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Forensic Science Oversight Board (FSOB)

Meeting Minutes

Scheduled: May 21, 2021 from 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 10:00 AM. A quorum was present.

1. Minutes approval (April and May meeting)

- A. Corrections need to be made. Minutes will be approved in June.

2. Subsection (d) of the FSOB statute follow-up

- A. The FSOB advisor invited District Attorney (DA) Quinn and Massachusetts State Police Crime Laboratory (MSPCL) Director Kristen Sullivan via email to the May 21st meeting. She also provided the list of questions the board voted on. The MSPCL responded on May 20, 2021, with a written response to the memorandum. The DA did not respond.
 - i. The FSOB communicates with stakeholders through the FSOB advisor. N. Gertner asked if the DA would have responded if the request came from a higher level than the FSOB advisor because she did not feel that the authority of the administration was behind the request.
 - ii. N. Gertner seeks to amend the authorizing statute so that the FSOB is not under EOPSS. She expressed that this would give the FSOB more authority to investigate and gather information. She would like proposed language for an amendment to be put on the June agenda. **EOPSS to circulate Texas and New York statute to assist the board’s discussion.**
 - 1. L. Kavanaugh expressed that this is an opportunity for the FSOB to think about the stakeholders they can engage to gather information and educate the public on the

importance of full participation in investigations initiated by the board with or without legislative amendment.

- a. L. Kavanaugh expressed that the FSOB does not have the authority to force anybody to respond to them but it does have the capacity to hold public events in which they can make clear who has and who has not participated. The FSOB can make clear the significance of obstructing an investigation. She stated that the FSOB should discuss what they can do right now with their existing authority to expose what is happening by way of stakeholder engagement and investigative authority.
- B. L. Davis, R. Cotton, A. Goldbach, and L. Kavanaugh to develop report per subsection (d)
- i. N. Gertner stated that the FSOB should issue a report with or without the DA's response. She expressed that the FSOB could draw conclusions and inferences from their silence and their public statements. She further stated that the report could indicate that the DA did not cooperate.
 1. N. Gertner suggested that the FSOB issue a report about the existence of a grand jury proceeding that they have limited information on due to grand jury secrecy. The confidentiality of a grand jury is due to the case associated with the grand jury but the DA letter sent from the Massachusetts District Attorney's Association (MDAA) to the FSOB stated that the subpoena goes beyond a single case to establish the creation of a local database.
 2. N. Gertner suggested the report describe in lay language the risk of an unregulated database. She stated that the DA's stance is "who cares what goes into the database as long as we are solving crime" but there are privacy issues and the notion that they are not solving crime. She expressed that the FSOB's only tool is public pressure.
 - ii. L. Davis stated that the report should include issues with the quality of the data (the review of the database to make sure that the data is entered correctly, and identified and handled appropriately) and also the confidentiality of the database itself in terms of cybersecurity.
 - iii. The report will provide the Bristol DA with a final opportunity to provide input.
- C. The board expressed their concern that DA Quinn did not respond to their request
- i. The FSOB expressed that the DA's failure to respond is troubling and is a disregard for the board and what they do. Members of the FSOB expressed that there is no way the DA does not know the FSOB's expectations or the serious issues they have highlighted. They expressed that they would have appreciated an acknowledgment of the invitation for discussion. The FSOB stated that no one outside of the District Attorney's Office knows pertinent details of the database.
 - ii. Goldbach requested that the FSOB chair or EOPSS Secretary reach out to the DA to request that the DA respond to the FSOB and relay their concerns. Chairperson Collins will draft a letter and reach out to the DA relaying the board's concerns. The chairperson will CC the board on her communications. L. Davis suggested the communication should include a tracking process (if by email, include read receipt, if by mail, ensure it is certified mail).
 1. The FSOB expects a response by June 17th.
 - iii. L. Kavanaugh stated that the memorandum that was sent was open-ended and inviting. She stated that it would be appropriate to use stronger language with the next request to the DA. She stated that the DA was given multiple weeks of notice and it is not unreasonable to set a deadline because the working group will draft a report before the next meeting and would like to include his response.
 - iv. DA Quinn gave an interview to WCVB 5, the board saw the video but felt it did not answer any of their concerns.
 1. R. Cotton stated that the DA has not informed the public that the samples in the database include exclusionary samples. The residents of Bristol County do not know that their DNA data may be included in the database.
 2. L. Davis noted that members of the press have attended FSOB meetings in the past but they have not attended since to hear the rest of the story.
- D. The board discussed the MSPCL's response (attached)

- i. T. Palmbach stated that his understanding of the MSPCL response is that they released very personal data and cannot guarantee that they did not release some law enforcement data. He expressed that this may pose a serious problem for the laboratory and that he foresees a shutdown and investigation by CODIS/NDIS, resulting in substantial ramifications on the Commonwealth.
- ii. L. Davis expressed that she was impressed with how the MSPCL handled the response. She stated that the data sent contained profiles that were collected legally but she is unsure how many of these samples were given voluntarily (exclusionary data). Not only Y-STR profiles were provided, but autosomal profiles were also provided. All data was given over in hardcopy requiring manual data input.
- iii. L. Kavanaugh stated that it was not clear that the data provided in response to the grand jury subpoena was limited to Bristol County and expressed concern that the response includes other counties even though the MSPCL has not voluntarily responded to requests from Worcester and Plymouth. She expressed that she is presuming that the MSPCL is constrained from disclosing any further information, which is why the FSOB requested that EOPSS send something with the authority to waive attorney-client privilege for purposes of obtaining more information about the grand jury proceedings.
 1. K. Collins informed the FSOB that there is a gag order for what EOPSS could disclose due to grand jury secrecy.
 2. L. Kavanaugh suggested that the board vote to reach out to the judge with a request that portions of the grand jury investigation be pierced for the subsection (d) investigation.
 - a. N. Gertner asked the FSOB to vote on a motion before the judge to give the FSOB redacted information because grand jury secrecy covers the particular investigation but does not cover the use of the data in other cases and other counties.
 - b. N. Gertner to draft a motion and draft pleadings. This will be discussed at the June meeting.
 3. N. Gertner stated that there will be a lawsuit in the future brought forth from individuals whose data is inappropriately distributed.
 4. T. Palmbach noted that the FSOB does not need to discuss or reference the grand jury because the letter presents probable cause. The letter indicates that there is a violation and due to the violation, the MSPCL notified ANAB. He quoted the MSPCL response letter *“the material provided included data developed from suspects and victims. Although the exact relationship of an individual to a case is not always known, profiles submitted for exclusionary purposes, e.g., family members and consensual sexual partners, were provided. The reports provided are very unlikely to contain profiles of law enforcement, laboratory personnel, or defense representatives, or testing observers. However, these data included profiles from individuals who are required, by statute, to be included in both the CODIS and state DNA databases,”* and stated that the FSOB should assume that all of the data mentioned is included based on this information. T. Palmbach explained that the laboratory’s letter affirms that the DAO’s local database has confidential data that needs to be protected and if the DA will not respond to any assurances that they have protected the data, the FSOB has to assume that they have not protected the data.
 - a. N. Gertner agreed and added that this answers the question that the FSOB would be asking of the judge and the previously proposed motion would create a needless diversion.
 - b. L. Kavanaugh responded that a motion to get clarification from the judge is still valuable due to the FIPA concerns. This could aid the FSOB’s understanding of the scope of the problem to know if the data provided by the laboratory includes counties outside of Bristol. The FSOB could infer that it does but she does not think the MSPCL letter is enough to make that inference.
 - c. N. Gertner expressed that there are two related issues at hand. The first is that of Bristol sharing the data it received with other counties (which the MDAA letter indicated they would) and the second is whether the subpoena included other

counties. She believes that the board has all it needs for the report itself. **She stated that she will draft pleadings for the other issue.**

5. L. Davis turned the board's attention to the last paragraph of the letter, "*the laboratory notified the ANAB accreditation manager of the grand jury subpoena and advised ANAB that we are currently working to determine if we are legally permitted to notify our customers (e.g., original submitting agency) of the release of data without violating the terms of the grand jury. ANAB has acknowledged MSPCL's disclosure and advised the Laboratory that further communication will be needed only if MSPCL is ultimately unable to meet their accreditation requirements (e.g., notification of customer of release of confidential information) due to grand jury restrictions.*" She expressed that in reading between the lines it looks the MSPCL may not be able to meet their accreditation due to information released of other customers besides the Bristol DAO.
 - a. K. Collins informed the board that the MSPCL's customer is law enforcement, not individuals. L. Kavanaugh and L. Davis stated that the board can reasonably inference that the information provided to Bristol included non-Bristol data otherwise a notification of the customer would not be necessary.
 - b. R. Cotton expressed that the laboratory has to follow NDIS rules regardless of what the Massachusetts statute states and if they do not follow those rules they cannot participate in NDIS. L. Davis added that the ANAB requires accredited laboratories to notify them of nonconformities, errors, and any issue that may conflict with their accreditation. L. Davis quoted ISO/IEC requirements 4.2.2 and 4.2.4, "*4.2.2 When the laboratory is required by law or authorized by contractual arrangements to release confidential information, the customer or individual concerned shall, unless prohibited by law, be notified of the information provided; 4.2.4 Personnel, including any committee members, contractors, personnel of external bodies, or individuals acting on the laboratory's behalf, shall keep confidential all information obtained or created during the performance of laboratory activities, except as required by law.*" L. Davis explained that 4.2.4 requires that the confidential information provided be kept confidential by the recipient and the laboratory has no assurance that Bristol County will protect the confidentiality of the information.
 - i. T. Palmbach expressed that Bristol County answered that question when they held a press conference with the database open and visible on the screen.

iv. L. Davis motioned to send the survey concerning the release of DNA data to the Boston Police Crime Laboratory. Kavanaugh seconded. Motion carried.

3. Public Comment

- A. Sarah Chu from the Innocence Project suggested that the FSOB consider an amendment to make the FSOB a customer of the laboratories. She also shared a Feb 4, 2020 letter that the Downstate Victims Coalition drafted to Members of the New York City (NYC) Council Committee on Public Safety when NYC was contemplating an unauthorized DNA database that was being held by the Office of Chief Medical Examiner and overseen by New York Police Department. She expressed that she was shocked that consensual partners and other people who were told that their DNA was taken for a particular case could potentially have their DNA exposed. She expressed that this is beyond the legitimacy of the authority of the crime laboratory and the FSOB. She stated this is about the legitimacy of the criminal legal system. She applauded the MSPCL for doing its best to maintain the legitimacy of its work and thanked the FSOB for its continued vigilance.

4. Mires presentation on the Missing Persons Task Force (PowerPoint and Missing Persons Task Force Report attached)

- A. The Familial DNA Bill was brought to the FSOB's attention due to the work that the Missing Persons Task Force (MPTF) was doing because Chairperson Collins was asked to attend an MPTF meeting in 2019 where they were discussing Familial DNA Bill S2480.

- B. A. Mires expressed that all of the problems that the FSOB has highlighted are due to systemic issues. She stated that she wants the FSOB to push initiatives forward. The MPTF has provided a template for specific actions because they have evaluated the state and federal mandates and demonstrated that Massachusetts has been lacking in following through on its commitments. She expressed that these are systemic problems and not an issue of any one agency. She proposed that the FSOB should finish their sections and then move forward with addressing system issues (prioritize funding, meet challenges of state backlogs, compliance issues, et cetera). The FSOB should also set up a pathway that engages stakeholders in the system.
 - i. A. Mires shared that the issue the MPTF identified is that there is not a statewide missing persons centralized census. The MPTF Report outlines solutions.
 - ii. She suggested encouraging EOPSS to gather federal funding while the FSOB identifies the areas that need funding to reach compliance.
 - iii. A. Mires stated that she empathizes with the DA's Offices in terms of their limitations in wanting to move cases forward due to lack of funding and provisions. She expressed that she was touched by what DA Ryan said about the responsibility to establish trust.
- C. N. Gertner expressed that she agrees that the board should be proactive.
- D. T. Palmbach commended A. Mires' work and addressed scope. He stated that the FSOB has to discuss 1) priorities because there are substantial fiscal needs in a variety of areas and the FSOB has not made formal requests for funding of the Commonwealth yet and 2) resolve genealogy
 - i. A. Mires responded that she just wants the board to think about the possibility of asking EOPSS to obtain federal funding and the FSOB to identify where funding is needed and engage stakeholders to address a variety of issues. She agreed with T. Palmbach that other things take priority and the missing persons census is one example of a project that needs funding.
- E. L. Kavanaugh expressed that she likes the idea of the FSOB advising on seeking federal funds regarding forensic priorities. She stated that she thinks it would be beneficial for the FSOB to have an understanding of how the state has in the past sought out those monies and used them. There is already a well-established process that both laboratories use to avail themselves of federal money. She expressed support for the FSOB to have a role in advising how funding gets prioritized.
- F. A. Mires would like to present in June and frame the issue for the FSOB.

5. Subsection updates

- A. S. Botch-Jones and G. Papagiorgakis updated the board on subsection (e). They encouraged the FSOB to continue providing feedback. They envision listing out the disciplines that they feel would fall under the purview of negligence and misconduct and then drafting a potential regulation to include as an appendix in the next FSOB report to the legislature for their consideration. The next FSOB report should include summaries of what everyone has done.
 - i. Board does not have a mandate to do an annual report, the FSOB is only required to report the audit findings to the legislature but the FSOB can still draft a report of their efforts.
 - ii. They asked the FSOB if they feel that the website is a mechanism for reporting.
 - iii. They will present on June 24th.
- B. A. Lynch and N. Rothstein will present subsection (i) on June 24th.
- C. T. Palmbach and R. Cotton will present their Springfield PD audit on June 24th.
 - i. The next audit is Boston Police Crime Laboratory (BPDCL). They have been notified and invited to all future meetings. A document with all of the requests the board made of MSPCL was sent to the FSOB.
 - 1. Working group developed for BPDCL audit (C. Goodband, S. Botch-Jones, G. Papagiorgakis, and L. Davis)
 - 2. Erin Forry from the BPDCL informed the FSOB that the Boston Police Department has a Forensic Division with three separate laboratories and three separate accreditation certificates (the Crime Laboratory, the Firearms Analysis Unit, and the Latent Print Unit).

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

- A. The state of emergency is being lifted in the next weeks and all executive orders will no longer be in effect. The FSOB may be meeting in person moving forward because they are bound to the Open Meeting Law.

B. L. Kavanaugh requested that the June agenda include a discussion of DAs who have not agreed to participate in the Hair Microscopy Project.