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CHARLES D. BAKER
Governor

KARYN E. POLITO
Lt. Governor

THOMAS A. TURCO, III
Secretary

Time: January 27, 2021 10:00am-2:00pm

Place: WebEx

Members in Attendance:

Chairwoman Kerry Collins (Undersecretary for Forensic Science)
Sabra Botch-Jones (Forensic Science Expertise)
Dr. Robin Cotton (Forensic Laboratory Management 1)
Lucy A. Davis (Clinical Quality Management Expertise)
Judge Nancy Gertner (New England Innocence Project)
Anne Goldbach, Esq. (Committee for Public Counsel Services)
Clifford Goodband (Expertise in Statistics 2)
Lisa Kavanaugh, Esq. (MA Association of Criminal Defense Lawyers)
Adrienne Lynch, Esq. (MA District Attorneys Association)
Dr. Ann Marie Mires (Academia, Research Involving Forensic Science)
Professor Timothy Palmbach (Forensic Laboratory Management 2)
Gina Papagiorgakis (Expertise in Statistics 1)
Nancy Rothstein (Nominee from Attorney General's Office)

Members Not in Attendance:

Vacant seat (Cognitive Bias Expertise)

The chair called the meeting to order at 10:00 AM. A quorum was present.

1. Minutes approval for the December meeting

- i. Approved unanimously.

2. Familial DNA

- i. Presentation (L. Kavanaugh, N. Gertner, A. Lynch, A. Mires) (draft document and slides attached)

1. A familial DNA report has been drafted per subsection F of the FSOB statute.

2. The FSOB will review the document and send their comments and feedback to EOPSS.

- a. The working group is looking for granular feedback beyond streamlining and tone.
 - b. The FSOB will present key takeaways in a bullet-pointed list in the report.
3. There are areas of consensus and areas of divergence among the working group. The report has not been finalized.
 - a. All agree that there areas in the Bill as it is currently written that need to be clarified or removed.
 - b. Areas of divergence vary from whether familial searching should be done at all, who should oversee it, privacy implications, and law enforcement's ability to responsibly use and oversee databases.
4. The focus of the draft report is organized in four sections that focus on the following areas: constitutional and policy backdrop of familial DNA, statutory framework in MA G.L. c.22E, the scientific underpinnings and areas of concern, and looking into detail at other jurisdictions
 - a. Each working group member focused on an area: constitutional and policy backdrop of familial DNA (N. Gertner), MA statutory framework (L. Kavanaugh), scientific underpinnings and areas of concern (A. Mires), models from other jurisdictions (A. Lynch)
 - b. L. Kavanaugh and A. Lynch created slides to explain their area
5. The report also features an executive summary, an annotated bibliography, and a robust appendix.
6. N. Gertner discussed her section and expressed a need to revisit important first principles to put the conversation in context. She discussed issues like the right to control personal information, the right to privacy, questions of retention and search and seizure, who can be compelled to provide DNA, the broader issues of people that consented to provide samples for exclusionary purposes, and the racially disparate impact of familial DNA.
 - a. She also discussed an area of consensus for the FSOB which is the issue of local databases and highlighted that local databases exacerbate the issues she mentioned because it escapes the controls of the state database. She stated that there are controls and care taken to create the state database.
7. L. Kavanaugh discussed her section regarding section 22E (slides attached).
8. A. Mires discussed her section which is a scientific section separate from moral and ethical privacy concerns. She expressed that the scientific community supports familial searching and believes it to be a powerful tool because it can be regulated.
 - a. The scientific community has set up careful guidelines to make sure this tool is scientifically valid and used under very specialized circumstances. If this

legislation moves forward, the opportunity that the FSOB has is to show how there is a strong body of scientific work and professional buy-in to support the tool when regulated using the parameters set forth by scientific agencies, working groups, and the FBI.

- b. She stated that there is a roadmap already with a large amount of support, body of literature, and knowledge that can guide legislation. Education of shareholders, most agree that this is a very powerful tool, these requests are already being made so have to take this opportunity to address it through legislation, have some policy but not legislative regulation.
- c. She additionally expressed that there are other things to consider other issues under the broader picture, citing rogue databases and rapid DNA as potential issues.

9. A. Lynch discussed her section (slides attached)

ii. Report Discussion

- 1. T. Palmbach provided feedback and suggested reducing the scope and neutralizing the tone of the report. He stated that doing this will help the conversation and will help the FSOB move towards a consensus.
 - a. He expressed that there may be scope creep and indicated that all are important but it will be easier to limit the scope strictly to familial DNA and 22E.
 - b. N. Gertner acknowledged Palmbach's suggestion and expressed that the research revealed that there are large gaps that are critical to consider and that the goal of the report is for the legislature to recognize the magnitude of the problem.
 - c. L. Davis agreed with T. Palmbach regarding the tone and extent of the document and suggested separating the information into two reports. One report that focuses on familial DNA and the second focusing on additional concerns.
 - d. R. Cotton agreed with T. Palmbach. She added that the issues laid out in the report are important but do not need to be blended. Familial DNA as a tool is supported by validation papers and scientific justification. The other issues can be outlined separately.
 - i. N. Gertner agreed that the issues can be separated but the issues should be included.
 - ii. L. Kavanaugh agreed with the feedback provided and stated that the FSOB should at minimum alert legislators of the other issues in the report.
 - iii. A. Goldbach stated that the report could reflect the different opinions within the FSOB. She stated that there does not need to be a consensus

and that she is concerned that the local database issue could be overlooked if placed in a different document.

- iv. A. Mires agrees that the report's tone should be neutralized and suggests reorganizing the report instead of splitting it into several documents. She also stated that she disagrees with showing a difference of opinions in the report.

3. General updates

- i. Palmbach and Cotton, RE: Springfield PD visit
 - 1. A draft summary report was circulated to the FSOB.
 - 2. T. Palmbach expressed that the FSOB should continue working on auditing and reaching out to labs.
 - a. The FSOB will continue looking at Springfield PD and is awaiting the documents that were requested of Springfield PD in December.
- ii. L. Kavanaugh, RE: Hair Microscopy Project
 - 1. A presentation was prepared for the Hair Microscopy Project which will be shared with the FSOB.

iii. EOPSS to reach out to schedule presentations

4. 2021 Discussion

- i. An FSOB website is being created to share documents, minutes, and agendas.
- ii. The FSOB will meet once a month in 2021. Future scheduled meetings*: Feb 26th, ~~March 19th~~, April 30th, and May 21st.
 - 1. The FSOB will reach out to EOPSS with their availability post-May.
- iii. N. Gertner, A. Goldbach, and L. Kavanaugh to present on changing the legislative language to amend the FSOB statute towards the end of May.

5. Topics not reasonably anticipated within 48 hours of the meeting

- i. The FSOB asked about the Bristol District Attorney's Office (DAO) position on local databases and the Use and Dissemination document. Concerning this question, the chair read a letter regarding Y-STR testing. The letter was written and signed by six MA DA's and directed to the chair and the FSOB members (see attached document)
 - 1. FSOB members expressed frustration that the letter was not provided earlier and concern in regards to the content of the letter.
 - 2. L. Kavanaugh stated that the issue outlined in the letter is a serious and problematic path that the DAO's are proposing and that the letter highlights the importance of FSOB's weigh-in. She expressed that the FSOB would not be able to endorse without careful examination and scrutiny. She stated that this could potentially threaten the status of the Massachusetts State Police Crime Lab (MPSCL) with NDIS. She indicated that the letter

indicated the creation of a database that does what the FSOB warned about and stated that it is inconceivable that the legislators envisioned section 10 being used in a way that allows law enforcement to make decisions independent of the decisions that the scientists at the MSPCL are making when they drafted section 22E in 1997.

3. R. Cotton stated that the letter fails to include that Y chromosome testing does not have the power that normal DNA testing. She explained that the letter does not mention that paternal lineage (grandfather, father, and sons) will all have identical Y chromosomes unless there is a mutation. She stated that the training does not overlap and that someone in the DA's office who has a legal training and not a scientific training may not appropriately assess what this means when there is a match.
4. The FSOB expressed that they are most concerned about CODIS and NDIS compliance. T. Palmbach expressed that those guidelines are very important and non-compliance could lead to tremendous collateral damage for the state, potentially resulting in the MSPCL losing the capacity to do CODIS DNA work.
 - a. In response to R. Cotton's question regarding the provision of records risking NDIS compliance, Sidney Collins, MA CODIS administrator, expressed that she has spoken to FBI legal and they have concerns in regards to how 22E is written and the implications for outside databases out of CODIS.
5. L. Davis cautioned about the use of Rapid DNA, which is usually used by non-accredited agencies, risk quality control issues.
 - a. A. Mires stated that the Y-STR profiles are not being generated by Rapid DNA machines and that the data will come from the MSPCL and will be entered into local databases.
 - b. L. Kavanaugh cautioned that there are many ways to populate a database and that although the current DAO local database is using MSPCL data, there are no measures in place to prevent them from populating the database using other methods. She added that the use of local databases raises many questions beyond using software that implicate scientific concerns.
6. C. Goodband asked why the MSPCL is not the entity that is conducting YSTR searches.
 - a. Sidney Collins responded that the only database that the MSPCL has that is searchable is CODIS. She added that YSTRs are inherently a familial search and is an integral part of the search that implicates all males in a paternal lineage. She added that MA's offender population has never been typed with YSTRs, therefore the knowns that would be used to compare forensic samples would be of victims, suspects, elimination standards that are provided to the MSPCL for individual cases. The YSTR technique is only used at the MSPCL as a secondary

technique when they cannot get an autosomal profile because of the nature of the evidence and these YSTRs are not attached to a highly discriminating autosomal profile.

7. L. Kavanaugh stated that in framing the legality of the request by DAOs, 22E governs the CODIS database and directs the lab director to provide records upon request but YSTRs are not in CODIS, why would 22E authorize the provision of these records
 - a. Sidney Collins expressed that Ys are starting to get into CODIS because the kits that test autosomal now include Ys if the YSTR also overlaps with autosomal in a kit that also has Ys. Additionally, YSTRs are in CODIS as part of human remains and missing person's investigations.
 - b. L. Kavanaugh motioned for the FSOB to provide the MSPCL with provisional guidance regarding the request from the DAO.
 - i. The chair indicated that the MSPCL needs to follow the legal guidance of their legal counsel.
 - ii. A. Lynch stated that she does not think the FSOB can tell the MSPCL what to do if the statute says they need to turn the records over there is nothing FSOB can do about it unless there is a court ruling.
 - iii. T. Palmbach stated that the CODIS administrator has legal liability if the information is released. He stated that he agrees that if legal counsel advises the MSPCL to release the information, they would have to do it but he does not see the problem in the FSOB providing guidance to the MSPCL to let them know that the FSOB is comfortable with a wait period.
 - iv. N. Gertner agreed with a nonbinding recommendation to the MSPCL to hold off and they can do it or not do it.
 - v. There was not sufficient time to finalize this discussion. The meeting ended at 2pm.*

6. Public comment

- i. Jack Cunha, Massachusetts Association of Criminal Defense Lawyers (MACDL) representative, expressed that MACDL opposes familial DNA searches and urges the FSOB to take this position. He cited first principles and privacy rights as issues. He stated that if there is legislation that requires it, it seems that judicial oversight would be essential because there needs to be oversight of this invasion of privacy by a judicial party and a judge should be the one to weigh in on constitutional concerns of each familial DNA searching case. He suggested that it should be required that the person be alerted that their DNA is being used because a family member might be a perpetrator. He stated these searches are not based on probable cause because anyone who

has shown up has been determined to not be a suspect. He suggested that the interpretation of the statute by the prosecutors is a misreading of the statute because the intent of the statute is to allow records to be given to law enforcement because they are matches.

- ii. Heather Bish expressed appreciation to the FSOB and stated that the FSOB's work will help her deliberate the familial DNA Bill to make it work for all stakeholders including victims and community members. She expressed that the tool would help victims and expressed that she hopes this tool to be helpful while also protecting community members' privacy. She noted that she would be sharing the MA Missing Person's Task Force report because the Task Force identified database issues. She expressed that there may be interwoven issues that she hopes can be tackled on a larger level.
- iii. Senator Gobi stated that when Heather Bish brought her the proposed bill a year ago, part of it was to start a robust conversation. She stated that she is in a new legislative session, and the bill needs to be refiled by February 19th. She expressed that the discussion and documents presented at the meeting are extremely helpful and that, due to the lengthy legislative process, there will be a lot of opportunity from the time the bill gets filed to work on it. She stated that she will do her best to consider the information provided in the Bill that will be refiled. She indicated that she will make the bill available to the FSOB.
- iv. Rock Harmon stated that he wants to extend the invitation to the DAs that signed the letter to learn about familial searching and embrace a process that has a better chance at solving a crime than the YSTR approach. He questioned why the state is pursuing the legislative route and indicated that MA is the first state to pursue legislation while all other states reviewed their existing database law. He stated that the resistance that was experienced in California, which is a state that has been doing familial searching for thirteen years, was mostly about misconceptions regarding NDIS. He stated there is nothing inherently that implicates the fourth amendment and in California, there has never been a legal challenge in a case being prosecuted to the legality of familial DNA searching. He urged the FSOB to look at the successes of familial searching.

*Amendment: The next scheduled meeting is February 10, 2021 11am-1pm (please see attached request for an earlier meeting). Feb 26th and March 19th meetings are cancelled. The next meetings are March 24th, April 30th, and May 21st.