



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: House Committee on Judiciary
From: Luke Martland, Director and Chief Counsel; Rebecca Wasserman,
Legislative Counsel
Date: March 1, 2017
Subject: S.79

I. Introduction

The purpose of this memorandum, which we will refer to during our testimony before the Committee, is to set forth some of the potential issues concerning S.79. Each section of the bill (the underlined text) is followed by our explanation and comments (the italicized text).

It is important to remember that we, as your attorneys, take no position as to policy or as to political issues. We do not advocate “for” or “against” any bill. Our role is more limited, to provide nonpartisan, accurate, and complete legal information and advice, including alerting you to potential issues, so that you can make the decisions you think appropriate. We hope that our testimony, and this memorandum, will achieve these goals.

II. Annotated text of S.79

Sec. 1. FINDINGS AND LEGISLATIVE INTENT

The General Assembly finds that:

(1) In Vermont, we celebrate the rich cultural heritage and diversity of our residents.

(2) All Vermont residents should be free from discrimination on the basis of their sex, sexual orientation, gender identity, marital status, race, color, religion, national origin, immigration status, age, or disability.

(3) Vermont must uphold the protection of religious freedom enshrined in the U.S. Constitution and the Vermont Constitution for all its people, and the State has a moral obligation to protect its residents from religious persecution.

(4) Article 3 of Chapter I of the Vermont Constitution prohibits any power from assuming any authority that interferes with or controls, in any manner, the rights of conscience in the free exercise of religious worship.

(5) Article 7 of Chapter I of the Vermont Constitution, also known as the Common Benefits Clause, provides that State benefits and protections are “for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.”

(6) Vermont residents have a right to privacy with respect to religious affiliation and an expectation that religious affiliation or identification shall not affect their residency in the State.

(7) Vermont residents are afforded the benefits and protections of law enforcement and public safety without regard to their sex, sexual orientation, gender identity, marital status, race, color, religion, national origin, immigration status, age, or disability. Consequently, they have a reasonable expectation that government officials will not monitor them or otherwise single them out merely on the basis of these characteristics. They likewise have a reasonable expectation that State and local government officials will not contribute to the creation or development of a registry based on the personally identifying information as defined in this act. Indeed, Vermont residents have expressed grave concerns that the federal government seeks to create or develop such a registry,

which would be contrary to Vermont and American values. This act is intended to narrowly address those concerns without impeding Vermont residents' enjoyment of other legal rights and benefits.

(8) Vermont State and local law enforcement work tirelessly to protect the rights and security of all Vermont residents afforded them under the Vermont and U.S. Constitutions. Moreover, Vermont residents benefit from and are safer through the cooperative and mutually beneficial interaction between local, State, and federal law enforcement, including the U.S. Border Patrol.

(9) Vermont residents are more likely to engage with law enforcement and other officials by reporting emergencies, crimes, and acting as witnesses; to participate in economic activity; and to be engaged in civic life if they can be assured they will not be singled out on the basis of the personally identifying information as defined in this act.

(10) This act is not intended to interfere with the enforcement of Vermont's public safety laws or efforts to prioritize immigration enforcement concerning individuals who pose a threat to Vermont's public safety.

(11) The State of Vermont therefore has a substantial, sovereign interest in prohibiting State and local government officials from collecting or disclosing certain information to federal authorities for the purposes of registration of its residents based on the personally identifying information as defined in this act. These prohibitions are not intended to interfere with Vermont residents' rights to free and equal access to government benefits and protection or the collection or sharing of data necessary to provide such benefits and protections.

Explanation and comments:

- *In general, legislative findings provide: i) an explanation of why the General Assembly believes a certain bill is necessary; and ii) guidance as to how the bill should be interpreted and applied. The findings in Sec. 1 were largely provided by the Office of the Attorney General and Governor's Office for this purpose. If this bill becomes law, a court may refer to these findings in determining legislative intent and the scope of the law. However, a court may also look at other factors, such as the plain meaning of the statutory language in Sec. 2, see, Wolfe v. Yudichak, 153 Vt. 235, 239 (1989) (“Although our overall aim is to determine the intent of the Legislature, we must first look to the plain meaning of the words”), or even the statements of Representatives and Senators. See, Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183 (D. Vt. 2012), aff'd in part, rev'd in part, 733 F.3d 393 (2d Cir. 2013).*
- *Therefore, although legislative findings may well be of value in explaining how a law should be interpreted and applied, there is no guarantee that findings will necessarily cure all potential defects in a law. As discussed below, we have concerns that Sec. 2 is vague, potentially open to varied interpretations, and may lead to unintended consequences.*

Sec. 2. 20 V.S.A. chapter 207 is added to read:

CHAPTER 207. PROTECTION OF PERSONALLY IDENTIFYING INFORMATION

§ 4651. PROHIBITED DISCLOSURE OF PERSONALLY IDENTIFYING

INFORMATION

(a) As used in this section:

(1) “Personally identifying information” means information concerning a person’s sex, sexual orientation, gender identity, marital status, race, color, religion, national origin, immigration status, age, or disability.

Explanation and comments:

- *11 attributes or characteristics are included in the definition of “personally identifying information.”*
- *One of the proffered rationales for including a larger number of attributes or characteristics is the dicta in City of N.Y. v. United States, 179 F.3d 29 (2d Cir. 1999), which we will discuss during our Committee testimony. This is a*

legitimate legal argument. However, as we will explain to the Committee, dicta is not considered binding on subsequent courts. As a result, although it can be argued that the inclusion of a larger number of attributes may make this bill more defensible, contrary arguments can also be made.

- *In addition, as discussed below, the inclusion of a larger number of attributes may increase the possibility of unintended consequences and confusion as to how this bill should be interpreted and applied.*

(2) “Public agency” has the same meaning as in 1 V.S.A. § 317 and shall include all officers, employees, agents, and independent contractors of the public agency.

Explanation and comments:

- *1 V.S.A. § 317(a)(2) defines “public agency” as meaning “any agency, board, department, commission, committee, branch, instrumentality, or authority of the State or any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the State.”*
- *This bill therefore applies to the State government, municipal and local governments, instrumentalities of the State, and employees, agents, and contractors.*

(b) A public agency shall not:

(1) collect information regarding the religious beliefs, practices, or affiliation of any individual for the purpose of registration of an individual based on his or her religious beliefs, practices, or affiliations;

Explanation and comments:

- *(b)(1) prohibits the collection of information regarding religious beliefs or practices, whereas (b)(2) prohibits the disclosure of any personally identifying information (including religion).*
- *This subdivision is narrowly tailored to registration based upon an individual’s religion and seems to effectively prohibit the intended conduct.*

(2) knowingly disclose personally identifying information to any federal agency or official for the purpose of registration of an individual based on his or her personally identifying information; or

Explanation and comments:

- *Subdivision (b)(2) is broader than (b)(1) and prohibits any employee, agent, or independent contractor working for the State government, or for any municipal and local government, from disclosing any of the 11 personally identifying attributes to a federal agency or official for the purposes of registration.*
- *The term “registration” is not defined in this bill, but has been defined as “[t]he act of making a list ... particularly of an official character, or of making entries therein,” Black’s Law Dictionary, or as being registered or the making of an “entry in a register” and a “register” has been further defined as “a record or list of names, events, items, etc. often kept by an official” or an entry in such a record. Webster’s New World Dictionary. Therefore, it is possible that the term “registration” in this bill could be interpreted broadly to encompass almost any list, registry, or database kept by a federal agency or official.*
- *The term “disclose” is not defined, but using its common definition would seem to cover the communication or transmission of information and data.*
- *The language in (b)(2) applies to existing registries or databases, and not merely new ones. For example, the intent of this bill seems to be that it will apply to existing registries and databases such as those maintained by ICE that contain information concerning immigration status. There is also no requirement that the registration be limited to only one of the 11 personally identifying characteristics.*
- *Pulling these threads together, (b)(2) could be read as potentially prohibiting the disclosure or transmission by any State or local employee, agent, or contractor, of any of the 11 personally identifying characteristics to any federal agency or official, if the federal agency is currently maintaining a list, record, or database that includes these characteristics.*
- *The State shares information concerning the personally identifying characteristics of Vermont residents with the federal government in many contexts and for many reasons that have little or nothing to do with immigration or the potential problems this bill is intended to address. To give a few examples:*
 - ✓ *Vital records: The State collects information concerning births, marriages, and deaths. Vermont is required to share this with the federal government. For example, information concerning each birth and death (including an individual’s age at death, sex, and race) is shared with the Centers for Disease Control and Prevention (CDC) and SSA. It appears that under a broad interpretation of this bill, this information sharing might have to cease upon passage.*
 - ✓ *Medicaid: The citizenship of Medicaid applicants must be verified. In addition, the Centers for Medicaid and Medicare Services (CMS) may use personally identifying information to verify or monitor claims.*

- ✓ *Benefit programs: Vermont reports age, disability, and race to the federal government concerning recipients of Temporary Assistance for Needy Families (TANF) funds.*
 - ✓ *Public safety: A Vermont law enforcement officer may enter personally identifying information into the NCIC system when an individual is charged with a crime, and DHS has access to NCIC.*
- *Two things must be stressed. First, we do not know the specifics of how data is shared as to the examples above, and, as a result, our concerns may not be valid. The examples are merely intended to illustrate how a broad interpretation of this bill may, but not necessarily will, have unintended impacts upon data sharing and transfer in many areas. Second, such a broad interpretation does not appear to be the intent of this bill, and the legislative findings may help to limit such a broad interpretation and resulting unintended consequences.*
 - *It may be argued that the phrase “for the purpose of registration ... based on his or her personally identifying information” narrows the bill. This argument could be challenged based on the following:*
 - ✓ *First, if this language adds an intent requirement, it is not a discriminatory intent, but merely an intent to register, which as noted above can be understood as maintaining any list or database.*
 - ✓ *Second, many of the various federal lists or databases that include the 11 personally identifying characteristics have been created with the purpose of tracking individuals based on those characteristics.*
 - ✓ *Third, the argument seems circular: That providing information for inclusion on a list is prohibited if the purpose of providing that information is to add to the list.*
 - ✓ *To take one example, the Social Security Administration maintains information on the age of every, or almost every, American for the express purpose of tracking their age, and determining eligibility for benefits based on age. The Social Security Administration also maintains information on the disability status of many Americans for the same reason. Such data would seem to fit the definition of “registration” and also would seem to be maintained for the “purpose of registration ... based on his or her personally identifying information,” in this case age or disability. As a result, we are not certain that the phrase “for the purpose of registration ... based on his or her personally identifying information” truly narrows the bill.*
 - *In addition to a potential impact upon federal programs, this bill may impact existing Vermont laws, rules, or programs. One example is 20 V.S.A. § 2366, the fair and impartial policing statute, that requires law enforcement agencies to collect data concerning the age, gender, and race of individuals stopped, and posting this information online.*

(3) use public agency money, facilities, property, equipment, or personnel to assist in creating or enforcing any federal government program for the registration of an individual based on his or her personally identifying information.

Explanation and comments:

- *This does not follow the same structure as subdivisions (b)(1) or (b)(2). Whereas (b)(2) prohibits the disclosure of personally identifying information, this subsection prohibits any assistance in “creating or enforcing” a federal registration “program.” The concerns as to potential unintended consequences discussed above would be even more relevant in the context of this language.*

(c) Any section, term, or provision of an agreement in existence on the effective date of this section that conflicts with subsection (b) of this section shall be invalidated on that date to the extent of the conflict.

Explanation and comments:

- *Subsection (c) invalidates any agreement, or provision of any agreement, that conflicts with this bill upon passage.*
- *As summarized above, we have concerns that a broad interpretation of subdivisions (b)(2) and (b)(3) might lead to unintended consequences. These concerns may be exacerbated if all agreements deemed in conflict are invalidated upon passage.*
- *Who will determine if any existing agreements, or parts of agreements, are in conflict with S.79 and therefore can no longer be followed or applied by State or local employees? Could this review process potentially create confusion or potentially interrupt data transfer or information sharing that this bill does not intend to impact?*

(d) 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, said policy or practice is, to the extent of such conflict, abolished.

Explanation and comments:

- *As discussed above, subdivision (b)(2) prohibits any employee, agent, or independent contractor working for the State government, or for any municipal and local government, from disclosing any of the 11 personally identifying attributes, including immigration status to a federal agency or official.*
- *As explained to the Committee, 8 U.S.C. § 1373(a) states that a “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.”*
- *The Second Circuit has held that 8 U.S.C. §§ 1373 and 1644 are constitutional and that “states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs” such as immigration enforcement. City of N.Y. v. United States, 179 F.3d at 35 (emphasis supplied).*
- *The result seems to be that, pursuant to subdivision (b)(2) all State and local employees are barred from disclosing immigration status to a federal agency or official such as DHS or ICE. However, pursuant to the “carve out” in subsection (d), that same employee can voluntarily disclose immigration status to the ICE if he or she wishes to do so. Therefore, the reach of this bill may be more limited than believed and may not prevent all such disclosures.*
- *In addition, the second sentence in subsection (d) invalidates all State or local law enforcement policies or “practice[s]” that “conflict[]” with 8 U.S.C. §§ 1373 and 1644. This could be interpreted as meaning that not only all formal or written policies, but also all informal or unwritten “practices” by law enforcement agencies to not share immigration information with the federal government will be invalidated as soon as this bill becomes law. Therefore, it could be argued that this bill may actually undermine local efforts (formal or informal) to restrict the sharing of immigration related information with federal agencies.*
- *It is unclear why the bill refers to “the lawful requirements of 8 U.S.C. §§ 1373 and 1644.” All of the requirements of these statutes are “lawful.” Including “lawful” is not necessary to hedge against a potential inappropriate use of these federal laws. In addition, without any guidance as to the meaning of “lawful requirements,” including this phrase could subject this section to a legal challenge for vagueness if a law enforcement officer was unsure how to distinguish between the lawful v. unlawful requirements in the statute.*
- *The failure to provide “carve outs” as to other federal laws, regulations, or programs that might be impacted by this bill may be of concern and could be*

interpreted as a legislative decision to not exempt such laws, regulations, or programs from the reach of this bill. Please see above for our concerns as to how this bill might be interpreted to impact data sharing between Vermont and various federal agencies and officials.

- *The findings in Sec. 1 indicate that this bill is not intended to interfere with immigration enforcement concerning individuals who pose a threat to Vermont's public safety, and there has been discussion that information should not be shared with the federal government concerning civil immigration violations. However, although the findings provide some context to the Legislature's intent, the language in this subsection is potentially vague as to whether this "carve out" is limited to meant to apply to compliance with 8 USC 1373 and 1644 with respect to sharing information concerning immigration status for the purpose of only criminal enforcement, or might apply to both civil and criminal immigration enforcement.*

(e) Nothing in this section is intended to prohibit or impede any public agency from disclosing or exchanging aggregated information that cannot be used to identify an individual with any other public agency or federal agency or official.

Explanation and comments:

- *Subsection (e) allows the disclosure and sharing of aggregated information and we have no comments or concerns regarding this language.*

§ 4652. AUTHORIZATION TO ENTER INTO AGREEMENTS

PURSUANT TO 8 U.S.C. § 1357(g) AND 19 U.S.C. § 1401(i)

(a) Notwithstanding any other provision of law, only the Governor, in consultation with the Vermont Attorney General, is authorized to enter into, modify, or extend an agreement pursuant to 8 U.S.C. § 1357(g) or 19 U.S.C. § 1401(i).

(b) Notwithstanding subsection (a) of this section, a State, county, or municipal law enforcement agency is authorized to enter into an agreement pursuant to 8 U.S.C.

§ 1357(g) or 19 U.S.C. § 1401(i) when necessary to address threats to the public safety or

welfare of Vermont residents arising out of a declaration of a State or national emergency.

Explanation and comments:

- *§ 4652 restricts the authority to enter into certain federal-state agreements to the Governor, in consultation with the Attorney General, unless the criteria set forth in subsection (b) are met. We have no concerns regarding this section.*

Sec. 3. EFFECTIVE DATE

This act shall take effect on passage.