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March 16, 2020

The Honorable Michael Carpenter, Chair
The Honorable Donna Bailey, Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, ME 04333-0100

Re: Attorney General Response regarding Collection and Compilation of Data on Profiling Pursuant to P.L. 2019, ch. 410, An Act To Eliminate Profiling in Maine

Dear Senate Chair Carpenter, House Chair Bailey and Members of the Committee:

I am writing regarding P.L. 2019, ch. 410, An Act to Eliminate Profiling in Maine (“Act”). Section 4 of the Act provides that “[t]he Attorney General, in consultation with interested parties, including law enforcement agencies and community, professional, research, civil liberties and civil rights organizations, shall explore available techniques for the collection and compilation of profiling data and shall report findings and recommendations to the Joint Standing Committee on Judiciary no later than March 15, 2020.” In response to this directive, our office sought input from the following organizations: Immigrant Legal Advocacy Project, Maine People’s Alliance, Maine Chiefs of Police Association, Maine Sheriffs Association, Maine’s eight District Attorneys, Cumberland Legal Aid Clinic, Maine Association of Criminal Defense Lawyers, ACLU Maine, Maine Department of Public Safety, Maine State Police, and NAACP. A copy of all the responses we received are attached to this letter.

Summary of Information Reviewed. In addition to the responses, we reviewed literature on data collection relating to racial profiling, including: 1) Racial Identity Profiling Advisory Board Annual Report (2019) (California); 2) State of Connecticut, Traffic Stop Data Analysis and Findings (June 2019); 3) Maine Human Rights Commission Data (2000-2020); 4) Report of the Advisory Committee on Bias-Based Profiling by Law Enforcement Officers and Law Enforcement Agencies (February 12, 2012) (Maine); 5) Report of the Intergovernmental Pretrial Justice Reform Task Force (December 2019) (Maine); and 6) Maine Chiefs of Police Model Policy Regarding Hate/Bias Crimes and Bias-Based Profiling.

Currently, there are multiple mechanisms in place for the collection of data relating to law enforcement in Maine. In addition to Maine State Police (“MSP”) and other state law enforcement

agencies, there are 120 municipal police departments, and 16 county sheriffs' departments in Maine. The records management systems used by each law enforcement entity is determined on an agency basis. In the February 12, 2012 Advisory Study, it was estimated that there may be as many as 13 different data collection systems used by law enforcement agencies in Maine. This number has not been updated. The current systems are decentralized and are not comprehensive. MSP collects information relating to traffic stops and the investigation of criminal complaints. In those instances where a traffic citation is issued, the investigating law enforcement officer records the age, race and gender of the detained individual. During criminal investigations, the age, sex, race, and ethnicity for complainants and suspects are captured in MSP's records management system. All Maine law enforcement agencies are required to submit data to MSP for specific categories of crimes, and this data is compiled and submitted to the United States Department of Justice on an annual basis.

The Maine Human Rights Commission ("MHRC") is the state agency charged with enforcing the Maine Human Rights Act ("MHRA"), which prohibits discrimination in public accommodations on the basis of race. After reviewing a charge of discrimination, the MHRC makes a determination of whether there are reasonable grounds to believe that discrimination in violation of the MHRA has occurred. Information from the MHRC indicates that between 2000 and 2020, there have been forty-eight public accommodation charges of race discrimination relating to municipal and county entities. The MHRC did not find reasonable grounds to support any racial profiling charges relating to law enforcement during that period.

We also reached out to the eight District Attorneys as well as all of the MDEA drug task force attorneys, who are assistant attorneys general, to determine whether any Motions to Suppress or Motions to Dismiss alleging racial profiling were filed by defense counsel. We received one response to this request. In *State of Maine v. Kam Leung* bearing Cumberland County Docket Nos. CR-2019-0623 and 2017-6994, defense counsel filed a Motion to Suppress evidence on the basis that the troopers "engaged in selective law enforcement tactics that involve discrimination based on race..." See Attachment 4. A hearing was held and a decision by the Court is still pending.

One reported case, *United States v. Garcia-Zavala*, 2018 WL 1091973 (D. Me. 2018), *aff'd*, 919 F. 3d 108 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 391 (2019), involving claims of a racially motivated pretextual traffic stop by a Maine State Trooper, was found to be without factual support. This finding was affirmed on appeal.

In its response to our inquiry, Immigrant Legal Advocacy Project ("ILAP") identified seven instances in which ILAP found some indicia of individuals being stopped, arrested and detained by Immigration and Customs Enforcement ("ICE") after a traffic stop for minor infractions or when no reason was provided. ILAP also reported that racial profiling by police is identified as a problem in the immigrant communities that ILAP serves.

Since approximately 1993, the Office of the Attorney General (“OAG”) was informally designated as the recipient of complaints of racial profiling by law enforcement. In addition, a protocol was established in conjunction with the development of a model policy for Hate/Bias Crimes and Bias-Based Profiling by the Maine Chiefs of Police Association in 2000. Since 1993, the OAG has received one complaint of racial profiling. This complaint was reviewed and was not substantiated.

As noted in the response of the ACLU, the states of California and Connecticut have recently established comprehensive data collection and compilation practices with respect to racial profiling.¹ In both states, the state legislature enacted a law mandating the collection and reporting of data relating to stops and civilian complaints against law enforcement officers. The process has involved multiple years of study, implementation that includes a centralized data collection and establishment of an advisory board to oversee the process. Data collection involves the entry of information into a central database by the investigating officer after the stop.² We understand that the data reporting process in Connecticut is designed to take 90 seconds or less and could be completed by an officer “on the side of the road” after the stop.

Options:

A. Implementation of a data collection and compilation program in Maine similar to California and Connecticut is one option the Legislature may wish to consider. As in other states, this would be a multi-year process. In addition, there must be safeguards in place to insure the reliability and integrity of the data collected. The assessment of police-citizen contact for the presence or absence of racial bias presents the challenge of how to account for alternative explanations for any racial disparity in stop rates. For example, is the difference based upon race, differences in driving/offending behavior, or differences in rates of exposure to law enforcement due to location of the encounter and population in or travelling through a particular location? The challenge for a study of racial profiling is to find suitable methods to pinpoint the correct explanation.

The Legislature would need to appropriate funding to retain a consultant with experience in the implementation of a data collection and compilation program addressing racial profiling in law enforcement as well as the development of a data collection system. We understand that the cost to build the data collection system in Connecticut was approximately \$750,000. Federal funds may be available that would offset some of the start-up cost pursuant to 23 CFR § 1300.11. It is

¹ We also understand the States of Oregon and Rhode Island have similar data collection and compilation programs.

² Extending the stop for the purposes of questioning the subject of the stop about matters not related to the purpose of the stop is not permitted. *Illinois v. Caballes*, 125 S. Ct. 834 (2005) (a stop may become unlawful if it is prolonged beyond the time reasonably required to complete the mission of the stop).

our understanding that provided a state meets the grant requirements, states are eligible for grants of \$375,000 per year. It should be noted that the Report of the Intergovernmental Pretrial Justice Reform Task Force (December 2019) (Maine) (“Task Force”) recognized that there are “significant gaps” in data collection and analysis in Maine.³ The Task Force recommended that the State “fully support and fund robust data development and collection...disaggregated by suspect classifications (at least race and gender).” *Id.* at 6 and 9. If the recommendation from this Task Force is followed, and if Option A is chosen, law enforcement/racial profiling data collection could be part of the larger data collection project recommended by the Task Force (which includes arrests, bail conditions, bail amounts, violations, jail data, and pretrial length of stay).

B. Another option would be to formalize the OAG racial profiling complaint policy to determine whether a more robust data collection process (like the state collection systems described above) is warranted. If all law enforcement agencies were required, either by statute or rule to report complaints of racial profiling to the OAG for review, there would be a centralized repository of complaints. As noted above, since approximately 1999, there has been only one complaint. That complaint was not substantiated. The lack of complaints may be because law enforcement agencies are not aware of the OAG complaint procedure or it may be because there are not many instances of racial profiling involving state or local law enforcement.⁴ Providing outreach and training to law enforcement agencies on the availability of the OAG complaint process should also be part of this option.

C. Under current law, the Maine Criminal Justice Academy (“MCJA”) has the authority to require every local law enforcement agency in Maine to adopt written policies consistent with policy standards established by the Academy. 25-A M.R.S. § 2803-B (2019). Mandatory reporting to the MCJA or OAG of racial profiling complaints could be added as a mandatory element of local law enforcement agency policy. In addition, the MCJA also has the authority to require law enforcement agencies to make certain reports to the MCJA on an annual basis. *See, e.g.*, 25 M.R.S. § 2805-B (2019). The Legislature or the MCJA could add racial profiling as a required category for annual reports as is currently the case for excessive force complaints. *Id.*

³ The Task Force was re-established by a February 6, 2019 Order of the Chief Justice of the Maine Supreme Judicial Court for the purpose of reviewing and improving the system of pretrial justice in Maine. Part of the responsibilities of the Task Force were to review relevant current research and data and make recommendations that will “achieve fairness in the application of policies and laws, including but not limited to, giving attention to racial, ethnic, gender, LGBTQ, and economic factors. Report of the Intergovernmental Pretrial Justice Reform Task Force (December 2019) (Maine) at 4-5.

⁴ Federal law enforcement stops would be beyond the scope of a state data collection system.

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I hope this information is responsive to the request for information. Please let me know if you have additional questions or concerns.

Sincerely,



AARON M. FREY
Attorney General

AMF/SPH

Attachments

cc: Members of the Joint Standing Committee on Judiciary:
Honorable Senator Shenna Bellows
Honorable Senator Lisa Keim
Honorable Representative Christopher Babbidge
Honorable Representative Barbara Cardone
Honorable Representative Philip Curtis
Honorable Representative John DeVeau
Honorable Representative Jeffrey Evangelos
Honorable Representative David Haggan
Honorable Representative Thom Harnett
Honorable Representative Lois Reckitt
Honorable Representative Rachel Talbot Ross