



The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
One Ashburton Place, Room 2133
Boston, Massachusetts 02108

Tel: (617) 727-7775
TTY Tel: (617) 727-6618
Fax: (617) 727-4764
www.mass.gov/eops

CHARLES D. BAKER
Governor

KARYN E. POLITO
Lt. Governor

THOMAS A. TURCO, III
Secretary

Time: February 10, 2021 11:00am-1:00pm

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 11:03 AM. A quorum was present.

1. Minutes

- i. January Meeting Minutes will be voted on at March 24th meeting.

2. MDAA Letter Discussion

- i. The FSOB received a letter on Jan 27th from the Massachusetts District Attorneys Association (MDAA).
- ii. The FSOB received a letter on February 10th from Massachusetts Association of Criminal Defense Lawyers (MACDL) and the American Civil Liberties Union (ACLU).
- iii. EOPSS provided an update on the Grand Jury subpoena received by the Massachusetts State Police Crime Lab (MSPCL) requesting Y-STR profiles. The Attorney General (AG) represents the MSPCL and filed a motion to quash which was denied. There was a nonevidentiary hearing with pleadings from both sides.

1. The FSOB asked if this decision was provided in writing and if it could be circulated. EOPSS confirmed the decision was in writing but will be not circulating the decision itself without first consulting with the AG in order to protect the integrity of the Grand Jury.
 - a. L. Kavanaugh stated that the Grand Jury investigation presents complications because the particulars of the proceedings are subject to the secrecy of the proceedings. She asked if there is a possibility for the FSOB or other stakeholders to weigh in on the litigation provided that those who have privacy interests in the creation of the local database are not privy to the specifics of the investigation. EOPSS indicated that they can provide the AG with any information the FSOB members would like them to provide.
 - b. The FSOB asked if they could request redacted copies of the pleadings from the AG to ascertain if the scientific and legal concerns contained in the MADCL and ACLU letter were among the concerns presented to the judge. L. Kavanaugh stated that it is the FSOB's responsibility to understand what issues were presented, how these issues were framed and explained to the judge and whether the judge has been given all relevant information to appreciate the scientific and accreditation implications of authorizing the request.
- iv. T. Palmbach stated that there are many legal arguments but it may be best if FSOB focused on the issue of compliance. The FSOB can state that it opposes the request on the basis of the net loss to Massachusetts if the MSPCL loses its NDIS compliance. He stated that the impetus behind 22E was to get the MSPCL accredited and in compliance with NDIS. With this litigation, the MSPCL will lose its compliance NDIS.
- v. L. Davis agreed with T. Palmbach and indicated that if the MSPCL is required to provide the profiles, the MSPCL will have to notify NDIS. Additionally, the Office of the Inspector General inspects the CODIS lab every 2-3 years and goes through every profile and generates a report that is part of the public record.
- vi. L. Davis stated that the biggest issues are privacy concerns and notification.
 1. L. Kavanaugh stated that an additional concern is that the DAO wants to not only compile charts but names associated with the charts. She stated that the MDAA letter appears to be stating that the Y-STR profiles that they have received historically are useless to them because the charts only have numbers and no identifiable information. She stated that the MSPCL is required to store profiles in CODIS only by identifying numbers and not by names. Privacy interests would be greatly implicated if the goal is to compel the MSPCL to include identifiable information.
- vii. L. Davis indicated that NDIS rules are strict and the DAO request contradicts CODIS and NDIS privacy concerns because the request will lead to the creation of an unregulated local database. She further explained that NDIS regulates the federal database (CODIS) and not state sub-databases that can only be operated within their state – any state databases' data cannot go into CODIS. If NDIS finds that this request is in violation of their rules, NDIS would limit Massachusetts' accessibility and the MSPCL would not be able to upload data, search the national database and would only be able to use CODIS within Massachusetts. Additionally, the CODIS software and profiles may be removed.
- viii. T. Palmbach agreed with the rigidity L. Davis described and added that the list of regulations is extensive ranging from who the administrator of the database is and their credentials to how the

data is encrypted and transmitted to what can and cannot be done to aggregate the data and how and when the data can be shared, etc.

1. He indicated that he does not believe the MSPCL can segregate its data and still maintain a state database that is completely separate from CODIS and noncompliance would completely shut them down and asked if Y-STR profiles are part of the system.
 - a. L. Davis clarified that Y-STRs can be maintained within the MSPCLs own database but she does not believe that any Ys are approved loci for upload to CODIS.
2. T. Palmbach stated that he does not believe that NDIS is going to care that Massachusetts has 22E and will expect the MSPCL to follow federal guidelines if the MSPCL wants to remain compliant with the federally authorized system.
3. L. Kavanaugh and L. Davis shared the FBI Quality Assurance Section 11.3, that specifically ask the lab about its compliance with state and federal privacy laws: *Laboratories participating in the National DNA Index System (NDIS) must comply with the provisions limiting access and disclosure to the DNA analyses and DNA samples maintained by federal, state and local criminal justice agencies (and the Secretary of Defense under 10 U.S.C. §1565) in accordance with the Federal DNA Identification Act ('Federal DNA Act'; 34 U.S.C. §12592). The Federal DNA Act provides for limited access to the DNA analyses and DNA samples to the following: "(A) to criminal justice agencies for law enforcement identification purposes; (B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules; (C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or (D) if personally identifiable for identification research and protocol development purposes, or for quality control purposes."* 34 U.S.C. §12592(b) (3). Generally, the state laws on confidentiality will be found in the respective state DNA database laws. Many of the state laws have provisions similar to those in the Federal DNA Act but for states with more expansive access and disclosure laws (such as, humanitarian purposes), the state has agreed, as a condition for its participation in NDIS, to comply with the more restrictive provisions of the Federal DNA Act. For those states having DNA database laws with more restrictive access and disclosure provisions than the Federal DNA Act, laboratories in those states are required to comply with their state laws. A state or local laboratory should have the applicable state laws readily available. The laboratory procedure for the release of personally identifiable information in connection with a database hit shall be compliant with the NDIS Operational Procedures Manual.
 - a. L. Kavanaugh added that to the extent that federal law is more stringent than local or state law, the lab is obligated to comply with the higher federal standard.
 - b. She also stated that she agreed with T. Palmbach's suggestion to focus on compliance because the FSOB's role in this context is to recognize the ways that authorizing the DAO request would interfere with the integrity of forensic science in Massachusetts and with the ability of the lab to continue operating as the gold standard and continue participating in NDIS and maintain its accreditation. She added that accreditation would not only affect participation in NDIS but could affect other aspects of forensic work being done by the MSPCL.
 - c. L. Kavanaugh called the FSOB's attention to some of the relevant MSPCL guidelines that bear on these issues:

- i. Guideline 1.1 of the DNA-YSTR Interpretations Guidelines, which identifies the range of contexts in which the lab will conduct Y-STR testing.
 - ii. Guideline 2.2 of the Lab's CODIS/DNA Unit Manual, which carefully delineates the different levels of access to CODIS data, from those who cannot add, modify, or delete records (the technician) to the administrator (who can edit other users' records and make system-wide changes).
- ix. N. Gertner stated it would be troubling if a judge overseeing the Grand Jury subpoena hearing only one side of the story decides to issue an order requiring the MSPCL to provide records which is dangerous in the ways discussed previously. She stated that this means two things, it compels the FSOB to:
 - 1. Take an independent position for the DAO request to be stopped and studied and to suggest that the implications of the request are substantial and should not be dealt with at a one-sided proceeding
 - 2. Seek to intervene in the grand jury proceeding by taking a stand and making certain the FSOB's stand is communicated to the Grand Jury. She stated that she respects the AG and does not mean formal intervention.
 - a. She stated that the FSOB has an independent and technical role in this issue that they have to assume. She stated that the FSOB cannot be bystanders because it is a step that could have implications beyond one case.
- x. L. Davis stated that the request to transfer data into spreadsheet is a huge administrative undertaking. She indicated that it would be a huge workload that would require extra staff because the information needs to be checked for accuracy, correctness and appropriateness.
- xi. R. Cotton indicated that Y DNA profiles are basically entirely different from usual DNA profiles. She explained that twenty loci on the Y chromosome are tested but all of that data, from an inheritance perspective, travels directly from father to son. Those profiles are not an identification and identifies paternal lineage only and not an individual. The statistical way to a match requires proficiency in the process. There is a considerable amount of expertise and background needed to study the biology of these loci and interpreting the implications for a match and there is not a person at the DAO that has the expertise needed. She added that it would be easy to make a mistake.
 - 1. She added that Y reports include a caveat with the results stating that although there is a match to the profile provided, there will be matches to all of the male relatives in the lineage of the profile provided.
 - 2. R. Cotton stated that normal sexual assault evidence goes through an extraction procedure to separate the DNA from the victim and any other DNA present. She stated that nobody uses Y-STRs if they are able to get a regular STR sample. Y-STR is used as a last resort to exclude people when it is impossible to separate female and male cells.
- xii. A. Lynch explained the CODIS protocols. She stated that the CODIS database in Massachusetts only maintains convicted offenders and this is the search database upon which it is compared. She indicated that after getting an exact match, a series of confirmatory steps that the database requires and it is only after these 4-5 steps are taken that a potential match is reported. These are in place for STR databases so that a full profile will identify to a higher degree of certainty than Y-STRs.

1. N. Rothstein indicated that she would like to share her opinion as a lawyer and not take a position on behalf of the AGO. She stated that it appears that the legislature did not intend for the existence of the loophole in 22E exists because the database only deals with convicted offenders. However, many Y-STR samples are not only of offenders. She directed the FSOB's attention to a provision from Vermont that would close the loophole and prevent the formation of shadow databases moving forward.
 2. L. Kavanaugh agreed and added that there is no differentiating between Y-STR profiles that were provided for elimination purposes and other Y-STRs. She indicated that 22E is being interpreted in a way that would undermine the purpose of the statute which is for the lab to participate in NDIS.
 3. L. Kavanaugh stated that there is no loophole because the request for Y-STR records is outside of 22E and is not permitted under the statute. She stated that it is inappropriate for the DAO to rely on a portion of the DNA statute to justify getting records that are not part of the database.
- xiii. L. Davis stated that the MDAA reference to the use of Y-STR as an investigatory tool can be said about any case using DNA. She indicate that what is in debate is not whether they will get hits, what is in question is if it is appropriate or scientifically beneficial.
1. T. Palmbach stated that he advocates for the use of some of these tools for investigative purposes and sees good use for it especially in cases of vulnerable populations. He indicated that it would be wrong to infer that there is a lesser need for protection of information and legislative, policy and database protection requirements are more severe especially with vulnerable populations.
- xiv. N. Gertner stated that the FSOB should focus on the issue at-hand and the MDAA letter to avoid getting paralyzed by the complexity of this issue and the FSOB can talk about the legislation moving forward at the next meeting.
1. A. Goldbach agreed that the FSOB's task is narrower for the Feb. 10 meeting and the FSOB should address both the legal and scientific concerns contained in the MDAA and MACDL letter because this is a pressing matter.
- xv. The FSOB discussed the need to take a position and reach a consensus about the issues that should be proved.
1. N. Gertner motioned that the board takes a position against the lab providing the YSTR information requested because interpreting the statute to authorize or compel the release of YSTR records risks the MSPCL's loss of accreditation status and risks being out of compliance with NDIS and risks violation of the plain language of 22E and 66A and we urge the AGO to bring the FSOB's position before the court hearing the subpoena. The board is in the midst of studying these issues and the legal and scientific implications and attaches MACDL/ACLU and the DAO's letter.
 - a. L. Kavanaugh seconded, two members abstained, and the remaining members voted in favor of the motion.

3. Public Comment

- i. Jack Cunha (MACDL) affirmed MACDL's position that the request is a radical repositioning of the statute and discussed the intent of the MACDL/ACLU position letter.
- ii. Sarah Chu (Innocence Project) commended the FSOB on a great discussion that highlights the importance of having a diverse set of stakeholders to contemplate all aspects of important forensic challenges. She stated that it is attractive to discuss the science alone but all decisions have social implication and science alone should not be the only concern.

1. L. Kavanaugh shared an article on Science Magazine (Human Genome at 20, Sciencemag.org, Vol. 371 Issue 6529, 5 February 2021)
2. Sarah Chu encouraged the FSOB to explore a series of relevant essays published on the Science Magazine website.

4. Future Meetings

- i. Feb 26th and March 19th meetings are cancelled. The next meetings are March 24th, April 30th, and May 21st.
- ii. Next meeting will focus on the Familial DNA Report.
 1. Feb. 26 deadline for Familial DNA report feedback.
- iii. Doodle poll to be sent out to schedule the rest of the year.