Explanation of stakeholder edits to CJTC's 11/21 draft
12/4/17

Section VIII (g) and (h)

Stakeholders seek to maintain this provision as approved by the CJTC in June, 2016 and again in September, 2017.

CJTC's draft:	Stakeholder draft
g. Personal characteristics shall not impact the decision to cite, arrest, or continue custody under Rule 3 of the Vermont Rules of Criminal Procedure. Immigration status cannot be the sole criteria for making the decision to cite, arrest, or continue custody under Rule 3 of the Vermont Rules of Criminal Procedure. h. Personal characteristics and/or immigration status, including the existence of a civil immigration detainer, shall not affect the detainee's ability to participate in pre-charge or police-initiated pre-court processes such as referral to diversion or a Community Justice Center.	g. Personal characteristics and/or immigration status, including the existence of a civil immigration detainer, shall not affect the detainee's ability to participate in pre-charge or police-initiated pre-court processes such as referral to diversion or a Community Justice Center. Furthermore, personal characteristics and/or immigration status shall not be used as a criteria for citation, arrest, or continued custody under Rule 3 of the Vermont Rules of Criminal Procedure.

The CJTC proposes altering this section to allow officers to take immigration status into account when making the decision to "cite, arrest, or continue custody." Members of the CJTC have expressed that immigration status should be permissible as a criterion because it may affect determination of flight risk.

This is an unnecessary and damaging amendment to already-approved language. Inserting immigration status into the Rule 3 decision-making process would encourage biased-based policing. Officers may make assumptions about individuals based on limited understandings of complex legal categories such as immigration status, likely perceiving undocumented immigrants to be inherently more of a flight risk. The outcome would be that undocumented individuals would be more likely to be detained, rather than cited and released.

Furthermore, the use of immigration status as a factor is unnecessary. The factors of whether or not a detainee is a flight risk can be determined independently of immigration status by relying on neutral categories such as length of time in state, ties to community, etc. The CJTC may claim that immigration status is a relevant factor in addition to those previously mentioned. Yet if the

totality of factors (without knowing status) would lead an officer to release an individual from custody, simply learning that someone is undocumented should not sway the determination towards continued custody.

Finally, in the vast majority of cases -- because of the prohibition on status inquiry in VIII.a -- officers will not be aware of an individual's immigration status, yet this lack of knowledge has not been deemed damaging to officers' abilities to make Rule 3 determinations. In the occasional case in which an officer does become aware of a detainee's status, that knowledge should not then be viewed as necessary to the Rule 3 determination.

Section IX

Stakeholders seek to maintain this provision as approved by the CJTC in June, 2016 and again in September, 2017.

CJTC's draft:	Stakeholder draft:
[Agency members] have authority to enforce federal criminal law. An unlawful border crossing is a federal crime. All laws and constitutional rights applicable to criminal investigations apply to the enforcement of federal criminal law. 1. [Agency members] operating near the Canadian border who have a specific and articulable reason to believe that an illegal border crossing has immediately occurred may ask a suspect about his or her immigration status, soliciting the support of federal law enforcement when/if reasonably necessary to protect officer and/or public safety. [Agency members] operating near the Canadian border may make inquiries consistent with the foregoing. 2. If an [agency member] is contacted by federal authorities please refer to Section XI, Collaboration with Federal Immigration Officers.	"[Agency members] shall not make warrantless arrests or detain individuals on suspicion of "unlawful entry," unless the suspect is apprehended in the process of entering the United States without inspection."

The CJTC version would significantly weaken this important provision. The section was drafted in 2016 in order to preserve law enforcement's ability to enforce criminal immigration law while providing clear directives on how to do so. The section was originally written in order to prevent suspicion of unlawful border crossings from becoming a loophole by which officers could skirt other restrictions on immigration enforcement.

This was not a theoretical concern, as the Deputy involved in the Grand Isle County Sheriff Department's detention of Lorenzo Alcudia in 2015, justified this discriminatory and unlawful detention based on suspicion of possible criminal activity. Though the deputy was determined by the Human Rights Commission (HRC) not to have had reasonable suspicion, the lack of clarity in the then-existing FIP policy allowed him to marshal this pretext. In the HRC's investigation into the stop, the Commission determines that the policy then in effect was "an example of window dressing -- a sort of meaningless document that sounds powerful but that is actually full of procedural bypasses and exceptions to the rules that swallow the principles it sets forth." Though the specific "procedural bypasses" referenced in this quote were related to another section of the policy then in place (regarding requests for identification), it is certainly plausible that if the officer in this case had been deprived of one pretext to detain Mr. Alcudia, he may have relied on another.

Current changes proposed by the Council would remove this important protection. The lack of definition of "near the Canadian border" and "immediately occurred" would leave officers with wide discretion on when to initiate investigations. "[A] specific and articulable reason to believe that an illegal border crossing had immediately occurred" would likely include perceptions of the suspect's personal characteristics, allowing officers to perform intrusive interrogations and communicate with federal immigration authorities based in part on the subject's perceived race and/or national origin.

The restoration of 2016's more restrictive language is necessary to ensure that suspicion of recent border crossing not become a pretext for local law enforcement to discriminate and become unnecessarily involved in immigration concerns.

Section X.c

Stakeholders seek to restore protections and clarify for victims and witnesses of crimes implied in the 2016 policy.

2016 version, as approved:	CJTC draft:	Stakeholder draft:
"[Agency members] should communicate that they are there to provide assistance and to ensure safety, and not to deport victims/witnesses and that [agency members] do not ask victims/witnesses about their immigration status nor will they report immigrants or the	"[Agency members] will ensure that individual immigrants and immigrant communities understand that full victim services are available to documented and undocumented victims/witnesses. [Agency members] should communicate that they are there to provide	[add to CJTC draft] "[Agency members] shall not share information about crime victims/witnesses with federal immigration authorities, unless it

immigration status of victims/witnesses to the Department of Homeland Security."	assistance and to ensure safety, and not to deport victims/witnesses."	is with the individual's consent."

The changes suggested by the CJTC would allow officers to report victims and witnesses of crime to federal immigration authorities, reducing the likelihood that individuals will report crimes and thereby reducing community safety. The CJTC claims that this amendment is required in order to comply with 1373 and 1644.

The state, however, has already enacted a looser definition of the lawful requirements of 1373 and 1644, based on ambiguities in current case law. The 2nd Circuit's 1999 ruling in *City of New York v. United States* suggests that 1373 may not sustain a constitutional challenge if a local jurisdiction can show a compelling interest in protecting confidentiality. The state relied on this interpretation to pass S.79, which states that "a public agency shall not … knowingly disclose personally identifying information[1] to any federal agency or official for the purpose of registration of an individual based on his or her personally identifying information" (§ 4651.b.2).

In order to demonstrate that the state held a compelling interest in restricting this communication, the Governor's legal counsel included the "finding" that: "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" (Sec. 1, 11).

Though the compelling, or "sovereign," interest referenced in S.79 is the state's interest in not sharing residents' information for the "purposes of registration," the legal principle is the same: information sharing of immigration status may be lawfully prohibited when a sovereign interest can be established. The state certainly has a sovereign interest in protecting the confidentiality of victims and witnesses. If immigrants believe that they can be turned over to ICE when reporting a crime, they will not do so, damaging public safety. Furthermore, Vermont would not be alone in advancing this specific justification; another recent court opinion lends further backing to stakeholder suggestions.

On 11/15, a Federal District Court in Pennsylvania enjoined the federal government from blocking funds to the Philadelphia Police Department in a 128 page ruling in *City of Philadelphia v. Sessions*. Among the elements of Philadelphia's policy challenged by the DOJ is a provision stating: "immigrants who are victims of crimes will not have their status as an immigrant transmitted in any manner" (14). However, in the ruling, the court found "that the City is in substantial

[1] "Personally identifying information" is elsewhere defined to include "immigration status" (§ 4651.a.1)

compliance with the Challenged Conditions for the FY 2017 Byrne JAG grant and that it can certify its compliance with Section 1373" (46).

In sum, the recent court decision concludes that a prohibition on information sharing regarding victims does not violate 1373 and 1644. The state has previously demonstrated a willingness to interpret the law as such, in the passage of S.79. The CJTC should uphold this interpretation and maintain protections for victims and witnesses of crimes in the FIP.

XI.a

Stakeholders seek to restore elements of the provision approved in September of this year and to clarify carve-out clauses added in the current CJTC draft.

Oct. 2017 version:	CJTC draft:	Stakeholder draft:
"Unless ICE or Customs and Border Patrol (CBP) agents have a criminal warrant, or [Agency members] have a legitimate law enforcement purpose exclusive to the enforcement of immigration laws, … [Agency members] shall not expend public time or resources responding to ICE or CBP regarding an individual's personally identifiable information other than citizenship or immigration status (e.g. residence, place of employment, court, or release dates)."	"No information about an individual should be shared with federal immigration authorities unless there is a law enforcement, public safety, or officer safety reason to do so that is not related to the enforcement of federal civil immigration law. This does not apply to communications regarding an individual's citizenship or immigration status: agency members may share this information without restriction in accordance with 8 U.S.C. §§ 1373 and 1644."	"No information about an individual shall be shared with federal immigration authorities unless necessary to an ongoing investigation of a federal felony, for which there is probable cause, and the investigation is unrelated to the enforcement of federal civil immigration law. Such information includes but is not limited to the individual's custody status, release date/time, court dates, whereabouts, residence, employment, identification numbers, appearance, telephone number, and familial relations. This does not apply to communications regarding an individual's citizenship or immigration status: agency members may share this information without restriction in accordance with 8 U.S.C. §§ 1373 and 1644."

There appears to be broad agreement on this important provision, though stakeholders believe that the language currently proposed should be clarified in two ways. First, stakeholders have rewritten the "carve-outs" to more clearly delineate the circumstances in which information sharing is allowed. The language of "necessary to the ongoing investigation" mirrors the language

agreed to in VIII.a, while the standard has risen to "federal felony, for which there is probable cause." This tightening of the standard is important because "law enforcement reason" or simply "criminal offense" would lead immigration authorities to rely on pretexts -- the most likely pretext being entry without inspection -- to compel information sharing when their true aim was civil immigration enforcement.

Secondly, stakeholders have reinserted a list of examples of the types of information not to be shared. This is particularly important because of the removal in Section VIII of the prohibition on responding to "requests for notification."

The maintenance of a strongly-worded and clear prohibition on information sharing is of the utmost importance. A traffic stop by the Franklin County Sheriff Department this summer, which resulted in the detention by Border Patrol of two farmworkers, provides a tragic case study as to why a clear prohibition on information sharing is required. The FCSD Deputy called for backup from Border Patrol after seeing that the driver possessed a Mexican identification and did not have a driver's license[2]. Throughout the course of the stop, he shared information with BP agents, including the driver's identification, address, employer, and date of birth, as well as the location of other individuals assumed to be immigrants. The actions of the FCSD employees in this stop demonstrate the need for clarity and precision in this section.

XI.d

Stakeholders seek to maintain this provision as approved by the CJTC in June, 2016.

CJTC's draft:	Stakeholder draft
"Unless ICE or Customs and Border Patrol (CBP) agents have a judicially-issued criminal warrant, or [Agency members] have a legitimate law enforcement purpose exclusive of the enforcement of immigration laws, [Agency members] shall not **offer** ICE or CBP agents access to individuals in [Agency's] custody."	"Unless ICE or Customs and Border Patrol (CBP) agents have a judicially-issued criminal warrant, or [Agency members] have a legitimate law enforcement purpose exclusive of the enforcement of immigration laws, [Agency members] shall not **give** ICE or CBP agents access to individuals in [Agency's] custody."

This small edit would have a large impact, allowing agencies to grant federal immigration authorities access to individuals in police custody under any circumstances, so long as the federal agent requested access. This outcome would severely undermine other provisions of the policy,

[2] The narrative of the police report includes a suggestion that the call for backup was due to safety concerns, citing "multiple occupants and failure to yield"; however, the timeline and bodycam footage show otherwise.

which prohibit lengthening detentions or otherwise acting to facilitate ICE's detention of immigrants.

The CJTC draft indicates that the language has been changed because of fears that local jurisdictions could be accused of "harboring" undocumented immigrants by denying federal authorities access to individuals in police custody. However, in order to amount to harboring, there generally must be some form of affirmative assistance in shielding an individual from detection. Not letting ICE into the jail without an individualized criminal warrant is declining to offer ICE assistance; it does not amount to assisting the detainee in escaping detection or arrest. If demanding a warrant from ICE were enough for harboring, then anyone who exercises their basic Fourth Amendment rights would be liable for harboring; such an interpretation of the law would be unconstitutional.

Furthermore, many jurisdictions around the country have adopted language similar or identical to that proposed by stakeholders and approved by the CJTC last year. Such jurisdictions include: Cook County IL, Denver CO, Santa Clara, San Francisco, and Richmond CA, and Taos and San Miguel Counties in NM. Many of these policies have been on the books for years without any constitutional or legal problems arising.

Agencies are firmly within their rights to decline to offer assistance to ICE or CBP by denying federal agents access to individuals in custody absent the limited circumstances. To do otherwise would undermine the entire policy by turning local police stations and barracks into temporary holding cells for ICE or CBP.