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Secretary

Forensic Science Oversight Board (FSOB)

Meeting Minutes

Scheduled: April 30, 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)

Members Not in Attendance:

Vacant seat (Cognitive Bias Expertise)
Nancy Rothstein (Nominee from Attorney General's Office)

The chair called the meeting to order at 10:02 AM. A quorum was present.

1. Minutes approval (March meeting)

- i. The FSOB suggested spelling out abbreviations on page 2
- ii. Minutes were approved unanimously

2. Hair Microscopy Project presentation

- i. Video presentation: <https://www.youtube.com/watch?v=rmSBz35U3ko>
- ii. PowerPoint PDF available upon request
 1. L. Kavanaugh explained that the reason there is a limited agreement in some counties is that the working group had identified one specific analyst who had given erroneous testimony. This analyst was used as a starting point to encourage District Attorney's Offices that were hesitant to participate in the hair review to agree to the more modest project of reviewing the subset of cases handled by that one particular analyst, in hopes of partnering later on.
 - a. District Attorney Marian Ryan urged every District Attorney's Office to fully participate in the hair review moving forward, adding that there is no reason **NOT** to do so at this stage.
 2. District Attorney Marian Ryan stated that the information presented is the result of years of work and collaboration. She thanked the laboratory, Ropes and Gray, and all of the folks in the various offices.

She expressed that the real challenge is that justice cannot wait for those convicted on the evidence that this model looks at; Massachusetts has had too many bumps on the road that have raised a legitimate concern in the public about the forensic evidence that has been presented to a jury. She stated that confidence has to be re-earned around that evidence because technology is growing and more forensic evidence will be presented in the future. Confidence has to be re-earned to ask the public to trust in the forensic evidence. She suggested that confidence is re-earned by taking responsibility for what has happened, creating models to address it, incorporating partners, and bringing people to justice.

- a. N. Gertner expressed her appreciation for the project and asked District Attorney Marian Ryan if the Massachusetts District Attorney's Association (MDAA) has a position on the project moving forward or is it likely to be District Attorney Office by District Attorney Office. District Attorney Ryan responded that the group is hopeful that the MDAA will take a position especially in light of the numbers reviewed. She understands that various offices want to know what they would be undertaking but she will be advocating to her colleagues that they have moved past that point and have demonstrated that it is doable and it is time to move beyond the limited agreement.
3. L. Kavanaugh clarified that the staff piece discussed in the video is related to the fact that her office agreed to do the bulk of the work and has enlisted their fellows to work on the project who only stay for the duration of their fellowship. The sooner the counties agree to full participation and allow the release of records, the better so that the project can be completed by the fellows already on the project.
4. District Attorney Marian Ryan expressed that as the model is institutionalized, they may need to go to the legislature to be legislatively funded if it does not receive grant funding.
 - a. L. Kavanaugh expressed that they received two new federal grants in 2020. One of them is for the Boston Police Crime Laboratory (BPDCL) to employ a similar effort. The BPDCL will partner with the Massachusetts State Police Crime Laboratory (MSPCL). Their focus will not just be on hair reviews.
- iii. L. Kavanaugh would like to allow the FSOB to think about the information presented to discuss at the next meeting.

3. Upcoming audit

- i. R. Cotton expressed that there should be a discussion about the FSOB's approach to who and how they are auditing. She discussed the need for guidance or a framework for auditing accredited and unaccredited laboratories as well as the smaller forensic service providers that responded to the 2019 survey.
 1. T. Palmbach agreed and added that he thinks the FSOB should audit BPDCL next because the board has an existing framework for auditing a big laboratory. He added that the FSOB and should additionally pick a small department to audit after the Springfield Police Department Crime Laboratory (SPDCL) audit is finalized.
 - a. T. Palmbach stated that they will present their audit report for the SPDCL on May 21st. The board will weigh in on what worked and what did not work.
- ii. T. Palmbach stated that BPDCL should be invited to present as soon as the next meeting because it will take time to audit them. S. Botch-Jones suggested using the list of requests to the MSPCL during their audit as guidance.
 1. Executive Office of Public Safety Security (EOPSS) will get this list to BPDCL soon.
- iii. A. Lynch stated that there is a difference between large laboratories, mid-sized service providers, and smaller units. The MSPCL and the BPDCL are the largest laboratories. The SPDCL and the Worcester Police Department Crime Laboratory are mid-level departments. The smaller laboratories may not do testing. She stated it would be helpful to define "forensic service provider".
 - a. L. Kavanaugh reminded the board that they had discussed defining it broadly to focus on both accredited laboratories and unaccredited laboratories. A broader definition allows the board to examine smaller departments that may be testifying in court. The chairwoman agreed with L. Kavanaugh and cited section (d) of the statute, "*the board shall initiate an investigation into any forensic science, technique or analysis*".

- b. N. Gertner stated that the term *forensic service provider* is referred to in 278A section 8 which deals with closed conviction testing. N. Gertner stated that the FSOB can audit the entire provider or a specific service.
 - c. L. Davis mentioned that it would be beneficial to revisit the survey because some respondents may not actually analyze evidence and instead collect evidence to submit to a laboratory.
 - 2. R. Cotton motioned that the next forensic service provider that the FSOB will audit is the Boston Police Crime Laboratory. A. Goldbach seconded. The motion carried.
 - a. EOPSS will reach out.
 - b. C. Goodband, S. Botch-Jones, G. Papagiorgakis, and L. Davis offered to help with the BPDCL audit.
- iv. T. Palmbach stated that the Bristol issue should be addressed soon and may not require a full onsite inspection.
 - 1. L. Davis stated that she would like to know more about Bristol's database because the information is scattered. She indicated she would like to know the current status, what they are doing and what their process is.
- v. N. Gertner suggested auditing Bristol as well as launching an investigation pursuant to subsection (d). L. Kavanaugh suggested auditing the practice. T. Palmbach disagreed and supported a singular investigation into Bristol violating the terms of receiving DNA data. He stated that regardless of their interpretation of Massachusetts legislation, they violated the current best practices for the safeguard and scope of use of DNA-derived data.
- vi. N. Gertner mentioned that she along with L. Kavanaugh and A. Goldbach have looked into bringing in a civil action to enjoin the use of the Bristol database arguing that it is a violation of the Fair Information Practices Act (FIPA).
 - 1. See agenda item 6 for further discussion.

4. Future meetings

- i. May 21, June 24, July 26, September 24, October 22, November 19, December 17

5. General updates

- i. Website is live: mass.gov/forensic-science-oversight-board
 - 1. The FSOB expressed that they would like to add presentation documents and that the reports section should be more specific with the labeling of the reports.
- ii. The Familial DNA Report was shared with legislators
 - 1. A. Lynch stated that Sidney Collins is taking an online course in Familial DNA and a participant in the course highlighted the board's report.

6. 4/27/21 letter to Undersecretary Collins from signatories, Judge N. Gertner, L. Kavanaugh, and A. Goldbach (letter available upon request)

- i. N. Gertner summarized the letter which addressed institutional questions. She stated that she does not want to be part of a board that is saying wonderful things but is not able to do them in any meaningful way. She reminded the FSOB that the board has been discussing familial DNA since June 2020. She stated that there was a parallel proceeding that the board did not know about. She indicated that the FSOB's concerns during the December meeting were real by March. She expressed that the evolution of the events is troubling to the signatories of the letter. She expressed that the Attorney General, representing the laboratory and presumably representing EOPSS, had the discretion to appeal the judge's order and the general principle of the case would have been available to the state appeals court. She expressed that the result of an appeal would have been a discussion and an implementation of what the board had worked on.
 - 1. She stated that whoever decided to not appeal did so directly and expressly against the wishes of the FSOB. She stated that if EOPSS decided to not appeal, it raises serious concerns about the FSOB's role and highlights a broader question of whether the FSOB should be under EOPSS or be an autonomous agency like the Texas Commission because EOPSS has divided loyalties. She also indicated it would be worth discussing if the state laboratory should be independent of EOPSS because these are structural issues.
- ii. The FSOB agreed and would like responses to the questions below:
 - 1. Who decided to not appeal, was it the laboratory or EOPSS? Was the laboratory consulted?

- a. The chairwoman responded that the Attorney General's Office represents the MSPCL in this matter. The FSOB heard the concerns of the laboratory and the concerns they raised with EOPSS when a legal request was made such as the grand jury subpoena. The Attorney General's Office did engage with EOPSS because the laboratory is under EOPSS. She stated that she is not at liberty to discuss the discussions between the Attorney General's Office and EOPSS because those discussions are under attorney-client privilege and she was not part of those discussions. She stated that she can report that it was a thoughtful discussion and all of the concerns that were raised by the MSPCL and FSOB were transmitted to the Attorney General's Office. What the board wanted brought forth in the litigation was brought forth in the litigation and everything that was asked to be turned over to the Attorney General's Office was turned over and the decision was made to not appeal.
 - b. N. Gertner responded that attorney-client privilege only restricts the attorney and not the client which is EOPSS. She stated that EOPSS can choose to disclose the information and that there is no bar to disclose why EOPSS chose to not appeal. The chairwoman responded that she will take this request back to legal counsel and that she was advised that the discussions were an attorney-client privilege and that she is not in a position to discuss further.
2. Was there a use and dissemination agreement?
 - a. The chairwoman responded that there is a draft use and dissemination agreement that is not signed. This draft was going to be before the board in January and will be before the FSOB at the May meeting.
3. Should the FSOB investigate/audit Bristol?
 - a. N. Gertner stated that the FSOB should initiate an investigation under subsection (d) part ii: *the board shall initiate an investigation into any forensic science, technique, or analysis used in a criminal matter upon: (ii) a determination by not less than 5 members of the commission, which may include the undersecretary for forensic sciences or the undersecretary's designee, that an investigation of a forensic analysis would advance the integrity and reliability of forensic science in the commonwealth.*
 - i. N. Gertner moved for an investigation under section (d) subsection ii to determine if the forensic analysis would advance the integrity and reliability of forensic science in the commonwealth. R. Cotton seconded, 1 abstained, 1 no, the motion carried.
 1. The FSOB will meet on 5/7 10am-12pm to vote on a list of questions to further the investigation. These questions will be sent to EOPSS to forward to L. Kavanaugh to compile before 5/7.
 - ii. N. Gertner stated that the May 21st meeting should include presentations from the Attorney General's Office, the Bristol District Attorney, EOPSS, and the MSPCL. She stated that the FSOB should request redacted copies of pleadings. L. Kavanaugh added that EOPSS should provide a redacted copy of the portion of the court order that specifies the records and in what form they were ordered to produce the records. She added that it would be difficult for the FSOB to launch an investigation if they do not know the parameters of what they are dealing with.
 - iii. N. Gertner moved to invite the Bristol District Attorney to the May 21st meeting to discuss the Y-STR database, R. Cotton seconded, 2 no, the motion carried.
 - iv. L. Kavanaugh moved to invite an EOPSS representative (that can waive the privilege regarding the grand jury subpoena) to the May 21st meeting. A. Goldbach seconded, 2 abstained, 2 no, the motion carried.
4. Should the FSOB be independent? Should the MSPCL be independent of EOPSS (under section 6 of the FSOB's charge)?
5. Has the MSPCL turned anything over?
 - a. The chairwoman responded that the laboratory has been complying with the subpoena and information has been provided pursuant to the subpoena. The MSPCL has not received or fulfilled any other requests. Nothing has been voluntarily turned over. Part of the motion to reconsider included the use and dissemination agreement and the motion was denied.

- b. N. Gertner responded that complying with the subpoena and turning over a lot of information does not mean that they cannot say that there is a use and dissemination requirement concerning that information. Providing the information with a use and dissemination agreement is not necessarily not complying with the grand jury process. The chairwoman clarified that she believes that the use and dissemination agreement was part of the proceedings and was denied.
 - c. L. Kavanaugh stated that the relationship between the grand jury investigation and the MDAA letter is unclear. She clarified that the laboratory has complied with the subpoena but not the letter.
 - 6. Were the records that the laboratory was ordered to produce limited to Bristol County or did it include other counties?
 - a. EOPSS will take this question back to see if the question can be answered for the next meeting.
 - 7. L. Davis asked if there are any controls and if data contains legal names because names are not entered into CODIS.
 - a. The chairwoman responded that she could not answer her question.
 - iii. T. Palmbach clarified that Bristol would use the information for investigatory purposes and if this process led to a suspect, they would need to submit a subsequent submission to the laboratory for confirmation. The chairwoman responded that she believes that the laboratory has to have its own independent confirmation.
 - 1. A. Lynch responded that it is an investigative lead and that if there is a match, a name would be provided that would allow for further investigation. It would not be testified in court. It does not have the confirmatory steps or the discriminating ability of a standard STR database.
 - 2. T. Palmbach explained that the laboratory has no scientific authority to reanalyze that data coming in. He stated that the FSOB should make a statement for the laboratory to indicate that the laboratory cannot accept the data back into the system for confirmation once it leaves the laboratory because the data could have been contaminated. The District Attorney would have to choose to prosecute a case without a confirmed DNA case. R. Cotton stated that there is nothing that compels them to get confirmation.
 - iv. N. Gertner stated that a grand jury proceeding is confidential because it is about a person but if the other information that is being turned over includes the information of other people, it is not within the purview of the grand jury.
 - 1. She described two different issues 1) if statute 22E requires the laboratory to turn over the records, 22E does not say what the recipient can do with the records, and 2) FIPA explains the responsibilities of the data holder. Once Bristol has these records and creates a database, the records are subject to FIPA.
 - a. N. Gertner reminded that there are also federal regulations. She stated that the Bristol District Attorney's Office could be in violation of state and federal law. She stated that EOPSS could bring a lawsuit but that would not have been necessary if an appeal had been filed.
 - b. N. Gertner called for EOPSS to sue to enjoin the use of the database under Section 314 of the Mass General Laws as a violation of the terms of the laboratory and a violation of FIPA. As an alternative, the FSOB can ask the Attorney General's Office to sue. She stated that EOPSS has independent standing to stop a practice that violates the rules.
 - i. A. Lynch stated that is not unlawful to have a Y-STR database. L. Davis added that each laboratory on every government level can make its own decisions concerning what they search within their state.
 - ii. N. Gertner stated that the issue is the dissemination and what they cannot do is share with other entities like other District Attorneys. A. Lynch stated that it is not against the law if a laboratory decided within their state parameters to upload Y-STR profiles in a database to do a database search. She expressed that there is a difference between whether it is permissible and whether it is advisable. The District Attorney's position is if the laboratory will not create a database to utilize the data then they will create the database instead.

1. R. Cotton stated that the District Attorney's Office indicated wanting all Y-STR profiles.
2. L. Davis stated that the problem is that they are asking for the MSPCL's data to create their database and not using data they created.
2. A. Lynch asked if the chairwoman can disclose the extent of the order because when something is turned over in connection to a specific investigation, its use is limited to that investigation.
 - a. L. Kavanaugh stated that the District Attorney has no intention of limiting the use of the data that he obtained through the grand jury investigation for other cases. She mentioned that he has appeared on WCVB 5 and displayed the database. She expressed that she is mystified as to why the Attorney General's Office has not filed a civil lawsuit. L. Kavanaugh shared the video on WCVB 5 of the Bristol District Attorney's Office displaying the confidential information in the database: <https://www.youtube.com/watch?v=NLC9YEATVLE>
- v. In regards to the authority of the FSOB, the statute gives the authority of oversight but has no enforcement powers. The FSOB has been charged with advising.
 1. A. Lynch stated that there is a difference of opinion as to the authority of the District Attorneys. The District Attorney's Office is operating under their interpretation of 22E.
 2. G. Papagiorgakis. The FSOB's authority has been brought up in the past, the FSOB statute is what is in question instead of what the Attorney General's Office did on this case.
 - a. N. Gertner responded that the FSOB has a right to reasonably expect that EOPSS as the FSOB representative takes the FSOB's position. She indicated that this is a representation issue, not an enforcement issue. EOPSS represents the FSOB and the board expects EOPSS to not take a position that is inconsistent with the board. The chairwoman responded that she will take this concern to EOPSS legal.

7. Public comment

- i. No public comment.