

1 **FORENSIC SCIENCE BOARD**

2
3 **DNA NOTIFICATION SUBCOMMITTEE**

4
5 **July 29, 2008, 3:00 p.m.**
6 **Basement Conference Room – B030**
7 **Patrick Henry Building**
8 **1111 E. Broad Street**
9 **Richmond, Virginia 23219**

10
11 **DRAFT MINUTES**

12
13 **Members Present:**

14 Mr. Steven Benjamin, Private Attorney
15 Dr. Leah Bush, Office of the Chief Medical Examiner
16 Lt. Col. Robert Northern, Virginia State Police
17 Mr. James Towey, Director, Virginia State Crime Commission
18
19 Frank Ferguson, Deputy Attorney General, Counsel for the Forensic Science Board

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21 **CALL TO ORDER / APPROVAL OF MINUTES OF JUNE 4, 2008 MEETING**

22
23 Mr. Towey called the meeting to order at 3:15 p.m. which allowed additional time for members
24 to review the draft minutes from the June 4th meeting and the Progress Report. Mr. Towey stated
25 that the purpose of today’s meeting was to discuss the status of what has been accomplished, and
26 what has not been accomplished, by the subcommittee to notify individuals in preparation of
27 providing a status report to the Board at its August 6th meeting. Mr. Towey announced that there
28 was some confusion previously with regard to representation with a possible conflict of interest
29 with the Attorney General’s Office counsel representing both the Board and the Department of
30 Forensic Science (“DFS”). Mr. Towey stated that the Board has now been provided with
31 separate counsel. Deputy Attorney Frank Ferguson has been appointed to provide the Board
32 with counsel and he has asked to speak to the subcommittee members in a closed session after
33 the public meeting in accordance with the Freedom of Information Act (“FOIA”).

34
35 Mr. Towey noted that the full transcript of the June 4th meeting is attached in the Progress
36 Report. Mr. Towey asked if there were any changes that needed to be made to the draft minutes
37 from the June 4, 2008 subcommittee minutes. There were none. Mr. Steven Benjamin made a
38 motion to adopt the minutes, seconded by Dr. Leah Bush, and accepted by unanimous vote.

39
40 **PROGRESS REPORT & DISCUSSION**

41
42 Mr. Towey stated that the progress report was put together to present to the Board at its next
43 meeting. Mr. Towey stated that he was appointed to serve as chair of a subcommittee formed “to
44 meet the requirements in the budget language regarding notification.” As part of the motion that
45 resulted in the formation of the subcommittee, the Department was to provide Mr. Towey with

46 the DFS database of individuals to be notified of the existence of DNA evidence in their files and
47 “to do what further work is necessary.” Concerns were raised by the DFS Director at the May 7,
48 2008 Meeting of the Board regarding IT security and sensitive data in the database. Mr. Towey
49 stated that the Board Chairman had assigned him the responsibility to ensure adherence to the
50 legal responsibilities of confidentiality in accordance with Virginia law. No concerns were
51 raised by any Board members at this meeting.

52
53 Mr. Towey provided a summary of the draft progress report that included a review of the June 4,
54 2008 meeting activities, which consisted of: adoption of a Mission Statement, the summary
55 provided by DFS and the Department of Corrections (“DOC”), approval of a Notification Letter,
56 and adoption of a Notification Plan.

57
58 Mr. Steven Benjamin provided an update on the progress made thus far with recruiting pro bono
59 attorneys to assist in the notification process. Mr. Benjamin announced that he had met with the
60 leadership of the state’s bar associations. Almost 200 attorneys from every area of the state from
61 many disciplines have volunteered their services and are ready to begin.

62
63 Mr. Towey provided details regarding the meeting with VITA on June 19, 2008 to ensure
64 compliance with IT security requirements and was advised that the database could be forwarded
65 to the Crime Commission so long as it was encrypted. Mr. Towey reported that it was resolved
66 that the most prudent and efficient course of action would be for Crime Commission staff to first
67 review the information in the database to identify sensitive information that was not essential for
68 the identification and location of the individuals. This could then be *extracted* from the
69 information that would be disseminated beyond the Crime Commission to licensed attorneys.
70 Once any non-essential information was extracted, it was determined that the VITA officials
71 would then be consulted with regard to the requirements, if any, pertaining to the remaining
72 information.

73
74 Mr. Towey reported that since the meeting, he received a letter from the Board Chairman, Joseph
75 Bono, requesting that he cease implementation of the plan until the full Board meeting on August
76 6, 2008. Mr. Towey felt that this was without authority and contrary to the directive given by the
77 Board at the May 7, 2008 meeting where it was clearly stated that he was to notify the Board of
78 the progress of the plan to carry out the requirements of the budget language. Mr. Towey stated
79 that all continued attempts to obtain information from the DFS have been unsuccessful.

80
81 There was discussion regarding the dissemination of confidential and privileged information to
82 pro bono attorneys.

83
84 Lt. Col. Northern stated that the Virginia State Police (“VSP”) is concerned about the
85 information being released from VCIN. He stated that the Crime Commission and the Office of
86 the Chief Medical Examiner are entitled access to VCIN as long as it is used for a criminal
87 justice purpose. However, the VSP cannot release VCIN information if they know that it will
88 not be used for a criminal justice purpose, such as private attorneys in this manner of the
89 implementation plan would not meet this definition.

90

91 Mr. Towey stated that he had already offered to extract any VCIN information from the DFS
92 database before being released.

93
94 Mr. Benjamin asked what is the meaning or statutory definition of “criminal justice purpose.”
95 Lt. Col. Bob Kemmler, VSP, responded that section 9.1 – 101 of the Code of Virginia provides
96 the definition for administration of criminal justice. Also, section 19.2 – 389(A) provides for the
97 release of criminal information from the CCRE to a criminal justice agency for the
98 administration of justice or the screening of applicants.

99
100 Mr. Benjamin asked if the VSP can provide the information to the DFS for purposes of
101 notification, why can it not provide it to Crime Commission or the subcommittee for the same
102 purpose. Lt. Col. Kemmler stated that the DFS and Crime Commission are criminal justice
103 agencies that have access to the data; the issue becomes blurred if it is the Forensic Science
104 Board subcommittee requesting the information. The Crime Commission can obtain the
105 information and use it for the purpose for which it was requested to be obtained, but it is not for
106 further dissemination outside of a criminal justice agency.

107
108 Lt. Col. Northern stated that everyone needs to recognize that this is a unique situation. A lot of
109 people and agencies are uncomfortable because of the transfer of responsibility from a state
110 entity to a civilian non-state entity to perform the notification, which is not the normal course of
111 business for state agencies.

112
113 Dr. Bush asked if the pro bono attorneys are vetted.

114
115 Lt. Col. Northern stated concerns that there are also concerns that some of these people do not
116 want to be notified because they may have re-established their lives. The attorneys need to know
117 that not everyone will be happy to be notified and there is a safety risk involved. Lt. Col.
118 Northern presented a hypothetical situation - what if the subject who is notified requests the
119 attorney to also represent him; would this be the expectation and is there a conflict of interest.

120
121 Mr. Benjamin replied that no, there is not a conflict of interest. He stated that it has been made
122 clear that the only commitment of the pro bono attorneys is to the Board to assist in the
123 notification process and to report back to the subcommittee. Mr. Benjamin stated that this was
124 the reason that the DFS was not selected to notify individuals because of the potential for lab
125 personnel to receive calls or letters requesting legal advice. If pro bono attorneys are asked to
126 provide advice or legal representation then it is up to that individual attorney to enter into an
127 attorney client relationship with that individual. The Mid-Atlantic Innocence Project has also
128 volunteered to provide this service.

129
130 Lt. Col. Northern raised this issue because of concerns raised by other Board members with the
131 perception of a conflict of interest. He also expressed concerns regarding incentives for
132 attorneys to provide this kind of representation in a high profile cases.

133
134 There being no further discussion or objections, Mr. Benjamin made a motion to adopt the
135 Progress Report as the report of the subcommittee, seconded by Mr. Towey, and accepted by
136 unanimous vote.

137
138 Mr. Towey stated that included in the Progress Report are verbatim transcripts from the May 7,
139 2008 Board meeting that clearly show, without any objections by Board members, that the
140 subcommittee was going to proceed with notifying people. Mr. Towey stated that as it stands
141 now, the subcommittee's efforts have been stifled to implement the notification plan. He will
142 forward the report to the DFS so that it will be included in the materials for the August 6, 2008
143 Board meeting and pursuant to the directives from the Chair, will provide a briefing on the
144 progress, or lack thereof, of the subcommittee.

145
146 Lt. Col. Northern stated that the confusion may lie in the fact that other Board members thought
147 that the mission of the subcommittee was to prepare the letters, get the addresses, and send those
148 letters out to specifically meet the requirements of the budget language; not to go above and
149 beyond the language's intent.

150
151 Mr. Benjamin stated that the plan put together by the Board, and articulated by Chairman Bono,
152 was for Mr. Towey to form the subcommittee to perform this mandate and report back on its
153 progress to the Board and empowered to use whatever outside expertise he thought was
154 necessary. Additionally, part of Chairman's Bono direction was for the DFS to transfer the
155 database to Mr. Towey and the subcommittee.

156
157 Mr. Benjamin stated that Secretary of Public Safety, John Marshall, wrote a letter to Chairman
158 Bono that was then distributed to each of the members of the Forensic Science Board. Mr.
159 Benjamin provided subcommittee members and the audience with copies of his response to the
160 Secretary's letter.

161
162 Mr. Towey announced that under section 2.2 – 3712 of the Code of Virginia the subcommittee
163 would go into closed session to discuss matters with legal counsel. Mr. Towey made a motion to
164 go into closed meeting to receive legal advice as permitted by section 2.2-3711(7) regarding the
165 Board's obligations, duties, and responsibilities, seconded by Mr. Benjamin, and accepted by
166 unanimous vote. Closed session began at 4:30 p.m.

167
168 At the conclusion of the closed meeting at 5:10 p.m., the open meeting reconvened where
169 subcommittee members certified by an affirmative vote that to the best of their knowledge that
170 only public business matters lawfully exempted from the open meeting requirements of this
171 chapter were discussed and only such public business matters as identified in the motion by
172 which the closed meeting was convened were heard, discussed or considered in the meeting by
173 the public body.

174
175 The meeting adjourned at 5:11 p.m.