



Office of Mayor Miro Weinberger

December 8, 2017

VIA ELECTRONIC AND U.S. MAIL

Alan Hanson
Acting Assistant Attorney General
Office of Justice Programs
United States Department of Justice
810 Seventh Street, N.W.
Washington, D.C. 20531

Dear Acting Assistant Attorney General Hanson,

The City of Burlington, Vermont (“Burlington”) submits this letter in response to your letter of November 15, 2017 expressing your concern that certain of Burlington’s laws, policies, or practices may violate 8 U.S.C. § 1373. Your letter cited three sections of the Burlington Police Department’s Fair and Impartial Policing Policy (“FIPP”) and specifically asked about the savings clause in the policy.¹

General Response

Burlington has certified and stands by its compliance with § 1373 for both FY 2016 and 2017 and believes that the Department’s concerns are unwarranted and misplaced. We are a welcoming city, as well as a law-abiding city, that draws strength from our diversity and celebrates the progress we have made as a nation to become more inclusive.

Burlington’s FIPP underwent a rigorous public drafting and vetting process prior to its implementation. The Police Commission, a public body of five citizens, held a series of community conversations at various locations around the City and reviewed recommendations from advocates, the police department, and city attorneys. This local,

¹ Burlington’s submission of this letter focusing on its compliance with §1371 does not waive any legal argument about the constitutionality of 8 U.S.C. §1373, the executive branch’s ability to require that the City certify compliance with § 1373 in order to receive its FY2016 or FY2017 JAG grants, or the additional conditions the executive branch has stated it will apply to the FY2017 JAG grants.

comprehensive, and fundamentally democratic process produced a final policy that the City Council adopted with a nearly unanimous vote and I as Mayor readily signed.

This FIPP includes a savings clause that states, “Nothing in this policy is intended to violate 8 U.S.C. § 1373.” With that clause, Burlington clearly acknowledges and abides by its obligation to comply with federal law and not to prohibit or restrict any official from communicating with federal immigration authorities as provided in § 1373.

Nevertheless, it is the responsibility of the federal government to enforce federal civil immigration laws, and the responsibility of local officials to keep their local communities safe. Each community is unique, and local officials are best positioned to understand what policies best serve local needs. Burlington’s police will continue their longstanding and legal practice of not inquiring into the civil immigration status of individuals unless this status is necessary to the ongoing investigation of a criminal offense. Any broader reading of § 1373 by the Department or efforts to coerce or commandeer local law enforcement officials to enforce civil immigration laws in order to receive this formula grant should be rejected.

The priority of Burlington’s Police Department is to enforce criminal laws, not civil immigration laws. As a practice, Burlington’s officers do not inquire about the immigration status of individuals except when that status is necessary to the ongoing investigation of a criminal offense. If immigration status information concerning a criminal offender is known, officers are permitted by the FIPP to cooperate with federal immigration authorities, but a recent Third Circuit case held that “immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal.” Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014). Administrative warrants and immigration detainers are civil immigration requests that are not reviewed by a judge, are not a lawful basis to arrest or detain anyone, and are not required to be followed by local law enforcement officials. To insist that these non-mandatory requests be interpreted as “a command to detain an individual on behalf of the federal government would violate the anti-commandeering doctrine of the Tenth Amendment.” Id. at 644. In fact, for local law enforcement officials to detain someone without a warrant or probable cause or to continue to detain someone who would otherwise be released by local officials, would raise serious constitutional concerns.

Burlington’s FIPP makes clear in Section VIII.F. that civil immigration detainers are not a lawful basis to detain individuals, but “(v)alid criminal warrants of arrest, regardless of crime, shall not be confused with immigration detainers.” These sections, when read as a whole, clearly demonstrate that Burlington’s FIPP instructs officers to comply with criminal warrants.

Nothing in any policy or practice adopted by Burlington, and particularly by the Burlington Police Department, in any way inhibits federal immigration officials from enforcing civil immigration laws.

Responses to Specific Concerns

You raised concerns about three specific sections of Burlington's FIPP.

1. Section V.C. of the FIPP:

Section V.C. of the FIPP states:

Because local police officers are not required to enforce “administrative warrants,” “immigration detainers,” and “requests for notification” issued by Immigration and Customs Enforcement (ICE), officers will not detain individuals based on any of these documents alone or comply with requests for notification, subject to subsection G below.

Section G states:

Pursuant to 8 U.S.C. § 1373 and 8 U.S.C. § 1644, the City of Burlington may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, federal immigration authorities information regarding the citizenship or immigration status, lawful or unlawful, of any individual. Burlington also may not prohibit, or in any way restrict, the sending, requesting, receiving, maintaining, or exchanging of information regarding the immigration status of any individuals. Nothing in this policy is intended to violate 8 U.S.C. § 1373 and 8 U.S.C. § 1644.

Your concern is that the section of V.C. about not complying with requests for notification of release “appears to restrict the sending of information regarding immigration status, in violation of section 1373(a).” Yet a request for notification asks a local law enforcement agency to notify immigration officials not about a person's immigration status or citizenship, but about their detention and dates of release. § 1373 does not cover the exchange of information about a person's detention, release, or physical location. Nor does it require local law enforcement to enforce federal civil immigration laws.

The FIPP does not prohibit any city official from sending any information regarding the citizenship or immigration status of any individual to any federal immigration authority and is therefore in accordance with § 1373.

To insist on a broader reading of § 1373, despite the clarity of its plain language, would impose affirmative obligations on Burlington, with associated costs, and “implicate the Tenth Amendment and its built-in anti-commandeering principles.” City of Philadelphia v. Sessions, 2017 WL 5489476, slip op. at 113, available at <https://www.paed.uscourts.gov/documents/opinions/17D0778P.pdf> (last visited on Dec. 7, 2017).

2. Section VIII.B.2. of the FIPP:

Section VIII.B.2 states:

Officers may not inquire about a person's civil immigration status unless civil immigration status is necessary to the ongoing investigation of a criminal offense.

It is essential to Burlington's law enforcement mission that victims report crimes and fully cooperate in investigations, that witnesses come forward and provide evidence, and that community members overall have trust in the City's officers. Burlington will be a less safe community if victims, witnesses, or others reporting crime believe that they will be subject to prosecution or deportation for no reason other than their immigration status. Burlington's officers do not request immigration or citizenship information from individuals with whom they are interacting except under narrow circumstances, but as subsection G above makes clear, Burlington's FIPP does not restrict officers from requesting or sending information regarding immigration or citizenship status to or from federal immigration officers.

8 U.S.C. § 1373 does not place any affirmative obligations on local law enforcement to investigate the immigration status of individuals encountered while fulfilling their duties or to enforce federal civil immigration laws. Burlington certifies that its FIPP does not regulate communications between City officers and federal immigration officials, but also insists that local law enforcement officials will not be commandeered by federal authorities into becoming civil immigration officers.

3. Section VIII.C.2. of the FIPP:

Section VIII.C.2 states:

Officers may utilize general federal databases in attempts to establish an individual's identity but should not involve federal immigration officials in such an inquiry unless necessary.

Although not cited in the Department's letter, the sentence following the above-cited provision directly addresses the Department's concern:

If federal immigration officials are involved, communication should be limited to what is needed to establish the individual's identity or to communicate regarding citizenship or immigration status.

The plain language of this section of the FIPP demonstrates compliance with 8 U.S.C. § 1373. Local law enforcement can set priorities and policies for officers regarding the steps to be taken to determine an individual's identity and when to involve federal immigration officials. Burlington does not prohibit any officer from communicating with federal immigration officials regarding an individual's immigration status, but local law enforcement officers are not required to communicate with federal officials every time a federal database is used to establish an individual's identity. This section of the FIPP, in

addition to the savings clause and several other provisions, shows Burlington's compliance with federal law.

8 U.S.C. § 1373 is a narrow statute that covers limited subject matter and circumstances. It should not be used to coerce local law enforcement officials into becoming civil immigration officers. When a person is a criminal suspect in Burlington, the City's policies call for the unfettered exchange of information about the individuals with federal authorities.

In his May 22, 2017 memorandum, Attorney General Sessions wrote "the term 'sanctuary jurisdiction' will only refer to jurisdictions that 'willfully refuse to comply with 8 U.S.C. § 1373.'" Burlington's FIPP demonstrates that the City complies with this statute and fully enforces criminal laws regardless of an individual's immigration status. The Byrne JAG funding allows Burlington's Police Department to invest in law enforcement resources that make the City a safer place. The City therefore requests that the Department recognize its continued compliance with 8 U.S.C. § 1373 for both FY 2016 and FY 2017.

Thank you,

A handwritten signature in black ink, appearing to read "M. Weinberger", is written over a faint rectangular stamp.

Miro Weinberger
Mayor