

**DRAFT**  
**ORDINANCE TO PROTECT EQUAL JUSTICE FOR ALL**  
**SUBMITTED TO THE FAIRFAX COUNTY BOARD OF SUPERVISORS**

***Section \_\_-\_\_-1; Findings.***

This Ordinance is founded on the following key principles: our communities' diverse backgrounds make Fairfax County stronger and more vibrant; all persons are entitled to equal treatment under the law irrespective of their race, ethnicity, citizenship or immigration status; and community relations built on trust, respect, acceptance and open communication between the County and its people are essential for the whole community's welfare, health, and safety. We do not want anyone in Fairfax County to be afraid to call law enforcement if their safety is at risk, or to report information that may help to solve a crime.

It is the policy of Fairfax County to cooperate with federal authorities including Immigration and Customs Enforcement ("ICE") on criminal immigration matters when required. Fairfax County's participation in civil immigration enforcement activities and related information sharing, however, has sowed fear in our community and deteriorated community trust. It is contrary to the County's public policy objectives to use its limited resources for activities that undermine community trust. Civil immigration activities may also violate the United States ("U.S.") Constitution and subject the County to unnecessary liability.

This Ordinance shall apply after \_\_ (date) \_\_\_\_, and shall apply as detailed in Section\_-3. To the extent existing Fairfax codes, ordinances or regulations conflict with this Ordinance they are hereby amended.

***Section \_\_-\_\_-2; Definitions.***

For the purposes of this Ordinance:

- (a) A "criminal judicial warrant" is a warrant supported by probable cause of a violation of a federal, state or local criminal law, and issued by a neutral magistrate or judge.
- (b) "Federal immigration authorities" means the Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"), Customs and Border Protection ("CBP"), and/or any successor or other federal agency or agencies charged with the enforcement of civil immigration laws.
- (c) An "ICE request" refers to any and all civil immigration warrants, administrative warrants, removal orders, and detainer requests, including any civil warrant or order for arrest or removal (*e.g.*, Form I-200, I-205), notice to appear, notice of custody determination, request pursuant to 8 C.F.R. § 236.1 or § 287.7 or similar provision that the recipient provide notice of release, or maintain custody of, a person based on alleged violation of a civil immigration law (*e.g.*, Form I-247A, I-203), and any other document issued by federal immigration authorities for the arrest or detention of a person for a civil immigration enforcement purpose; this includes when any of the above civil immigration documents appears as a "hit" in the Federal Bureau of Investigation National Crime Information Center ("NCIC") database.

***Section \_\_-\_\_-3; Applicability of Ordinance.***

Unless specified herein, all provisions of this Ordinance applying to "Fairfax County" (or "the County") shall apply to Fairfax County and all its agencies, departments, subdivisions, commissions, councils, committees

and boards; as well as all officers and persons employed by Fairfax County or acting on its behalf. After the effective date of the Ordinance, any entity or person that is not an agency or agent of Fairfax County but which requests or elects to accept funds from the County will be required, as a condition of acceptance of those funds, to abide by the Ordinance and to be treated as an agency for purpose thereof,<sup>i</sup> except to the extent that the Virginia Code mandates that the County disburse such funds without any restrictions.

***Section \_\_-\_\_-4; Protection of Confidential Information.***

(a) ***Definitions.*** For the purposes of this Section:

- (i) “Confidential information” is information maintained by the County relating to an individual’s:
  - (1) Sexual orientation or gender identity;
  - (2) Race or ethnicity;
  - (3) Potential or actual status as a victim of domestic violence, a victim of sexual assault, or a witness in a criminal matter;
  - (4) Receipt of public assistance;
  - (5) Citizenship or immigration status; or
  - (6) Tax records (including any information contained in an individual’s tax records).
- (ii) “Citizenship or immigration status information” means all matters regarding questions of citizenship of the United States or any other country, the authority to reside in or otherwise be present in the United States, or any other immigration matter enforced by federal immigration authorities.

(b) It is the policy of the County not to disclose confidential information to any person or entity, ***unless:***

- (i) The disclosure has been consensually authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual’s parent or legal guardian; or
- (ii) The disclosure is to a Fairfax County agency officer or employee, will be kept confidential, and is necessary to fulfill the purpose or achieve the mission of any Fairfax County agency; or
- (iii) In the case of confidential information *other than* citizenship or immigration status information:
  - (1) The disclosure is required by Virginia or federal law; *and*
  - (2) The disclosure is necessary to fulfill the purpose or achieve the mission of any Fairfax County agency, and is limited to the recipients necessary to fulfill the purpose or achieve the mission of such Fairfax County agency; or;
- (iv) In the case of citizenship or immigration status information, a criminal judicial warrant or binding court order has been secured that requires disclosure of such information, ***provided that*** nothing in this Ordinance:
  - (1) Prohibits or restricts the County from performing its obligations under Virginia Code §§ 19.2-83.2 & 53.1-218 (requiring inquiries pertaining to citizenship when a person is booked in jail, and that results be communicated to the State Compensation Board) or any other Virginia law to which the County is otherwise subject; or
  - (2) Prevents persons from maintaining or exchanging citizenship or immigration status

information with federal immigration authorities or any other federal, state, or local government entity pursuant Sections 1373 and 1644 of Title 8 of the United States Code, provided they do so *without expending Fairfax County resources* (including but not limited to Fairfax County facilities, property, equipment, and employee time while on-duty) to do so.

- (c) All applications, questionnaires and interview forms used in relation to Fairfax County benefits, opportunities or services shall be promptly reviewed by the pertinent agencies and any questions regarding citizenship or immigration status information, other than those required by statute, ordinance or court order, shall be deleted within 60 days of the passage of this Ordinance.

***Section \_\_-\_\_-5; Threats Based on Citizenship or Immigration Status Prohibited.***

For the purposes of this Section, “family member” shall be interpreted broadly and inclusively. Fairfax County shall not:

- (a) Use threats—whether express or implied— toward a person or their family member in an effort to compel the person to act against their will, including to compel the person to turn themselves in to federal immigration authorities, based upon the actual or perceived citizenship or immigration status of the person or their family member;
- (b) Communicate a threat to have federal immigration authorities detain or deport that person or any family member of that person under circumstances that reasonably tend to produce a fear that the threat will be carried out; or
- (c) Subject a person to verbal abuse, meaning the use of a remark which is insulting, mocking, or belittling directed at a person based upon the actual or perceived:
  - (i) Race, color, sex, religion, national origin, English proficiency, sexual orientation, or gender identity of that person; or
  - (ii) Citizenship or immigration status of that person or that person’s family member.

***Section \_\_-\_\_-6; Notification of Persons in County Custody Subject to ICE Requests; Identification of Federal Immigration Agents.***

- (a) Upon receipt of any ICE request, including any request for detention, transfer, notification, interview or interrogation regarding an individual currently in Fairfax County custody or control, the recipient shall promptly hand-deliver a copy of the request to the individual named therein. Unless a criminal judicial warrant accompanies the request, the recipient will notify the individual that it will not be complying with the request. If such a warrant is present and the recipient intends to comply with the request, the individual will be so notified within 4 hours of receipt. In either case, the notification shall advise the individual of their right to legal counsel and their right to remain silent, in the appropriate language.
- (b) Individuals with whom federal immigration authorities engage will be notified that they are speaking with ICE or CBP (or any other federal immigration authority), and federal immigration agents shall be required to wear duty jackets and make their badges visible at all times while in facilities controlled by the County or persons or entities which are recipients of County appropriations.

**Section \_\_ -7; Separating County Law Enforcement from  
Enforcement of Civil, Federal Immigration Law.**

(a) **Definitions.** For the purposes of this Section:

- (i) "Contact information" means home address, work address, telephone number, electronic mail address, social media contact information or any other means of contacting an individual.
- (ii) "Eligible for release from custody" means that an individual may be released from custody because one of the following conditions has occurred:
  - (1) All criminal charges against the individual have been dropped or dismissed;
  - (2) The individual has been acquitted of all criminal charges filed against them;
  - (3) The individual has served all the time required for their sentence;
  - (4) The individual has posted a bond, or has been released on their own recognizance;
  - (5) The individual has been referred to pre-trial diversion services; or
  - (6) The individual is otherwise eligible for release under Virginia or local law.
- (iii) A "stop" by law enforcement occurs when a person is not free to leave, including in a motor vehicle.<sup>ii</sup> A stop is a seizure subject to the requirements of the Fourth Amendment of the U.S. Constitution. Unless otherwise expressly provided in Virginia statutes,<sup>iii</sup> stops must be based on individualized, reasonable suspicion of a crime.<sup>iv</sup> Stops are limited in time *and* scope; they must be no longer and no more expansive than necessary to confirm or dispel an officer's suspicion.<sup>v</sup>
- (iv) An "arrest" or "detention" occurs when:
  - (1) An individual is formally taken into custody or brought before a magistrate pursuant to a criminal judicial warrant or a provision of the Virginia or Fairfax Code;<sup>vi</sup> or
  - (2) Under the totality of the circumstances, an individual's freedom of movement is "curtailed to a degree associated with formal arrest," which occurs when a reasonable person in the individual's position would have understood that they are not free to leave;<sup>vii</sup> or
  - (3) An individual is held over in a detention center after they are otherwise eligible for release from custody (defined above).

Where there is a deprivation or restraint of a person's liberty but short of a full arrest, a "stop" (defined above) might be at issue.

(b) The County (including all persons and entities bound by the Ordinance as detailed in Section 3) is prohibited from engaging in the following civil immigration enforcement activities:

(i) *Stops; arrests; delay or refusal of bail or release from custody.*

- (1) In the absence of a criminal judicial warrant, to arrest, stop, or expand the scope of a stop of a person, or delay or refuse bail or release from custody of a person otherwise eligible for release from custody, based on the existence of an ICE request. To arrest someone based on any of these civil immigration documents includes taking any such document into account (even as one of various factors) when deciding whether to release an individual on a summons pursuant to Va. Code § 19.2-74.
- (2) To arrest, stop, or expand the scope of a stop, or delay or refuse bail or release from custody of a person otherwise eligible for release from custody, based solely on the person's actual or suspected citizenship or immigration status.

In order to exercise authority to arrest someone without a warrant under Va. Code §19.2-81.6, Fairfax County officers and employees shall obtain “confirmation” from federal immigration authorities that an individual is unlawfully present in the U.S. and “has previously been convicted of a felony in the United States and deported or left the United States after such conviction” by confirming the underlying existence of a criminal judicial warrant or particularized facts establishing probable cause of a crime.

- (ii) *Requesting citizenship or immigration information*, or otherwise investigating or assisting in the investigation of an individual’s citizenship or immigration status, **provided that** nothing in this Ordinance prevents Fairfax from performing its obligations under Va. Code §§ 19.2-83.2 & 53.1-218 (requiring inquiries pertaining to an individual’s citizenship when booked in a detention center—but not beforehand) or any other federal or Virginia law to which it is otherwise subject, or a binding court order or criminal judicial warrant requiring such inquiry or investigation.
- (iii) *Disclosure of sensitive non-public information*. Responding affirmatively to requests from federal immigration authorities for sensitive non-public information about an individual, including information about an individual’s incarceration status, release date, court date, charges, criminal record, location, date of birth, nationality, or contact information, unless:
  - (1) such disclosure has been consensually authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual’s parent or legal guardian; or
  - (2) a criminal judicial warrant or binding court order compelling such disclosure is presented.
- (iv) *Provision of access*. Unless presented with a valid and properly issued criminal judicial warrant, providing federal immigration authorities with access to an individual in Fairfax County custody (including minors in the custody or control of Fairfax Public Schools or Juvenile Detention Center) or use of Fairfax County property, facilities or equipment to question or interview such an individual, for the sole purpose of enforcing federal civil immigration law.
- (v) *Participation in a federal registry*. Using Fairfax County resources—including but not limited to County property, facilities, equipment, information, and officer and employee time while on-duty—to investigate, enforce, or assist in the investigation or enforcement, of any federal program requiring registration of individuals based on race, gender, gender identity, sexual orientation, religion, immigration status, or national or ethnic origin.
- (vi) *Agreements to perform immigration enforcement functions*. Entering into an agreement to perform the functions of an immigration officer or to support or assist in a civil immigration enforcement operation, whether pursuant to Section 1357(a)(3) of Title 8 of the U.S. Code or any other law, regulation, or policy, whether formal or informal. Such agreements include but are not limited to agreements to establish traffic perimeters related to immigration enforcement.

***Section \_\_-\_\_-8; Acceptance of Identification Documents.***

It is the policy of Fairfax County to accept as valid proof of identification any combination of non-fraudulent documents that includes an individual’s identification and an address or other information sufficient to reasonably demonstrate the individual’s residence or address, and not to criminally penalize an individual—including by choosing to arrest an individual instead of releasing them on a summons under Va. Code § 19.2-74— for failure to carry identification documents, **provided that** nothing in this Ordinance prevents officers from enforcing Va. Code § 46.2-300 (“Driving without license prohibited; penalties”) or any other Virginia or federal law imposing a criminal penalty for failure to carry a specified form of

identification or license under defined circumstances. Fairfax County shall not criminally penalize a passenger in motor vehicle stop for failure to present a driver's license.

Proof of a person's gender identity shall **not** be required to establish identification, and in all cases, officers shall address and in documentation refer to all members of the public using the names, pronouns, and titles of respect appropriate to the person's gender identity as expressed or clarified by that person.

***Section \_\_-\_\_-9; Restrictions on Search or Collection of Biometric Data or Materials.***

- (a) "Biometric data and materials" means all verification or authentication data and materials, such as fingerprints, DNA and other samples, models, similarity scores, and measureable biological characteristics such as height, sex, eye color, scars, marks, and tattoos.
- (b) It is the policy of Fairfax County not to search or collect biometric data or materials, unless:
  - (i) An individual is arrested and taken into custody for a Central Criminal Records Exchange ("CCRE")-reportable offense; or
  - (ii) The search or collection of biometric data or materials has been consensually authorized in writing by the individual to whom such search or collection pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or legal guardian. **However**, an individual's consent to search or collect biometric data or materials shall not be sought unless there is individualized suspicion of criminal activity by the individual or the biometric data or materials is sought to clear the individual of alleged wrong-doing.

***Section \_\_-\_\_-10; Establishment of a Language Assistance Policy.***

Fairfax County shall consult with Limited English Proficient ("LEP") community members to enact a formal County-wide Language Assistance Policy for LEP individuals and shall provide interpretation or translation services consistent with that policy, as may be required under federal Executive Order 13166 and the 1964 Civil Rights Act's protections against national origin discrimination.

***Section \_\_-\_\_-11; Establishment of a Legal Defense Fund.***

Through appropriations of public moneys and contracts with one or more non-profit organizations established through a competitive process, Fairfax County shall establish a public fund to provide: a) legal representation in immigration matters, and b) guidance and referral services for legal representation, to qualifying persons living or working in Fairfax County in need of legal representation for matters related to their immigration status.<sup>viii</sup>

***Section \_\_-\_\_-12; Accountability; Data Collection and Aggregation.***

- (a) The definitions used in Section -7 are incorporated by reference, except that for the purposes of sub-section (b) (ii), "stop" includes any stop *or* arrest as defined in Section -7, above as well as "mental detentions" and other involuntary stops resulting from interactions with law enforcement.
- (b) Fairfax County Police Department, Fairfax County Sheriff's Office, and any other law enforcement and corrections departments and agencies bound by this Ordinance ("reporting agencies") shall record and maintain, solely to create the reports described in this sub-section (b) below, the following information:

- (i) For each ICE request pertaining to a person in County custody, including any request for detention, transfer, notification, interview, or interrogation received from federal immigration authorities (regardless of the department's or agency's response to such request):
1. The requesting agency;
  2. The subject individual's race, gender, and place of birth;
  3. Date and time that the subject individual was taken into the reporting agency's custody, the location where they were held, and the arrest charges;
  4. Date and time of the receipt of the request;
  5. Immigration or criminal history indicated on the request form, if any;
  6. Whether the request was accompanied by (i) a criminal judicial warrant or (ii) any other documentation regarding immigration status or proceedings;
  7. Whether a copy of the request was provided to the individual and, if yes, the date and time the individual was notified of the request;
  8. Whether the individual provided written consent to the request, and if so, in what language;
  9. Whether the individual requested to confer with counsel regarding the request;
  10. The reporting agency's response to the request, including a decision not to fulfill the request;
  11. If applicable, the date and time that the federal immigration authority took custody of, or was otherwise given access to, the individual; and
  12. The date and time of the individual's release from the reporting agency's custody.
- (ii) For each stop:
1. The self-identified race, ethnicity, and age of the person stopped;
  2. The location of the stop, including the street address or nearest intersection;
  3. A central identifying report number, which shall allow documentation of stops to be matched with documentation of any criminal or civil citation or arrest resulting from the stop;
  4. Specific, individualized description of the facts that established reasonable suspicion to make a stop prior to the stop being made-- boilerplate descriptions are prohibited;
  5. The approximate duration of the stop;
  6. The outcome of the stop, including whether officers issued a warning, issued a civil or criminal citation, or made an arrest, and in the event of a citation or an arrest, the charge(s), and whether the individual was convicted of such charge(s).
  7. Whether officers conducted a weapons frisk during the stop and, if so, the specific and articulable facts establishing reasonable suspicion that the detained individual was armed and dangerous;
  8. Whether officers conducted a search based on probable cause and, if so, the facts establishing probable cause to conduct a search;
  9. Whether officers asked any person(s) to consent to a search, and if so: whether the individual provided written consent to the request, and in what language; and
  10. Whether officers found any unlawful weapons, narcotics, or other contraband during a search, and the nature of such contraband.
- (c) Every six months, agencies required to record and maintain the information described in sub-section (b) above shall provide reports to the public via the reporting agency's website, and to the [OVERSIGHT ENTITY], regarding the information collected in sub-section (b), in an aggregated form that is stripped of all personal identifiers, in order that the agency and the community may monitor

compliance with all applicable law and internal regulations, including prohibitions against bias-based policing. Data should be aggregated by the reporting agency and by year, and, if applicable, by type of patrol and district.

**Section \_\_-\_\_-13; Redress.**

Any person who alleges a violation of this policy may file a written complaint for investigation with [OVERSIGHT ENTITY], an oversight agency, which shall establish procedures and complaint forms to be made available on its website, along with an explanation of the Ordinance.

**Section \_\_-\_\_-14; Severability.**

The provisions of this Ordinance are severable. If any provision, clause, section or part of this Ordinance or its application is held invalid by any court with jurisdiction, the invalidity shall not affect other provisions or applications that can be given effect without the invalid provision clause, part or application. It is hereby declared that the legislative intent of the Fairfax County Board of Supervisors is that this Ordinance would have been adopted had such invalid provision, clause, section, part or application not been included herein.

<sup>i</sup> *E.g.*, Fairfax County Sheriff's Office SOP 006, Sec. II (all Sheriff's procedures will conform to local law and Fairfax County policy). Though the Sheriff is not an officer nor an agency of Fairfax County, *see Carraway v. Hill*, 265 Va. 20, 24, 574 S.E.2d 274, 276 (Va. 2003), local governments like Fairfax County have the authority to appropriate supplemental compensation to the Sheriff and "may condition such appropriations on the sheriff's restrictions on the use of appropriated funds." *Roop v. Whitt*, 768 S.E.2d 692, 289 Va. 274 at fn.1 (Va. 2015). *See also Bailey v. Loudoun County Sheriff's Office*, 288 Va. 159, 167-68, 762 S.E.2d 763, 765 (Va. 2014) (noting that "to receive funds from Loudoun County, the Sheriff's Office agrees to be treated 'as any other department' under Loudoun County's authority. The consequences of this arrangement are significant. . . Also, Loudoun County approves the Sheriff's Office's budget and retains authority to dictate the Sheriff's Offices' policies"); Va. Code 15.2-1605.1 (affording local governments the authority to appropriate supplemental compensation for the Sheriff).

<sup>ii</sup> Factors taken into account to determine whether a stop is a seizure implicating the Fourth Amendment include "the number of police officers present during the encounter, whether they were in uniform or displayed their weapons, whether they touched the defendant, whether they attempted to block his departure or restrain his movement, whether the officers' questioning was non-threatening, and whether they treated the defendant as though they suspected him of illegal activity rather than treating the encounter as 'routine' in nature." *Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 461 (4<sup>th</sup> Cir. 2013) (citations omitted). This is not an exhaustive list. *Id.*

<sup>iii</sup> For instance, a stop may be made to effectuate an arrest pursuant to a warrant or *capias* issued by a neutral magistrate pursuant to VA statutes. *See* footnote 3 & accompanying text.

<sup>iv</sup> "Reasonable suspicion" means specific, articulable facts—more than mere speculation or a hunch—that would objectively lead an officer to suspect that an individual has committed, is committing, or is about to commit a *crime* (reasonable suspicion to arrest), or that an individual is armed and dangerous (reasonable suspicion to search). Suspicion that an individual is unlawfully present in the U.S. is *not* reasonable suspicion of a crime.

<sup>v</sup> *See, e.g., Guijon-Ortiz v. United States*, 660 F. 3d 757, 770 (4<sup>th</sup> Cir. 2011) (concluding that "extending the [traffic] stop to verify the validity of [an individual's] ID without reasonable suspicion might well have rendered the stop unreasonable if the stop had been longer or if some other aspect of the officer's conduct had demonstrated definitive abandonment of the prosecution of the traffic stop...Possessing probable cause that a driver has committed a traffic infraction does not give an officer free rein to keep the vehicle and its passengers on the side of the road while the officer investigates any hunch, whether through questioning or other methods, so long as the stop is shorter than the time it would have taken to conduct the ordinary incidents of a traffic stop....Although an officer may investigate matters unrelated to the justification for a traffic stop, those investigatory pursuits must be limited in both scope and duration, and are evaluated under the totality of the circumstances.") (emphasis added) (citations omitted).

**Draft Ordinance to Protect Equal Justice for All**  
**2/12/2018**

<sup>viii</sup> Numerous jurisdictions throughout the country, including Baltimore, MD and Prince George's County, MD, provide legal defense funds for immigrants. *See, e.g.,* The Vera Institute of Justice, *SAFE Cities Network Launches: 11 Communities to Provide Public Defense to Immigrants Facing Deportation* (Nov. 9, 2017), available [here](#). For a sample ordinance, *see* Seattle's [Ordinance](#) relating to the Office of Immigrant and Refugee Affairs, providing legal representation, or guidance and referral services for legal representation, to indigent Seattle residents and workers in immigration proceedings, and establishing standards for the provision of legal representation and guidance and referral services for legal representation (April 28, 2017).