STATE OF NEW YORK

4949

2021-2022 Regular Sessions

IN SENATE

February 19, 2021

Introduced by Sens. PARKER, KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Internet and Technology

AN ACT to amend the executive law, in relation to the processing of evidence related to sexual offenses and the inclusion of such results in the state DNA identification index

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 2 and 9 of section 995 of the executive law, as added by chapter 737 of the laws of 1994, are amended to read as follows:

2. For purposes of forensic DNA analysis, the term "forensic DNA laboratory" shall mean any forensic laboratory operated by the state or unit of local government, that performs forensic DNA testing on crime scenes, **forensic testing on evidence of sexual offenses** or materials derived from the human body for use as evidence in a criminal proceeding or for purposes of identification and the term "forensic DNA testing" shall mean any test that employs techniques to examine deoxyribonucleic acid (DNA) derived from the human body for the purpose of providing information to resolve issues of identification. Regulation pursuant to this article shall not include DNA testing on materials derived from the human body pursuant to title five of article five of the public health law for the purpose of determining a person's genetic disease or medical condition and shall not include a laboratory operated by the federal government.

9. "DNA subcommittee" shall mean the subcommittee on forensic DNA laboratories and forensic DNA **and sexual offense forensic evidence** testing established pursuant to subdivision thirteen of section nine hundred ninety-five-b of this article.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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§ 2. Paragraph (b) of subdivision 2 of section 995-b of the executive law, as added by chapter 737 of the laws of 1994, is amended to read as follows:

(b) ensure that forensic analyses, including forensic DNA testing **and sexual offense forensic evidence testing**, are performed in accordance with the highest scientific standards practicable;

§ 3. Subdivisions 7, 11, 12 and 13 of section 995-b of the executive law, as added by chapter 737 of the laws of 1994 and paragraph (a) of subdivision 13 as amended by chapter 560 of the laws of 1999, are amended to read as follows:

7. The commission and DNA subcommittee may establish, appoint, and set terms of members to as many advisory councils as it deems necessary to provide specialized expertise to the commission with respect to new forensic technologies including DNA testing methodologies **and sexual offense forensic evidence testing methodologies**.

11. Upon the recommendation of the DNA subcommittee established pursuant to subdivision thirteen of this section, the commission shall designate one or more approved methodologies for the performance of forensic DNA testing **and sexual assault forensic evidence**, and shall review and act upon applications by forensic DNA laboratories for approval to perform forensic DNA testing.

12. Promulgate standards for a determination of a match between the DNA records contained in the state DNA identification index and a DNA record of a person **or sexual offense forensic evidence** submitted for comparison therewith.

13. (a) The commission shall establish a subcommittee on forensic DNA laboratories and forensic DNA **and sexual offense forensic evidence** testing. The chair of the subcommittee shall be appointed by the chair of the commission. The chair of the subcommittee shall appoint six other members to the subcommittee, one of whom shall represent the discipline of molecular biology and be appointed upon the recommendation of the commissioner of the department of health, one of whom shall represent the discipline of population genetics and be appointed upon the recommendation of the commissioner of the department of health, one of whom shall be representative of the discipline of laboratory standards and quality assurance regulation and monitoring and be appointed upon the recommendation of the commissioner of the department of health, one of whom shall be a forensic scientist and be appointed upon the recommendation of the commissioner of the department of health, one of whom shall be representative of the discipline of population genetics and be appointed upon the recommendation of the commissioner of criminal justice services and one of whom shall be representative of the discipline of forensic science and be appointed upon the recommendation of the commissioner of criminal justice services. Members of the DNA subcommittee shall serve for three year terms and be subject to the conditions of service specified in section nine hundred ninety-five-a of this article.

(b) The DNA subcommittee shall assess and evaluate all DNA **and sexual offense forensic evidence** methodologies proposed to be used for forensic analysis, and make reports and recommendations to the commission as it deems necessary. The DNA subcommittee shall make binding recommendations for adoption by the commission addressing minimum scientific standards to be utilized in conducting forensic DNA **and sexual offense forensic evidence** analysis including, but not limited to, examination of specimens, population studies and methods employed to determine probabilities and interpret test results. The DNA subcommittee may require a demon-

stration by an independent laboratory of any proposed forensic DNA **or sexual offense forensic evidence** testing methodology proposed to be used by a forensic laboratory.

(c) The DNA subcommittee shall make binding recommendations for adoption by the commission with regard to an accreditation program for laboratories performing forensic DNA **and sexual offense forensic evidence** testing in accordance with the provisions of the state administrative procedure act. Such recommendations shall include the adoption and implementation of internal and external proficiency testing programs, including, if possible, a blind external proficiency testing program for forensic laboratories performing forensic DNA **and sexual offense forensic evidence** testing. The DNA subcommittee shall also provide the commission with a list of accepted proficiency testers.

(d) The DNA subcommittee shall be authorized to advise the commission on any other matters regarding the implementation of scientific controls and quality assurance procedures for the performance of forensic DNA **and sexual offense forensic evidence** testing, or on any other matters referred to it by the commission.

§ 4. Section 995-d of the executive law, as added by chapter 737 of the laws of 1994 and subdivision 2 as amended by chapter 560 of the laws of 1999, is amended to read as follows:

§ 995-d. Confidentiality. 1. All records, findings, reports, and results of DNA **and sexual offense forensic evidence** testing performed on any person shall be confidential and may not be disclosed or redisclosed without the consent of the subject of such DNA **or sexual offense forensic evidence** testing. Such records, findings, reports and results shall not be released to insurance companies, employers or potential employers, health providers, employment screening or personnel companies, agencies, or services, private investigation services, and may not be disclosed in response to a subpoena or other compulsory legal process or warrant, or upon request or order of any agency, authority, division, office, corporation, partnership, or any other private or public entity or person, except that nothing contained herein shall prohibit disclosure in response to a subpoena issued on behalf of the subject of such DNA **or sexual offense forensic evidence** record or on behalf of a party in a civil proceeding where the subject of such DNA **or sexual offense forensic evidence** record has put such record in issue.

2. Notwithstanding the provisions of subdivision one of this section, records, findings, reports, and results of DNA testing, other than a DNA record maintained in the state DNA identification index, may be disclosed in a criminal proceeding to the court, the prosecution, and the defense pursuant to a written request on a form prescribed by the commissioner of the division of criminal justice services. Notwithstanding the provisions of subdivision one of this section, a DNA **or sexual offense forensic evidence** record maintained in the state DNA identification index may be disclosed pursuant to section nine hundred ninety-five-c of this article.

§ 5. Section 995-e of the executive law, as added by chapter 737 of the laws of 1994, is amended to read as follows:

§ 995-e. Applicability. This article shall not apply to a forensic DNA laboratory operated by any agency of the federal government, or to any forensic DNA test **or sexual offense forensic evidence test** performed by any such federal laboratory.

§ 6. Section 995-f of the executive law, as amended by chapter 560 of the laws of 1999, is amended to read as follows:

§ 995-f. Penalties. Any person who (a) intentionally discloses a DNA record, [~~or~~] the results of a forensic DNA test or analysis**, or the result of a sexual offense forensic evidence test of analysis**, to an individual or agency other than one authorized to have access to such records pursuant to this article or (b) intentionally uses or receives DNA records, [~~or~~] the results of a forensic DNA test or analysis**, or the results of a sexual offense forensic evidence test of analysis**, for purposes other than those authorized pursuant to this article or (c) any person who knowingly tampers or attempts to tamper with any DNA sample [~~or~~]**,** the collection container **or sexual offense forensic evidence sample** without lawful authority shall be guilty of a class E felony.

§ 7. Subdivisions 6 and 7 of section 995-c of the executive law, as added by chapter 737 of the laws of 1994, are amended and a new subdivision 10 is added to read as follows:

6. DNA **and sexual offense forensic evidence** records contained in the state DNA identification index shall be released only for the following purposes:

(a) to a federal law enforcement agency, or to a state or local law enforcement agency or district attorney's office for law enforcement identification purposes upon submission of a DNA record in connection with the investigation of the commission of one or more crimes or to assist in the recovery or identification of specified human remains, including identification of missing persons, provided that there exists between the division and such agency a written agreement governing the use and dissemination of such DNA records in accordance with the provisions of this article;

(b) for criminal defense purposes, to a defendant or his or her representative, who shall also have access to samples and analyses performed in connection with the case in which such defendant is charged;

(c) after personally identifiable information has been removed by the division, to an entity authorized by the division for the purpose of creating or maintaining a population statistics database or for identification research and protocol development for forensic DNA analysis or quality control purposes**; and**

(d) in the case of a victim of a sexual offense, such victim shall have access to information regarding:

(i) whether a sexual offense forensic evidence test is performed by any forensic DNA laboratory;

(ii) whether the result of a sexual offense forensic evidence test of analysis was entered into the state DNA identification index; and

(iii) whether there is a match between the result of a sexual offense evidence test of analysis and the state DNA identification index.

7. Requests for DNA **and sexual offense forensic evidence** records must be in writing, or in a form prescribed by the division authorized by the requesting party, and, other than a request pursuant to paragraph (b) of subdivision six of this section, maintained on file at the state DNA identification index in accordance with rules and regulations promulgated by the commissioner of the division of criminal justice services.

10. (a) The commissioner of criminal justice services, in consultation with the DNA subcommittee and the commission, is hereby authorized to establish a plan for the timely testing of sexual offense forensic evidence and the inclusion of the results of such testing in the DNA identification index pursuant to the provisions of this article.

(b) Any forensic evidence collected or obtained in connection with the investigation of a crime or offense contained in article one hundred thirty of the penal law shall be included in the state DNA identifica-

tion index pursuant to this article. This subdivision does not require a forensic DNA laboratory to test all items of forensic evidence obtained in a sexual offense forensic evidence examination or a sexual offense investigation. For the purpose of timely processing of sexual offense forensic evidence, this subdivision intends to ensure that the best evidence is selected and analyzed as soon as practicable among the representative sample of forensic evidence, based on the medical examination or the sexual offense investigation, the collection and preservation of that evidence, and the transfer of the evidence from the medical facility or the law enforcement agency to the forensic DNA laboratory.

(c) (i) No later than ten business days after being booked into evidence, a law enforcement agency that receives sexual offense forensic evidence shall forward such evidence to any forensic DNA laboratory which has been authorized by the commission to perform sexual offense forensic evidence testing and analysis for inclusion in the state DNA identification index.

(ii) Such laboratory shall perform the requisite testing and analysis within three months of its receipt of the sexual offense forensic evidence if sufficient staffing and resources are available. An analysis shall include an examination of DNA evidence, development of a potential suspect profile, and the forwarding of the resulting DNA record to the state DNA identification index in accordance with the regulations of the division of criminal justice services.

(d) The failure of a law enforcement agency to submit sexual offense forensic evidence within the period required by this subdivision shall not affect the authority of (i) the agency to submit the evidence to a forensic DNA laboratory for analysis or (ii) of a forensic DNA laboratory to analyze the evidence or provide the results of the analysis to the appropriate agencies and the state DNA identification index.

(e) A law enforcement agency in possession of sexual offense forensic evidence that has not been forwarded to a forensic DNA laboratory within the time frame required by this subdivision shall: (i) by September first of each year submit to the division of criminal justice services a list of the agency's active criminal cases for which sexual offense forensic evidence has not yet been forwarded to a forensic DNA laboratory; and (ii) submit to the division of criminal justice services or a forensic DNA laboratory, as appropriate and subject to the availability of storage space, all sexual offense forensic evidence pertaining to those active criminal cases that has not yet been submitted for lab analysis within two years after the effective date of this subdivision.

(f) No later than one year after the effective date of this subdivision, the division of criminal justice services shall submit to the governor and the appropriate legislative committees of the senate and the assembly a request for any necessary funding to accomplish analyses of sexual offense forensic evidence required by this subdivision.

(g) The division of criminal justice services may solicit appropriate grants and funding opportunities in furtherance of the activities required by this subdivision from foundations, other governmental agencies and individuals, under such terms and conditions as the division shall deem appropriate.

§ 8. This act shall take effect September 1, 2022.