

1 Draft Minutes  
2 Forensic Science Board Meeting  
3 August 6, 2008  
4 DFS Central Laboratory, Classroom  
5

6 Board Members Present  
7

8 Mr. Steven Benjamin  
9 Mr. Joseph Bono, Chair  
10 Leah Bush, M.D.  
11 Ms. Marla Decker  
12 Mr. Barry Fisher  
13 Colonel W. Steven Flaherty  
14 Ms. Katya Herndon (Designee for Mr. Karl Hade)  
15 Mr. Robert Jensen  
16 Ms. B. J. Northington (Designee for Leonard Cooke)  
17 Ms. Elizabeth Russell  
18 Mr. S. Randolph Sengel  
19 Mr. James Towey (Designee for Delegate Albo)  
20

21 Board Members Absent  
22

23 Sheriff F. W. Howard, Jr.  
24

25 Staff Members Present  
26

27 Ms. Wanda Adkins, Office Manager  
28 Ms. Elizabeth Ballard, Forensic Scientist, Forensic Biology  
29 Mr. Jeffrey Ban, Central Laboratory Director  
30 David Barron, Ph.D., Technical Services Director  
31 Ms. Donna Carter, Office of Financial Management Services Manager  
32 Ms. Guinevere Cassidy, Legal Assistant  
33 Mr. Douglas Chandler, Manager, Information Technology Services  
34 Ms. Leslie Ellis, Human Resources Manager  
35 Mr. Tom Gasparoli, Public Information Officer  
36 Ms. Michele Gowdy, Department Counsel  
37 Ms. Linda Jackson, Controlled Substances Section Chief  
38 Mr. Bradford Jenkins, Forensic Biology Section Chief  
39 Mr. Ronald Layne, Director of Administration and Finance  
40 Ms. Alka Lohmann, Breath Alcohol Section Chief  
41 Mr. Pete Marone, Director, Department of Forensic Science  
42 Mr. Butch Martin, Human Resources Analyst  
43 Ms. Elizabeth Mirza, Grants Administration/Policy Analyst  
44 Mr. Kevin Patrick, Western Laboratory Director  
45 Mr. James Pickelman, Firearm/Toolmarks Section Chief  
46 Mr. Steven Sigel, Deputy Director

47 Mr. Sherwood Stroble, Policy, Planning and Budget Manager  
48 Ms. Susan Uremovich, Eastern Laboratory Director  
49 Ms. Lisa Schiermeier-Wood, Forensic Biology Section Supervisor,  
50 Ms. Amy Wong, Northern Laboratory Director  
51 Mr. Robin Young, Latents Section Chief

52

53 Call to Order:

54

55 Chairman Bono called the meeting to order at 10:00 am.

56

57 Chairman Bono acknowledged Wanda Adkins as the temporary secretary for the meeting.  
58 Chairman Bono also introduced Guinevere Cassidy as the new secretary for the Forensic  
59 Science Board (Board). Chairman Bono on behalf of the Board thanked Wanda Adkins  
60 for her work with the Board. Chairman Bono also thanked the members of the public  
61 attending the meeting for taking interest in the Board.

62

63 Adoption of Agenda:

64

65 Chairman Bono asked if there were any additions or changes to the draft agenda. Mr.  
66 Benjamin noted that the three items he had requested from the May meeting were not  
67 listed. Mr. Marone indicated that they would be addressed in full, adding that an  
68 accounting of the \$1.4 million expenditures accounting was included in the Board packet.

69

70 Colonel Flaherty made a motion to adopt the agenda; it was seconded by Mr. Benjamin  
71 and adopted by unanimous vote.

72

73 Mr. Bono informed the Board that public comment would be taken at the end of the  
74 meeting and limited to two and one-half (2.5) minutes each.

75

76 Adoption of Minutes

77

78 Chairman Bono noted that the draft minutes included the transcription requested by Mr.  
79 Towey as an addendum. Mr. Sengel made a motion to accept the draft minutes; they  
80 were accepted by unanimous vote.

81

82 Director's Report

83

84 Director Marone discussed the building projects first; the Northern laboratory is  
85 scheduled to open in spring of 2009, the Eastern laboratory is adding space and in the  
86 Central laboratory renovations are ongoing.

87

88 The Department of Forensic Science (DFS) just recently achieved its 1,000<sup>th</sup> firearms hit  
89 using NIBIN technology and its 5,000<sup>th</sup> data bank hit.

90

91 Director Marone then went on to discuss the post-conviction project. He first provided a  
92 brief history of the project and then announced that all case files with criminal history

93 information had been sent to the contract laboratory. Only 156 cases currently are  
94 awaiting conviction information, with over 400 cases having results returned to DFS.

95  
96 The Board was provided workload summary reports in their packets and Director Marone  
97 discussed the reduction in backlog.

98  
99 The Department of Planning and Budget (DPB) declined to provide a presentation to the  
100 Board, but provided Director Marone with a written proposal on the scope of their Best  
101 Practices Management Audit. DFS is in discussions with the Secretary of Public Safety  
102 regarding this issue.

103  
104 No new grants had been applied for and the post-conviction grant is still pending.

105  
106 Director Marone again discussed the accounting of the \$1.4 million that was provided to  
107 the Board members in their packet.

108  
109 Mr. Jensen commented on the workload summary for firearms and how the backlog had  
110 been reduced by over one-half. He questioned the backlog in forensic biology and  
111 Director Marone explained that the post-conviction cases were artificially inflating the  
112 forensic biology backlog.

113  
114 Mr. Benjamin asked what constituted a qualifying conviction. Director Marone provided  
115 a copy of the Virginia Code Title 18.2, Chapter 4, the introductory page which listed  
116 crimes against a person and explained that a qualifying conviction is a felony that is listed  
117 on this page.

118  
119 Director Marone informed the Board that DFS was involved in an Auditor of Public  
120 Accounts Audit and will provide the report to the Board when it becomes available.

121  
122 Chairman's Report

123  
124 Chairman Bono introduced Mr. Frank Ferguson, Counsel for the Forensic Science Board,  
125 appointed by the Office of the Attorney General, Mr. Ferguson is currently the Director  
126 of Legislative and Regulatory Affairs for the Virginia Lottery.

127  
128 Scientific Advisory Committee

129  
130 Chairman Fisher reported that the Scientific Advisory Committee (SAC) had completed  
131 its review of new scientific programs pursuant to the Board's request and recommended  
132 that Mitochondrial DNA, Y-STR DNA and the new Breath Alcohol Instrumentation be  
133 approved by the Board. The SAC had several sub-committees review these programs and  
134 ultimately recommended to the Board implementation at DFS.

135  
136 Chairman Fisher made a motion that the Board accept these recommendations from the  
137 SAC to adopt those new technologies, seconded by Mr. Sengel and accepted by  
138 unanimous vote.

139

140 The SAC also was tasked with addressing the issue of contextual bias. Mr. Brad Jenkins,  
141 Section Chief, Forensic Biology, gave a presentation to the SAC on the new DNA  
142 verification procedures that will be implemented in the forensic biology section. The  
143 SAC was satisfied with the changes that had been adopted by DFS.

144

145 Maria Everett, Executive Director, FOIA Council

146

147 Ms. Everett addressed the Board on issues regarding access to public meetings and  
148 materials under the Virginia Freedom of Information Act. She discussed and gave  
149 handouts to the Board on open meeting requirements, e-mails and e-mail meetings,  
150 teleconferencing and other electronic meetings.

151

152 DNA Sub-Committee Notification

153

154 Mr. Benjamin inquired if Chairman Bono would allow Marvin Anderson to speak to the  
155 Board prior to the discussions on the DNA notification. Mr. Anderson provided brief  
156 factual information to the Board on his post-conviction experience.

157

158 Chairman Bono reviewed with the Board the budget language that was enacted July 1,  
159 2008. Chairman Bono introduced to the Board the prepared letters with corresponding  
160 envelopes addressed to the 492 people for whom an address had been obtained from the  
161 Department of Corrections (DOC). Chairman Bono stated "If the Board approves the  
162 verbiage in these letters, I am prepared before I leave Richmond to make sure that those  
163 letters are mailed to the right individuals who have a right to know what was found in the  
164 "Mary Jane Burton" files."

165

166 Mr. Ferguson explained that he is at the meeting because of some discussions regarding  
167 the budget language and the differences in approach between the Board and DFS. Mr.  
168 Ferguson stated that he had some background in legislative interpreting and legislative  
169 drafting, has worked with the General Assembly and, many years ago, in criminal law  
170 and prosecution. To address the Chairman's question, he stated "in my view the letter is  
171 written and open to your discretion on how to word the letters, but those appear to me to  
172 fulfill the mandate of budgetary language."

173

174 Mr. Towey gave a progress report on the Sub-committee on the Notification of DNA  
175 Evidence. The sub-committee progress report is attached as addendum "A"

176

177 Mr. Towey stated that on June 20, 2008 Director Marone sent a memorandum to  
178 Secretary of Public Safety. (See attached addendum "B")

179

180 Mrs. Gowdy clarified that the date of the letter should have been July 20<sup>th</sup>; there was a  
181 typo on the memorandum.

182

183 Mr. Towey questioned why as Chairman of the sub-committee he couldn't get the  
184 database, why this information would be forwarded to other non-criminal justice

185 agencies, what measures were being taken to make sure this was being done within the  
186 confines of the law and why weren't those steps taken to give that information to Mr.  
187 Towey.

188  
189 Director Marone responded that the key wording in the memorandum was information  
190 outside of the sensitive information that we can provide allowable by DFS Information  
191 Technology (IT) security. Director Marone also stated that Mr. Towey when asked to  
192 sign a confidentiality agreement for that data, he would not.

193  
194 Mr. Towey responded that he was not given the opportunity to sign a confidentiality  
195 agreement; in fact at the meeting with VITA in which Mr. Quagliato was present, Mr.  
196 Towey stated that signing a confidentiality agreement would create bad precedent.

197  
198 Director Marone stated he must have misunderstood. Mr. Towey expressed that he really  
199 tried to work with DFS to try to reach an agreement on terms for which we could get  
200 some of the most basic information: names, jurisdictions and convictions.

201  
202 Mr. Sengel commented that there maybe a solution to this and asked for counsel's  
203 comment. He proposed that under the statute dealing with the dissemination of criminal  
204 history information, that there is a provision which provides for the disclosure of that  
205 information to agencies outside the criminal justice system if it is pursuant to a written  
206 agreement which dictates the terms and purpose for which the information will be used.

207  
208 Mr. Ferguson responded that his concern was not the inter-agency issue. For the most  
209 part, we are talking about are criminal justice agencies that can transfer the data back and  
210 forth. For the purposes of this particular project the budgetary language probably would  
211 provide the general provision so the Board can receive information. The issues that he  
212 was concerned about were the method for contacting the individuals and the use of  
213 volunteer attorneys to do so. He was not aware of any procedure that allows the  
214 distribution of data to volunteers from a source that is limited in its distribution or  
215 dissemination. As Mr. Towey pointed out there is some lack of clarity as to what the data  
216 source is. The fact that the Board may only be using the name and address doesn't  
217 matter. It's still from a limited distribution source, for example CCRE. It doesn't matter  
218 if all you have is the first name if that's where it came from you are limited to the  
219 distribution of that data beyond a criminal justice agency or agency that enters into some  
220 kind of agreement. Mr. Ferguson further stated that there was another issue that the  
221 members of the sub-committee were aware of his thoughts on, and probably the one that  
222 is of equal importance at least because there maybe ways around the database issue.  
223 There is an ancient and well accepted principle of statutory construction that applies here.  
224 The principle essentially says when the General Assembly or a legislative body dictates  
225 that something is to be done, who is to do it and how it is to be done you may not do it by  
226 any other means. The issue here is the General Assembly in this budget language has  
227 limited the Board by how they may effectuate the mandate of notifying these individuals.  
228 Mr. Ferguson then presented his legal advice on the issue. The Board doesn't have the  
229 authority to authorize the sub-committee to do something they weren't authorized to do  
230 to begin with, with all due respect to the Board. He emphasized that he looked at this

231 again after the sub-committee meeting last week and cannot reach a different conclusion  
232 than this.

233

234 Colonel Flaherty agreed with Mr. Ferguson and stated that his issue is the idea of sending  
235 private/volunteer individuals out to make these contacts. The use of private attorneys  
236 creates a set of problems; one being lack of control the Board would have over the  
237 notification process. The Colonel offered the services of the Virginia State Police (VSP)  
238 to utilize their database resources to obtain more current addresses for mailing.

239

240 Mr. Towey commented that based upon the advice just given by Mr. Ferguson, stating  
241 that the offer of VSP could not happen because the budget language only mentions DOC.  
242 He continued on to disagree with Mr. Ferguson's analysis and offered a handout on this  
243 issue. (See addendum "C")

244

245 Mr. Benjamin offered another suggestion stating that he had people at the meeting who  
246 would like to make remarks. Mr. Benjamin then stated that he would also like to make  
247 comments on this same subject now, if that would be acceptable. He presented his  
248 interpretation to the Board – it is that the General Assembly in its language has not  
249 limited us to the method of delivery by mail. Mr. Benjamin further explained to the  
250 Board why he disagreed with Mr. Ferguson's advice and his interpretation.

251

252 Mr. Ferguson asked the Chairman to be able to voice his interpretation at this point  
253 stating that Mr. Benjamin and Mr. Towey are perfectly free to disagree with his  
254 interpretation.

255

256 Mr. Benjamin then moved on to the budget language itself.

257

258 Chairman Bono cautioned everyone that this discussion is extremely important and asked  
259 for everyone to please stick to the issues without getting personal. He proceeded to ask  
260 Mr. Benjamin to address his assertion of ambiguity in the statute.

261

262 Mr. Benjamin commented that Mr. Ferguson has referenced rules of statutory  
263 interpretation. You only use rules of statutory interpretation when a statute is ambiguous.  
264 There is no ambiguity in this statute. The obligation that was imposed on the Board is  
265 stated without any ambiguity in that first sentence. "*The Forensic Science Board*" that's  
266 the Board not the Department, not DOC, not the Virginia State Police, the Forensic  
267 Science Board, "*shall ensure that all individuals ... are informed*" that this evidence  
268 exist and is available for testing. What it does not say is the Forensic Science Board shall  
269 notify all such individuals, it does not say the Forensic Science Board shall inform all  
270 such individuals instead the General Assembly deliberately added the word the Forensic  
271 Science Board shall ensure that these individuals are informed. That is the statutory  
272 mandate to the Board. In the next sentence it describes what the Board must do. It must  
273 prepare two form letters, "*one sent to each person*". What it does not say is that it must  
274 be sent by any particular method of delivery. It left it to the Board to determine what  
275 method of delivery would best ensure not just notify but ensures notification. It is  
276 understood from a practical experience the problems that we have with the U.S. mail.

277

278 Chairman Bono disagreed.

279

280 Mr. Towey added that this is a rule of statutory construction and not a rule of law that is  
281 cited by Mr. Ferguson. The maximum is subordinate to the primary rule that the  
282 legislative intent governs the interpretation of the statute. Thus it can be overcome by a  
283 strong indication of contrary legislative intent or policy. Mr. Towey stated that he  
284 received a statement from the Chair of the Public Safety Sub-committee of Senate  
285 Finance through which this went through which states "Our intention in the budget  
286 language was for the notification process to go forward quickly and that the budget  
287 language was not to be restricted. In fact we intended it to be broadly construed".

288

289 Chairman Bono asked to hear from Board Counsel first.

290

291 Mr. Ferguson commented that the intent of a single legislator in case law is replete with  
292 this particularly in Virginia and that it is irrelevant in determining what a statute is to be  
293 determined.

294

295 Ms. Decker stated that the Board should not debate legal analysis, for once, let's roll up  
296 our sleeves and figure out a way to get there.

297

298 Chairman Bono asked for a brief lunch break.

299

300 Upon reconvening, Chairman Bono limited debate to fifteen minutes and stated that it  
301 would last until 1:00 p.m.

302

303 Debate continued with discussion by Mr. Towey and Chairman Bono.

304

305 Mr. Benjamin discussed why he was opposed to using the U.S. mail and why he was in  
306 favor of accepting the sub-committee's recommendation of the pro bono services of  
307 attorney members of the Virginia State Bar in good standing licensed to practice law.

308

309 Mr. Towey asked if the pile of letters that Chairman Bono proposed to go out are to the  
310 560 individuals for whom we received addresses from DOC?

311

312 Chairman Bono responded, yes.

313

314 Mr. Towey asked Director Marone the following, "At the May 7<sup>th</sup> Board meeting you  
315 said 'You just don't send a report out to the last known address.' What has changed this  
316 May 7<sup>th</sup> that has increased your confidence in these last known addresses?"

317

318 Director Marone stated that there have been a number of revisions in the searches that  
319 DOC has done. The data has improved on the addresses, but some of them are still a few  
320 years old. Reports are not going out, these are the letters saying if you have questions  
321 call somebody back.

322

323 Mr. Ferguson stated if the only language in the budget enactment said that the Forensic  
324 Science Board shall ensure that all individuals who were convicted due to criminal  
325 investigations, etc. are informed that such evidence exists, he might agree with Mr.  
326 Towey. Unfortunately, you can't ignore the language that follows that. You have to read  
327 the enactment as a whole. You are required to give effect to all words in the enactment if  
328 possible and once that is said, you have to do it within those bounds. Mr. Ferguson  
329 further stated that Colonel Flaherty's suggestion that VSP can help is probably okay not  
330 withstanding the strict interpretation of his comments that he espoused earlier. VSP has  
331 independent authority to do as Colonel Flaherty is offering anyway. VSP doesn't need  
332 this budget language to tell them they can or can't do that and as long as we are using  
333 another state agency within the confines of achieving your goal, you probably can do  
334 that. It's broad language at the beginning but that language is constricted by the language  
335 that follows.

336  
337 Ms. Decker stated that she agrees with the Board's Counsel and his interpretation of a  
338 strict reading of the budget language as a Board member, she is troubled by the fact that  
339 the Forensic Science Board is charged with ensuring that all individuals who were  
340 convicted during this period of time are notified. That is the marching orders. Ms.  
341 Decker further stated that the method as set forth by the General Assembly is inadequate.

342  
343 Mr. Jensen stated his desire to complete the task and by allowing the sub-committee to  
344 work on compliance with the budget language.

345  
346 Chairman Bono asked if there was a motion to terminate the debate early.

347  
348 Mr. Benjamin stated no and made a motion to extend the debate. Seconded by Mr.  
349 Towey and the debate was extended with the vote being 5 in favor and 3 opposed.  
350 Motion carried and the debate was extended.

351  
352 Mr. Benjamin stated that one of the components that he suggested is delivery in the first  
353 instance be made through the use of volunteer attorney members of the State Bar. Mr.  
354 Benjamin stated that prior to the meeting of the sub-committee and knowing that the sub-  
355 committee was going to take up this proposal he met with attorneys on the Governor's  
356 staff to present this proposal,. The proposal of using pro bono attorneys to make this  
357 notification was fully discussed. Mr. Benjamin informed that nobody expressed any  
358 concern or objection to it. The one reservation that he heard was that there is no way it  
359 will work because the subcommittee would never be able to get enough attorneys to  
360 volunteer to notify all these people. Next, the sub-committee met and this process of  
361 using pro bono attorneys was proposed.

362  
363 Chairman Bono acknowledged that Mr. Larry Roberts, counsel to Governor Kaine was  
364 present and asked for him to address Mr. Benjamin's comments.

365  
366 Mr. Roberts stated that he did not agree with the characterization. The meeting was to  
367 discuss how this process would move forward and the notation came up about using  
368 outside lawyers. Mr. Roberts stated that he would be interested in exploring the idea as a



369 part of a stake holder meeting with Mr. Benjamin, prosecutors, department, victims and  
370 advocates. Mr. Roberts stated that it's not true to say that he had no objections to it; he  
371 was not in favor of it as constituted and didn't say anything about the inability to get  
372 lawyers.

373

374 Mr. Benjamin disagreed. He continued to discuss the development of the proposal.

375

376 Mr. Benjamin continued to discuss why pro bono attorneys were his preferred method to  
377 comply with the budget language. He indicated that almost 200 attorneys have  
378 volunteered to take part in this project. Next, Mr. Benjamin requested that the Assistant  
379 Ethics Counsel for the Virginia State Bar speak.

380

381 Colonel Flaherty expressed his concerns about having volunteers descend on people's  
382 home and expressed his desire to send the letters. He again offered the data bases of  
383 VSP.

384

385 Dr. Bush said that as a state agency she recognized confidentiality issues. She expressed  
386 her concern for ensuring the receipt of the letter and suggested some sort of registered  
387 mail or something that they have to sign for or maybe send a letter back.

388

389 Mrs. Herndon stated that the Chief Justice supported using pro bono attorneys for  
390 notification.

391

392 Ms. Northington agreed with Colonel Flaherty.

393

394 Ms. Russell stated that she was also concerned with using volunteers and that the letters  
395 are a good first start.

396

397 Mr. Sengel suggested a compromise: use pro bono attorneys to verify addresses and then  
398 bring that information back to the Board or to the VSP, who then look into their  
399 information databases and provide some assistance in trying give more information to  
400 work with or give the Board more information to work with in terms of actually notifying  
401 these individuals.

402

403 Dr. Bush commented that maybe things have changed since the sub-committee met but  
404 her understanding initially when they voted as a subcommittee on this issue, was that the  
405 pro bono attorneys would conduct research and provide the subcommittee with the  
406 correct address that they had verified. Then the subcommittee/Board would send out the  
407 letters.

408

409 Mr. Benjamin stated that she was correct except the subcommittee said that we would  
410 give the attorneys the actual form notice letter from the Board to deliver in whatever  
411 means they deemed appropriate.

412

413 Dr. Bush stated that she thought they were going to be mailed out with some caveat at the  
414 bottom saying please contact me. She was unaware that it was expected that the  
415 attorneys hand deliver the letters.

416

417 Mr. Benjamin stated his desire to have the pro bono attorneys ascertain the most current  
418 address, determine the most reliable means of delivery and that the attorney would  
419 facilitate that form of delivery. The attorney would be under an obligation to report back  
420 to the Board.

421

422 Colonel Flaherty asked under what authority or what legal or statutory precedence does  
423 the Board have to enter into agreements with anyone?

424

425 Mr. Ferguson stated that there is no authority to use pro bono attorneys. Further, there is  
426 no control mechanism in place. This Board has no ability to control their actions which  
427 is part of the reason it goes back to using any non-state agency. Furthermore, if there is  
428 no attorney/client relationship there's no ethical obligation, no legal obligation. Mr.  
429 Ferguson then opined if you could get around that with some fairly specific memorandum  
430 of agreement? He did not know what the enforcement mechanism would be. These  
431 were his concerns about the implementation of the project.

432

433 Chairman Bono asked if one opinion is that the use of pro bono attorneys is allowed and  
434 another is that they are not allowed then who makes the ultimate decision to say yes you  
435 can or no you can't?

436

437 Mr. Ferguson stated that the Board votes and makes whatever decision they choose  
438 having had the advice of counsel.

439

440 Mr. Towey discussed Virginia Code §2.2-3600 regarding Virginia State Government and  
441 the Volunteers Act.

442

443 Mr. Ferguson further clarified his advice.

444

445 Ms. Decker stated that many resources have been discussed, but no sharing of the data  
446 has occurred.

447

448 Mr. Benjamin stated, "Mr. Chairman I move that the names, case jurisdiction and the  
449 offense date and any other non-confidential information but specifically names, case  
450 jurisdictions and offense date for all cases in which evidentiary biological information  
451 was found to exist be provided to James Towey, Executive Director of the Virginia State  
452 Crime Commission for review to ensure that there is no confidential information included  
453 for distribution once he has made that sweep to attorneys who are licensed to practice law  
454 in the Commonwealth of Virginia and who are members in good standing with the  
455 Virginia State Bar who have volunteered to provide pro bono assistance to use their best  
456 efforts to ensure that the correct person is actually notified. That is my motion. I would  
457 have no objection to an amendment that at the same time that the form letter developed  
458 by the sub-committee also be mailed to the individuals determine by the Department and

459 further vetted by others if that be the case. I don't have any objection to that if someone  
460 wanted to add that to the motion. I don't see how that complicates things."

461

462 Chairman Bono asked if the motion was written down verbatim.

463

464 Mr. Benjamin stated, "Okay let me repeat it again. My motion is that the names, and by  
465 that I mean the suspect names that appear in the Department's files, the case jurisdiction  
466 and the offense date and other non confidential information as may be available for all  
467 cases in which evidentiary biological material has been or is found to exist in department  
468 case files be provided to James Towey, Executive Director of the Virginia State  
469 Commission for his review to ensure that the dissemination of the additional information  
470 is not provided by law and that upon Mr. Towey having discharged that duties that the  
471 forms letters developed by the sub-committee and appended to the progress report be  
472 provided (tape changed) sub-committee with the non confidential information to  
473 attorneys who are licensed to practice law in the Commonwealth of Virginia who are  
474 members in good standing of the Virginia State Bar and who have volunteered to  
475 provide, pro bono, their assistance and best efforts to ensure that the correct person within  
476 the meaning of the budget language is actually notified of the existence of biological  
477 material that maybe suitable for DNA analysis and other facts as mandated by the budget  
478 language – insert the actual section number – item 408. That is my motion."

479

480 Mr. Towey seconded the motion.

481

482 Chairman Bono stated that the motion has been made and is seconded by Mr. Towey.

483

484 Chairman Bono asked if there was any discussion and asked for Mr. Ferguson to  
485 comment on the legal consequences.

486

487 Mr. Ferguson stated that if it is the decision of the Board to adopt the motion made by  
488 Mr. Benjamin, it is being done at your peril, against advice of counsel.

489

490 Ms. Decker asked what kind of liability for the Board is associated with utilizing  
491 volunteers. Mrs. Decker further stated that the Board could say they are volunteering to  
492 do things at their own peril but this is going outside state agencies and using volunteers.

493

494 Mr. Benjamin discussed that these are risks that attorneys face everyday. Mr. Benjamin  
495 informed that the Mid-Atlantic Innocence Project has volunteered to provide training in  
496 safety issues to any attorney. Mr. Benjamin stated that these are volunteers and he is  
497 satisfied that there is no liability for the Board.

498

499 Mr. Towey stated "As far as liability goes to the existent that it makes anybody feel any  
500 better about liability to the Board. I will put on the record that I take sole responsible for  
501 this. I say that partly as a joke but I'm serious. This thing has to move forward and to  
502 the extent that there is any liability you can put on the record, for whatever it's worth."  
503 He urged the Board to move forward with this proposal.

504

505 Colonel Flaherty stated that this motion is an extremely broad interpretation of the budget  
506 language and goes way beyond the Board's authority. He disagreed with this proposal.

507

508 Chairman Bono asked for a five minute recess.

509

510 Upon reconvening, Chairman Bono asked that Mr. Ferguson address the Board on the  
511 liability issues. Mr. Ferguson reiterated that there is no predicating the ingenuity of  
512 someone who may find a cause of action to file against a State agency. He further stated  
513 that he has provided his advice and that if the Board does not follow his advice, the  
514 current policy of his office (the Office of the Attorney General) is that you, the Board  
515 would be advised to seek the assistance of outside counsel. The Office of the Attorney  
516 General would not represent you because it would be an inconsistent position and that  
517 would be inappropriate.

518

519 Chairman Bono asked for a roll call.

520

521 Ms. Adkins read the motion: "Mr. Benjamin moved that the names, the suspect names  
522 and DFS case files, jurisdiction and offense date for all cases in which evidentially  
523 biological materials has been or found to exist in DFS case files be provided to James  
524 Towey, Executive Director with the Virginia State Crime Commission for his review to  
525 ensure that the dissemination of additional information is not prohibited by law and that  
526 upon Mr. Towey having discharged that responsibility the forms letters developed by the  
527 sub-committee and appended to the progress report be provided by the sub-committee  
528 with the non-confidential information to attorney who are licensed to practice law in the  
529 Commonwealth of Virginia who are members in good standing of the Virginia State Bar  
530 and who have volunteered to provide, pro bono, their assistance and best efforts to ensure  
531 that the correct person within the meaning of the budget language is actually notified of  
532 the existence of biological material that maybe suitable for DNA analysis and other facts  
533 as mandated by the budget language item 408."

534

535 Chairman Bono asked Mr. Benjamin if the wording of his motion was correct.

536

537 Mr. Benjamin stated that it should be specified earlier in the motion that we are talking  
538 about materials found in the cases during the years 1973-1988.

539

540 Ms. Decker asked Mr. Benjamin if he wanted the type of offense in there not just the  
541 offense date.

542

543 Mr. Benjamin stated that he was trying to be as narrow as possible, so that there is the  
544 least possible sense of this being confidential information. That's why there is a catch all  
545 – any other non-confidential information that can be provided and that's why he asked  
546 that Mr. Towey screen the data.

547

548 Ms. Gowdy asked to address the Board and asked if based on the budget language the  
549 motion intentionally did not use the word "convicted?"

550

551 Mr. Benjamin answered that the notification should only go to those who are convicted  
552 and that's why incorporated by reference is the budget language.

553

554 Mr. Benjamin asked the Chairman, to allow the Bar Counsel, Ethics Counsel to make a  
555 statement.

556

557 Chairman Bono refused.

558

559 Mr. Benjamin then asked for the public to be allowed to address the Board.

560

561 Chairman Bono again refused because that comes later in the agenda.

562

563 Mr. Benjamin disagreed.

564

565 Ms. Adkins: Mr. Benjamin – yes

566 Dr. Bush – abstain

567 Ms. Northington – abstain

568 Ms. Decker – no

569 Colonel Flaherty – no

570 Ms. Herndon – yes

571 Mr. Jensen – yes

572 Ms. Russell – no

573 Mr. Sengel – no

574 Mr. Towey – yes

575

576

577 4 yes, 4 no and 2 abstain – in the event of a tie the Chairman votes

578

579 Mr. Bono – no

580

581 4 yes, 5 no and 2 abstain

582

583 Chairman Bono asked if at this point there was another motion.

584

585 Colonel Flaherty stated, "Mr. Chairman I move that all individuals who are convicted due  
586 to criminal investigations for which case files for the years between 1973-1988 were  
587 found to contain evidence possibly suitable for DNA testing be informed that such  
588 evidence exists and is available for testing, by letter sent through the U.S. mail. The  
589 Department of Corrections with consultation with Department of State Police will assist  
590 in providing the best address available to the Department of Forensic Science for these  
591 mailings."

592

593 The motion was seconded by Mr. Sengel.

594

595 Mr. Towey asked for clarification on what best address available means?

596

597 Colonel Flaherty stated that he thought some evaluation would be done to determine the  
598 most current address.  
599  
600 Chairman Bono asked if there were any other questions or discussion.  
601  
602 Mr. Benjamin urged everyone to vote against this motion because he stated that this is the  
603 method least calculated to ensure the notification.  
604  
605 Mr. Sengel stated that he would vote for the motion with the idea it is a first step and may  
606 be followed by others.  
607  
608 Mr. Benjamin asked for a point of clarification on what letter would be sent.  
609  
610 A discussion of the form of the letter ensued.  
611  
612 Chairman Bono acknowledged Mr. Benjamin's comments.  
613  
614 Mr. Towey reiterated his disagreement.  
615  
616 Ms. Decker stated that she agreed with Mr. Sengel that this motion is only a first step.  
617 She fully anticipated coming back again to discuss phase two. She stated that she would  
618 vote for this motion because the Board needs to move forward today.  
619  
620 Chairman Bono stated that he too will vote for this motion and that this is only a first  
621 step. The next meeting is scheduled for October 8, 2008, but if a special session is needed  
622 then it will be scheduled.  
623  
624 Dr. Bush reiterated her concerns about the lack of some type of a receipt of mailing.  
625  
626 Chairman Bono asked if the Colonel would amend his motion to send it out by registered  
627 mail.  
628  
629 Ms. Russell asked if the letters can be sent regular and certified mail.  
630  
631 Colonel Flaherty amended the motion to include U. S. regular and certified mail and  
632 asked for a roll call.  
633  
634 Chairman Bono asked Ms. Adkins to please read the motion.  
635  
636 Ms. Adkins stated, "Colonel Flaherty moved that all individuals who were convicted due  
637 to criminal investigations for which case files for years 1973-1988 were found to contain  
638 evidence possible suitable for DNA be informed that such evidence exist and is available  
639 for testing by form letter approved by the Board sent through U.S. and certified mail.  
640 The Department of Corrections with consultation with the Virginia State Police shall  
641 assist in providing the best address available to DFS for these mailings."  
642

643 Mr. Towey asked if this motion entails that the letters are going out to the persons that are  
644 thus far known or are there going to be further efforts to identify the 350 for which there  
645 were no matches in DOC?  
646

647 Colonel Flaherty stated that he anticipated continuing to send out letters as individuals'  
648 addresses were identified.  
649

650 Chairman Bono stated that this is the first step in a process. The motion has been made  
651 and seconded; there will be a roll call on this one.  
652

653 Ms. Adkins:

654 Mr. Benjamin – No  
655 Dr. Bush – Yes  
656 Ms. Northington – Yes  
657 Ms. Decker – Yes  
658 Colonel Flaherty – Yes  
659 Ms. Herndon – Yes  
660 Mr. Jensen – No  
661 Mrs. Russell – Yes  
662 Mr. Sengel – Yes  
663 Mr. Towey – No  
664

665 7 – yes; 3 – no  
666

667 Chairman Bono stated that the Board has voted to send these letters out, not this letter but  
668 a letter notifying the people that are identified in the budget language of their rights. He  
669 asks that the Board address the language in the letter.  
670

671 Discussion ensued regarding the contents of the letter.  
672

673 Chairman Bono asked if someone would like to make a motion.  
674

675 Mr. Benjamin began to make a motion and Ms. Decker specified the language of the  
676 motion stating, "This motion is that the draft letter proposed by the sub-committee with  
677 the modification that we add into it the contact information provided by the Mid-Atlantic  
678 Innocence Project."  
679

680 Chairman Bono asked if his name as Chairman was going on the bottom of the letter.  
681

682 Mr. Ferguson asked for expansion of the motion because if the person who received the  
683 letter is not the named individual, who does that person contact and say I'm not the  
684 named person.  
685

686 Mr. Benjamin offered that instead of a phone call could the Board provide a response  
687 mechanism such as an enclosed card stamped card to DFS.  
688

689 Discussion ensued regarding the enclosed card and it was generally agreed upon.

690

691 Ms. Adkins read the motion, “That the letter to be sent will be the letter approved by the  
692 sub-committee supplemented by a sentence indicating that those who would like legal  
693 advice may contact the Mid –Atlantic Innocence Project (at whatever number and name  
694 they provide) and further a request to return an enclosed self-addressed stamped card in  
695 the event that the recipient of the letter is not the subject described in the letter be  
696 included.”

697

698 Chairman Bono stated that the concept discussed regarding the letter should be voted  
699 upon and then allow Project Innocence to clean it up making sure that all the phrases and  
700 requirements are included. He asked if anyone had an objection to that amendment.

701

702 Mr. Benjamin agreed.

703

704 Chairman Bono asks for a second to Mr. Benjamin’s motion and Ms. Decker seconded it.  
705 Chairman Bono stated that a roll call vote is not needed on this one. All those in favor of  
706 Mr. Benjamin’s motion regarding the letter, motion was carried.

707

#### 708 Regulations on Public Participation

709

710 Chairman Bono asked about the regulations on public participation. Ms. Gowdy  
711 explained that pursuant to statute, the Board is required to promulgate these regulations  
712 before December. A template of the suggested regulations is provided in the Board  
713 packet.

714

715 Ms. Russell stated that these are the same regulations that every agency has to adopt. She  
716 made a motion to adopt them. The motion was seconded by Ms. Herndon. The motion  
717 carried by unanimous vote.

718

719 Mr. Benjamin then moved back to the notification issue stating that by motion when the  
720 letters are sent out a copy be provided to the Innocence Project so they know who might  
721 be calling them.

722

723 Mr. Ferguson stated that there is a problem with Mr. Benjamin’s motion in that it has the  
724 potential for disclosing confidential information. He went on to suggest that the  
725 Innocence Project verify with DFS after they receive an inquiry.

726

727 Mr. Benjamin withdrew the motion.

728

729 Ms. Decker then requested that DFS set up an informational data base to track what  
730 letters have gone out, what date they were sent, date of the last known address and  
731 whatever other information may be helpful in accounting for this notification process.  
732 She declined to make a motion asking for the goodwill of DFS.

733



734 Director Marone indicated that DFS would compile this information in a format that  
735 could be shared with the Board.

736

737 New Business

738

739 Mr. Jensen questioned the Chairman Bono regarding the laboratory where he was once  
740 employed, indicating that it was in Washington D.C., not the Commonwealth of Virginia.

741

742 Chairman Bono stated that his laboratory was in fact in Washington D.C.

743

744 Mr. Jensen then questioned his membership on the SAC and subsequently his  
745 membership on the Board. Chairman Bono stated that if there was a question about his  
746 qualifications, it should be addressed to the Office of the Governor.

747

748 Chairman Bono encouraged anyone questioning his qualifications to speak with the  
749 Office of the Governor.

750

751 Chairman Bono stated that the next meeting is October 8, 2008, and suggested that it  
752 begin at 9:00am.

753

754 Ms. Decker asked that the DNA notification be placed on the agenda so that the Board  
755 may receive an update.

756

757 Mr. Jensen made a motion to adjourn, seconded by Mr. Sengel.

758

759 Chairman Bono thanked the Board for its intense work as well as thanked the people in  
760 the audience.

761

762 The meeting adjourned at 2:55 p.m.

763

764

765

766

767

ADDENDUM “A”

FORENSIC SCIENCE BOARD MINUTES

**VIRGINIA FORENSIC SCIENCE BOARD  
SUBCOMMITTEE ON THE NOTIFICATION OF DNA EVIDENCE**

**Progress Report  
July 29, 2008**

## **I. Background**

In 2001, following the exoneration of Marvin Anderson, the public learned that potentially thousands of archived files in the Department of Forensic Science ("Department") contained physical evidence that could be subjected to DNA testing. In December 2005, after four more wrongfully-convicted men proved their innocence from DNA testing of the physical evidence in the archived cases, Governor Mark Warner ordered the full-scale review and DNA testing of any biological evidence remaining in the archived 1973-to-1988 case files of the Department. Over 5,000 files contain physical evidence; 2,166 of those files have a named suspect. Although the Department has been unable to verify conviction information in all cases, at least 941 convicted defendants are involved.

When the project was announced, the Department predicted completion within 1 ½ to 2 years. Based on a cost estimate from the Department, \$1.4 million dollars was allocated to complete the project. Two-and-a-half years later, the Department has not completed the project. No results have been announced; an additional \$4.5 million has been requested from federal authorities to complete the project; and no convicted defendants have been notified that their case files contain physical evidence that may be subjected to DNA testing.

In October, 2007, the Virginia Forensic Science Board ("Board") recommended notifying convicted defendants by letter. Board member Steven D Benjamin agreed to draft a proposed notification letter. Board member Katya Herndon recommended that the Mid-Atlantic Innocence Project be given the list of suspects to be notified of the evidence, stating that the Board should not be in the position of providing legal advice to the suspects.

In January, 2008, Mr. Benjamin presented a draft letter to the Board and moved for the acceptance of a notification letter and development of procedures for its dissemination. That motion died for lack of a second. Mr. Benjamin then asked that the Board bring the issue of notification to the attention of the Governor and the chairs of the Courts of Justice Committees. That motion was defeated.

In March, 2008, the General Assembly passed budget language requiring the Board to notify convicted defendants of the existence of physical evidence found in the Department's case files and to advise them whether DNA testing in any particular case was being conducted.<sup>1</sup>

## **II. Subcommittee Formation & Authorization**

Implementation of the order of the General Assembly was addressed at the May 7, 2008, meeting of the Board. All 13 members of the Board were present. Also in attendance were 27 staff members of the Department of Forensic Science. A verbatim transcript of the segment of the meeting pertaining to the formation and authorization of the Subcommittee is attached<sup>2</sup> and can be summarized as follows:

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<sup>1</sup> The budget language is attached as **Attachment A.**

<sup>2</sup> **Attachment B.**

- Board member Steven Benjamin moved for the formation of a subcommittee chaired by James Towey, the Director of the Virginia State Crime Commission (“Crime Commission”), and asked that Mr. Towey appoint members to the subcommittee to perform the duties required by the General Assembly. As part of the motion, the Department was to provide the database of individuals for whom evidence exists to Mr. Towey so that he could send it on to the Department of Corrections (“DOC”) to discharge their responsibility under the requirement of the General Assembly and to “do what further work is necessary.”
- In making this motion, Mr. Benjamin noted that it was for good reason that the General Assembly ordered the Board to implement the requirement and not the Department – something which was expressly considered – and recalled that Director Marone had, at the last Board meeting, advised that the type of work ordered is not the job of scientists or the Department.
- Director Marone interjected to raise a concern, explaining:
 

Mr. Chairman, I have just one concern for you. I just want to make sure I’m covered. We do have IT security that we have to comply with and, as we give things to [DOC] now, its hand carried, from us to them. Some of this data is encrypted because it does have all the personal information, social security numbers and so forth, and I just want to make sure I am not stepping out of bounds with complying with IT security. We’ve gone through a very involved mating dance with [DOC] to get this data correct and I don’t want to step out of bounds with that, so they are satisfied with the integrity of their data and we are satisfied with ours that we are within the bounds of that. I have no problems with that. I just want to make sure.
- Regarding this sole concern raised by the Director, the Board Chairman responded that those issues could be addressed to make sure that the legal issues regarding confidentiality would be adhered to and asked Mr. Towey if he was willing to take on that task. Mr. Towey agreed.
- The Board appointed Mr. Towey Subcommittee Chair, “to meet the requirements in the budget language regarding notification.”
- In the event there was a need for expertise not possessed by members of the Board, the Board authorized Mr. Towey to select whomever he believed most appropriate to aid in the fulfillment of the requirements of the General Assembly’s directive.
- The Board directed Mr. Towey to report back to the Board in August on the “progress” of the Subcommittee. Mr. Towey responded that he would do so at every meeting.
- No objections or concerns were raised by any Board members concerning the appointment or duties of the Subcommittee.

### **III. Meeting of the Subcommittee and Adoption of Notification Plan**

Three Board members were appointed by Mr. Towey to serve on the Subcommittee; Lt. Colonel Robert B. Northern of the Virginia Department of State Police, Dr. Leah Bush of the Office of the Chief Medical Examiner (“OCME”), and Mr. Steven D Benjamin, an attorney engaged in the private practice of law. A meeting of the Subcommittee was scheduled for June 4, 2008.

In preparation for that meeting, Mr. Towey met with the Department’s Director and Counsel on May 15, 2008. The transfer of the database to Mr. Towey was discussed. The Department agreed to transfer the database to Mr. Towey once the additional information had been received by the Department from DOC. Mr. Towey stated that he would ensure compliance with the requirements promulgated by the Virginia Information Technology Agency (“VITA”).

On May 16, 2008, Mr. Benjamin met with members of the Governor’s staff and discussed a tentative Subcommittee plan to use volunteer Virginia attorneys to make the notifications. The staff members found nothing objectionable about the proposal.

All members of the Subcommittee were present at the June 4<sup>th</sup> meeting. The Subcommittee unanimously approved a Mission Statement.<sup>3</sup> The Mission Statement emphasizes that, in carrying out the General Assembly’s requirement, the Subcommittee will “endeavor to ascertain the manners of identification, location, and notification that are most effective, efficient, and aimed at achieving the ends of justice.”

Representatives from both the Department and DOC were in attendance. The Subcommittee was informed that there were 2,166 individuals for whom evidence had been located in their files. Of this number, the Department had “verified” convictions for 941. It was these 941 individuals whose information was submitted to DOC in furtherance of obtaining additional information pertaining to identity and location. Of the 941, there were 564 matches in the system (60 of which did not have addresses), 330 non-matches, and 47 matches listed as deceased. A DOC representative said that some of the individuals had multiple addresses because they had emergency contact information listed, such as family members, and that much of the information was dated. It was reported to the Subcommittee that DOC was currently conducting a review of its paper records to refine the results of the initial search of its system.

Mr. Towey asked for a timeline for the completion of the work being conducted by DOC. A DOC representative replied that the initial assignment (the search of the system) was completed on May 28, 2008, and that the review of the paper records was expected to be completed within another two to three weeks, placing the estimated completion date at June 25, 2008.

A specific Notification Plan was proposed. Mr. Towey said that he would ensure implementation within the confines of VITA requirements. At that point, Crime Commission

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<sup>3</sup> The Mission Statement is attached as **Attachment C**.

staff would put the information in a usable format to be broken down into categories for assignment to pro bono attorneys. Mr. Benjamin explained the nature and importance of pro bono service and an attorney's training and experience in providing notice. He explained that the volunteer attorneys would be responsible for locating the individuals, verifying conviction information, and making the required notification. The volunteer attorneys would report back to the Subcommittee on the status of each individual and their notification. It was also discussed that it would be beneficial to have a master list of the attorneys and the names of the individuals assigned to them in order to ensure that all individuals on the list were located and notified.

The Subcommittee was presented with a proposed notification letter for their consideration. Mr. Towey moved to adopt a wording amendment proposed by Mr. Benjamin as well as the addition of contact information. The notification letter, as amended, was approved unanimously.<sup>4</sup> Mr. Benjamin moved to approve the course of action discussed. The Notification Plan was approved unanimously.<sup>5</sup>

#### **IV. Implementation of Notification Plan**

##### **A. Pro Bono Legal Assistance**

Mr. Benjamin met with the leadership of the Virginia State Bar, and of each of the other Virginia statewide bar associations.<sup>6</sup> He requested and received their assistance in recruiting attorneys to perform, for the Board, this pro bono project. The efforts of the State Bar and the other bar associations were immediately successful. The response to the solicitations published in the Bar's official publications has been overwhelming. Well over 100 attorneys from across the state have volunteered to locate, verify, and notify the people who must be reached. The volunteers include large law firms in Richmond and Northern Virginia, such as Hunton & Williams, McGuire Woods, Troutman Sanders, LeClair Ryan, Covington & Burling, Dewey & LeBoeuf, and Kelley Drye. Individual volunteers include retired judges, Deputy Commonwealth's Attorneys, law professors, and attorneys with active civil and criminal defense practices.

These attorneys have made room in their practice for this work. They are ready to begin.

##### **B. VITA Requirements and Policies**

Mr. Towey arranged a meeting with officials from VITA on June 19, 2008, to ensure compliance with information technology security requirements. Present at the meeting from the Subcommittee were Mr. Towey and Mr. Benjamin. Present from VITA were Peggy Ward, Chief

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<sup>4</sup> The notification letter is attached as **Attachment D**.

<sup>5</sup> A verbatim transcript of the entire June 4, 2008 meeting of the Subcommittee on the Notification of DNA Evidence is attached as **Attachment E**.

<sup>6</sup> Virginia Association of Black Women Attorneys, Virginia Women Attorneys Association, Hispanic Bar Association, Asian American Bar Association, Virginia Association of Commonwealth's Attorneys, Virginia Trial Lawyers Association, Virginia Bar Association, Virginia Association of Defense Attorneys, Old Dominion Bar Association, Local Government Attorneys of Virginia, Virginia Real Estate Attorneys League, and Virginia Creditors Bar Association.

Information Security Officer; Cathie Brown, Deputy Chief Information Security Officer; and Michael Watson. Also present at the meeting were Stewart Petoe, Director of Legal Affairs at the Crime Commission, and Charles Quagliato from the Office of the Attorney General of Virginia.

The VITA officials advised that the database must be encrypted in order to be transferred from the Department to the Crime Commission. After discussing the requirements for transfer beyond the Crime Commission to licensed attorneys, it was resolved that the most prudent and efficient course of action would be to first review the information in the database to identify sensitive information that was not essential for the identification and location of the individuals. This could then be extracted from the information that would be disseminated beyond the Crime Commission. Once any non-essential information was extracted, it was determined that the VITA officials would then be consulted with regard to the requirements, if any, pertaining to the remaining information.

### **C. Progress on Identification, Location and Notification**

To date, the transfer of the database from the Department to the Crime Commission has not occurred.<sup>7</sup> As a result, no progress has been made on the Subcommittee's responsibility to identify, locate, and notify the individuals for who evidence exists.

Immediately following the meeting with the officials from VITA on June 19, Mr. Towey began to request the necessary information from the Department. The next day, by letter dated June 20, 2008, the Board Chairman requested that Mr. Towey cease implementation of the Notification Plan and wait until the August 6 meeting of the Board, at which time Mr. Towey should present the "proposal" to the Board.<sup>8</sup> Mr. Towey responded to the Board Chairman, stating, in part, "I do not understand you to be directing the Subcommittee to halt its work, because such a directive would be in the name of the Board without prior authority."<sup>9</sup>

Continued attempts to obtain notification information from the Department were unsuccessful.

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<sup>7</sup> Despite the fact that the Board Chairman ordered Mr. Towey, not the Department, to take on the task of ensuring that laws pertaining to the confidentiality of information was adhered to, and despite the fact that a plan was arranged at the meeting with VITA to ensure compliance regarding sensitive information, the Department continued to cite concerns over sensitive information as a reason for refusing to transfer the database. In addition, pursuant to Virginia Code § 19.2-389(1), even criminal history record information can be disseminated to "criminal justice agencies", the definition of which expressly includes the Crime Commission.

<sup>8</sup> Attachment F

<sup>9</sup> Attachment G.



ITEM 408.	Item Details(\$)		Appropriations(\$)	
	First Year FY2009	Second Year FY2010	First Year FY2009	Second Year FY2010
<b>Department of Forensic Science (778)</b>				
408.	Law Enforcement Scientific Support Services (30900) ....		\$37,209,975	\$37,209,975
	Biological Analysis Services (30901) .....	\$10,535,958		\$10,535,958
	Chemical Analysis Services (30902) .....	\$8,177,068		\$8,177,068
	Physical Evidence Services (30904) .....	\$9,386,087		\$9,386,087
	Training and Standards Services (30905) .....	\$724,133		\$724,133
	Administrative Services (30906) .....	\$8,386,729		\$8,386,729
	Fund Sources: General.....	\$35,703,991		\$35,703,991
	Federal Trust.....	\$1,505,984		\$1,505,984

Authority: §§ 9.1-1100 through 9.1-1113, Code of Virginia.

A. Out of this appropriation, \$219,000 the first year and \$219,000 the second year from the general fund shall be used to fund payment in lieu of taxes made to the City of Richmond for the agency's central laboratory.

B. The Forensic Science Board shall ensure that all individuals who were convicted due to criminal investigations, for which its case files for the years between 1973 and 1988 were found to contain evidence possibly suitable for DNA testing, are informed that such evidence exists and is available for testing. To effectuate this requirement, the Board shall prepare two form letters, one sent to each person whose evidence was tested, and one sent to each person whose evidence was not tested. Copies of each such letter shall be sent to the Chairman of the Forensic Science Board and to the respective Chairmen of the House and Senate Committees for Courts of Justice. The Department of Corrections shall assist the Board in effectuating this requirement by providing the addresses for all such persons to whom letters shall be sent, whether currently incarcerated, on probation, or on parole. In cases where the current address of the person cannot be ascertained, the Department of Corrections shall provide the last known address. The Chairman of the Forensic Science Board shall report on the progress of this notification process at each meeting of the Forensic Science Board.

## Forensic Science Board Meeting – May 7, 2008

### - Transcript of the Authorization of the DNA Notification Subcommittee -

**Mr. Benjamin:** I would like to make a motion to form a subcommittee and to name James Towey the chairman of the subcommittee. I ask that James Towey appoint the other members of the subcommittee and to perform the duties that the General Assembly has directed that the Board discharge. Pete correctly advised us at our last meeting that the type of work that this budget language requires is not the job of scientists or the Department of Forensic Science. He said that and I agree whole-heartedly They aren't investigators. This task will require investigatory and leg work. It is for good reason, Mr. Chairman, that the General Assembly directed that this Board do these things and not the Department of Forensic Science and that was expressly considered. And so, it is our responsibility, and I also note that there is no money attached to it. That is another thing; I don't want to ask them to do something to which funds weren't allocated. I suggested James because he and his staff are accustomed to working with DOC. That component won't be difficult at all. Not only has DOC been instructed to assist the Board in this, but in the legislative process they assured me, and others, that they were happy to assist in this. Also, James is accustomed to working with the Virginia State Police, and with the sheriffs, and with all of the law enforcement community and so I think he would be a natural as a Chair of this subcommittee. As part of this motion, I would ask that the Department be asked to provide their database to James so that he can send this then to discharge responsibility to the Department of Corrections and do what further work is necessary

**Chairman Bono:** Does this have to be a motion or can I appoint James the Chairman of the Subcommittee?

**Director Marone:** Mr. Chairman, I just have one concern for you, I just want to make sure I'm covered. We do have IT security that we have to comply with, and as we give things to corrections now, it's hand carried, from us to them, some of this data is encrypted because it does have all the personal information, social security numbers and so forth, and I just want to make sure I am not stepping out of bounds with complying with IT security We've gone through a very involved mating dance with corrections to get this data correct and I don't want to step out of bounds with that, so that they are satisfied with the integrity of their data and we are satisfied with ours that we are within bounds of that. I have no problems with that, I just want to make sure.

**Chairman Bono:** I think that the way the Commonwealth works, those issues can be addressed to make sure that the legal issues regarding confidentiality are adhered to. James, would you be willing to take on that task?

**Mr. Towey:** Sure.

**Chairman Bono:** I would like to appoint you as the subcommittee chair person, to be able to meet the requirements in the budget language regarding notification.

**Mr. Towey**: How many people will be appointed to this subcommittee?

**Mr. Benjamin**: I suggest leaving that to James.

**Chairman Bono**: That is what I was going to suggest, however many it would take, as long as it's not two or three hundred. .. and would you be able to report back to us then in August on the progress of the subcommittee?

**Mr. Towey**: Absolutely, I would presume that at every meeting there would be an update.

**Chairman Bono**: Then, my second presumption is that you will then coordinate in terms of these confidentiality issues with department counsel to make sure that we are following Commonwealth law

**Mr. Fisher**: Who are the members of the subcommittee? From the Forensic Science Board or outside of the Board?

**Chairman Bono**: I would suggest that it be Board members however, if there's expertise that is required outside of the Board

**Mr. Towey**: I don't think it would require anyone outside of the Board.

**Chairman Bono**: That's your call.

**Mr. Benjamin**: I agree with giving him the discretion to consult outside experts. I would ask that you expressly acknowledge that discretion.

**Chairman Bono**: Ok. I would like to put that on the record then, if there is a need for outside expertise, i.e., expertise that lies outside of the people that are on the board, you are authorized, I think I can authorize that. I authorize you to select whomever you believe is most appropriate to fulfill requirements of what appears in the budget. Now that leads to another question: in terms of documentation that can be available to the Board before our next meeting, in the way of an update so that we have a chance to digest this, would you be able to make something available to the Board through department counsel so that if any questions arise regarding where you are in the process we will know ahead of time?

**Mr. Towey**: Sure.

**FORENSIC SCIENCE BOARD  
DNA NOTIFICATION SUBCOMMITTEE**

**MISSION STATEMENT**

Budget Item 408(B) of the recently enacted budget for fiscal years 2009 – 2010, mandates that the Forensic Science Board (“the Board”):

- Ensure that all individuals who were convicted due to criminal investigations for which its case files for the years between 1973 and 1988 were found to contain evidence possibly suitable for DNA testing, are informed that such evidence exists and is available for testing. Specifically, the Board shall:
  - Prepare two form letters, one to be sent to each person whose evidence was tested, and one to be sent to each person whose evidence was not tested.
  - Send copies of each such letter to the Chairman of the Forensic Science Board and to the respective Chairman of the House and Senate Committees for Courts of Justice.
  - Report on the progress of this notification process at each meeting of the Board.

At the May 7, 2008 meeting of the Board, the DNA Notification Subcommittee was established for the purpose of carrying out the requirements of Budget Item 408(B). In fulfilling the above-noted requirements, the Subcommittee shall endeavor to ascertain the manners of identification, location, and notification that are most effective, efficient, and aimed at achieving the ends of justice. While the Subcommittee must make best efforts to successfully complete its mandate, it will also make best efforts to respect the privacy of the individuals being identified, located, and notified. The responsibilities and functions of the Subcommittee will cease upon the completion of the mandate imposed by Budget Item 408(B).

# NOTICE

DEFENDANT

CASE JURISDICTION:

COURT CASE NUMBER:

VA DFS CASE NUMBER.

OFFENSE DATE:

Court records indicate you were convicted of a crime in the listed case.

This letter is to notify you that the Virginia Department of Forensic Science has located physical material in the Department's case file that is available and possibly suitable for DNA testing.

DNA testing of the physical material may provide evidence that is relevant to your guilt or innocence of the crime.

The physical material [is / is not] being subjected to DNA testing at this time.

If you are not the individual described in this letter, please contact [name of pro bono attorney] at [contact information].

**DNA Notification Subcommittee**  
**June 4, 2008**  
**- Transcript -**

**James Towey:** I would like to thank everyone for coming. We have a small group here for a reason, and that's because we're a subcommittee that has a limited task to perform. At the May 7<sup>th</sup> meeting of the Forensic Science Board, the Chair, Joe Bono, asked that I form and chair a subcommittee to implement the requirements of Budget Item 408(B), which requires the Board to insure that all individuals convicted of crimes for which the case files at DFS between '73 and '88 were found to contain evidence that is possibly suitable for DNA testing are informed that such evidence exists and is available for testing or has already been tested. The Board has also been required by this budget language to send copies of every notification letter to the Chairman of the Forensic Science Board as well as to the Chairman of both the House and Senate Committees Courts of Justice. Lastly, the budget language asks that we report on the progress of this notification process at each meeting of the Board. I believe the next meeting of the Board is August 6<sup>th</sup> and we will be issuing a report on what has transpired between May 7<sup>th</sup> and August 6<sup>th</sup> at that time. As I said, we have a small subcommittee here because we are dealing with a very specific task. The members that were selected were selected because of what they can bring to the table with regard to what needs to be accomplished. The people that are serving on the subcommittee are people who, because of their positions or their experiences, will be useful in the task that we have to carry out. The members include me, from the state Crime Commission, Lt. Colonel Robert Northern, Steve Benjamin, and Dr. Leah Bush from the Office of the Chief Medical Examiner. The Crime Commission is involved here because we have some resources that can assist in this endeavor and one of our staff members, Christina Barnes, our methodologist, is going to be very instrumental in helping us to organize the material that we have and to breakdown it down into a format that we can use. Also, the Crime Commission will be responsible for the various notifications that go out to the affected individuals. Lt. Col. Northern is here because certainly the State Police is an agency that has the capabilities that will help us to possibly identify and locate some individuals that there may be trouble with locating. The same goes for Dr. Leah Bush, from the Office of the Chief Medical Examiner. There are resources that she has that she can help us out with, as far as individuals that have been in DOC and that might be deceased at the time. Steve Benjamin is a member because of his very close ties and excellent working relationship with the State Bar. We're going to certainly need volunteers at some point to help locate and identify any individuals who we are not able to identify and locate through other means. That is really our primary function here, identifying, locating, and then notifying the individuals that are affected. After that, the subcommittees' task will be complete.

(Dr. Leah Bush enters)

**James Towey:** Dr. Bush, I was just giving an introduction of what we are doing and why each subcommittee member was selected based upon what resources they can bring to the table. That is why we have this composition of a subcommittee. It is rather small and I think it will work well because it is a task oriented subcommittee. Let's get this job done effectively and efficiently and let's achieve justice as expeditiously as we can.

**Steve Benjamin:** I think you have summarized a lot; maybe we can review the Mission Statement.

**James Towey:** You have the handouts. I think it is always good to have Mission Statement to make sure there is no uncertainty as to what is intended. The first part of the Mission Statement is simply a reflection of the budget language. I will read you the second paragraph that states:

At the May 7, 2008 meeting of the Board, the DNA Notification Subcommittee was established for the purpose of carrying out the requirements of Budget Item 408(B). In fulfilling the above-noted requirements, the Subcommittee shall endeavor to ascertain the manners of identification, location, and notification that are most effective, efficient, and aimed at achieving the ends of justice. While the Subcommittee must make best efforts to successfully complete its mandate, it will also make best efforts to respect the privacy of the individuals being identified, located, and notified. The responsibilities and functions of the Subcommittee will cease upon the completion of the mandate imposed by Budget Item 408(B).

I think that the most important part is that our function ends when the last notification letter goes out. At this time I move that we adopt that mission statement.

**Steve Benjamin:** I second that.

**James Towey:** We'll take a vote to adopt the mission statement

**Steve Benjamin:** Are there any questions or discussions?

**James Towey:** All voting in favor of the mission statement say "aye," All those against adopting the Mission Statement please voice your opposition by stating "no."

(Mission Statement approved by unanimous vote)

**James Towey:** The Mission Statement is adopted. Regarding the procedure for the identification and location of persons that are going to be notified, and this is what we wanted to accomplish today, I think this is going to be a pretty short meeting. I think that what I'd like to do here today is basically lay out a plan for how we can achieve what we need to do to get this task done. This is a fairly limited task; there may be some glitches along the way which we can deal with when we come to them. At this point, we need to discuss what our general game plan is and what the roles of different agencies are. I met with Director Marone and Michelle Gowdy and they were kind enough to show me some examples of responses that they had received from clerk's offices and commonwealth's attorneys and it was certainly helpful to see some of the difficulties that may be encountered in trying to properly identify and locate individuals. It is my understanding that DFS has been maintaining a database with the information that they have received and that they have been working with the Department of Corrections to obtain any of the information that

DOC has that can be added to that database. It was hoped that that would be completed by the end of May Pete do you know if that has been completed by now?

**Pete Marone:** I just got the last memo from Rick yesterday, or the day before yesterday

**DOC Representative:** We have provided to forensics several files of our investigation. With our files we had 941 records. Of those we had 564 matches in our system. Of those 564 matches we did not have addresses for 60 of them, so that is really 504. There were 330 non-matches in our system and there were 47 of these suspects that were listed as dead in our system. We provided that information to forensics and we are doing one last review. Our corrections department started using a new system back in the mid 90's, so prior to that they had paper records so for some of these non-matches we're actually doing a sample of the data and going back to the field and seeing if they have any paper records at all on those non-matches. So we are hoping, based on the sample, we've done about 2-3 weeks of conferring, we'll know whether or not we have any additional data. If it looks good then we'll keep pursuing it, if it doesn't then we'll let forensics know and that would be the end of it.

**James Towey:** You said you received 941?

**DOC Representative:** It was a total of 941 records because again there were a number of records that included victims in them and we did not include that data.

**Pete Marone:** James I think you may be confused. You are thinking about the 2,000 number or the 1,000 number. The 2,000 is all the individuals that had evidence and a named individual. Now you call off those that were convicted and that drops the number down significantly to roughly over 1,000 people.

**Lt. Colonel Northern:** So the 940 were convictions?

**Pete Marone:** Yes, and I would add that the addresses that we are finding, some of these individuals have multiple addresses because it's not just Joe Smith's address. The majority of them are emergency contacts, family members, cousins, brothers, sisters, uncles and a lot of them are multiples.

**DOC Representative:** He is absolutely right, a lot of that is family information, last known contact, that kind of stuff. As well as the fact that we gave a last update, meaning when was the last time this addresses was modified in the system, and some of these go back to the 70's, 80's, early 90's. Some are in the 2000's but there are a lot of older records.

**James Towey:** So just for clarification, the number that we are dealing with, that this subcommittee has to deal with is not the 2,066

**Pete Marone:** I'll give you a hard number; my guess is that it's closer to 1,000 than 2,000. It's those individuals that are convicted.



**James Towey:** Ok, so that number is substantially lower than I had originally thought. At the last meeting I thought we were dealing with 2,000. So because the 2,000 were not convictions those were just people for whom evidence was in the file.

**Pete Marone:** Cases where we had evidence in the file and a named suspect.

**Steve Benjamin:** On a request for a laboratory examination, on a certificate analysis there will be a data block for a suspect. That doesn't necessarily mean that person was convicted or that there was any conviction in the case. It is just a data field that is filled out when a request for laboratory examination is made or when a certificate of analysis is returned, so apparently the 2,000 number are those situations where evidence was discovered in a file and the file also reflected that there was at least a suspect. The next question for the purposes for fulfilling this mandate was to determine the cases where there was an actual conviction because it's the convicted people that we required to notify

**James Towey:** Of the approximately 1,000, I think the number you gave was 941, there were 564?

**DOC Representative:** We have 564 matches in our system but of those, 60 we did not have addresses for. That would give you about 504.

**James Towey:** For those 60 that you didn't have addresses, was there still emergency contact information?

**DOC Representative:** No sir, there were no addresses in our system at all for those. So while we had the offender in the system, there were no addresses. Again, this data goes back some.

**Steve Benjamin:** The figure for non-matches, that doesn't mean they weren't convicted, that only means that they weren't received by DOC.

**DOC Representative:** The non-matches were not in our system. That's why we are going to go back and do a sampling and see if there are any paper records out there.

**Steve Benjamin:** I see, so they could have been received by DOC but for whatever reason not be part of your system.

**DOC Representative:** That is correct.

**James Towey:** As far as the timeline goes, about how long do we think it would be for that information to be transferred to DFS?

**DOC Representative:** I'm sorry, could you ask that again?

**James Towey:** Do you have an estimation on how long it would be before.

**DOC Representative:** We completed this assignment on May 28, I did just send them an updated status report for clarification this week, but we have completed this initial analysis of giving them the addresses and are doing this final paper review to see if there is any additional address information on the paper records. Now, it's going to take at least 2-3 weeks to do that because you know, it means calling the office and having them literally go back and see if they have these files. There are some record retention issues.

**James Towey:** When I had discussed with Pete and Michelle a couple of weeks ago, I think that we were in agreement that there is no point in transferring any data until it had reached a good stopping point. We thought that good stopping point would be when all that information was received by you and then incorporated into their data so that we weren't taking something that was in the middle of the process that would cause additional confusion. Just as a side note, 2-3 weeks is probably sufficient because the one thing I am hoping to do in the next week or two is to meet with officials from VITA to make sure that we are doing everything that we need to do under the Virginia Information Technology Act. As that meeting may not take place for another week or so, three weeks is not a problem.

**DOC Representative:** The chances of these paper records are fairly slim. The other address records they've already got, they've given them to them so they've got that. The only thing, if you don't mind me recommending we put in our status report that I would consider doing some VCIN checks on them, they might have better addresses on them than DOC has. The arrest records or whatever ...

**James Towey:** And that is why the State Police is here on the subcommittee. Once we take the step of sharing the DOC data with DFS current data, then I would suggest at that point, after I communicate and figure out our obligations under VITA, it would be at that point that we transfer the data and information that DFS has to myself and then we could share that with State Police for them to run that through their system to see if there is additional information we could obtain.

**Dr. Leah Bush:** What I was going to say was that unfortunately a lot of the folks that end up in DOC are an at-risk population and often end up in our shop because of at risk behavior. We have databases in a computer that go back probably to the late 80's or so and then it's all paper records. I don't know that we could hand search paper records but we could certainly call out everybody that we find that has vanished into thin air, as long as we have some identifying information, the name with a birthday or a social security number or something like that, then we could probably search our database and pull up all the "John Allen Smiths" and see if any of their information matches any of your missing DOC people. We did a project a few years ago with the State Police where we printed everyone who came through there; we printed their fingerprints and submitted them to the State Police to run to see if they were wanted or if their fingerprints popped up. Unfortunately, you would think we would get some hits of unidentified people, but we really didn't get much, but I am certainly willing to give it a try because it is the same population that is at risk of ending up at the Medical Examiners Office that end up in DOC so we can do that and try to see if any of our deceased people have been reported. Obviously, that is going to be an unexplained natural or unexpected natural death; you know if they just drop dead at home and they are a fairly young person, any violent death. It is not going to capture

anybody that dies in the hospital from cancer after they've been released from jail. I can check with Janet Reyney in the Vital Records Department and see, because they keep all the vital records, not just the OCME death certificates. They keep our red border certificates but they also keep green border certificates as well, the natural death certificates and there may be a way for them to search. I don't know how extensive their database is or how far it goes back or what they've got in the computer. I could certainly check with Mrs. Reyney, she is the vital registrar for the Commonwealth and I could check with her and see if there is some way we could search these "unknowns" through the red borders and green borders and see if any of them pop up and again on the death certificate it has very specific identifying information; date of birth, social security number, last known address, but the things we are going to key on are the social and the date of birth to try to make sure we have the correct person. I will check with Mrs. Reyney tomorrow and see if that's something we can do once we cull it down to the ones we have no idea how to find and see if they have passed away

**Steve Benjamin:** Colonel does the State Police component make sense to you?

**Lt. Colonel Northern:** Absolutely, I was sitting here thinking about DMV checks, I mean if you are looking for current addresses, DMV is going to be as current as anybody I had some concern when you said many of the address are going back to the 70's and 80's, they probably no longer going to have an address for a lot of these folks because they are usually a very transient population.

**Steve Benjamin:** Who would accomplish the DMV checks?

**Lt. Colonel Northern:** We should be able to do that as well, I've got to make sure we are in compliance with State Code, as long as it is for law enforcement purpose we should be ok, but we need to verify that.

**James Towey:** Again, this is why these individuals are on the subcommittee because they bring this intelligence to the table and I think that...

**Steve Benjamin:** I am just here to fill out the forms.

**Dr. Leah Bush:** You are our token, non-state government person right?

**Lt. Colonel Northern:** There are other databases, such as the Employment Commission, those type of databases tend to be very helpful.

**James Towey:** I think that what we are hearing here is that the game plan is that when the information is obtained from DFS after combining their information with DOC and after we make sure we are doing what we need to do under VITA regulations and policies, then we exhaust what we can do via the State Police, DMV, OCME, and make sure we've done all we can do to obtain any available information through those agencies. Now, at that point, the planned course of action would be to take that information and to have Christina over here organize it. I understand that it is already fairly well organized by jurisdiction but we'll put it in a format that we can use and this will also be after conferring with VITA. We will put it in a

format we can use, that will contain the information and that will have the certain location or identity of individuals or information that can assist with the next step in locating individuals who are being difficult to find. I think that at that point we would break down the list into groups of 15 or 20 by jurisdiction and that is where we get Steve, with his contacts with the Trial Lawyers Association and the State Bar and we graciously receive the help of Shawn Armbrust, from the Innocence Project, who is willing to aid in getting volunteer attorneys to help us by putting their feet on the ground. If there is any difficulty in identifying or locating someone, a lot of times, simply putting feet on the ground by a local attorney who can easily get to the courthouse to check through the files can help. I would suspect that there is more information in there than some clerk's offices may provide in response to a query. One example I always use from the AG's Office is that one case we had was a no go unless we found an essential witness and the essential witness had fled Virginia and we found him on a dude ranch in Montana. These days, with the technology as it is, there are ways to try and locate people and I think that is something that can be accomplished. Again, I will be conferring with VITA to make sure that everything that we are doing is appropriate every step of the way, but I think that the idea of having volunteer attorneys do this should help to drastically reduce the amount of individuals who are still out there as being unidentified or whose locations have not yet been ascertained. We can really minimize the amount of people that we are dealing with. Steve, I didn't know if you wanted to talk about your plan for the volunteers.

**Steve Benjamin:** I think the plan makes sense and we have received the offer of assistance from the Capital Region Innocence Project and they are very accomplished and working with generally large firms that have the resources and the staff to do extensive pro bono work. All attorneys licensed in Virginia are obligated to perform pro bono legal work and this is the type of work that any lawyer in Virginia and any of the established firms would be happy to assist the state with. So the plan that you have put together, James, contemplates our using the pro bono assistance of attorneys of obviously good reputation within the state and asking for their pro bono assistance to accomplish three essential tasks. One is to find these folks who have been convicted and for whom evidence exists that might be suitable for testing. Hopefully, most of that will have already been accomplished by DOC, State Police, the Office of the Chief Medical Examiner, but those who have not been located, we will ask that the attorneys make a final effort to locate these folks by doing, essentially investigative leg work. We'll ask them also to verify that the people we have identified as the people convicted in these cases are in fact, as best as they can determine, the people who were convicted in these cases. Once they have made reasonable efforts to make this verification, we will ask that they notify these individuals by sending the letter that is next on the agenda. The board has been asked to draft a letter that we are going to get to and then to ensure that this letter is sent to the individuals. Your plan contemplates attorneys, once they find and verify identities, that they then notify them and their task would be to send the letter that we approve, which is coming up next. I think that it would make sense for this subcommittee to reach out to the major Bar Associations to advise them that we are interested in pro bono assistance and I would also, of course, like the help of the Innocence Project which has probably more extensive pro bono contacts. I think that is a good plan.

**Dr. Leah Bush:** Quick question, is there going to be anybody tasked with just what I often do when I am looking for somebody, which is just logging on the internet, google, hit people search

and put this information there and just see who pops up. Usually, they give you an age of the person. It's "Joe Smith" who's 52 and lives in Danville, Virginia. Well, if they are the wrong age then you can just cross him right off the list. Is there going to be anybody maybe in VITA that would be tasked with this or would it be the pro bono guys?

**Steve Benjamin:** James thought you might have the time (laughter). That is really the sort of thing the attorneys are going to be doing.

**Dr. Leah Bush:** When we send the letters, are they going to be registered mail or somehow return receipt so we know that the correct guy got it and it wasn't just delivered to some mailbox and then - oh well.

**Steve Benjamin:** That is a very good idea and I am hoping that the pro bono attorneys would be happy to take on that expense.

**Pete Marone:** That is one question that I had when I was looking at the notice was once we make this notification would it not be prudent to make sure that the person we are talking to is in fact the right person and not a brother or relative?

**Steve Benjamin:** Exactly right, Pete.

**Dr. Leah Bush:** Well, since we were going to verify that we had the correct person, I guess I was just thinking that we should be sure the mail got to them so that we know the person that is signing is the person that is supposedly the convicted person.

**Steve Benjamin:** That's why I thought it made all the sense in the world to let the volunteers worry about that and they will have a select number for each person.

**James Towey:** Each attorney will have a small number of people and I imagine a lot of these attorneys might be associated with larger firms that have some of this new software that enables them to be more accurate than a Google people search. We are trying to do this in a way where we are using the volunteers' resources because there has not been any money set aside for this project. What they get out of it is their pro bono work.

**Steve Benjamin:** This is prized pro bono work. To be able to do pro bono work, first for the Innocence Project, which has a tremendous reputation, and second for the State of Virginia. This is pro bono work which people will compete to do.

**Dr. Leah Bush:** Do they get points in heaven or some form they fill out to earn points?

**Steve Benjamin:** Well, there is a very complex calculation for how many points in heaven you get.

**James Towey:** They get less time in Hell.

**Pete Marone:** For clarification purposes I just want to be straight about the volunteer attorney team. So the real function of the Board will be to, through the various sources, come up with the most current address we can and locate the individuals. Then decide which two forms of letters will be sent. I would assume, prepare those letters and then hand those letters off to the volunteer team who would then take the responsibility of sending those letters out by certified mail or something. Then that would be their function, trying to locate these folks and making sure they are the one's who receive these letters.

**James Towey:** And when we have the certified mail receipt and know we have the right person, that is when we can report back to the Board that these individuals have been notified and these are the one's that have still yet to be notified.

**Pete Marone:** Question, once we have identified the individuals, and by the way, that last step about the volunteers is my one concern about IT security and confidentiality and so forth with the sensitive data with the social security, date of birth and all that, you have these people's lives. That would be my one question for James to ask VITA. DFS has agreements with DOC to get this done and we both signed those agreements and State Police and we have shared data, such as the sex offender registry. Once you get to the next level, where it is outside the government, we need to be real careful with the sensitive data. My question would be, after we have those volunteers find that data, and this is a question, I don't know, wouldn't it be better then to have that data then go back to James and the Crime Commission and then the Crime Commission send those letters out. So 1), you have all that data in one place, and 2), you are making sure that it's all copasetic once they've identified them you are then keeping track of it and you, the government entity, has control over that notification.

**James Towey:** Well I think the data would be sent back to the Crime Commission because we would be doing the notification letters with that information..

**Pete Marone:** No, no, Steve said that you were going to get the letters and the attorneys were going to send them out. My question is, I feel more comfortable if they gave you the data and you sent it out. You send it out, as the Board notifying, rather than somebody else.

**James Towey:** Well, I think that certainly we want to make sure that the process we are implementing here is legally sound and the plan that we are proposing today is the one that we think will be effective and efficient. Having said that, I do plan on meeting with VITA officials and the reason why I need to meet with VITA officials is that I realize that it's not possible to ask them a generalized question and get a generalized response because every step of this procedure, and there are a good four steps, are involving different agencies and different individuals and at each step, different information. What I have to do at my meeting with VITA is ask detailed questions and get detailed responses and, obviously, if we were to go ahead and implement the plan and there was a portion of it that was in violation of VITA, we would defeat the whole purpose of what we are doing.

**Steve Benjamin:** There won't be any part of it that would be in violation of VITA, you will make sure of that. I think one of the other considerations is that the Crime Commission does not have the extra resources to deal with the potential influx of inquiries that these letters might

cause. You don't have the staff or the manpower to start receiving calls or letters from inmates with their many questions, this makes it more manageable. The Crime Commission also cannot form an attorney client relationship.

**Lt. Colonel Northern:** The other concern to, along with the VITA privacy concern, is that I've got to make sure with our law enforcement databases, that we can then turn that information over to outside folks that would have that information contained in this database and make sure they are entitled to that by the Code. That is a concern. We'll check on that to make sure.

**James Towey:** Well that is the generalized plan. The next order of business, you all can take a look at the proposed notification letter. It is basically one letter that can be two versions by the modification of the last sentence.

**Steve Benjamin:** I'm already suggesting a change to this. In the second paragraph, the second paragraph is just one sentence. After the words "that is" let's insert the words "available and possibly suitable." So it will read, "This letter is to notify you that the Virginia Department of Forensic Science has located physical material in a department case file that is available and possibly suitable for DNA testing."

**James Towey:** Cross out the rest of the sentence.

**Steve Benjamin:** And what I've tried to do is pair it as precisely as I can with the legislative language.

**Lt. Colonel Northern:** The other thing that jumps out at me looking at this, if I were to receive one of these letters and it was obvious to me that I was not the person listed in the case identified in the letter, and then I would want to reach out to somebody to let them know that, should we include information for a contact person or place?

**Steve Benjamin:** That is a very good idea and I think that's what makes the most sense is to talk with the volunteers attorneys about their willingness to receive questions and for example, if asked to explain the Virginia law as to the possible right to testing.

**Lt. Colonel Northern:** I'm thinking of those folks that shouldn't get these or are not the person we are looking for. .. (tape cuts off and switches to next side) .. that's 40 volunteers, and each one of those volunteers has ten people and each one of those ten people are going to talk to their person and between the 40 volunteers they are going to get 40 different assessments or interpretations as far as what their options are; as opposed to funneling it through something central that you could then sort back out somehow. We need consistency. We need it all to be done the exact same way, so that no one person is given any more information than another. Consistency has got to be the key for how we address these.

**Steve Benjamin:** Well the consistency lies in the law. The law in Virginia is detailed, specific, and complex about who has the right to request testing and it is there that the attorney has the role to play. If someone wants material tested then theoretically they can go to any Virginia attorney and ask what their rights are under Virginia law. To the extent that there are differences

in the quality of legal advice that is given, that is the reality of the system, but the law is the law and there is and should be only one correct answer and we really can't improve on that.

**Lt. Colonel Northern:** I would feel better and I would even volunteer our agency, you know we are staffed in the Fusion Center 24/7 and we've got analysts down there, because there would be some questions we would probably want to ask that person. "Do you know this individual?" or maybe some follow-up questions just to make sure it's not who we are looking for. If we ascertain that they do have some legal questions, we could certainly provide them with a number or an organization or a group or whatever, as far as legal advice, because we would not get into that anyway, that's not our business. We could refer them to a number or a contact as far as legal advice goes.

**Steve Benjamin:** So your preference would be that someone in prison received this letter, he maintains his innocence, and he wanted the material tested, you prefer that he be directed to the Virginia State Police?

**Lt. Colonel Northern:** Well my concern is for those people that we've made a mistake, we sent it to the person but it is not the person we intended to send it to. They would have a number to call and say "hey, I am not *this* Joe Smith."

**Dr. Leah Bush:** We could put that in the letter contact information saying, "if you are not the person listed in the above case please contact so and so." This would let so and so know that we need to keep looking for John Q. Smith.

**Lt. Colonel Northern:** That's more of my concern.

**Steve Benjamin:** That is something we would require of the volunteer attorneys. It only makes sense, quite frankly, because if they get a letter back saying "I am not the person," then we have failed to ensure that the correct person was notified. That attorney would have been assigned that name, John Doe, here is this name, here is this case, and as part of the notification procedure we need to verify that this is the correct John Doe who was convicted. After he has done all his work to verify it and the letters go out, if he then gets a response from John Doe that says "I am not the person you are looking for," then the attorney needs to take the steps to find who the correct John Doe is. It would be appropriate for the attorney to ask the subcommittee or your agency for some additional assistance but it is his job, when it finally gets to him, is to verify that this is the correct person.

**Lt. Colonel Northern:** But that information ultimately needs to get back to the sources that provided it, whether it was a DOC address, a DMV record, a VCIN file, we would need to know that so that we could go back and research to see what the problem is, because obviously someone has some incorrect information that would need to be updated. It's got to get back to those individuals that provided the information.

**James Towey:** Couldn't the incorrect information though have also come from the attorney level, from those that were not more thorough. It might be best to have them contact the attorney that was responsible for sending their letter out. Then the attorney can see if they have made a



mistake in their search, if it not something they are able to remedy then they can go back and see where the mistake had come from before it got to them.

**Lt. Colonel Northern:** I know DOC would be interested to know if they provided incorrect data.

**Dr. Leah Bush:** Would all the pro bono attorneys be returning all this stuff to us in some form or fashion?

**Steve Benjamin:** They will report on the status of each letter they send. As to whether it was sent to wrong person or whether anyone received the letter at all or whether it was accepted and so forth.

**Dr. Leah Bush:** So they have to report in back to the Board and then we could provide it to DOC or VSP?

**James Towey:** Yes, ultimately our responsibility as a subcommittee is to report to the Board at each meeting as far as who has been notified. So we would know if there were, by next September, still 60 individuals who the attempts for which to notify had gone unsuccessful we would know, ok we still have 60 we have to deal with.

**Steve Benjamin:** Yea, and if the attorney gets a response to one of these letters saying, "I am not the person," and he can't determine what the trouble is, or even if he can, he will still be notifying us that this was the response that he got to that letter.

**Lt. Colonel Northern:** And at some point, too, I think it would be important that the Board have a list of all the names and assignments of the various attorneys, a breakout of the attorneys name and who they had.

**Dr. Leah Bush:** Like a sort of spreadsheet.

**Steve Benjamin:** Absolutely, because it is our responsibility to make sure that each of these people are located, that they are the correct person, and they are notified.

**James Towey:** I would move that, in regard to this notification letter, number one we incorporate the change requested by Steve in the second paragraph so that it would state, "physical material in the Department's case file that is available and possibly suitable for DNA testing." Strike the rest and that a sentence be added at the end stating, "if you are not the individual described in this letter, please contact. " and then it would be name of the attorney that sent the letter out and their contact information.

**Steve Benjamin:** I second that.

**James Towey:** Anyone object? All those that approve of the motion please signify by saying "aye."

(Notification Letter approved by unanimous vote)

The motion is approved. I had on the agenda "timeline and completion of subcommittee responsibilities." I don't really know how much there is to say in that regard other than, obviously, we may have some glitches along the way but the intention is to move as efficiently as possible so that this issue can be accomplished as quickly as possible but of course being careful enough that everything is being done accurately and within the confines of the law. It is important to note though, just so everyone is clear, that the subcommittee's responsibility will end when the last person is notified and we inform the Board at the meeting.

**Dr. Leah Bush:** Or they are determined to be deceased. Would we bother notifying the families?

**Steve Benjamin:** We've not been directed to do so.

**Dr. Leah Bush:** Ok, so if they are deceased then that is the end of it.

**James Towey:** I don't know if anyone else has any other concerns in regard to the timeline. At this time I think we want to proceed quickly, but of course carefully, to make sure that what we are doing is appropriate. I want to put this on the front burner because this is not something to put on the back burner by any means. Does anyone have any comments with regard to the timeline?

Finally, I think what I'd like to do is ask for approval for the course of action that we've spoken about. The course of action being running it through the appropriate agencies and then having the Crime Commission organize the information in a format that can be easily used. Then it will be distributed to the attorneys in groups of 20, with the assistance of the State Bar, the Trial Lawyers Association, and the Mid-Atlantic Innocence Project, and then ultimately there would be notification letters that would be sent out that would be approved and certainly this would be reported to the Board at the next meeting. I think that is August 6<sup>th</sup>. I would move that we would approve.

**Steve Benjamin:** Instead of naming a specific Bar Associations why don't we simply modify that to say, "Bar Association," and also I think that concerns have been expressed that this procedure will include the use and dissemination of information as is consistent and permitted by Virginia law

**James Towey:** I think that is the proposed course of action, with Steve's comments.

**Steve Benjamin:** I'll make that motion.

**James Towey:** I will second that motion. Does anyone want to speak in opposition of that motion? All in favor of that course of action please signify by saying "aye."

(Notification Plan is approved by unanimous vote)

**James Towey:** The course of action is approved. With that, I think we are complete for today. One thing we may want to do, I don't want to put the cart before the horse, but it may be a good idea to set a tentative date for the next subcommittee meeting before the next Board meeting. If we decide that it is not necessary then we can always strike it, but while we have everyone here I was thinking we could set something up. The next Board meeting is August 6<sup>th</sup>, if we could set something up the last week of July, just so we can discuss the status of what's occurred and what steps we need to take.

(July 29 at 3:00pm is decided upon)

**James Towey:** I think that if we just discuss the status and the next steps just so we are in line for when I report to the Board so that no one on the subcommittee is surprised. With that I move that we adjourn.

8528 Tidewater Drive  
Indianapolis, Indiana 46236  
June 20, 2008

James Towey  
Executive Director  
Virginia State Crime Commission  
General Assembly Building  
910 Capitol Street, Ste. 915  
Richmond, VA 23219

**Re: Subcommittee on the Notification of DNA Evidence**

Dear Mr. Towey:

I have been following with great interest the news reports related to the Subcommittee on the Notification of DNA Evidence. According to the minutes from the most recent Forensic Science Board Meeting, my request to you was as follows:

Pursuant to the by-laws, Chairman Bono appointed Mr. Towey as the subcommittee chairperson to meet the requirements in the budget language regarding notification on the post-conviction cases. Mr. Towey will choose the other members of the subcommittee to include Board members, however if there is a need for outside expertise Chairman Bono authorized Mr. Towey to select whomever he believes to be most appropriate to fulfill the requirements of the budget language. Chairman Bono requested a progress report of the subcommittee prior to the August meeting.

I appreciate your efforts in bringing this subcommittee together and moving forward with the directive in the budget language. However, I am concerned that the notification process apparently proposed by the subcommittee be in compliance with Virginia law governing the dissemination of criminal history information, as set forth in Chapter 23 of Title 19.2 of the Code of Virginia. Releasing the names, social security numbers, dates of birth, addresses and conviction information to individuals or organizations not specifically authorized by applicable statutes may be problematic. I would like clarification on whether there is statutory authority to release this information, and I believe this matter should be carefully reviewed by the full Board before the subcommittee proceeds further.

From a practical perspective, we are dealing with people who may have spent time in confinement and who, after serving time in an institution, would like to put the past behind them. I applaud your effort to notify these people, and notify them we must. However, these people deserve respect and the methods we choose must be mindful of the confidentiality which appears to be absent in the press reports on the activities of your subcommittee. These people should be notified in a way which gives them an option to seek retesting of evidentiary material without

compromising their privacy or identity in the press. In addition we must be mindful of the victims and their families in this process.

I am also concerned with anyone speaking on behalf of the Forensic Science Board in an official capacity without that discussion being vetted through the board. I respectfully request that you present your proposal for compliance with the budget language for discussion to the Forensic Science Board on Wednesday, August 6, 2008, prior to implementation.

Thank you for your time and I look forward to hearing from you soon.

Sincerely,

A handwritten signature in black ink that reads "Joseph Bono". The signature is written in a cursive style with a large, stylized "J" and "B".

Joseph Bono  
Chairman, Forensic Science Board



# COMMONWEALTH of VIRGINIA

## Virginia State Crime Commission

Delegate David B. Albo, *Chairman*  
Senator Kenneth W. Stolle, *Vice Chairman*

General Assembly Building, Suite 915  
910 Capitol Street  
Richmond, Virginia 23219

*Director*  
James O. Towey

804-225-4534  
Fax: 804-786-7872

*Director of Legal Affairs*  
G. Stewart Petoe

June 23, 2008

Joseph Bono, *Chairman, Forensic Science Board*  
8528 Tidewater Drive  
Indianapolis, Indiana 46236

**Re: Subcommittee on the Notification of DNA Evidence**

Dear Mr. Bono:

I have reviewed your letter expressing concern over the notification process unanimously approved by the subcommittee and requesting that I cease implementation of the process until it is reviewed by the full Board. I too, am concerned with ensuring that the efforts of the Subcommittee conform to all applicable laws. To this end, I met with the Chief Information Officer and other officials from the Virginia Information Technology Agency last Wednesday to make sure that the Subcommittee was complying with all of that agency's requirements. I am aware of the laws pertaining to criminal history information. No such information will be released. On the contrary, the Subcommittee will extricate this information prior to dissemination of selected information to licensed attorneys. That is precisely why I have requested from the Department the fields of data they have acquired. The Subcommittee wishes to identify the existence of material that should not be released and assess the minimum information available and necessary to do what the General Assembly has ordered. It is frustrating that the Department will not comply with even this request. Finally, I am aware that the individuals being notified, as well as the victims, deserve respect.

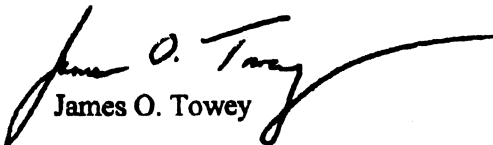
It was my understanding that when the Board unanimously entrusted me with the chairmanship of this Subcommittee, they did so because they believed I would handle the situation in a responsible, effective, and efficient manner. Obviously, effectively identifying and locating individuals will require the release of some identifying information to licensed attorneys. The fact that the Department has been unable to complete the identification and location process through its own means reveals this to be true. The release of certain minimal information can be done within the confines of the law and is necessary

I understand that this process has been ongoing for quite some time now. The Subcommittee was formed, I thought, to bring success to an effort that has, thus far, been stifled. From the time that the budget language was introduced before the General Assembly, however, I have witnessed the attempts of some to sabotage the effort. I am saddened to see that such attempts are continuing to succeed.

I would appreciate your supporting my efforts as Chair of this Subcommittee. Although you appointed me as Chair, you are permitting the Department to deal directly with you so that the Department can ignore my requests for assistance. This is insubordination that is further delaying the notification we have been ordered to accomplish. I do not understand you to be directing the Subcommittee to halt its work, because such a directive would be in the name of the Board without prior authority. Accordingly, I would appreciate your notifying the Department, in writing, that it should provide the information I have requested.

Please give me a call to discuss this, Joe.

Sincerely,

  
James O. Towey

**ADDENDUM “B”**

**FORENSIC SCIENCE BOARD MINUTES**



**Adkins, Wanda**

**From:** Marone, Pete  
**Sent:** Thursday, August 21, 2008 8:53 AM  
**To:** Adkins, Wanda  
**Subject:** FW: Notification Memos

**Attachments:** Secretary Marshall Draft Memo.doc; Memo to Sec. Marshall.doc

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**From:** Marone, Pete  
**Sent:** Sunday, July 20, 2008 8:16 PM  
**To:** Harris, Marilyn; John Marshall  
**Cc:** Gowdy, Michelle  
**Subject:** Notification Memos

Attached are the two memos regarding notification.



Secretary Marshall  
Draft Memo....



Memo to Sec.  
Marshall.doc (27 ...

Pete Marone  
Director, Virginia Department of Forensic Science  
700 North 5th Street  
Richmond, VA 23219  
804-786-2281  
Fax 804-786-6857  
<http://www.dfs.virginia.gov>

## Memorandum

TO: Secretary of Public Safety John Marshall

FROM: Pete Marone, Director, Department of Forensic Science

DATE: June 20, 2008

SUBJECT: Notification of Convicted Individuals in the Post Conviction Project

The Department of Forensic Science is requesting your assistance to contact state agencies which can assist in the post conviction notification process. Pursuant to the budget language requiring notification to individuals who have been convicted, DFS has taken the first step by providing information to the Department of Corrections. DOC has assisted by providing addresses in over 500 cases. Mailing notices to these addresses would comply with the budget language requirements. However, for approximately 350 cases DOC had no information and in order for DFS to proceed further, DFS needs further assistance in order to identify the addresses for the remaining individuals. This goes well beyond the direction of the budget language, but is certainly the right action to follow.

DFS has identified the following agencies which may be able to assist in this process:

- Department of Motor Vehicles
- Department of Health – Office of Chief Medical Examiner, Vital Records
- Virginia Employment Commission
- Virginia Compensation Board – LIDS
- State Corporation Commission
- Department of Taxation

DFS will provide any and all information that is allowable by its IT security policy. Please be aware that the amount of information varies from case to case.

**ADDENDUM “C”**

**FORENSIC SCIENCE BOARD MINUTES**

It is the opinion of the Attorney General's representative that the budget language constrains the Department of Forensic Science Board (Board) from delegating its mandated duty to notify the individuals, by using *pro bono* attorneys. Specifically, Mr. Ferguson opines that the rule of statutory construction, *expressio unius est exclusio alterius*,<sup>1</sup> precludes other persons and entities other than the Board from accomplishing the task set forth in Item 408 of the 2008 budget bill:

As indicated, it is my view that the budget language at issue is subject to standard rules of statutory construction. In this case, the budget has not only directed that the notification task is to be performed, it also specifies the way in which it is to be performed. Under those circumstances the well-accepted principle "*Expression unis est exclusio alterius*" applies. That is, a legislative enactment which limits the way in which something is to be done or the entity which may do it evinces the intent that it is not to be done otherwise, or by a different entity. There are many citations to this principle in case law and AG Opinions. See, e.g., *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E. 2d 799, 803 (1982); *Christiansburg v. Montgomery County*, 216 Va. 654, 658, 222 S.E. 2d 513, 516 (1976); *Pine v. Commonwealth*, 121 Va. 812, 821, 93 S.E. 652, 654 (1917) cited in 1987-1988 Op. Atty. Gen. Va. 634; 1986-1987 Op. Gen. Va. 130; 1983-1984 Op. Gen. Va. 218; 1976-1977 Op. Gen. Va. 200.<sup>2</sup>

Although not included in the list of citations above, there is a single A.G. Opinion that addresses the statutory construction of a budget bill.<sup>3</sup> In this opinion, the "plain meaning rule" is applied to the budget language, just as it would to any other statutory enactment.<sup>4</sup> In budget bills, as well as other statutory enactments, the plain meaning rule simply requires determining if the meaning of the words is clear and unambiguous. Additionally, case law commands that "when a statute is clear and unambiguous, its plain meaning must be accepted without resort to extrinsic evidence or the rules of construction."<sup>5</sup> And finally, *expressio unius est exclusio alterius* is a rule of construction, not law, and should never supersede public policy or legislative intent.<sup>6</sup>

This is demonstrated by the cases and A.G. opinions cited by Mr. Ferguson. In *Christiansburg v. Montgomery County*,<sup>7</sup> the trial court, in an annexation case, ruled that a town needed to compensate the county for lost tax revenues. In examining the relevant statute, the Virginia Supreme Court held that the General Assembly had given specific, clearly delineated authority to trial courts in these cases. The ability to award compensation for lost tax revenues was not in the enumerated list; therefore, the trial court did not have the authority to make this kind of an award.

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<sup>1</sup> "The granting of certain powers is the exclusion of others." *Pine v. Commonwealth*, 93 S.E. 652 (1917). Also defined as "the expression of one thing is the exclusion of another," in *Blacks Legal Dictionary*, 5<sup>th</sup> edition.

<sup>2</sup> E-mail from Frank S. Ferguson, Esq., to James Towey, August 1, 2008, at 3:52 p.m.

<sup>3</sup> WL 1067726, Va. A.G. (Virginia Attorney General Opinion) (2002).

<sup>4</sup> Id.

<sup>5</sup> *Gonzalez v. Fairfax Hosp. System*, 239 Va. 307, 389 S.E.2d 458 (1990).

<sup>6</sup> *Pine*, 93 S.E. at 654 (1917). Additionally "the rule is a rule of statutory construction and not a rule of law. The maxim is subordinate to the primary rule that the legislative intent governs the interpretation of the statute. Thus, it can be overcome by a strong indication of contrary legislative intent or policy. *Sutherland Statutory Construction* (7<sup>th</sup> ed.) § 47:23 (pg. 415).

<sup>7</sup> *Christiansburg v. Montgomery County*, 216 Va. 654 (1976).

In Grigg v. Commonwealth,<sup>8</sup> two parents wished to home school their children, even though they were not certified to do so. Attempting to evade this requirement, they argued that their home was a “private school,” and thus was not subject to state certification requirements. In rejecting this argument, the Virginia Supreme Court stated that by drawing a distinction between private schools and home schools, the General Assembly clearly intended the two types of schooling to be treated differently. “When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way....In permitting home instruction only by a qualified tutor or teacher, the General Assembly has declared that such instruction by an unapproved person shall be impermissible.”<sup>9</sup>

In Pine v. Commonwealth,<sup>10</sup> the Supreme Court of Virginia specifically refused to countenance an argument based upon the maxim of *expressio unius est exclusio alterius*, albeit in the context of interpreting a portion of Virginia’s Constitution. The defendants in a criminal case, convicted of violating moonshine laws, argued that Virginia’s Constitution granted the legislature certain powers “regulating, or prohibiting the manufacture or sale of intoxicating liquors.” This meant in turn that the legislature was prohibited from enacting any laws, including criminal laws, that exceeded the scope of this constitutional provision. In rejecting this argument utterly, the Virginia Supreme Court noted:

The maxim “Expressio unius est exclusio alterius,” though often of importance and value, is not of universal application, even in the interpretation of state Constitutions....the application of arbitrary rules of [statutory] construction will be resorted to with hesitation, especially when it would bring about results contrary to the declared public policy of the state, and hamper the Legislature in amply providing for the health, morals, safety, and welfare of the people. **Only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned, in view of the known policy of the state, will be considered as prohibiting the powers of the Legislature.**<sup>11</sup>

This point is also expressed in the legal treatise Sutherland Statutory Construction (7<sup>th</sup> ed.) § 47:23 (pg. 415):

**The rule is a rule of statutory construction and not a rule of law. The maxim is subordinate to the primary rule that the legislative intent governs the interpretation of the statute. Thus, it can be overcome by a strong indication of contrary legislative intent or policy.**

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<sup>8</sup> Grigg v. Commonwealth, 224 Va. 356 (1982).

<sup>9</sup> *Id.* at 364.

<sup>10</sup> Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917).

<sup>11</sup> *Id.* at 654 (emphasis supplied).

Or, to repeat the citation from Pine v. Commonwealth, “Only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned, in view of the known policy of the state, will be considered as prohibiting the powers of the Legislature.”<sup>12</sup> Otherwise:

**[W]hen interpreting a statute or legislative enactment, one must first look at the plain meaning of the statute or enactment to determine if there is any ambiguity in its meaning. If the meaning of the enactment is clear and unambiguous, there is no cause to resort to the rules of statutory construction.**<sup>13</sup>

The examples from a number of Attorney General Opinions, including the ones referenced by Mr. Ferguson above, illustrate this quite clearly. Frequently the legislature places a list into a statute; if something is not in the list, it is not deemed to be a part of the statute or an acceptable alternative, which is all that *expressio unius est exclusio alterius* really means.

For instance, the Attorney General was asked if prisoners doing volunteer work for a diversionary program could be included within the scope of coverage of the Virginia Workers’ Compensation Act.<sup>14</sup> In issuing his opinion, the Attorney General reviewed the relevant statute, Va. Code § 65.1-4.1, which provides optional coverage for certain types of specifically enumerated volunteers, such as volunteer fire fighters and volunteer lifesaving and rescue squad members. Because this authorizing statute did not include prisoner volunteers doing community service work, the Attorney General concluded that they could not be included within the scope of the Workers’ Compensation Act.

In another opinion, the County Attorney for Grayson County asked whether a town (or towns) could contract with their local sheriff to provide law enforcement services.<sup>15</sup> The relevant statute, Va. Code § 15.1-131.3, provided that towns could contract with “any other county, city, town, any agency of the federal government exercising police powers, or with any combination of the foregoing...[or] the Department of State Police.” The Attorney General opined that because there was a specific list of entities that could be contracted with to provide such services, and sheriffs were not included in that list, they were not an option. (Sheriffs are constitutional officers, and are not be deemed to be agents of employees of a county, such that a county could “hire” them out).

When asked whether a police officer could conduct a warrantless arrest of a juvenile for shoplifting, if the crime was not committed in the officer’s presence, a similar reading of the relevant statute was employed.<sup>16</sup> The statute, Va. Code § 16.1-246, lists the specific instances under which a child may be taken into immediate custody without a warrant: if the juvenile commits a crime in the presence

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<sup>12</sup> *Id.*

<sup>13</sup> Va. Op. Atty. Gen., issued May 15, 2002; 2002 WL 1067726; *additional citations omitted*.

<sup>14</sup> 1987-88 Va. Op. Atty. Gen. 634 (Feb 29, 1988).

<sup>15</sup> 1986-87 Va. Op. Atty. Gen. 130 (Dec 16, 1986).

<sup>16</sup> 1983-84 Va. Op. Atty. Gen. 218 (Mar 6, 1984).

of the officer, of if the officer has probable cause to believe that the juvenile has committed an offense which would be a felony if committed by an adult. Therefore, the Attorney General opined, because there is a specific list of circumstances, and misdemeanors not committed in the officer's presence are not included in that list, they are not part of the statute, and officers may not conduct such warrantless arrests.

Similarly, the Attorney General has opined that if local governments are authorized to include variance procedures for zoning appeals, that does not mean that they are authorized to enact variance procedures for subdivision regulations.<sup>17</sup>

In all of these analyses, there is a specific list or grant of authority in a statute. The omission of another alternative provides clear evidence that the legislature did not intend for that alternative to be valid.

While the claim has been made that the budgetary language under consideration specifies a certain manner in which the Board must carry out its assigned task, a close reading of the provision indicates that this is not the case. Rather, the opening sentence evinces that the legislature wished to ensure the Board would have wide latitude in carrying out its task. The directive given to the Board does not specify how they shall carry out their task. Rather, it only says that they "shall ensure" the notifications are done; in other words, it is the Board's duty "to make sure or certain"<sup>18</sup> that the notification reaches the correct persons. The only specific tasks given to the Board are to prepare two form letters, and deliver a copy of each letter sent to the Chairman of the Board, and the Chairmen of the Courts of Justice Committees. Everything else is up to them.

Attention has been drawn to the second to last and third to last sentences in the budget language—the language that directs the Department of Corrections to assist the Board. This language creates an imperative to DOC; they must provide these addresses (whether they wish to or not). However, these sentences do not imply that the Board may not make use of other resources or agencies in "ensuring" that the letters are sent. If that were the case, then it would have been improper to have sought the assistance of the State Police. Instead, the plain meaning of this language is that the Board must ensure that notification, via a form letter, is sent to certain individuals, and DOC must provide assistance.

If the language of the budget stated the Board "must provide notice, and shall use the services of DOC, the Comp Board, and the State Police," that perhaps might be taken as a sign that the legislature did not wish for any other entities to assist the Board in this task. However, the phrasing of the budget language is not specific in this regard; the phrasing suggests that the Board may do whatever is necessary (within the law) to "ensure" that notice is given. And, DOC must provide assistance with the last known addresses. To apply the maxim of *expressio unius est exclusio alterius* to such plainly written language would create an unwieldy interpretation that is at odds with the clear meaning of the words.

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<sup>17</sup> 1976-77 Va. Op. Atty. Gen. 199 (Sept. 16, 1976).

<sup>18</sup> The definition of "ensure" as defined by the American Heritage dictionary, 3<sup>rd</sup> edition.