



Commonwealth of Massachusetts
Office of the State Auditor
Suzanne M. Bump

Making government work better

Official Audit Report – Issued September 26, 2017

Sex Offender Registry Board

For the period July 1, 2015 through June 30, 2016





Commonwealth of Massachusetts
Office of the State Auditor
Suzanne M. Bump

Making government work better

September 26, 2017

Mr. Kevin Hayden, Chair
Sex Offender Registry Board
PO Box 4547
Salem, MA 01970

Dear Mr. Hayden:

I am pleased to provide this performance audit of the Sex Offender Registry Board. This report details the audit objectives, scope, methodology, findings, and recommendations for the audit period, July 1, 2015 through June 30, 2016. My audit staff discussed the contents of this report with management of the agency, whose comments are reflected in this report.

I would also like to express my appreciation to the Sex Offender Registry Board for the cooperation and assistance provided to my staff during the audit.

Sincerely,

A handwritten signature in blue ink, appearing to read "SMB", written over a light blue circular stamp.

Suzanne M. Bump
Auditor of the Commonwealth

cc: Daniel Bennett, Secretary, Executive Office of Public Safety and Security

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
OVERVIEW OF AUDITED ENTITY	3
AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY	7
DETAILED AUDIT FINDINGS WITH AUDITEE’S RESPONSE.....	10
1. The Sex Offender Registry Board had not classified all sex offenders.	10
2. SORB did not properly ensure that all sex offenders were assigned final classifications before they were released from incarceration.	15
3. SORB did not obtain current addresses for 1,769 sex offenders who were in violation of registration requirements.	18
APPENDIX	22

LIST OF ABBREVIATIONS

CMR	Code of Massachusetts Regulations
DOR	Department of Revenue
DTA	Department of Transitional Assistance
ISA	Interdepartmental Service Agreement
O/S	out of state
OSA	Office of the State Auditor
SJC	Supreme Judicial Court
SORB	Sex Offender Registry Board
SORIS2	Sex Offender Registry Information System 2

EXECUTIVE SUMMARY

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, the Office of the State Auditor has performed an audit of the Sex Offender Registry Board (SORB) for the period July 1, 2015 through June 30, 2016. As a result of the Supreme Judicial Court (SJC) ruling in John Doe 380316 v. Sex Offender Registry Board, 473 Mass. 297 (2015), SORB suspended hearings from December 15, 2015 through mid-February 2016 to train its staff and address its administrative needs to comply with this ruling, which required the implementation of the “clear and convincing evidence” standard in classifying sex offenders. Consequently, it was necessary to expand our audit period through August 31, 2016 to properly evaluate the changes necessary for SORB to comply with the SJC decision.

This performance audit was initiated to determine whether SORB (1) effectively managed the procedural and operational changes regarding the classification and the remanding of convicted sex offenders for evidentiary hearings required by SJC; (2) promptly transmitted sex offender information to the Federal Bureau of Investigation and police departments in the communities where sex offenders intended to work, live, or attend institutions of higher education; and (3) identified sex offenders who might be in violation of their responsibility to register with SORB or whose addresses could not be verified.

Below is a summary of our findings and recommendations, with links to each page listed.

Finding 1 Page 10	SORB had not classified all sex offenders.
Recommendations Page 11	<ol style="list-style-type: none">1. SORB should develop and implement policies and procedures that ensure that sex offenders have recommended and final classifications in accordance with Chapter 6 of the General Laws and its own regulations.2. SORB should, to the extent possible, take measures to update the information it has on the 936 sex offenders discussed in this finding (e.g., conduct a death match with the Social Security Administration to determine whether any are deceased; determine whether any have become incapacitated and are now residing in nursing homes; and obtain current addresses for the rest). It should then assign recommended classifications to offenders and send them notification of their classifications.

Finding 2 Page 15	SORB did not properly ensure that all sex offenders were assigned final classifications before they were released from incarceration.
Recommendations Page 15	<ol style="list-style-type: none">1. SORB should prepare written policies and procedures to ensure that offenders are given final classifications at least 10 days before release from incarceration.2. SORB should work more closely with houses of correction to get accurate offender release dates.
Finding 3 Page 18	SORB did not obtain current addresses for 1,769 sex offenders who were in violation of registration requirements.
Recommendations Page 19	<ol style="list-style-type: none">1. SORB should establish written policies and procedures to ensure that it regularly obtains sex offender address information from various executive-branch agencies and updates this information in its database.2. SORB should work with the Department of Transitional Assistance to agree on a secure method of data transmission for updated sex offender addresses.3. SORB should establish a secure data exchange for the receipt of the updated addresses of sex offenders who are in violation of their registration status from the Department of Revenue.4. SORB should consider working with other executive-branch agencies as necessary to develop Interdepartmental Service Agreements for additional data exchanges for addresses.

Post-Audit Action

SORB indicated that after our audit period, it completed classifications for an additional 101 of the 378 cases that were remanded to it from the courts for reclassification from January 1, 2016 through August 31, 2016. It has also held an additional 129 hearings for cases that were remanded to comply with the “clear and convincing evidence” standard.

OVERVIEW OF AUDITED ENTITY

The Sex Offender Registry Board (SORB) was established by Chapter 239 of the Acts of 1996. The act and its amendments have been codified as Sections 178C–178Q of Chapter 6 of the Massachusetts General Laws. This legislation was enacted to comply with the 1994 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,¹ which required states to create a registry of sex offenders and crimes against children. SORB is an agency within the Executive Office of Public Safety and Security and has seven full-time board members appointed by the Governor. The day-to-day operations of the agency are administered by an executive director, and during our audit period, SORB had 42 other employees, including 3 hearing examiners. The major units within SORB are Registration, Classification, Hearings, Victim Assistance, Legal, and Administrative. In fiscal year 2016, SORB had appropriations totaling \$4,250,620 and expenditures totaling \$4,103,349. According to its website,

The mission of [SORB] is to promote public safety through educating and informing the public in order to prevent further victimization. This is accomplished through registering and classifying convicted sex offenders by risk of reoffense and degree of danger and disseminating the identifying information of those offenders who live, work and/or attend institutions of higher learning in the communities of the Commonwealth of Massachusetts.

SORB works with local, state, and federal law enforcement agencies to ensure the proper registration of sex offenders in Massachusetts. SORB is the single agency responsible for the classification of each registered sex offender.

At the time of our audit, SORB’s Sex Offender Registry Information System 2² contained records on 21,808 convicted sex offenders. The chart below shows the reported status of each active sex offender.

Active Sex Offenders Convicted in the Commonwealth

Offender Status	Number of Offenders
In state	13,127
Moved out of state	5,260
Incarcerated	2,874
Deported	547
Total	<u>21,808</u>

-
1. This program was established under Chapter 42.VI.14071 of Title 42 of the 1997 US Code.
 2. This is a Web-based sex-offender registry operated by the Executive Office of Public Safety and Security and used by state and local police departments and federal law enforcement to keep track of registered offenders and identify possible suspects when a sex crime has been committed.

SORB’s classification of a sex offender determines whether and how the offender’s information may be released to the public. Currently, SORB has four classification levels for sex offenders:

- level 0: unofficial classification for sex offenders known to SORB who have registered but have not yet been classified
- level 1: classification for offenders with low risk of reoffense and danger to the public
- level 2: classification for offenders with moderate risk of reoffense and danger to the public
- level 3: classification for offenders with high risk of reoffense and danger to the public

Sex offenders who are required to register with SORB must annually update their registration data, such as changes to their home addresses, work addresses, secondary addresses, or attendance at institutions of higher education. Offenders who do not comply with these requirements are considered to be in violation and are subject to arrest, fines, and/or imprisonment. Sex offenders are also in violation when they fail to register or verify registration information, give false information, or move without notifying SORB as required. The chart below shows the offender levels and reported statuses of sex offenders living in the Commonwealth as of February 2017.

Active Sex Offenders Living in the Commonwealth

Offender Level	In Violation of Registration	Registered	Registration Required*	Total Number of Offenders
0	936	427	250 [†]	1,613
1	150	2,454	N/A	2,604
2	410	5,760	N/A	6,170
3	197	2,528	N/A	2,725
Total	<u>1,693</u>	<u>11,169</u>	<u>250</u>	<u>13,112[‡]</u>

* These are first-time sex offenders who are not in violation and are awaiting their initial sex offender level classifications.

† SORB officials told us that during the board’s system upgrade, there were issues with some legacy records in the data conversion process. SORB stated that once this was corrected, it determined that only 13 offenders out of this 250 have a registration requirement and 5 of them are currently incarcerated. However, this information was provided to us after the end of our audit fieldwork and therefore was not confirmed by the Office of the State Auditor.

‡ The total number of sex offenders living in the Commonwealth was 13,127; however, 15 offenders had no assigned sex offender level classification and therefore are omitted from our totals.

Information on level 1, 2, and 3 offenders is added to the sex offender registry, but only level 2 offenders classified after July 12, 2013³ and level 3 offenders have their information (name; home, work, secondary, and institution of higher education addresses; sex offenses; physical description; photograph; and registration status) posted to the online sex offender database available to the public. Police departments are notified of offenders living, working, and/or attending institutions of higher education in their jurisdictions and can release information regarding all level 3 offenders and provide information regarding level 2 offenders to the public upon request in accordance with Section 178J of Chapter 6 of the General Laws.

Sex Offender Classification Process

After sentencing, the court or custodial and supervisory agencies, such as houses of correction, probation departments, and the Parole Board, must provide SORB with offender information and inform offenders of their duty to register. Sex offenders must register with SORB and thereafter make sure that their registration information is current. After they register, SORB notifies offenders that it has confirmed their duty to register, provides them with their recommended classification levels (based on their risk of reoffense and the degree of danger they pose to the public), and informs them of their right to request a full evidentiary hearing challenging SORB's recommended classification. Offenders must request evidentiary hearings within 20 days of receiving notice of SORB's recommended classifications. Offenders are informed of their right to counsel, and if an offender is deemed indigent, an attorney is appointed for him/her if s/he requests one. If offenders appeal their recommended classifications, they remain classified as level 0, and any information about them is not available to the public until hearings are held and final classifications are made. However, unless good cause is established for an offender's failure to appear at his/her classification hearing and SORB grants a continuance, the board must conduct a classification hearing and issue a written decision with SORB's final classification. For incarcerated offenders, final classifications must be made at least 10 days before the offenders' earliest release date.

Hearings are conducted by a hearing examiner or board member in accordance with the Standard Rules of Adjudicatory Procedure outlined in Sections 9–12 of Chapter 30A of the General Laws. Hearings and

3. In Michael Moe & Others v. Sex Offender Registry Board, 467 Mass. 598 (2014), the Supreme Judicial Court held that SORB could not retroactively apply amendments to the Sex Offender Registry Law requiring online publication of Level 2 sex offenders' information because it violated the Commonwealth's constitutional due process. As a result, SORB may not publicly disseminate on the internet any information regarding Level 2 sex offenders finally classified on or before July 12, 2013.

administrative records are closed to the public. A hearing's scope is limited to reviewing evidence and determining the offender's classification and duty to register. SORB bears the burden of proof at all classification hearings. Pursuant to Sections 11(7) and (8) of Chapter 30A of the General Laws, SORB's hearing examiner must issue a final, written decision supporting its findings and, by "clear and convincing evidence," its final classification of an offender. The sex offender may appeal the board's decision to the superior court and then, if not satisfied, to an appellate court. During this appeal process, the sex offender retains the final sex offender level classification assigned by SORB.

On December 11, 2015, in John Doe 380316 v. Sex Offender Registry Board, 473 Mass. 297 (2015), the Supreme Judicial Court (SJC) concluded that SORB must prove sex offenders' classification levels by a higher legal standard of "clear and convincing evidence." The burden of proof is on the board, and it must issue a written decision that proves its findings by "clear and convincing evidence." Prior to this decision, the standard of proof applicable to classification determinations was the less stringent "preponderance of the evidence" standard.

Because of the SJC decision, all cases either under appeal or pending at the court level were remanded to SORB. First-time classified offenders were classified as level 0 again, and repeat offenders were returned to their previous classifications. From January 1, 2016 through August 31, 2016, 378 sex offender cases were remanded for reclassification by SORB. SORB completed 137 decisions under the new evidence standard during that time. Only 37 of these decisions, from 83 hearings, were among the 378 cases remanded by courts; thus SORB had only completed 10% of the remanded cases as of August 31, 2016.

The remanding of a sex offender's case can delay the process of disseminating offender information to the public because Section 1.26 of Title 803 of the Code of Massachusetts Regulations prohibits public notification of sex offender information until the classification process is completed.

AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, the Office of the State Auditor has conducted a performance audit of the Sex Offender Registry Board (SORB) for the period July 1, 2015 through June 30, 2016. As a result of the Supreme Judicial Court (SJC) ruling in John Doe 380316 v. Sex Offender Registry Board, 473 Mass. 297 (2015), SORB suspended hearings from December 15, 2015 through mid-February 2016 to train its staff and address its administrative needs to comply with this ruling. Consequently, it was necessary to expand our audit period through August 31, 2016, specifically for audit procedures related to Objective 1 in the table below, to properly evaluate the changes necessary for SORB to comply with the SJC decision.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Below is a list of our audit objectives, indicating each question we intended our audit to answer; the conclusion we reached regarding each objective; and, if applicable, where each objective is discussed in the audit findings.

Objective	Conclusion
1. Has SORB managed the procedural and operational changes required by the SJC decision in a manner that allows it to fulfill its stated mission of promoting public safety through educating and informing the public to prevent further victimization? Specifically,	
a. Does SORB use the new “clear and convincing evidence” standard ⁴ in its hearings?	Yes
b. Does SORB maintain public safety in the scheduling of both remanded and current cases by giving priority scheduling to the sex offenders who are most dangerous?	No; see Findings <u>1</u> and <u>2</u>
c. Has SORB removed from its website the information for sex offenders who are undergoing reclassification or changed the classification to what it was before the remanded hearings?	Yes

4. A hearing examiner must find that SORB’s classification of a sex offender is proved by a high degree of probability by using the higher standard of “clear and convincing evidence,” according to John Doe 380316 v. Sex Offender Registry Board, 473 Mass. 297 (2015).

Objective	Conclusion
d. Has SORB effectively communicated information to affected victims and local police departments?	Yes
2. Does SORB receive all of the information required by Section 178E of Chapter 6 of the General Laws from agencies that have custody or supervision of an offender, and does it promptly transmit this information to the Federal Bureau of Investigation and the police departments in communities where the sex offender intends to work, live, or attend school?	Yes
3. Does SORB use Department of Revenue (DOR) and other executive-branch information available to it under Section 178F of Chapter 6 of the General Laws to identify offenders who may be in violation of their responsibility to register or whose addresses cannot be verified?	No; see Finding 3

To achieve our objectives, we gained an understanding and assessed the design of the internal controls over the use of the “clear and convincing evidence” standard, scheduling, removal of offenders from the website, communication of information, receipt and transmission of information, and use of information from DOR and other executive-branch agencies for locating violators.

We obtained a full copy of the Sex Offender Registry Information System 2 (SORIS2) and assessed the reliability of the data we obtained from it. We reviewed the controls for access to programs and data, program changes, and computer operations. We also analyzed data in SORIS2 by performing additional validity and integrity tests, including testing for missing data and scanning for duplicate records. We determined that the data from this system were sufficiently reliable for the purposes of our audit.

In addition, we performed the following audit procedures:

- For the period January 1, 2016 through August 31, 2016, we reviewed all 37 remanded sex offender classification cases for which SORB had made a written decision to ensure that the hearing examiners used the “clear and convincing evidence” standard when they completed their final sex offender classifications.
- We reviewed a nonstatistical random sample of 35 of 248 sex offender hearing prioritization forms from January 1, 2016 through August 31, 2016 to determine whether SORB maintained public safety by giving priority in its classification scheduling to the most dangerous sex offenders as required by Section 178K of Chapter 6 of the General Laws.
- We reviewed a nonstatistical random sample of 35 cases from the population of 378 cases remanded by a Massachusetts appellate court or superior court to SORB for reclassification from January 1, 2016 through August 31, 2016. We inspected the SORB website to verify that SORB had removed the now-unclassified sex offenders’ information from its website or changed

the sex offender classifications to what they were before the remanded hearings as required by John Doe 380316 v. Sex Offender Registry Board.

- We queried SORIS2 and found that of the 378 remanded cases, there were 198 in which a victim registered with SORB's Victim Assistance Unit. We then selected a nonstatistical random sample of 35 out of the 198. We viewed hardcopy notification letters to registered victims and queried SORIS2 to review electronic notifications sent to local police departments indicating that the sex offenders would go unclassified or return to the classifications they had had before the remanded hearings.
- We tested all 103 first-time sex offenders released from incarceration for the period July 1, 2015 through June 30, 2016 to determine whether their final sex offender classifications were determined 10 days before release, as required by Section 178E of Chapter 6 of the General Laws.
- We selected a nonstatistical random sample of 35 out of a population of 189 final sex offender classifications made by SORB for the period July 1, 2015 through June 30, 2016 to determine whether it transmitted this information within five days to the Federal Bureau of Investigation and the police departments in the communities where the sex offenders intended to work, live, or attend institutions of higher education as required by Section 178E of Chapter 6 of the General Laws. To support our conclusions, we reviewed information in SORIS2, emails, registration forms, probation department files, criminal docket sheet reports, booking reports, sex offender treatment reports, police reports, and any other documents in the sex offenders' hardcopy files.
- We interviewed officials from the state's Department of Transitional Assistance (DTA) and reviewed the Interdepartmental Service Agreement between SORB and DTA allowing SORB to receive addresses of sex offenders who were in violation of their registration status. We reviewed SORB's compliance with this agreement. We also obtained the list of violators SORB provided to DTA on June 24, 2016, which contained 1,769 sex offenders who were in violation of their responsibility to register or whose addresses could not be verified. A list provided by DTA showed 39 violators collecting public benefits. We determined whether they had different addresses from those SORB had on file and whether SORB obtained these matched offenders' addresses from DTA.
- We interviewed SORB's staff to determine to what extent SORB sent information to DOR, such as the current known addresses, for sex offenders who were in violation of their responsibility to register or whose addresses could not be verified to determine whether DOR had the same addresses for them.

We applied data analysis software to the SORIS2 database to extract the number of sex offenders convicted or living in the Commonwealth and to develop statistics regarding unclassified sex offenders and offenders in violation of registration requirements. We used nonstatistical sampling to help us achieve our audit objectives and therefore did not project our results to the various populations.

DETAILED AUDIT FINDINGS WITH AUDITEE'S RESPONSE

1. The Sex Offender Registry Board had not classified all sex offenders.

As of the end of our audit period, the Sex Offender Registry Board (SORB) had not assigned required classifications to 936 sex offenders. Although these individuals were convicted of sex offenses dating from October 1996 through January 2017 and have since been released from prison or custody or placed on parole, they are in violation of their requirement to maintain current registration information with SORB, and SORB has not recommended classifications for 912 of them. Further, although the remaining 24 had recommended classifications, SORB did not finalize their classifications when they did not request hearings or failed to appear at their scheduled hearings. These offenders had been convicted of various offenses such as rape, rape of a child with force, and indecent assault and battery on a child less than 14 years old (see appendix for full list of offenses). Without a formal classification, information about these offenders, such as their names, home and work addresses, photographs (if available), registration statuses, and offenses, is not publicly available to help ensure the safety of the general public, including children.

Authoritative Guidance

Section 178L of Chapter 6 of the Massachusetts General Laws states, "The board shall prepare a recommended classification of each offender." According to this statute, this classification should be recommended before an offender is released from prison or custody or placed on parole. Further, Section 178K(2) of Chapter 6 of the General Laws indicates the recommended classification based on the offender's risk of reoffense and the degree of danger s/he poses to the public. The classification levels are level 1 for low risk, level 2 for moderate risk, and level 3 for high risk.

In addition, Section 178K(3) of Chapter 6 of the General Laws states,

[SORB] . . . shall give immediate priority to those offenders who have been convicted of a sex offense involving a child or convicted or adjudicated as a delinquent juvenile or as a youthful offender by reason of a sexually violent offense or of a sex offense of indecent assault and battery upon a mentally retarded person pursuant to section 13F of chapter 265, and who have not been sentenced to incarceration for at least 90 days, followed, in order of priority, by those sex offenders who (1) have been released from incarceration within the past 12 months, (2) are currently on parole or probation supervision, (3) are scheduled to be released from incarceration within six months.

Further, state laws and regulations, as well as SORB's Classification and Registration Unit policies and procedures, require that all sex offenders receive recommended classifications, which are finalized when sex offenders either accept recommended classifications or fail to request hearings within 20 days of notice of their classifications.

Finally, Section 1.12(1) of Title 803 of the Code of Massachusetts Regulations (CMR) states,

Failure of the sex offender to appear at the scheduled hearing without good cause shown will be deemed a voluntary waiver of his or her attendance at the hearing. The hearing shall proceed as scheduled, without the offender present. The Hearing Examiner shall make a final classification decision, pursuant to 803 CMR 1.20.

Reasons for Noncompliance

SORB does not have adequate internal controls, such as policies and procedures, in place to ensure that all sex offenders are classified in a timely manner (i.e., while they are still in custody). This allows some offenders with a high risk of reoffense to remain unclassified.

Recommendations

1. SORB should develop and implement policies and procedures that ensure that sex offenders have recommended and final classifications in accordance with Chapter 6 and its own regulations.
2. SORB should, to the extent possible, take measures to update the information it has on the 936 sex offenders discussed in this finding (e.g., conduct a death match with the Social Security Administration to determine whether any are deceased; determine whether any have become incapacitated and are now residing in nursing homes; and obtain current addresses for the rest). It should then assign recommended classifications to offenders and send them notification of their classifications.

Auditee's Response

OSA asserts that SORB has not classified 936 offenders who are in violation of their obligation to register. While this is accurate, the laws and regulations governing SORB's classification process prevent many members of this group from being classified. . . . SORB must establish notice to an offender before it proceeds with the classification process. Offenders who are in violation are quite often incapable of being provided with the requisite notice to proceed with their classification. Of the 936 unclassified offenders in violation, SORB has never been able to establish notice for 842 of them. Since many offenders have been in violation from the beginning and before SORB could establish notice, we are left without the recourse to proceed with their classification process. The audit team's reliance on the guidance provided by 803 CMR 1.12(1) is misplaced because the audit team has not fully recognized the complexity of our due process requirement to provide notice to the offender.

The relevant portions of our Statute and Regulations that impose a notice requirement to the offender before proceeding with the classification hearing process is contained in M.G.L. c. 6, sec. 178L(1)(a) and 803 CMR 1.07–1.08, respectively. In addition, case law has repeatedly referenced the existence of a notice requirement. Generally, the Court has held that “[w]here the State seeks to impinge on a recognized liberty interest, triggering the right to procedural due process, we have held that the requirements of due process are notice and opportunity to be heard.” Doe v. Attorney General, 430 Mass 155, 165, (1999). See also Doe No. 68549 v. SORB, 470 Mass 102, 106, (2014) “We have emphasized that the sex offender registration requirement ‘implicates constitutionally protected liberty and privacy interests.’” In a SJC decision from SORB’s infancy, Roe v. Attorney General, 434 Mass. 418, 430 (2001), the Court specifically held that SORB’s requirement that offenders provide a registration form with their current address does not violate due process. The SJC also noted that our registration requirement and related registration form can be properly construed “as reasonably calculated to provide actual notice” such that we can rely on it as sufficient notice to the offender in order to proceed with our classification process even if the offender failed to respond. Yet, the Court also further commented that “[W]ithout having actually received notice, the offender’s opportunity to prevent public dissemination would be lost, and there would also be a distinct and disturbing possibility that the board would disseminate inaccurate information about the offender.” Id.

Consistent with this decision, SORB’s practice has been to proceed with the classification process for registered offenders even when they fail to respond to notice from SORB. Practically speaking, this most routinely occurs when an offender fails to respond to SORB’s notice of its preliminary classification determination to the address provided in an offender’s most current registration form. When a properly noticed offender fails to respond to his/her preliminary classification it becomes final. The same holds true if an offender later fails to appear at a requested hearing. If an offender fails to appear at a scheduled hearing without good cause shown the hearing proceeds in absentia and the offender is finally classified after a written decision.

Regarding the 936 unclassified offenders in violation, that number must be put into context in two respects. As mentioned above, of the 936 unclassified offenders in violation, SORB has never been able to obtain a registration form for 842 of them. Thus, for these 842 we have no address for the provision of notice. A majority of these 842 offenders for whom we have no registration form are offenders identified at the origination of the Commonwealth’s [Sex Offender Registry Law, or SORL] who we believed were subject to a registration and classification requirement in our jurisdiction. Second, based upon the reasonable measures that SORB and other public safety stakeholders have collectively and previously undertaken to locate these offenders, SORB believes it lacks jurisdiction to classify a significant number of them. Approximately 170 of these offenders are known or believed to be living in another state or country. In addition, approximately 100 of the 936 are deported or believed to be deported. However, they properly remain in violation and are subject to arrest and prosecution if they return to the Commonwealth for failing to follow the SORL. Upon reviewing the 936 unclassified offenders as result of this audit report, we have reason to believe that approximately 50 are deceased. Once SORB receives definitive confirmation that they are deceased they will be deactivated from SORIS2. Again, with regards to the remaining unclassified offenders in violation, SORB does not have the requisite notice to proceed with their classification.

We appreciate the extent to which OSA's Audit Findings will assist us in the development and implementation of policies and procedures to better classify this particularly challenging category of offenders in accordance with the SORL, and enhance our execution of reasonable measures to update the information we have for them. However, as to Recommendation 1, SORB is unable to "develop and implement policies and procedures that ensure that . . . sex offenders have recommended and final classifications in accordance with Chapter 6 and its own regulations" . . . while complying with our obligations under the SORL and our state and federal constitutions.

As to Recommendation 2, SORB has taken and will continue to take all reasonable measures to update the information it has on the 936 unclassified offenders in violation. SORB routinely works with local municipalities, their police departments, the Massachusetts Parole Board, the U.S. Marshal's Office, Immigration and Customs Enforcement, the Registry of Motor Vehicles, and the Massachusetts State Police, including MSP Violent Fugitive Apprehension Section (VFAS), to locate offenders in violation and enforce compliance with registration obligations. Because SORB is not a law enforcement agency, SORB must rely upon its law enforcement partners in this endeavor. Monthly trainings with our law enforcement partners addresses this and other aspects of ensuring compliance with registration. Once an unclassified offender is located or taken into custody by law enforcement, SORB is able to begin the classification process.

Auditor's Reply

SORB initially asserted that it could not proceed with classifications of these 936 offenders because it believed that the law required it to provide these offenders with actual notice of classification proceedings. In this context, actual notice would require physically handing notice of classification proceedings to the offender. Subsequently, SORB clarified its initial reliance on actual notice, citing Roe v. Attorney General, 434 Mass. 418 (2001).

In Roe v. Attorney General, the Supreme Judicial Court (SJC) ruled that SORB can proceed with classification proceedings even if it receives no response from an offender as long as it has provided notice reasonably calculated to provide actual notice. SJC stated, "Where the board [SORB] had made efforts 'reasonably calculated to provide actual notice,' due process would not impose any requirement that the offender actually receive notice. . . . Thus, [SORB] could, consistent with due process, release information about any offender who failed to respond to a form of notice that had been reasonably calculated to provide him with notice." Therefore, SORB's reliance on the requirement of actual notice was misplaced because SJC does not require that SORB provide offenders with actual notice of classification proceedings.

SORB's response also indicates that our reliance on 803 CMR 1.12(1) is misplaced because the Office of the State Auditor (OSA) does not fully recognize "the complexity of [SORB's] due process requirement to

provide notice to an offender.” However, SORB’s own regulations, specifically 803 CMR 1.12(1), clearly allow SORB to proceed with a sex offender’s classification hearing if the offender fails to appear at a hearing without good cause. According to 803 CMR 1.12(1), SORB’s hearing examiner “shall make a final classification decision” under these circumstances. As stated above, in Roe v. Attorney General, SJC ruled that SORB can proceed with classification after making efforts “reasonably calculated to provide actual notice,” including sending notice to the listed address on an offender’s SORB registration form. SORB therefore possesses the authority and the means to notify these offenders of classification proceedings.

In its response, SORB indicates that it does not definitively know the whereabouts of 842 of these 936 offenders because it does not have addresses for them. SORB further asserts that it believes it lacks jurisdiction to classify them for a number of stated reasons: (1) some either live or might live outside the country or in other states; (2) immigration authorities either deported or might have deported others; (3) others might have died. However, OSA believes SORB could have confirmed or ruled out these possibilities in order to classify the offenders. Whether or not any of these reasons is accurate, the offenders remain in violation of their registration requirements, and SORB has not done all that it could to address these violations.

Despite SORB’s assertions that it cannot provide proper notice to these 936 offenders to proceed with classification hearings for them, the Sex Offender Registry Law requires the offenders to register and annually verify their registration data with SORB. Any offender who fails to do so is subject to criminal penalties under Section 178H of Chapter 6 of the General Laws. Although SORB is not a law enforcement agency, it could notify all pertinent district attorneys, the Massachusetts State Police, and/or local police departments that these 936 offenders had not fulfilled the requirement and request that criminal complaints and warrants be sought against them. SORB could also request that these law enforcement agencies enter outstanding warrants in all active federal and state warrant databases. This would help law enforcement officials locate offenders in violation not only in Massachusetts, but also outside the state. After law enforcement officials locate these offenders, SORB can proceed with classification hearings against them.

OSA also recommends that SORB establish an effective offender verification process, as discussed in Audit Finding 3.

2. SORB did not properly ensure that all sex offenders were assigned final classifications before they were released from incarceration.

SORB did not issue final classifications for incarcerated first-time sex offenders at least 10 days before their earliest release dates. As a result, the offenders' names, addresses, offenses, and registration statuses were not posted to SORB's website and were not otherwise available to the public, when appropriate, upon the offenders' release into the community. This could affect public safety decisions to protect children and the general public.

Specifically, for the 103 offenders released from incarceration during our audit period who had registered with SORB, 63 did not have final classifications at least 10 days before their earliest possible release date. Of these 63 offenders, SORB did issue final classifications to 6 before their actual releases, and it issued final classifications to another 33 after their releases. These 33 offenders were given final classifications an average of 109 days after they were supposed to be classified, with the longest taking 411 days after the offender's release from incarceration. As of the end of our audit fieldwork, 24 of these 63 offenders had not received final classifications. An offender's final classification level determines the amount of information that can be disseminated about him/her to the public.

Authoritative Guidance

Section 178E of Chapter 6 of the General Laws requires SORB to classify a sex offender at least 10 days before his/her earliest possible release date.

Reasons for Noncompliance

SORB did not have written policies and procedures that provided for the classification of sex offenders before they were released from incarceration. SORB also stated that it relies on the individual correctional facilities to supply it with anticipated release dates, and that these dates often are subject to change, which makes it difficult to determine when final classifications need to be assigned and to schedule timely hearings when necessary.

Recommendations

1. SORB should prepare written policies and procedures to ensure that offenders are given final classifications at least 10 days before release from incarceration.
2. SORB should work more closely with houses of correction to get accurate offender release dates.

Auditee's Response

OSA determined that SORB did not issue final classifications for 63 incarcerated first-time sex offenders at least 10 days before their earliest release date. While this is technically true for 49 of those individuals, there are operational reasons that make it impossible for SORB to finally classify every first time offender before release.

First, 23 of the 49 individuals had sentences that were simply too short to allow SORB to conduct final classifications hearings and issue a decision prior to their release. To put this into perspective, the process to finally classify an offender takes approximately 10 to 12 months to complete. It includes procedural time to gather all relevant information to allow the Board to determine an offender's preliminary classification, to give an offender an opportunity to challenge such recommendation, to determine whether the offender is indigent and for the case to be forwarded to the Committee for Public Counsel Service ("CPCS") for assignment of counsel. Once a case is assigned public counsel, additional time is needed for scheduling and to comply with discovery deadlines. After the hearing is conducted, appropriate time is needed for the examiner to issue a detailed written decision supporting the classification by clear and convincing evidence. Further, this 10–12 month timeframe does not account for any unexpected delays, which might include new counsel having to be assigned, a second day of hearing, valid continuances and scheduling conflicts. Given the above timeframe, SORB could not have possibly classified these offenders with such short sentences. By way of example, 18 of the offenders the audit team indicates were not properly classified were released from incarceration within six months, and two were released in under nine months. This time-frame, which we suggest was not considered by the audit team, is what the courts have found necessary and appropriate to satisfy due process. Also, it's important to note that two of the offenders were not properly identified as sex offenders by the correctional facility that housed them. This issue has since been resolved by SORB's new database (SORIS2) that was rolled out in 2015.

In addition to SORB's enabling statute and regulations, SORB's fulfillment of its mandate and mission is also guided by evolving case law. For example, in Doe 7083 v. SORB, 472 Mass. 475 (2015), the SJC held that SORB must classify incarcerated offenders in reasonable proximity to their anticipated release dates. If an incarcerated offender is classified too early, the decision remains preliminary and the offender can seek a continuation of his/her hearing at a reasonable time prior to his/her actual release date. Id. at 489. An array of court decisions have placed even greater mandates on SORB in furtherance of the offender's right to due process. Court decisions have had a significant impact on the Agency's ability to comply with classification before release. . . .

Lastly, the remaining 26 cases on the audit team's list face understandable challenges, the most obvious being the SJC's decision in Doe 380316 changing the standard of proof at classification hearings to "clear and convincing." This case was applicable retroactively to any classification hearing pending before SORB, the Superior Court, or the appellate courts. As a result, hundreds of decisions were remanded for classification hearings under the new elevated standard. Many were level 3 offenders whose information the public could no longer access, and whose hearings necessarily took priority over those of less serious offenders. In the absence of the SJC's decision, more offenders would have been classified before release within the audit period.

Auditor's Reply

Although SORB contends that the actual number of individuals who were not properly classified at least 10 days before their earliest release date is 43, the information that it provided to us indicated that 63 did not have final classifications at least 10 days before their earliest possible release dates and that many remained unclassified for extended periods beyond their release dates.

Section 178K(3) of Chapter 6 of the General Laws requires that offenders receive final classifications at least 10 days before their release dates and that SORB prioritize its classifications:

The sex offender registry board shall make a determination regarding the level of risk of reoffense and the degree of dangerousness posed to the public of each sex offender listed in said sex offender registry and shall give immediate priority to those offenders who have been convicted of a sex offense involving a child or convicted or adjudicated as a delinquent juvenile or as a youthful offender by reason of a sexually violent offense or of a sex offense of indecent assault and battery upon a mentally retarded person pursuant to section 13F of chapter 265, and who have not been sentenced to incarceration for at least 90 days, followed, in order of priority, by those sex offenders who (1) have been released from incarceration within the past 12 months, (2) are currently on parole or probation supervision, and (3) are scheduled to be released.

We cannot comment on the average amount of time it takes SORB to classify offenders, particularly if they appeal their initial classifications. However, to comply with this law, SORB should have established adequate controls (i.e., policies and procedures) to ensure that it could properly prioritize the classification of sex offenders and that those classifications were made as close to the offenders' release dates as possible, always within 10 days before their release dates. SORB's lack of controls over this activity has contributed to its inability to meet the statutory requirement.

Further, in OSA's opinion, the case cited by SORB as an example of why it is difficult to meet the timeframe requirement (Doe 7083 v. SORB, 472 Mass. 475 [2015]) is a unique case and does not support SORB's argument that it cannot classify offenders too early. SJC ruled that SORB finally classified this offender too early because he was civilly committed to a treatment center for sex offenders, reasoning that he had not had the opportunity to avail himself of treatment at the center before SORB finally classified him. SJC ruled that SORB should base its final classification on the offender's "current" risk of reoffense to protect the offender's right to due process. SJC ruled that SORB had to classify Doe 7083 at a time "reasonably close" to his actual release date, at which point both SORB and Doe 7083 could

introduce evidence relevant to his final classification (his then-“current” risk of reoffense and danger to the public).

Although we are sympathetic to the challenges faced by SORB since SJC changed the standard of proof at classification hearings to “clear and convincing,” the law states that final classifications for incarcerated first-time sex offenders must occur at least 10 days before their earliest release dates. SORB should prepare written policies and procedures to address this issue and ensure compliance with state law.

3. SORB did not obtain current addresses for 1,769 sex offenders who were in violation of registration requirements.

SORB did not ensure that it had current addresses for sex offenders who were required to register with it. Once an offender is convicted of a sex offense, SORB records his/her last known address in its database. To ensure that the address information in its database is accurate, SORB has entered into Interdepartmental Service Agreements (ISAs) with the Department of Transitional Assistance (DTA) and the Department of Revenue (DOR) to conduct address verifications, but it is not performing these verifications. Further, SORB did not enter into any other ISAs with executive-branch agencies to verify sex offenders' addresses. As a result, SORB lacks the information necessary to ensure that it has the current addresses of 1,769⁵ sex offenders who were required to register with SORB but have not done so, and therefore their whereabouts and information about their offenses, including their classifications, are not communicated by SORB to local law enforcement and the general public. This could create a risk to public safety. While the exact locations of these offenders are not known, our testing of data provided by DTA revealed 39 sex offenders who were in violation of registration requirements and collecting public benefits in Massachusetts, and 30 of these offenders had different Massachusetts home or mailing addresses from the ones in the SORB database.

Authoritative Guidance

According to 803 CMR 1.26(5), “Pursuant to M.G.L. c. 6, § 178D, the Board is required to keep the registry up-to-date and accurate.” Section 178F of Chapter 6 of the General Laws also requires SORB to obtain violators' addresses from executive-branch agencies such as DOR and DTA “when there is reason to believe a sex offender required to register has not so registered.”

5. As of June 24, 2016, there were 1,769 active sex offenders in Massachusetts who were required to register with SORB.

Reasons for Noncompliance

SORB did not have policies and procedures to ensure that it acquired current sex offender address information from various executive-branch agencies. DTA officials told us their department had updated address information for SORB, but it required a secure method of transmission, which SORB never established. SORB officials did not comment on why the board had not established a secure method of transmitting address information from DTA. They did state that because of changes in management, the current management was unaware that SORB had an ISA with DOR to obtain address information, as the agreement was executed in 2008 but was apparently seldom (if ever) used.

Recommendations

1. SORB should establish written policies and procedures to ensure that it regularly obtains sex offender address information from various executive-branch agencies and updates this information in its database.
2. SORB should work with DTA to agree on a secure method of data transmission for updated sex offender addresses.
3. SORB should establish a secure data exchange for the receipt of the updated addresses of sex offenders who are in violation of their registration status from DOR.
4. SORB should consider working with other executive-branch agencies as necessary to develop ISAs for additional data exchanges for addresses.

Auditee's Response

OSA determined that SORB did not ensure that it had current addresses for 1,769 sex offenders who were required to register. The audit team attributed this to SORB's failure to promulgate sufficient policies and procedures to acquire current sex-offender addresses from various executive-branch agencies. As outlined below, we believe that this finding is not supported by the facts.

First, the 1,769 sex offenders for whom SORB does not have current addresses are offenders who are in violation of their obligation to register. . . . 803 CMR 1.26(5), cited in this section as Authoritative Guidance, addresses in detail the offender's requirement to verify that his/her own information is current and accurate. The existence of some number of offenders in violation with unknown addresses is inevitable because some offenders are unwilling to comply with the sex offender registry law. By way of analogy, under the current SORL, SORB is no more capable of ensuring full compliance with its statute by sex offenders than the court system is capable of ensuring full compliance with the obligation of criminal defendants to appear at court proceedings. Thus, the audit team's reliance on the Authoritative Guidance in Detailed Finding 3 is misplaced. . . .

SORB works with a host of law enforcement agencies in the Commonwealth to locate offenders in violation and verify addresses for offenders on the Registry. Police and other law enforcement agencies continually verify addresses of sex offenders in their cities and towns. The local, state, and federal authorities have access to SORIS2 and utilize the electronic system to place sex offenders in violation, or comment on the validity of an address of a sex offender. Our partners in law enforcement regularly conduct these audits to protect the citizens in their communities. The Board itself has no lawful power to arrest or detain a sex offender. However, when the Board places someone in violation for failing to register, the Registry of Motor Vehicles is notified, which triggers a license suspension. Police, therefore, have the ability to actively look for offenders, apply for an arrest warrant, or arrest offenders who are in violation. Several SORIS2 enhancements provide increased functionality to assist law enforcement with investigating and locating offenders in violation and the enforcement of registration requirements.

With regards to the audit team's recommendations in Detailed Audit Finding 3, SORB responds as follows:

- 1. SORB will continue to establish written policies and procedures to ensure that it regularly obtains sex offender address information from various executive-branch agencies and updates this information in its database.*
- 2. SORB appreciates the audit team's diligence in reviewing its ISA with DTA. Upon learning that DTA had reciprocal offender information to provide, SORB worked with DTA to establish a secure method of data transmission for updated sex-offender addresses. SORB is now receiving these reports on a weekly basis.*
- 3. SORB has worked with DOR to establish a secure data exchange for the receipt of updated addresses of sex offenders who are in violation of their registration status from DOR.*
- 4. SORB will continue to explore working with other executive-branch agencies as necessary to develop ISAs for additional data exchanges for addresses.*

Auditor's Reply

Contrary to what SORB asserts in its response, our conclusion on this matter is supported fully by the information we obtained and analyzed during our audit, information that we believe is accurate. OSA believes that SORB can do a better job of ensuring compliance with its sex offender registration requirement because, under its regulations, it has the responsibility of keeping the information in its registry current. Under state law, it also has the ability to obtain information from other state agencies to help identify the current locations of offenders for this purpose. However, in OSA's opinion, SORB has not been effectively using these abilities to verify addresses; specifically, SORB is not routinely performing these verifications and has not entered into any ISAs with executive-branch agencies to verify sex offenders' addresses, other than the agreements with DTA and DOR.

In its response, SORB suggests that it is difficult for it to maintain accurate information because offenders are responsible for verifying that their information is current and accurate. However, SORB cannot solely depend on offenders to maintain current and accurate information; if it could, the Legislature would not have given it the ability to research this information through agreements with executive-branch agencies. Although we do not dispute SORB's assertion that it works with law enforcement officials to help verify the addresses of sex offenders, we do not know to what extent it does so. In OSA's opinion, working with law enforcement officials should not be a replacement for obtaining violators' addresses from executive-branch agencies such as DOR and DTA.

Based on its response, SORB is taking measures to address our concerns in this area.

APPENDIX

Offenses of Level 0 Unregistered Offenders

Offense Type	Number of Offenders
Aggravated rape	8
Assault of child with intent to commit rape	7
Assault with intent to commit rape	53
Dissemination of child pornography	5
Dissemination of matter harmful to minors	2
Indecent assault and battery on a person aged 14 or older	237
Indecent assault and battery on a person with intellectual disability	2
Indecent assault and battery on child under 14 years of age	177
Inducing minor into prostitution	2
Kidnapping of a child under the age of 16	1
Living off or sharing earnings of minor prostitute	1
Out-of-state (O/S) aggravated rape	4
O/S assault with intent to commit rape	1
O/S attempt to commit a crime: incestuous marriage or intercourse	1
O/S attempt to commit a crime: indecent assault and battery on a person aged 14 or older	1
O/S enticing a child under the age of 16	2
O/S indecent assault and battery on a person aged 14 or older	13
O/S indecent assault and battery on child under 14 years of age	22
O/S inducing minor into prostitution	1
O/S open and gross lewdness and lascivious behavior	1
O/S purchase or possession of child pornography	3
O/S rape	6
O/S rape and abuse of child	5
O/S rape of child with force	1
O/S unnatural and lascivious acts with child under 16	4
Open and gross lewdness and lascivious behavior	24
Purchase or possession of child pornography	2
Rape	143
Rape and abuse of child	21
Rape of child with force	129
Unnatural and lascivious acts with child under 16	3
No offense recorded	54
Total	<u>936</u>