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Forensic Science Oversight Board (FSOB)

Meeting Minutes

Scheduled: May 7, 2021 10:00am-12:00pm, 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)
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:

Clifford Goodband (Expertise in Statistics 2)
Nancy Rothstein (Nominee from Attorney General's Office)
Vacant seat (Cognitive Bias Expertise)

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

Chairwoman Collins was asked to report back on the Executive Office of Public Safety and Security's (EOPSS) attorney-client privilege. K. Collins informed the FSOB that EOPSS is not going to waive their attorney-client privilege. K. Collins expressed that EOPSS appreciates the FSOB's work and everything the board has done. K. Collins reminded the FSOB that EOPSS has brought numerous issues to the board. The board should not feel as though EOPSS does not want to bring anything of notice to the board. EOPSS will bring before it anything the board wants EOPSS to bring. The FSOB is independent of EOPSS and the chairwoman does not have a vote.

N. Gertner stated that she does not accept the position that EOPSS is not waiving a privilege that it does not own, the privilege is attached to the Massachusetts State Police Crime Laboratory (MSPCL) and not to EOPSS. EOPSS represented the MSPCL if the laboratory said they wanted to appeal EOPSS would not have a right to deny the request. She stated that the question is how EOPSS is enforcing the board's recommendations.

- 1) **Generate and vote on lists of questions and requests RE: Bristol database investigation pursuant to subsection (d) of the FSOB statute (See page 4 and 7 for the final lists of questions and requests)**
 - a) L. Kavanaugh and L. Davis created a list of questions and requests directed at the Bristol County District Attorney (Bristol County DAO) and the MSPCL for the board to review and edit.
 - i) The questions are inclusive of any DNA profile and not just the Y-STR profiles because the extent of the type of DNA data they have is unknown. The board expressed that they do not have access to the court order and do not fully know the type of data that was requested or if data had been obtained before the court order.
 - (1) Y-STR is taken from the male chromosome. Autosomal DNA is the rest of DNA.
 - (2) Boston Police Crime Laboratory (BPDCL) and the MSPCL conduct DNA testing. The chairwoman informed that she does not believe there is any other laboratory in the state that does DNA testing.
 - (a) The list of questions will be sent to the BPDCL in the future.
 - ii) The board discussed potentially using this set of questions as a template to survey any DNA testing laboratories in MA to understand how widespread the issue is:
 - (1) A. Mires discussed surveying independent private laboratories operating in Massachusetts like Redgrave
 - (a) **EOPSS to research Redgrave and share information.**
 - (b) L. Davis asked for clarity on the role of private laboratories that are not accredited and if the FSOB is allowed to investigate private corporations.
 - (i) N. Gertner responded that the board's authorizing statute allows them to investigate techniques and the board could investigate the products of the laboratory's work and not the laboratory itself or their use of the data.
 - iii) The board edited the list of documents and requests and provided suggestions.
 - (1) S. Botch-Jones stated that in addition to the questions listed, the board should request a copy of all protocols and relevant documents.
 - (2) T. Palmbach suggested making the list of questions and requests to the MSPCL less broad. He suggested being more specific so that the laboratory provides information relevant to Bristol or any DAO request.
 - b) The FSOB discussed the structure/chain of command of the MSPCL.
 - i) L. Kavanaugh stated that the relationship between the laboratory and EOPSS becomes complicated because she is interested to know if the laboratory has a different position than EOPSS concerning the issues contained in the memorandum. She stated that it seems that EOPSS made a decision not to waive attorney-client privilege and if the FSOB asks questions of the laboratory that probes at that, they would not get a response.
 - (1) T. Palmbach expressed that the laboratory is being put in an unfavorable position because it is not okay to ask a subordinate why they obeyed or did not obey a particular decision. L. Kavanaugh agreed that the questions could be structured in a way that does not put the laboratory in a compromising position.
 - (2) R. Cotton reminded the FSOB that the laboratory is under the Massachusetts State Police Colonel. She stated that it would be helpful at a later meeting to discuss the laboratory's command chain regarding decision points.
 - (3) A. Goldbach stated that she appreciates T. Palmbach's comment but that it presumes that the MSP Colonel did not agree with the position of the scientists which may not be the case. It is also likely that the Colonel was supportive.
 - (4) L. Kavanaugh agreed with R. Cotton and wondered if the MSPCL scientists are able to make scientific decisions independent of law enforcement, or does law enforcement have the power to override their scientific judgment. She explained that if it is the latter, it would speak to subsection (c) vi of the FSOB statute ("*determining the proper entity to control the crime laboratory and whether it would be*

appropriate to transfer such control to another executive agency or to an independent executive director”).

- c) L. Kavanaugh sent the edited listed of questions and requests to EOPSS to disseminate to the board.
 - i) N. Gertner motioned to send the list of questions as currently constituted, written, and circulated by L. Kavanaugh, to the Bristol County DA. A. Mires seconded, 2 abstained, 2 absent. The motion carried.
 - ii) S. Botch-Jones motioned to send the list of questions as currently constituted, written, and circulated by L. Kavanaugh, to the Massachusetts State Police Crime Laboratory. N. Gertner seconded, 1 no, 1 abstained, 2 absent. The motion carried.
 - iii) The MSCPL questions and requests will be sent to Kristen Sullivan, MSPCL Director, and Chief Science Officer. The Bristol questions and requests will be sent to Thomas Quinn, Bristol County District Attorney.

2) Topics not reasonably anticipated within 48 hours of the meeting

- a) R. Cotton asked what would be the obligation of that District Attorney to turn over information that they had discovered in that match if a District Attorney had an STR database and made a match that was used in an investigation resulting in a charge and trial.
 - i) A. Lynch responded that it would be exactly as if it were a case with a CODIS match in which the fact that the investigative lead was generated from a CODIS match would not be admitted in trial. It is not usually admissible and is not considered a match because of subsequent testing. They may have to show what other persons were pursued if there were a third-party culprit motion.
- b) A. Mires requested the addition of a short discussion regarding the Missing Persons Task Force report that was circulated in January. She expressed that she hopes the FSOB considers writing a letter of endorsement to the legislature.
 - i) A. Mires to share additional information with EOPSS. EOPSS to recirculate the report to the board.
- c) The May 21st meeting may potentially be extended (past 2pm). Please consult mass.gov/forensic-science-oversight-board for the final meeting schedule.

3) Public comment

- a) No public comment.

MEMORANDUM

TO: Bristol County District Attorney

FROM: Forensic Science Oversight Board

DATE: May 7, 2021

RE: Topics to be discussed during May 21, 2021 FSOB meeting

What follows is a set of questions that we invite you to discuss with the Board at our May 21, 2021. You are welcome to provide the FSOB with written responses, to present orally, to present with a PowerPoint, or to respond in whatever manner you feel will be most appropriate. Our hope is to provide you with notice of the range of issues that the FSOB is interested in hearing about.

For all questions, the terms “DNA data” and “DNA profiles” refer to both autosomal and Y-STR DNA profiles and any additional information related to those DNA profiles.

1. If you are opting not to respond to any or all of the below questions, what is your rationale for not responding?
2. Are you in possession of any DNA data that you did not generate?
3. When and from whom have you received any DNA data?
4. What is the format of the DNA data you received (i.e., hard copy, computer file, .xlsx file, .cmf file)?
5. How is the DNA data being stored (e.g., hard copy, commercial software spreadsheets, commercial database programs)? Provide specific name and version of the software, if applicable.
6. What are you doing with the DNA data you have received?
7. What future plans do you have related to DNA databases/spreadsheets?
8. Were/are there any restrictions placed on your use of the DNA data you received? If so:
 - a. What are they?
 - b. How were they determined?
 - c. Who is responsible for overseeing compliance with any restrictions on data use?
 - d. How will you document your compliance with any such restrictions?
9. To what extent do you follow the guidance of any accreditation or licensing organizations with respect to DNA data access, security, quality assurance and control?
10. Does your agency plan to seek the appropriate accreditation, certification, or licensing to conduct forensic searches and DNA profile comparisons? If so, what accrediting, certifying, or licensing entity?

11. Have you developed any written protocols or guidance to address any or all of the issues enumerated below related to the establishment and oversight of your planned DNA database/spreadsheet? (Specifically: (a) data access/security; (b) data quality assurance; (c) handling of searches/profile comparisons; (d) confidentiality; (e) methodology/loci questions; (f) notification & expungement; (g) data sharing with outside entities).
12. If so, could you provide the FSOB with a copy of all such protocols?
13. Whether or not you have developed any *written* protocols or guidance regarding the enumerated issues, what are your plans with respect to the following:

Data access/security

- a. How will data be imported or entered into your database/spreadsheet?
- b. Who will have access to the database/spreadsheet?
- c. Are there different levels of access of personnel who are authorized to view/edit/alter data? If so:
 - i) Who can view the data?
 - ii) Who can edit the data?
 - iii) What requirements are there for authorization?
- d. How will new information and data be integrated into the database/spreadsheet over time?
- e. What measures do you have in place to track who accesses/enters/views/edits data?
- f. What security measures exist to protect the data from being accessed or modified by unauthorized individuals (internal or external to your agency)?
- g. How will information be removed from the database/spreadsheet?

Data quality assurance:

- h. Will those with access to the database/spreadsheet be required to undergo training? If so:
 - i) What are the specific training procedures?
 - ii) Who will be authorized and qualified to perform the training?
 - iii) What competency testing will be conducted to ensure successful completion of the training?
 - iv) How frequently will training be conducted?
- i. What verification procedures will there be to ensure the accuracy of data?
- j. As data is removed or new data integrated into your database/spreadsheet, are there any verification procedures to ensure that the accuracy of the remaining/new data is not impacted by those changes?

Handling of searches/profile comparisons. Do you have written protocols for the following:

- k. How searches will be performed?
- l. How comparisons of potential matches will be performed?
- m. Who is/will be authorized to initiate a search?
- n. Who is/will be authorized to make a comparison?
- o. What verification procedures are/will be required prior to releasing or acting upon a match generated using your database/spreadsheet?
- p. Whether you will require any specialized training for individuals who are authorized to conduct searches and to make comparisons? If so:
 - i) What are the specific training procedures?
 - ii) Who will be authorized and qualified to perform the training?
 - iii) What competency testing will be conducted to ensure successful completion of the training?
 - iv) How frequently will additional training or continuing education be required and conducted?

- q. Do you intend to perform searches in adjudicated cases? (for example, if requested by a defendant seeking to develop evidence of innocence) If so, will you notify a defendant if the search performed hits to a known profile that does not match the defendant's profile?

Confidentiality:

- r. What protocols or procedures do you have to protect the confidentiality of the DNA profiles and the information contained in your database/spreadsheet?
- s. Does your database/spreadsheet include names or other identifying information about the sources of the profiles?
- t. What measures are in place to ensure that personal identifying information is shielded from those with and without authorized access to the data?
- u. If profiles have been or will be anonymized, who is authorized to learn the identity of a profile that is "matched" as a result of a search?

Methodology/loci questions:

- v. Which DNA loci are included in your database/spreadsheet?
- w. Have you identified a list of DNA profiling kits that have been validated for inclusion in your database/spreadsheet?
- x. If so, by what method have you determined the appropriateness of the DNA profiling kits to be included on that list?
- y. What searching and/or matching algorithms will be used to conduct and confirm DNA profile matches.
- z. Will a qualified DNA analyst review the matches? What parameters do you use to qualify persons to review and confirm matches?
- aa. What are the requirements to search mixed and partial DNA profiles?
- bb. Some Y-STRs are known to be rapidly mutating. Is there a procedure for how to handle profiles that match at all but one or two loci?
- cc. Have you determined the allele or haplotype frequency for a profile or multiple profiles in your database?
- dd. Have you checked for internal matches within the database, or do you have plans to do so?

Notification & expungement:

- ee. What measures are in place to notify individuals that their DNA profile is included in your database/spreadsheet?
 - i) Defendants?
 - ii) Witnesses/victims who provide elimination samples?
 - iii) Lab personnel/defense experts/ police who provide elimination samples?
- ff. If there is a database/spreadsheet breach will people in the database/spreadsheet be notified?
- gg. How will a defendant or other individual whose profile is included in the database/spreadsheet know if they became a suspect as a result of a search in this database/spreadsheet?
 - i) Would it be subject to discovery?
- hh. Have you defined any circumstances in which a profile that you initially include in your DNA database/spreadsheet can or should be removed? If so:
 - i) By what criteria would a DNA profile be removed?
 - ii) Is there a method for an individual to have their DNA profile expunged?
 - iii) If so, what is it?

Data sharing with outside entities:

- ii. What protocols and procedures are in place to prevent DNA data from being used for non-law enforcement purposes?
- jj. What protocols and procedures are in place to allow DNA data held in your database/spreadsheet to be given to other agencies, persons, or organizations?
- kk. If you have developed such protocols, please provide the FSOB with a copy of them.
- ll. Do you have an agreement with any outside entities, including other District Attorney offices:
 - i) To collaborate with or receive DNA data from?
 - ii) To provide DNA data from your database/spreadsheet
- mm. If so, would you provide the FSOB with copies of all such agreements?

MEMORANDUM

TO: Massachusetts State Police Crime Laboratory

FROM: Forensic Science Oversight Board

DATE: May 7, 2021

RE: Topics to be discussed during May 21, 2021 FSOB meeting

What follows is a set of questions that we invite you to discuss with the Board at our May 21, 2021. You are welcome to provide the FSOB with written responses, to present orally, to present with a PowerPoint, or to respond in whatever manner you feel will be most appropriate. Our hope is to provide you with notice of the range of issues that the FSOB is interested in hearing about.

For all questions, the terms “DNA data” and “DNA profiles” refer to both autosomal and Y-STR DNA profiles and any additional information related to those DNA profiles.

1. When did the laboratory receive the Bristol County grand jury subpoena that is the subject of this inquiry?
2. Did the laboratory have any scientific concerns about complying with the Bristol County subpoena? If so:
 - a. What were the concerns?
 - b. To whom did they communicate those concerns?
3. Has the laboratory received any other requests for DNA data from any other counties, outside of Bristol County? If so:
 - a. When?
 - b. From which other counties?
 - c. Did the laboratory provide any DNA data in response to these requests?
4. Has the laboratory received any other grand jury subpoenas or court orders seeking DNA data, other than the one subpoena from Bristol County that has already been brought to the attention of the FSOB?
5. What records did the court order the laboratory to produce in response to the grand jury subpoena? What was the exact language of the court’s order?
6. Has the laboratory released DNA profile records pursuant to the Bristol County grand jury subpoena?
7. Is there a Use and Dissemination Agreement that has been executed by Bristol County and the laboratory regarding any records released?

- a. If so, please provide the FSOB with a copy of the executed Use and Dissemination Agreement.
 - b. If not, why not?
8. When and to whom have you provided any DNA data developed and retained by the laboratory?
9. What is the format of the DNA data you provided (i.e., hard copy, computer file, .xlsx file, .cmf file)?
10. What information was included in the data provided (e.g., proper names, social security numbers, addresses, inmate number, gender, race, other confidential or identification information)?
11. Did the data provided include DNA data developed from customers in any of the following categories:
 - a. Suspects
 - b. Law enforcement or lab personnel
 - c. Victims
 - d. Family members or household members of victims
 - e. Consensual sexual partners of victims
 - f. Defense representatives/ testing observers
12. Were you able to and/or did you inform your customers in advance that the confidential information concerning samples submitted by them that you developed DNA profiles on may be given to another entity or placed in the public domain?
13. Did you receive agreement from said customers before providing the confidential information to another entity?
14. Were there any protections of the DNA data released from either intended or unintended alteration?
15. Were there any limitations placed on what DNA data you provided?
16. Have you complied with your accrediting body's requirements relating to disclosure of significant changes, events, and nonconformities?
17. Did the DNA profiles provided include people who under the authority of Massachusetts statute, regulation or other legal requirement allowed to be included in a DNA database?
18. Did the DNA profiles provided include people who do not meet the Massachusetts statute, regulation or other legal requirement to be included in a DNA database?
19. Did the DNA profiles provided include people who are currently held in your CODIS state database?
20. Did the DNA profiles provided include people who are not currently held in your CODIS state database?