

August 29, 2025

Dear Members of the Criminal Justice Council,

I am writing on behalf of the ACLU of Vermont to share our thoughts on the 2024 updated Fair and Impartial Policing Policy. We appreciate the Council's review of this important policy, especially in light of the current moment when there are mounting pressures on local law enforcement to become involved in federal immigration enforcement activities. Our comments reflect the testimony we delivered to the House and Senate Judiciary Committees in the spring of 2025 and our communications with the Council in February of 2024 ahead of the adoption of the updated policy. We hope that the Council will work to address our concerns either through internal processes or with the support of the Legislature.



PO Box 277
Montpelier, VT 05601
(802) 223-6304
acluvt.org

Certification of Compliance

Since 2024, there has been significant conversation about the role of the Attorney General's Office and the Council (collectively, the State) in assessing individual agencies' FIPPs for compliance with 20 V.S.A. § 2366. We write to address any perceived confusion around this issue.

The 2019 amendments to § 2366 were the result of negotiations among—and a joint proposal by—the Attorney General's Office (then represented by David Scherr), Migrant Justice (Will Lambek), and the ACLU of Vermont (Lia Ernst). The purpose of the amendments was twofold: (1) to expressly permit agencies to adopt greater restrictions on involvement and information-sharing with federal immigration authorities than contemplated in the Model FIPP; and (2) to get the State out of the business of determining whether agency policies violate federal law.

These purposes are explicitly spelled out in Act 41¹, the 2019 amendments to § 2366. First, subsection (a)(1) was amended as follows:

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, ~~at a minimum~~, each component of the Criminal Justice Training 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

¹ Available at <https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACTo41/ACTo41%20As%20Enacted.pdf>.

greater communication or involvement with federal immigration authorities than is permitted under the model policy.

The added language could not be clearer that agencies may choose to adopt more stringent limitations on communications and involvement with federal immigration officials than exist in the Model FIP.

Second, subsection (b) was amended as follows:

~~To encourage consistent fair and impartial policing practices statewide, the~~ The Criminal Justice Training Council, in consultation with the Office of the Attorney General, shall review the policies of law enforcement agencies and constables required to adopt a policy pursuant to subsection (a) of this section, to ensure those policies ~~establish each component of the model policy on or before April 15, 2018~~ comply with subdivision (a)(1) of this section. If the Council, in consultation with the Office of the Attorney General, finds that a policy does not ~~meet each component of the model policy~~ comply with subdivision (a)(1) of this section, it shall work with the law enforcement agency or constable to bring the policy into compliance. If, after consultation with ~~its attorney or with the Council and the office of the Attorney General, or with both,~~ the law enforcement agency or constable fails to adopt a policy that ~~meets each component of the model policy~~ complies with subdivision (a)(1) of this section on or before July 1, 2019, that agency or constable shall be deemed to have adopted, and shall follow and enforce, the model policy issued by the Council. A finding of compliance with subdivision (a)(1) shall not constitute a finding of compliance with any other applicable law.

The amendments to subsection (b) make clear that the scope of the State's review of FIPPs is limited to determining whether they comply with subsection (a)(1) only, which in turn requires each agency to adopt a policy that *must* include each component of the Model FIPP and *may* include additional restrictions on collaboration with federal immigration authorities—including “additional restrictions on . . . communications regarding citizenship or immigration status.” The State's review expressly does *not* include an assessment of whether a policy conflicts with “the lawful requirements of 8 U.S.C. §§ 1373 and 1644,” referenced in subsection (f). This is evident from subsection (b)'s repeated reference to compliance *with subsection (a)(1)*—not subsection (f). And if that were not clear enough, subsection (b) ends with the admonition that “[a] finding of compliance with subdivision (a)(1) shall not constitute a finding of compliance with any other applicable law.”

It is worth noting that the exclusion of any assessment by the State of whether a FIPP conflicts with federal law was intentional. H.518 was drafted in the face of threats from the Trump Department of Justice to withhold JAG/Byrne funds from states that it deemed not in compliance

with 8 U.S.C. §§ 1373 and 1644. By precluding the State from making any assessment of compliance with any other law, including §§ 1373 and 1644, H.518 ensured that the State could not *itself* be deemed in violation of those statutes when its role was limited to simply determining whether a FIPP complied with § 2366(a)(1). That is, the State could not be deemed to have sanctioned a policy arguably violating federal law when it was never called upon to make any such assessment. *See* ACLU-VT Testimony to the Senate Judiciary Committee re: H.518 (Apr. 17, 2019)² (“*[H.518] gets the State out of the business of determining whether any individual agency’s FIPP conflicts with federal law; the Criminal Justice Training Council (CJTC) and the Attorney General’s Office (AGO) will assess only whether each policy includes each component of the model policy. This provision ensures that agencies can exercise the flexibility afforded them by [subsection (a)(1)] while protecting the State against threats, reasonable or otherwise, to withhold certain federal funds.*”).

This was also the explicit testimony of the Attorney General’s Office at the time of the legislature’s statutory updates in 2019. On February 27, 2019, David Scherr testified to the House Judiciary Committee on behalf of the Attorney General’s Office regarding the new certification requirements in 20 V.S.A. § 2366(b) and stated “*The Final sentence makes it clear that a finding of compliance with this law does not constitute a finding of compliance with any other applicable law. And that is to make very clear that the findings of our office and of the council are making no representation with regard to federal law. And we believe that it’s perfectly possible for us to make a finding as to whether subdivision (a)(1) is met without also having to make any representation about compliance with federal law.*”

To the extent that there is now any perceived lack of clarity as to whether the State is responsible for assessing whether an agency’s FIPP conflicts with federal law, we assure you that there is none. H.518 was created specifically to avoid such an outcome. H.518 was a hard-fought compromise between entities like the ACLU of Vermont and Migrant Justice, which wanted greater restrictions on Vermont law enforcement involvement with immigration enforcement, and the Attorney General’s Office and the Criminal Justice Council, which were concerned about implications of potentially violating federal law. All four entities supported this bill (an unusual achievement in itself) precisely because it allowed the State to find municipal FIPPs in compliance with relevant *state* law without requiring any assessment of compliance with *federal* law. In short, the State’s current position stands in stark contrast to what it told the Legislature when it was considering the consensus, compromise position presented by these stakeholders.

² Available at

<https://legislature.vermont.gov/Documents/2020/WorkGroups/Senate%20Judiciary/Bills/H.518/Public%20Comment/H.518~Lia%20Ernst~Written%20Testimony%20from%20the%20ACLU~4-17-2019.pdf>.

Enforceability

We have concerns about the enforceability of the FIPP in practice and would propose that the policy be updated to require the collection of publicly accessible data from Vermont law enforcement entities regarding their communications with federal authorities involved in immigration enforcement, specifically Customs and Border Patrol and Immigration and Customs Enforcement.

This is of particular concern to the ACLU of Vermont because we are currently in litigation with the Essex County Sheriff's Office over access to public records related to their collaboration with immigration officials that could potentially violate the FIPP.³ This case arose from comments made by the Sheriff, who was reported as noting that *"people in his relatively remote part of the state get shaken up when they see unfamiliar folks. Up there, he said, everyone basically knows everyone. Colby said he would likely call immigration authorities after a traffic stop if he thought the people in the car were undocumented."*⁴ Such a call would likely violate the FIPP and, if based on race or other protected categories, could also violate the constitution.

One of the best tools to determine if there are potential systemic violations of the policy is to have records of the communications between local law enforcement and federal authorities. We recognize that many communications with federal authorities would not violate the policy and propose that, when tracking this information, officers and agencies be required to note the nature of the communication along with the time, date, and outcome. We also hope this reporting requirement will also serve as a check that would prompt officers to reflect on their training regarding allowable communications, and to consult their supervisor for guidance when appropriate. We hope that the Council will consider implementing such a data collection requirement to help ensure continued compliance with the policy.

³ ACLU of Vermont, *ACLU Sues Essex County Sheriff for Records on Immigration Involvement* (June 4, 2024), available at <https://www.acluvt.org/en/press-releases/aclu-sues-essex-county-sheriff-records-immigration-involvement>.

⁴ Charlotte Oliver, *Up for a vote, limits on police-immigration intel surface law enforcement concerns*, Community News Service of Vermont (Dec. 14, 2023), available at <https://vtcommunitynews.org/2023/12/14/up-for-a-vote-limits-on-police-immigration-intel-surface-law-enforcement-concerns/>.

Conclusion

We appreciate the Council's review of these policies and the opportunity to share our thoughts and concerns. We are available for further consultation and communication and would be happy to review any proposed amendments that the Council might consider.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lia Ernst', with a stylized, cursive script.

Lia Ernst
Legal Director