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Forensic Science Oversight Board (FSOB)
Meeting Minutes

Scheduled: June 24, 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)
Nancy Rothstein (Nominee from Attorney General's Office)

Members Not in Attendance:

Clifford Goodband (Expertise in Statistics 2)
Vacant seat (Cognitive Bias Expertise)

The chair called the meeting to order at 10:01 AM. A quorum was present.

1) Minutes approval (Meetings: April 30, May 7, May 21)

a) Approved

2) Subsection Updates

- a) **FSOB investigation pursuant to subsection (d) Bristol County District Attorney's Office (DAO) DNA database (additional info contained in report)**
- i) L. Kavanaugh reminded the FSOB that the board repeatedly asked to receive a response from the Bristol District Attorney (DA) to shed light on the database but the DA declined the opportunity, therefore the draft report draws reasonable inferences based on the information that the FSOB does have.

- ii) The report provides a chronology of the events and discusses information received early on from the DAs and the MA State Police Crime Lab (MSPCL) response, identifies legal framework, factual findings, and concludes with implications such as accreditation and scientific concerns.
 - (1) The working group stated that everything in the fact-finding section (section d) is pulled directly or quoted from information received from MSPCL. Any inference is specified as such.
 - (2) The group used the survey to format and explain why each question is important.
 - (3) The report contains a screenshot of the WCVB broadcast interview with the DA showing confidential information. The group wants to keep it and redact the confidential information. R. Cotton stated that the picture is of case data. Although it is not a list of individuals, does not look like database information, names are not showing and it is not a spreadsheet.
- iii) L. Davis reviewed the regulatory implications and concerns with accreditation and meeting other requirements. She stated that the group will add information about requirements that need to be met to obtain forensic grants. Forensic grants require accreditation to provide funds.
- iv) R. Cotton reviewed the scientific concerns. She informed attendees that Y-chromosome testing developed around 2003, specifically for sexual assault cases where there is a mixture of female and male DNA. The DNA that is going to be searched in the Bristol database are haplotypes which means that all males in a specific lineage will have the same set of grouped STRs, therefore, an STR match is not an identification.
 - (1) L. Davis shared a link to the yhrd database (yhrd.org) that specifies the statistic of uniqueness of a profile. This is a research-operated population database that provides the value for a match to help people understand the weight of that match.
- v) L. Kavanaugh discussed the summary, recommendations, and conclusions contained in the report.
 - (1) The report proposes applying the statute to recommend that the board vote that the Bristol County database threatens the integrity and reliability of forensic science in the Commonwealth of MA.
 - (2) The report also recommends that a civil lawsuit under Chapter 66a (Fair Information Practices Act) is appropriate and suggests that the Attorney General's Office (AGO) initiate a civil lawsuit to prevent the dissemination of personal data.
 - (3) The report also recommends legislative changes: a revision to 22e (the statute that governs CODIS) to prohibit the lab from sharing aggregate DNA data and a revision that would prohibit the establishment of unregulated databases. The former recommendation may be revised to give the MSPCL the authority to disclose data if they choose to.
 - (4) L. Kavanaugh also added that an amendment to the FSOB governing statute should be considered because the FSOB cannot enforce or compel responses.
- vi) The FSOB discussed the report.
 - (1) L. Kavanaugh mentioned that the language that Senator Gobi proposed in the Familial DNA Bill at least partially addresses 22e. A. Mires added that the language in the bill gives the lab greater control and authority to decide what information they release and the bill also prohibits the creation of unregulated databases.
 - (a) The FSOB will determine if the language in the bill needs to be expanded to specify that it refers to all CODIS DNA and not only familial DNA.
 - (2) L. Davis mentioned that other states have a searchable Y-STR database. The Orange County DAO has a Y-STR and autosomal database where they upload data provided by a private laboratory that tests samples that the Orange County DAO collects. The California Civil Liberties Union filed a lawsuit against them. Attendee Meg Foster added that Colorado, California, Texas, and Virginia explicitly permit familial searching: <https://www.ojp.gov/pdffiles1/nij/grants/251081.pdf>. Sarah Chu informed the FSOB that Maryland just passed a bill to regulate the use of genetic genealogy: <https://www.billtrack50.com/billdetail/1254294>.

- (3) A. Lynch informed that FSOB of a pending Rhode Island case. Y-STR DNA led to an arrest on a cold case murder. The police department did not consult with the prosecutor's office. The case was dismissed and the arrested individual filed a lawsuit against the police department based on the Y-STR's lack of probable cause. L. Davis added that there is a federal case where a search of the yhrd database led to a request to the FBI for identifiable information.
- (4) T. Palmbach asked if the legislature can have public hearings that require entities like the district attorney's office to answer them. The Executive Office of Public Safety and Security (EOPSS) responded that they could have a public hearing but cannot require anyone to testify or appear. He asked how common it would be for someone in a political position to deny that request. T. Palmbach also asked where the subsection (d) report would go and if it could be publicly available. The final report will be published on the FSOB website. The statute also requires that the report be sent to the Executive Office of Public Safety and Security, the Joint Committee on Public Safety and Homeland Security, the Supreme Judicial Court, the Massachusetts District Attorneys Association, the Massachusetts Attorney General, the Committee for Public Counsel Services, the Massachusetts Association of Criminal Defense Lawyers, Inc. and the New England Innocence Project, Inc.
- (5) A. Lynch informed the FSOB that she shared the draft report with the president and executive director of the Massachusetts District Attorneys Association (MDAA). The executive director indicated that the president of the MDAA indicated that they would like to reserve the right to attach a minority report to the subsection (d) report once they have had the opportunity to review the subsection (d) report. A. Lynch informed the FSOB that she is not sure if the Bristol DA notified the other members of the MDAA of the notices the FSOB sent in previous weeks.
- (a) The FSOB expressed their concern for the MDAA request. A. Goldbach questioned why the MDAA would request to issue a minority report without first reading the subsection (d) report. S. Botch-Jones asked why the MDAA is not willing to engage with the FSOB; why skip the intermediary step of engaging with the FSOB. L. Davis agreed and added that the MDAA could just provide the FSOB with pertinent information to include in the report.
- (b) R. Cotton asked if the minority report would be generated by people outside of the board or by people on the board who are opposed to the report. A. Lynch responded that she believes that the MDAA would be the issuing body. A. Lynch would not generate the minority report.
- (i) L. Kavanaugh responded that it would be inappropriate for any external body to issue any sort of a report and that only a board member could issue a minority report. She added that a minority report submitted by A. Lynch makes far more sense.
- (c) L. Kavanaugh stated that the subsection (d) report would include as exhibits all documents received by the FSOB pertinent to the subsection (d) investigation. She added the FSOB is open to receive additional data or information that the MDAA believes that the FSOB needs to consider in their investigation.
- (d) L. Kavanaugh expressed that she does not know how voting works for the MDAA and that the letter received by the FSOB only had six signatories out of the eleven DAs. She expressed concern that the MDAA does not represent every single member and that the FSOB should consider inviting individual DA input. A. Lynch stated that she will confirm if the MDAA will take a position as an association or broken down by members.
- (e) N. Gertner stated that the MDAA could issue an information document, not a minority report. She added that the FSOB should expressly invite the DAs and take into consideration various viewpoints.
- (i) The FSOB will invite all stakeholders (MDAA, each DA, ACLU, and MACDL) to provide written feedback and/or appear at the next meeting to present.
1. Written responses need to be submitted a week before the meeting. If a stakeholder wishes to be on the agenda, they must inform L. Pimentel at least 48 hours before the meeting.

2. The FSOB would like the Familial DNA Report to be included in the communications but it should be made clear that they are providing feedback on the subsection (d) report.
- (6) N. Rothstein informed the FSOB that she shared the report with the AGO. She expressed that she individually believes that the report in general is well done and does a good job of summarizing the issues. She added that there were a couple of statements in the report that the AGO legal team does not agree with. She expressed that the legal team spoke at length about 66a and they do not think that the statute or the case law interpreting the statute is as clear as the report makes it on whether Bristol DAO violated 66a and they do not agree with a lawsuit. She added that the report makes inferences about the grand jury subpoena in this case that the office takes issue with: inference on page eight where it says “this data almost certainly includes DNA data from Worcester and Plymouth counties, both of whose elected district attorneys already expressly authorized the release of said data for inclusion in the Bristol database. It very likely includes DNA data from all of the counties that are signatories to the January 27, 2021 letter.” N. Rothstein explained that although the FSOB does not have all of the information, the AGO legal team believes it is clear that the data involved Bristol County only and the board cannot assume that there was improper usage by the Bristol County DAO of a grand jury subpoena. She added that they can infer from the court ruling against the motion to quash that the court found it to be a validly issued subpoena.
- (a) N. Gertner stated that the FSOB could not draw inferences either from the court’s refusal to quash the subpoena because that refusal could have been based on issues that the FSOB is not aware of, e.g. issues specific to the case. She added that the grand jury was about an investigation into a particular case and the DA sought this information concerning that case. However, the inference of distribution comes from the letter signed by six DAs that the FSOB received. She added the FSOB is justified to take them at their word. She added that no inferences can be drawn from the AGO declining to litigate on this issue and expressed that there may be a political or resource motive. She stated that she continues to believe that not appealing the subpoena was a huge mistake because they are all shadowboxing in a very important issue. Had the AGO appealed the subpoena there would have been a proceeding before the appeals court and issues concerning the case would have remained confidential but the issues highlighted by the FSOB would have been made public. She concluded that inferences made in the report were fair inferences. N. Rothstein responded that she will relay the judge's concerns to the AGO.

b) Subsection (e) update

- i) G. Papagiorgakis and S. Botch-Jones discussed the draft document which addresses implementing and reviewing a system for laboratories to report professional negligence and misconduct. They expressed that they do not want to confine it to just criminal acts.
 - (1) L. Davis asked who would investigate criminal acts. She stated that criminal acts would be investigated by the courts and the law but the FSOB should play a role. A. Goldbach added that based on experience with the Dookan and Farak chaos, it would have been great to have the FSOB during that time. Although it would be the AGO, a DAO, or possibly the Inspector General’s Office who would investigate criminal conduct, the FSOB could also conduct a separate investigation from a different perspective.
 - (2) A. Goldbach mentioned that it would be helpful for the team to provide examples of acts that are not criminal and that would not fall under misconduct or professional negligence.
 - (3) N. Rothstein suggested getting the Ethics Commission’s perspective because they often deal with parallel investigations.
- ii) The team discussed forensic service providers and asked the FSOB if it makes sense to list out professions. S. Botch-Jones shared an OSAC list that specifies laboratories and professions (<https://www.nist.gov/osac/osac-organizational-structure>). The team asked if listing out specific

disciplines or only laboratories. The statute's reference of forensic service providers refers to laboratories.

(1) A. Goldbach expressed that she is in favor of the broadest definition possible in terms of forensic service provider because some smaller departments do not have a laboratory but perform forensic services.

(2) G. Papagiorgakis responded that they want to find a way to capture all different disciplines in different departments and accreditations.

(3) A. Mires expressed that the definition in 3.1.3 is sufficiently broad ("Forensic service providers include agencies, organizations, businesses, or individual parties, who apply scientific or technical techniques in examining crime scenes, recovering evidence, extracting and recovering electronic data, conducting analysis, examination or testing; and provide interpretation of findings, conclusions, and reports for investigative, intelligence, regulatory and litigation purposes, or for policy development.")

iii) The FSOB agreed that although all state and municipal employees have to complete a conflict of interest training, it would be helpful to add guidance for forensic service providers to have a policy in place that would help identify and prevent conflict of interests.

iv) The team discussed different mechanisms for reporting and asked the FSOB for further input.

(1) Would the complaint be submitted via email or the FSOB website?

(2) If there is a complaint, it would be handled under executive session.

(a) Would the entire FSOB participate or only certain members?

v) A. Lynch expressed that it is preferable to have the document formatted the way that the FSOB will be implementing it as a policy or procedure which is currently the document's format.

vi) Subsection (e) will be placed on the September agenda for September and will be potentially voted on in October. Feedback and comments will be accepted through August.

(1) The team added comments to the document and would like the FSOB to confirm that the comments reflect the 6/24/21 discussion.

c) **Subsection (c) update: Springfield PD audit**

i) T. Palmbach and R. Cotton circulated a draft report.

(1) The team would like two years worth of crime and work data and redacted comprehensive reports for all the major areas of work that the Springfield PD laboratory does.

(2) T. Palmbach explained that Springfield PD provided three basic fundamental reports that did not contain analysis reconstruction, expert opinion, pattern interpretation, etc. which are elements that are usually incorporated in crime scene reports.

(a) Larger diverse units would do this type of work. T. Palmbach expressed that the department needs more resources because it does not appear that they do this type of work. However, the Springfield PD laboratory calls in the MSCL often.

(b) In the future, the FSOB can coordinate Springfield reports and the corresponding MSPCL reports.

ii) T. Palmbach explained the team asked for fingerprint comparison reports, one with an example of an identification and one of an exclusion or inconclusive.

(1) The PD provided a report for processing evidence for fingerprints that concluded with a statement indicating that no identification was plausible. T. Palmbach explained that an area of criticism here was that there was zero mention of methodology. He stated that this indicates a dire need for training, certification, and standardized documents.

(2) The team did not receive a report with an identification and expressed that some of the most fundamentally important things in making a statement of identity are: how it was stated, what was the basis of stating it, what is the supportive evidence for it, what demonstrative evidence backs this up, was it peer-reviewed, how was it peer-reviewed.

- iii) T. Palmbach stated that the Springfield PD laboratory personnel are overworked and highly committed and are stating that they do not have the capacity, time, or money to receive training, get accreditation and develop or adopt appropriate standards and guidelines.
 - (1) T. Palmbach added that no one is IAI certified.
 - (2) He stated that this is probably going to be the norm with other unaccredited forensic service providers.
 - (3) R. Cotton expressed concern that the department does not have a protocol and is testifying in court. She added that they should not have asked for reports but a case folder
 - (4) The team re-iterated that the Springfield PD laboratory is willing to make changes but does not have the resources. L. Davis stated that there is grant money out there but they do not have the personnel and grant money does pay for staff.
- iv) A. Lynch stated that it may be a case of semantics and that asking for the file and background data or case jacket may provide more insight. She stated that she does not know how any evidence would get admitted if they cannot testify that the methodology used is one recognized by the courts for admissibility. A. Lynch asked if the request was narrow in scope and the Springfield PD responded with the bare minimum.
 - (1) She added that if this is all the information that is available with unaccredited labs, the FSOB should determine if there is a basic level of criteria for what the examination entails that have to be met before the examination is recognized as an authorized method to qualify departments to testify.
 - (2) The team should share what a typical accredited laboratory report looks like.
 - (3) A. Lynch stated that it would be helpful to know the percentage of cases they call MSPCL, Crime Scene Services, and what are the criteria for asking for assistance. She stated that she is confident that the Springfield PD laboratory calls Crime Scene Services for every homicide.
 - (a) R. Cotton responded that the Springfield PD laboratory uses ACE-V.
 - (b) T. Palmbach added there was a reference in one of the reports that they saw impressions in blood but there was not a mention that they did anything with them.
 - (i) The team agreed that they need to fully understand the Springfield PD laboratory's role versus the MSPCL.
- v) L. Davis expressed that she is not surprised by what the team is reporting because this is common with unaccredited laboratories. She stated that it does not mean that the laboratory is not doing quality work but that they probably are doing quality work but not writing it down. Additionally, they do not have staff and do not have a designated person that could record the information for them.
- vi) T. Palmbach would like to revisit the laboratory to have the personnel talk and walk the team through documents.
- vii) A follow-up visit to Springfield (scheduled for August 31, 2021)
 - (1) The first visit was at the height of the pandemic.
 - (2) Provide a definite list of documents to review before the visit to give the department time to gather the documents.
 - (3) The updated report will be presented at the September or October meeting.

3) Follow-up on previous presentations

- a) Hair Microscopy Project (L. Kavanaugh)
 - i) L. Kavanaugh informed the FSOB that the 278a working group had a meeting on 6/23. The group drafted a letter that will be sent out to DAs. L. Kavanaugh will circulate the letter to the FSOB. If the working group receives responses by 7/26, this agenda item will not be added to the 7/26 agenda but if they have not received responses, the item will be placed on the agenda for the FSOB to issue a statement in support of broader compliance from DAOs.
- b) Missing Persons Task Force (A. Mires)

- i) A. Mires informed the FSOB that she attended Missing Children's Day and was able to make a compelling argument regarding the lack of data for missing persons and highlight the great work of the Missing Persons Task Force, the DA's offices, and the MSP's Cold Case Unit. A. Mires will reach out to Angela Davis about specific recommendations contained in The Missing Persons Task Force such as improving the structure of the system and the creation of a Missing Persons Census.
- ii) She mentioned that there was traction and advertisement for the Familial DNA Bill. The legislature will be working on the budget, therefore, the bill will not be discussed until September.

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

- a) Open meetings can remain remote for the foreseeable future.
- b) FBI met with CODIS administrators across the country and they referenced the FSOB report and said it was a must-read.

5) Public comments

- a) Sarah Chu stated that soliciting stakeholder feedback for the subsection (d) report is an appropriate way for stakeholders to express their feedback and also offers support for their perspective. Regarding the subsection (c) discussion, she expressed that the FSOB is doing an important job of establishing the expectations for how it believes forensic services should be offered in the Commonwealth. The FSOB can be an advocate for forensic service providers and identify and draw attention to resource needs and help bring everyone to the same baseline level of performance across the state. She also commented on the discussion regarding the revisions to the FSOB statute and suggested providing the FSOB with subpoena power.