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Forensic Science Oversight Board (FSOB)

Meeting Minutes

Scheduled: March 24, 2021 10:00am-2:00pm, 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 10:02 AM. A quorum was present.

1. Housekeeping matters

- i. S. Botch-Jones, L. Davis, N. Gertner, C. Goodband and T. Palmbach were sworn in.
- ii. The cognitive bias seat is still vacant, the FSOB offered suggestions. L. Davis provided a list of potential options and L. Kavanaugh suggested Jeff Kukucka at Towson University.
- iii. Minutes for January and February meetings were approved unanimously.

2. Familial DNA (final report attached)

- i. The Report was jointly drafted by working group members and the advisement of the FSOB. CODIS Administrator, Sidney Collins, and Sr. Advisor on Forensic Science Policy at the Innocence Project, Sarah Chu, served as research advisors to the working group.
 1. A. Lynch stated that the Y-STR database section is an area that may not represent a monolithic opinion of the board and indicated that people may have different perspectives.
- ii. An updated draft report was circulated. The new draft addressed the scope and tone issue mentioned in previous meetings and was reorganized to differentiate between the issues.

1. T. Palmbach stated that the working group did a decent job addressing the concerns mentioned in previous meetings and expressed that the document in its totality is neutral.
 2. SD1685 incorporates many of the concerns and recommendations addressed in previous meetings and the Report. SD1685 is a revised familial DNA legislation filed on 2/18/2021 submitted by Senator Anne Gobi and supported by other members of the legislature.
 3. L. Kavanaugh indicated that the Report incorporates the motion and vote that was taken at the February meeting regarding the DA's office's request for Y-STR profiles (found in section B)
 - a. FSOB members asked for an update.
 - i. The Attorney General's Office represents Massachusetts State Police Crime Laboratory (MSPCL) in any litigation. The aforementioned motion was submitted to those that are representing the MSPCL. The motion was allowed for the MSPCL to provide reports and the motion to reconsider was presented and was denied. Cannot further discuss it because it is a grand jury investigation and the interests of all parties must be protected.
 - ii. A. Goldbach concluded that the MSCPL is then required to provide the information that was requested and asked if this puts the MSPCL in jeopardy with CODIS and/or accreditation.
 1. The Executive Office of Public Safety (EOPSS) explained that the MSPCL is required to turn over what was requested as part of the grand jury proceedings. Although EOPSS does not know if the MSPCL is in jeopardy of losing its accreditation status. When the MSPCL has been directed to provide information or do something by court order, they do advise the FBI and ANAB as to what they are doing so that the FBI can intervene if they so choose. EOPSS will report back upon checking in with the MSPCL.
- iii. The working group provided an overview of the Report (page two and three of the Report includes an executive summary and section summaries)
1. Familial DNA Report Section A
 - a. N. Gertner stated that the purpose of section A is to frame the general constitutional and privacy concerns that animate the rest of the Report. N. Gertner explained that Massachusetts has been historically cautious, for example, 22E calls for a controlled centralized database that regulates issues concerning personal information as well as search issues and 4th amendment issues regarding access to the database. She added that caution and care should be taken before it is expanded especially due to the overrepresentation of minority DNA profiles in the database (see page 6).
 - b. L. Kavanaugh added that the intent of section A is to make explicit that familial searching is an expansion of how the DNA database is traditionally used for investigation and acknowledges that familial DNA is not an automatic next step. She added that it significantly expands the purview of who can be investigated.
 2. Familial DNA Report Section B
 - a. L. Kavanaugh stated that section B frames the legislative landscape of 22E and situates the familial DNA proposal within that framework. It provides a brief overview of how the law came to be and discusses the legislative priorities that served as underpinnings for establishing 22E. She explained that the section also walks through the limited persons that are required to submit DNA and the establishment of a notification system to ensure that DNA sample collection and the handling of DNA samples are done appropriately. It additionally gives the laboratory the authority to promulgate regulations which speaks to one of the Report's recommendations to the legislature regarding SD1685 where the FSOB

indicated that some of the topics included in the law should be left to the discretion of the MSPCL and are best defined by regulation instead of legislation. She added that this could additionally ensure alignment with federal expectations.

- b. L. Kavanaugh added that there is a brief discussion in section B regarding the fact that 22E does not express the legality of familial searches. She added that the laboratory has expressed a preference for having clear statutory authority and guidance. The Report includes an endorsement of the MSPCL's interpretation and states that the legislature needs to amend the statute to enable familial searching.
 - c. Section B also expands on the discussion of local databases and includes the motion and vote from the February 10 FSOB meeting (see page 10). This section recommends that if the legislature is inclined to amend 22E to authorize familial searching, it should not occur without a robust public debate and a consideration of both familial searching and also non-regulated local databases.
 - d. The FSOB discussed the Rapid DNA tool. Rapid DNA is not discussed in detail in the Report because it necessitates a robust discussion and will broaden the scope of the Report. Additionally, Rapid DNA is not used in Massachusetts.
3. Familial DNA Report Section C
- a. A. Mires stated that section C focuses on the context within familial searching. Familial searching searches the same database but using it to identify biologically-related individuals to the offender that is legitimately in CODIS. It is a tool that has been regulated and discussed by the scientific community. They have developed validation procedures for this emerging technology based on sound scientific principles as long as certain conditions are met. The section details validation and search procedures and problems with unregulated databases.
 - b. A. Mires stated that familial searching adds to the investigation process but it is only good if it is carefully regulated. Most states have not regulated the use of this tool through legislation and have instead interpreted and developed policies and procedures to deal with it.
4. Familial DNA Report Section D
- a. A. Lynch stated that section D of the Report itself goes through the history and lays out what the various options are as promulgated by other states and lists the pros and cons of each without taking a position. The section does not provide any recommendations but instead putting out suggestions as to what is effective and what has worked in other jurisdictions. The section discusses how other states deal with their process of familial searching and reviews other state's approaches to things like applications and record keeping and retention.
 - b. The legislature should consider the process in other states including but not limited to:
 - i. All states that conduct familial searching utilize the tool in the most serious unsolved crime after reasonable investigative leads have been exhausted which enables an application of familial search to be made.
 - ii. All states require participation by the prosecuting attorney to complete the application.
 - iii. All states kept spreadsheets to organize application information and actions taken on an application.
 - iv. In most jurisdictions, training is required and memorandums of understandings are filed.
 - v. Some states allow a post-conviction review of a familial DNA search of an application.
 - vi. The area with the most diversity of possible recommendations is the mechanism for making an application.

1. The Report includes an additional possibility where the committee reviews applications and is the applicant that submits the application to the court for approval.
 2. The working group disagreed on judicial involvement.
- iv. A. Lynch indicated that she will be filing a motion asking the FSOB to consider a bifurcated vote.
1. Other working group members clarified that the bifurcated vote would not be for the Report and instead is referring to the action items. The bifurcated vote would delineate the FSOB's endorsement and indicate how many members support familial DNA, how many oppose familial DNA, and how many support restrictions of local databases, and how many oppose restrictions of local databases. A. Lynch explained that the second paragraph of section D speaks to why a bifurcated vote on issues of familial DNA and Y-STR databases would not oppose the Report.
 2. She stated that a bifurcated vote would allow the legislature to understand parts that are supported and parts that the DA's are declining to weigh in on this distinction will not be evident if the vote is not bifurcated. The legislature will know where the various members stand regarding the familial searching legislation and on the Y-STR database which is not finalized and is still a work in progress.
 3. A. Lynch motioned for Bifurcated Vote on the draft report to allow voting on the issue of authorizing Familial DNA Searches to be separate from the voting on the local Y-STR database issue. N. Rothstein seconded.
 - a. If allowed, the voting options would be:
 - i. On the issue of Familial DNA Searching (FDS) Legislation
 1. ___ Support legislation authorizing familial DNA searching of the state CODIS database
 2. ___ Oppose legislation authorizing familial DNA searching of the state CODIS database
 3. ___ Abstain from taking a position
 - ii. On the issue whether to recommend legislation to prohibit aggregation of DNA records of including Y-STR DNA files in a local, non-laboratory database:
 1. ___ Support prohibition of unregulated databases
 2. ___ Oppose prohibition of unregulated databases
 3. ___ Abstain (because the Bristol program is in the infancy of its development phase and not ripe for a vote in favor or opposition).
 - b. If denied, the voting options would be:
 - i. ___ Approve submission of draft report to legislature
 - ii. ___ Oppose submission of draft report to legislature
 - iii. ___ Abstain from voting on draft report
4. A friendly amendment was submitted by L. Kavanaugh to clarify the motion and indicate there is support for the Report.
- a. L. Kavanaugh motioned for Bifurcated Vote on draft report to allow voting on the Report's recommendations with respect to Familial DNA Searches to be separate from the voting on the Report's recommendations with respect to unregulated DNA databases.
 - i. Insofar as the Report addresses the authorization of Familial DNA searching by the Lab:
 1. Support recommendations contained in report, oppose recommendations contained in report, abstain
 2. All voted in support unanimously
 - ii. Insofar as report recommends legislation to prohibit aggregation of forensic DNA records, including Y-STR records, in a local, non-laboratory database:

1. Support recommendations contained in report, oppose recommendations contained in the Report, abstain
2. A. Lynch abstained, all other members voted in support
5. N. Gertner motioned to send the Report as currently written with appendices, to all legislators on the bill along with the draft minutes from the March meeting. L. Kavanaugh seconded. All voted in favor unanimously.

3. Planning for future meetings

- i. Doodle Poll was sent for future meetings (monthly meetings 10a.m.-2p.m.). April 30th and May 21st are confirmed.
- ii. Subsection (i) (N. Rothstein and A. Lynch) to present to FSOB in April for a vote. April agenda to include Hair Microscopy Presentation and Springfield Audit.
 1. T. Palmbach suggested auditing the Boston Police Crime Laboratory next and inviting them to present and provide documents. He stated that they should be scheduled for May (EOPSS to reach out). C. Goodband, S. Botch-Jones, G. Papagiorgakis, and L. Davis offered to help with the Boston Police Crime Laboratory audit
 2. EOPSS to create a blueprint outline of what FSOB did for the first audit
 3. FSOB stated that they should vote on including DAO local databases like Bristol County as a forensic service provider to be audited by the FSOB.
 - a. This will be discussed in the April agenda under “next audit”.
- iii. Subsection (e) (G. Papagiorgakis and S. Botch-Jones) to present to FSOB in May for a vote.
- iv. Board to coordinate with EOPSS to schedule their presentation.

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

5. Public comment

- i. Sidney Collins informed the FSOB that there are three pieces of software that the laboratory could obtain for familial DNA searches. The MSPCL already has one CODIS that is not as user-friendly. There is one from Denver and another one from Texas called MPKin. All states that conduct familial searches use one of these except for California. California made its own.
 1. L. Davis added that there is also a company called Small Pond that provides software.
- ii. Sarah Chu from the Innocence Project expressed admiration for the MSPCL and how meticulously consider their legal authority and how they carry out their duties with regard to the database. She also thanked the FSOB for the complex discussion of the many issues that are tied to familial searching and unregulated databases. She stated that the discussion crystalized two issues for her; the importance of the separation of investigative powers and that there are so many ways public safety can be comprised by unintended consequences when unregulated activity, whether testing or databases, is conducted. She expressed that mitigating issues and consequences before implementation of technology is integral to preserving the legitimacy of the criminal process and hopes there is a way to formalize this process for emerging technologies. She expressed the importance of the task of evaluating emerging technology and the conversations between the FSOB and the legislature especially when forensic technology issues are contemplated.

The meeting adjourned at 1:58p.m.