

From: ACLU of Vermont
To: The Vermont Senate Judiciary Committee
Re: Proposed modifications to Act 5 of 2017 to better protect Vermont communities
Date: 2/11/2025

Overview

The ACLU has issued recommendations for a wide range of actions to help protect the people most likely to be most impacted by the policies of the Trump administration. Specifically, we rightfully anticipated the greatest potential threats to members of the LGBTQ+ and immigrant communities, as well as people seeking and providing legal reproductive and gender affirming health care.

One mechanism the state of Vermont can use to better protect these communities is to limit information sharing with the federal government and hostile states when the request is in furtherance of an investigation or proceeding that pertains to imposing liability for accessing legally protected healthcare services, engaging in First Amendment-protected activity, providing assistance to non-citizens, and prosecuting individuals for offenses related to immigration status.

Vermont law currently has limitations on both the information that can be shared with federal authorities, and the ability of local officials to enter into cooperative agreements with federal officials found in Act 5 of 2017. However, these restrictions can and should be strengthened to address the attacks on the communities identified above.

Proposed amendments to Act 5 of 2017

Act 5 provides a solid foundation for efforts to limit state compliance in federal overreach, but it can be strengthened to add additional restrictions on information sharing. Specifically, we recommend that Act 5 be amended to further limit the information that can be disclosed to the federal government, provide guidance on assessing requests for information, and remove exceptions that would allow state and local officials to enter into collaborative agreements with immigration and customs officials without gubernatorial or legislative approval. Proposed amendments can be found below.

20 V.S.A. chapter 207 § 4651. PROHIBITED DISCLOSURE OF PERSONALLY IDENTIFYING INFORMATION

(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;



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- (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
- (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.
- (4) comply with a request for information or assistance if they have reason to believe the request is in furtherance of any investigation, arrest, prosecution, or other sanction of conduct initiated by federal authorities or out-of-state authorities that seeks—
 - (A) to impose civil or criminal liability or professional sanction upon a person or entity for the provision, supplying, assistance with, securing, or receipt of, or any inquiry concerning or relating to, health care services if the services as provided would have been lawful under State law and consistent with good medical practice if they occurred entirely in this State;
 - (B) to identify or impose civil or criminal liability upon a person or entity based on their participation in activities protected by the First Amendment of the U.S. Constitution;
 - (C) to impose civil or criminal liability, or other penalties, upon a person or entity for provision of humanitarian assistance, legal assistance or other aid to benefit a noncitizen if that provision would have been lawful if it occurred entirely in this State;
 - (D) to identify or apprehend a person in order to subject them to civil immigration detention, removal or deportation proceedings; or
 - (E) to prosecute a person or persons for offenses related to immigration status, including but not limited to violations of Sections 1253, 1304(e), 1306(a) and (b), 1324, 1325, or 1326 of Title 8 of the United States Code, or violations of Sections 1028A³ or 1546³ of Title 18 of the United States Code.¹
- (c) In the event a State agency, employee or agent receives a request that they have reason to believe is in furtherance of an investigation, arrest, prosecution or other sanction described in Section 1(a)-(e) of this statute, they shall notify the agency director and refer the request to the Governor's Office. Upon receipt of the referral, the Governor's Office shall
 - (1) Assess, including by consulting with relevant federal authorities or out-of-state authorities as appropriate, whether information or assistance is being requested or commanded.
 - (2) Where a court order, subpoena, warrant or other legal process is presented, assess its validity and application.



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- (3) Assess whether, in light of the federal authorities' or out-of-state authorities' stated or apparent purposes, complying with the request would violate 20 V.S.A. chapter 207 § 4651.
 - (4) Assess whether, in light of the federal authorities' or out-of-state authorities' stated or apparent purposes, complying with the request would violate potentially applicable state statutory or constitutional provisions. Such provisions may include, but are not limited to, statutory and constitutional protections for privacy rights, speech and association, healthcare, abortion, due process, equal protection, and other civil rights and civil liberties guarantees.
 - (5) Provide these assessments to the referring employee and agency and direct them to deny or grant the request.
 - (6) If directing that the request be granted, provide a written summary of these assessments to the referring agency. The summary shall be retained for as long as applicable law may require, but in any event no less than six years after the date of execution.
- (d) 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.
- (e) 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.
- (f) 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.

§ 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.~~

Background

Act 5 of 2017



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In 2017 Vermont passed Act 5 which pertains to a public agency's disclosure of personally identifying information, and the ability of local law enforcement to enter into cooperative agreements with federal immigrations and customs officials. Act 5 generally prohibits public agencies from disclosing personally identifying information to any federal agency or official, specifically for the purpose of registration of an individual based on personally identifying information. Personally identifying information is defined in this statute as information concerning a person's sex, sexual orientation, gender identity, marital status, race, color, religion, national origin, immigration status, age, or disability. "Registration," under Act 5, is not defined.

Also under Act 5, only the Governor, in consultation with the Vermont Attorney General, is authorized to enter, modify, or extend agreements for state and local law enforcement to perform the functions of immigration or customs officers pursuant to 8 U.S.C. § 1357(g) or 19 U.S.C. § 1401(i). State, county, or municipal law enforcement agencies are authorized to enter into agreements pursuant to 8 U.S.C. § 1357(g) or 19 U.S.C. § 1401(i) only 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."

We recommend that Act 5 be amended to further limit the information that can be disclosed to the federal government, provide guidance on assessing requests for information, and remove exceptions that would allow state and local officials to enter into collaborative agreements with immigration and customs officials without gubernatorial approval. Combined, these amendments will offer greater protections to communities likely to be targeted by the Trump administration.

The proposed amendments generally prohibit state employees from voluntarily complying with a request to provide information or assistance to federal authorities, or authorities of another state, if they have reason to believe that the request is in furtherance of an investigation or proceeding that pertains to imposing liability for accessing legally protected healthcare services, engaging in First Amendment-protected activity, providing assistance to non-citizens, and prosecuting individuals for offenses related to immigration status. These additional limitations on information sharing are necessary to offer greater protection to the communities most likely to be targeted by the incoming administration.

Further, in the proposed amendments, when a state agency or employee receives a request, they have reason to believe is in violation of 20 V.S.A. chapter 207 § 4651(b) they must notify their director and refer the request to the Governor's Office. Then, the Governor's Office determines the appropriate action. There is no assessment requirement provided under Act 5 of 2017, and this additional language will provide guidance to state officials on procedures for properly assessing requests and ensure that the governor's office is aware of potential requests that might violate the statute.



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Finally, we recommend removing § 4652 (b) because this exception has the likelihood of nullifying the protections found in § 4652 (a) that gives the governor the authority to enter into agreements with federal officials related to immigration and customs enforcement. President Trump has already declared a national emergency at the Southern border related to immigration, and we could see more to come. If § 4652 (b) is not removed, we could see law enforcement agencies enter into agreements to perform the functions of immigration or customs officers pursuant to 8 U.S.C. § 1357(g) or 19 U.S.C. § 1401(i) without authorization from the governor's office, which is a necessary check on the use of state and local resources to aid in mass deportation efforts.

Immigration Status and 8 U.S.C §§ 1373 & 1644: One concern that is likely to be raised is if these amendments comply with 8 U.S.C §§ 1373 & 1644. These sections of federal law purport to bar state and local policies that restrict employees from sending certain immigration information to the federal government. However, courts have construed the statutes narrowly and concluded that they govern only immigration status and citizenship information rather than other matters, like release dates or home addresses.ⁱⁱ

While Act 5 and the proposed amendments seek to limit state agencies from disclosing information intended to identify people for civil immigration proceedings or prosecute them for offenses related to immigration status, Act 5 explicitly states, "*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.*" This exception makes it clear that state officials are not barred from sharing information related to citizenship or immigration status but does bar the sharing of other information that might be likely used to initiate immigration proceedings or prosecutions related to immigration status.

ⁱ 8 U.S.C. § 1253 Failure to comply with removal orders, 8 U.S.C. §1304(e); Failure to carry a certificate of registration; 8 U.S.C. § 1306 (a) Willful failure to register; 8 U.S.C § 1306 (b) Failure to notify change of address; 8 U.S.C. § 1324; Transporting or harboring non-citizens outside of designated points of entry; 8 U.S.C. § 1325 (a) Improper time or place, avoidance of examination or inspection, misrepresentation and concealment of facts; 8 U.S.C. § 1326 Unauthorized reentry; 18 U.S.C. § 1028A and 1546 Presentation, production, or possession of false documents.

ⁱⁱ See *Cty. of Ocean*, 475 F. Supp. 3d at 374-76.