy is a model policy that provides enough clarity to law enforcement about federal and state statutes, about what they require, and about how Law enforcement should respond in the confines of those laws.

Also, to clarify why the Attorney General’s office is signing off on the Winooski model and then providing a different proposal. Under the Winooski model to say, *“no information about an individual shall be shared with fed immigration authorities unless (with the carveouts for public safety issues).”* That is good, but our legal opinion is that it goes too far in restricting information sharing.

Federal law is very clear especially in 2nd circuit, where Vermont sits, that there can’t be a Vermont policy that restricts state or local law enforcement from sharing citizenship and immigration information about individuals with federal immigration authorities. We can’t tell Law Enforcement not to share that information under state or federal law. Because of those laws what we can do is stress the priorities which are: public safety, building public trust, making sure that people feel that they can contact the police and they will come help them, and not help ICE to enforce immigration laws. The Attorney General’s office tried to push this policy as far as it could go within the confines of the law while providing clarity to law enforcement.

There can be more clarity in this section (custodial detention as suggested) and we are happy to accept friendly amendments at the full council meeting. As far as the loophole – if law enforcement said they needed to call ICE because it was a public safety issue and that proved to not be true, and if there was in fact actually not a public safety issue, then that would be a violation of this policy and then the VCJC could deal with it [*professional regulation category C*].

Our goal was to create a policy that pushes the bounds of state and federal laws as far as we can to make it as protective as possible while also making it as clear as possible to law enforcement, and we consider the policy itself (if it’s clear and understandable) then it’s something we can teach to, that we can train law enforcement about, and then if there is a violation of this policy then it could be something that is sanctionable.

*Discussion Ensued:*

*Will Lambek:* *Just to clarify on the distinction between 4 (when communication will occur) and 5 (will information related to citizenship or immigration status be included or excluded from that standard). If the committee adopted the Winooski model for 4 and included the red bracketed text, in the Attorney General’s office opinion would that violate federal statute?*

* *Erin Jacobsen:* I don’t think it would violate federal statute. I also don’t think it provides enough clarity around when information can be shared, and we have lengthened the FIP policy. One of our goals was to be as clear as possible and provide examples and comments to be illustrative of what we are talking about here.

*Will Lambek:* Looking at 5 what do we want to do about information related to citizenship or immigration status? Do we make our policy compliant with federal statutes or not. Winooski and 8 other jurisdictions have struck all references to that exception (information related to citizenship or immigration status) to have one unitary standard to say: “when we are talking about restrictions in information standards, we are talking about restricting all information (such as address, custodial status or family, whereabouts)”. We think it’s very important that the state model policy not make the distinction related to citizenship or immigration status that is in current policy. We understand the 2nd circuit ruling, but it is an outlier, and most others have said it is an unconstitutional statute.

We believe it can be the position of the VCJC that these federal statutes are unconstitutional, and that the policy is knocked down by them. The Attorney General’s office will say this creates a problem of enforceability. We understand it could end up in litigation and it would be up to a judge to decide if a department’s actions were justified or not. In the five years the Winooski model has been in place it has never been contested because the language is clear. If the Criminal Justice Council were to implement the Winooski model, there would be clear guidelines and expectations set out to officers and they would follow that clear expectation. It may end up in litigation and then it would be up to a judge to decide which is valid. But in the meantime, we would have a vastly improved policy that strengthens standards and supports immigrant communities in Vermont.

* *Erin Jacobsen* – I wish we didn’t have 8 USC 1373 and 1644, but we do. I wish the 2nd circuit had ruled differently, but it didn’t. I wish we had a Supreme court that would view 8 USC 1373 and 1644 as unconstitutional, but we don’t. Furthermore, we have a state law that specifically says that *“to the extent any state or local law enforcement policy or practice conflicts with the lawful requirements of 8 USC 1373 and 1644 that policy or practice is to the extent of the conflict abolished.”* So, we have this additional layer in state law that says – *“if you create a policy that tells law enforcement that they can’t share information with ICE, that is abolished unless and until a court says 1373 and 1644 is unconstitutional.”* As the state’s lawyer, we tried to create a policy that made it clear that local and state law enforcement shouldn’t be sharing information with ICE or doing their job in immigration enforcement within the bounds of these federal laws. What we have proposed is within the bounds of all of these laws, while making it clear, but that public trust is paramount.

*Will Lambek:* Migrant justice was involved in the conversations in the legislature when that state law passed. During those discussions we were heartened by the words *“lawful requirements of 1373 and 1644”* and that is key towards the enforceability of the Winooski model. If it’s the position of the Criminal Justice Council that the federal statutes are unconstitutional then there are no lawful requirements of 1373 and 1644. The Attorney General’s office has certified the nine jurisdictions as compliant with state statute and the model policy. They have not endorsed them, but they have ruled them compliant.

Tim Lueders Dumont:The phrase *“or as required by state or federal law”* could be helpful, I’m just not sure in this discussion. There is simplicity to the Winooski model, but I appreciate the Attorney General’s proposal because it has practice based important pieces to it. This is the balancing act between practice vs policy, which is difficult. I don’t have any solutions, other than to say that, when in doubt referencing reminders that you must always be in compliance with state and federal law. I have appreciated hearing from Erin and Will.

*Karen Tronsgard Scott*: Greatly appreciates the hard work that has gone into this to make it understandable to the committee. I would like to make a motion to accept the language from the Winooski model with suggested updates to improve the clarity around section 4. *I think it’s important for the subcommittee to come out with the broadest and most inclusive interpretation, as this will all be debated again at the Council. If we give the Criminal Justice Council, the broadest possible interpretation then we go from there. If we limit it here, we will be more limited going into the council.*

*Justin Stedman* – second the motion – *I appreciate the work that has gone into this, and this is more than words on paper, this is people’s lives. My son plays baseball with children of migrant farm workers, and I see the fear in their eyes when I pull into their driveway, and I recognize it and it pains me immensely. But I also recognize that I represent 41 individuals that represent the State of Vermont who if they go afoul of this policy will be represented by the Attorney General’s Office and I cannot vote for language that is contrary to that which is approved by the Attorney Generals Office. I wanted to say out loud that I am more conflicted about this particular piece of work than I have been about much else in my career.* I do sincerely appreciate both sides, but I cannot vote in favor of the Winooski model until it meets the endorsement of the Attorney General’s Office. Jason Gravelle (as proxy) will take the vote for me.

*Karen Tronsgard Scott restated the motion: “to accept the Winooski model as presented today with the suggested updates to improve clarity in section 4.” Further discussion was had on clarifying language and if it is necessary.*

*\*\*Karen Tronsgard Scott makes a motion to accept the Winooski model as presented today, second by Amanda Garces – All in favor – 4 Yes, 3 Abstain, 2 No* (Karen Tronsgard Scott Yes, Xusana Davis Yes, Barb Kessler No, Justin Stedman (Proxy - Jason Gravelle) No, Tabitha Moore Y, Gregg Jager Abstain, Glenn Boyde Abstain, Tim Lueders-Dumont Abstain, Amanda Garces Yes)

* Barb Kessler - I think it’s important to note that this is where we could not come to consensus when presented in the report to the Council.

\*\*Karen Tronsgard Scott makes a motion to accept the Winooski Model as presented today for number 5, second by Tabitha Moore, All in favor – *4 Yes, 3 No, 2 Abstain* (Barb Kessler No, Justin Stedman (Proxy - Jason Gravelle) No, Gregg Jager, No, Glenn Boyde Abstain, Tim Lueders-Dumont Abstain, Xusana Davis Yes, Tabitha Moore Yes, Karen Tronsgard Scott Yes, Amanda Garces Yes).

*Discussion Ensued:*

*Tabitha Moore* – I wanted to be here today because we have been working on this for years, but we still have a lot of work to do to make sure that we are providing guidance so that this does not fall onto the shoulders of officers on the street who are left with a lack of guidance. This is one of my bigger worries because that is how backlash happens. We need to make sure that as a committee we dig in and work with our partners in law enforcement and clarify any points where officer discretion is expected but they could then get their hand slapped for using.

*Tim Lueders-Dumont* – Traffic stops are different than custodial interrogation. Temporary traffic stops only require reasonable suspicion. To continue that into an investigatory stop, you need additional reasonable suspicion. To arrest, you need probable cause. The training that needs to take place with officers needs to include that prolonging a stop is lawful, but you need to have reasonable suspicion. The custodial detention part of that phrase is what I find to be tough. You can stop someone without detaining them. If you ask to go and you can, you are not being detained. There is a way to break that down separately in a training perspective.

*Amanda Garces –* there are going to be two positions that will be hired to create these trainings.

This policy can’t run afoul of state and federal law or criminal procedures. When there is ambiguity an officer knows what their training says but they also can’t violate rule or law.

**Approval of prior minutes**: Motion to approve minutes from 8.25.23 and 6.9.23 meetings (with amendment of Tim Lueders-Dumont in the August minutes by Tim Lueders-Dumont), second by Gregg Jager. All in favor, Glenn Boyde abstains as he was not present for the meeting.

**Public Comment**

Will Lambek – The subcommittee voted to endorse the Winooski model for 4 and 5. By endorsing the language in 5 that means the bracketed language in 4 which was contingent on the 5 decision it means the bracketed language in four is not being endorsed.

4 – “XI a No Information [other than information related to citizenship or immigration status] about an individual shall be shared with federal immigration authorities…

*Discussion Ensued- With the affirmed vote for provisions 4 and 5 the voted language is as such:* ***4-*** *“No information about an individual shall be shared with federal immigration authorities unless: 1) necessary to an ongoing investigation of a felony, for which there is probably cause, and the investigation is unrelated to the enforcement of federal civil immigration law or 2) with the consent of the individual, for the purposes of obtaining a U, S, or T visa.* ***5-*** *Nothing in the [Agency] Fair and Impartial Policing policy is intended to violate federal law.*

The report will reflect options of alternative if/then language for the Council.

*Erin Jacobsen –* when this goes before the council you should present number 5 before presenting number 4, that may help clarify things for folks.

*Gregg Jagger –* This has been a lot of work I want to thank Will and Erin for doing the lions share and for trying to make it understandable. This will take a lot of training for officers and is incredibly difficult but thank you so much for making it digestible.

*Happy retirement to Barb Kessler.*

*Karen Tronsgard Scott*- Thank you Amanda for leading us through this process and your tenacity for making sure all voices were heard.

Motion to adjourn Tim Lueders-Dumont, second Gregg Jager – all in favor.

Meeting Adjourned