

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
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January 25, 2021

Dr. William Watson, Chair
DNA Identification System Oversight Committee
c/o Metropolitan Forensic Science Center
5350 Second Street N.W.
Albuquerque, New Mexico 87102
Email: wwatson@cabq.gov

Re: Opinion Request – DNA Identification Act

Dear Dr. Watson,

We have completed our review of the questions submitted to us by former City of Albuquerque Chief of Police Michael J. Geier regarding the DNA Identification Act (hereinafter the “Act”), NMSA 1978, Sections 29-16-1 to -13 (1997, as amended through 2013). Specifically, Chief Geier posed three questions for our review:

1. Does the Act allow or preclude the entry of a DNA profile generated from a deceased individual with a documented felony arrest or conviction into the New Mexico DNA Identification System (“NMDIS”) for the purpose of comparison to evidence profiles generated from unsolved criminal cases?
2. Does the Act allow or preclude searches of DNA profiles generated from criminal cases to be compared to DNA profiles generated from reference samples in NMDIS for the purpose of establishing potential familial matches?
3. Does the Act allow or preclude DNA profiles in NMDIS to be compared to casework evidence profiles or suspect reference profiles generated from law enforcement agencies using RAPID DNA analysis techniques?

Based on our examination of the relevant constitutional, statutory, and case law authorities, as well as the information available to us at this time, and as explained in greater detail below, we conclude that (1) law enforcement agencies may, consistent with the Act, enter a DNA profile generated from a deceased individual with a documented felony arrest or

conviction into NMDIS for the purpose of comparison to evidence profiles generated from unsolved criminal cases; (2) the Act does not prohibit a law enforcement agency from conducting searches for the purpose of establishing potential familial matches; and (3) because the Act generally does not itself specify which scientific techniques NMDIS may utilize, the determination of whether RAPID DNA analysis techniques may be utilized in NMDIS is left to the NMDIS Administrative Center and the Federal Bureau of Investigations.

As a preliminary matter, we are guided by basic principles of statutory interpretation when construing the provisions of the DNA Identification Act. Most importantly, all statutes must be interpreted so as to effectuate the intent of the Legislature. *See* NMSA 1978, § 12-2A-18(A)(1) (1997) (providing that “[a] statute or rule is construed, if possible, to... give effect to its objective and purpose”); *see also State v. Ogden*, 1994-NMSC-029, ¶ 24 (noting that the purpose of statutory interpretation is to “determine and effectuate the intent of the legislature”). A statute must be considered “as a whole so that each provision may be considered in relation to every other part.” *New Mexico Pharm. Ass’n v. State*, 1987-NMSC-054, ¶ 8. Where the relevant statutory language is clear and unambiguous, courts will generally refrain from further interpretation. *See Storey v. University of New Mexico Hospital/BCMC*, 1986-NMSC-096, ¶ 7 (“An unambiguous statute should be given effect according to its clear language.”). However, courts will “look beyond the four corners of the statute” where “the literal meaning leads to conclusions that are unjust or nonsensical.” *Inv. Co. of the Sw. v. Reese*, 1994-NMSC-051, ¶ 13.

Another critical principle of statutory interpretation is that statutory authority may be either express or implied. It is well-settled that governmental agencies, for example, “possess those powers expressly granted by the Legislature, as well as those necessarily implied to implement express powers.” *Cerrillos Gravel Products, Inc. v. Board of County Comm’rs of Santa Fe County*, 2005-NMSC-023, ¶ 7. *See also New Mexico Dept. of Health v. Ulibarri*, 1993-NMCA-048, ¶ 8 (“The authority of an administrative agency in making rules or regulations is not limited to those powers expressly granted by statute, but includes all powers that may be fairly implied therefrom.”) and *Qwest Corp. v. NMPRC*, 2006-NMSC-042, ¶ 20 (“Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes.”). In determining whether authority may be found by implication in a statute, courts will look to the statute’s context and additional provisions, as well as the purpose behind the statute. *See Redman v. Board of Regents of New Mexico School for Visually Handicapped*, 1984-NMCA-117, ¶ 10 (relying in part on “[t]he legislative mandate in the prior section” to conclude that “[t]he legislature’s failure to provide express authority in the State Board” did not mean that it did not possess the disputed rulemaking authority) and *Qwest Corp.*, 2006-NMSC-042, ¶ 20 (looking in part to legislative intent).

Analysis

We understand that law enforcement agencies first began utilizing DNA testing to solve criminal cases in the United States more than thirty years ago. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62, 129 S.Ct. 2308, 2316 (2009) (noting that “[m]odern DNA testing” was first used “in criminal investigations in the mid-1980s”). Since then, Congress authorized the creation of a federal database to connect DNA identification systems and laboratories across the nation. *See Maryland v. King*, 569 U.S. 435, 444-45, 133 S.Ct. 1958, 1968. The Combined DNA Index System (or “CODIS” as it is commonly abbreviated) now includes all states in the nation. *Id.* As our Court of Appeals has noted, “New Mexico elected to participate in CODIS” through the passage of the DNA Identification Act in 1997. *State v. Blea*, 2018-NMCA-052, ¶ 11.

Broadly speaking, the Act created a DNA Identification System (“NMDIS”) with, among other things, the express purpose of “facilitat[ing] the use of DNA records by local, state and federal law enforcement agencies in the ... *identification, detection or exclusion of persons* in connection with criminal investigations” and the registration of sex offenders. § 29-16-2(B) (emphasis added). To achieve this purpose, the Act authorizes the Administrative Center (the “Center”) to establish and administer the NMDIS, and directs that the NMDIS shall provide for the collection, storage, DNA testing, maintenance and comparison of samples and DNA records for forensic and humanitarian purposes.[1] § 29-16-4(A). It contemplates law enforcement agencies may use NMDIS for the “*generation of investigative leads, statistical analysis of DNA profiles and identification of missing persons and unidentified human remains.*” *Id.* (emphasis added). The Act further requires any convicted felon, sex offender, or individual “convicted as an adult pursuant to youthful offender or serious youthful offender proceedings under the Children's Code,” § 29-16-3 (C), to provide a DNA sample to be entered into NMDIS. *See generally* § 29-16-6. In addition, any individual over the age of eighteen is required to provide a DNA sample upon arrest for a felony, § 29-3-10(A), but this sample cannot be tested or analyzed unless one of three criteria is satisfied.[2] § 29-3-10(B).

Your first question asks whether the Act allows or precludes the entry of a DNA profile generated from a deceased individual with a documented felony arrest or conviction into NMDIS for the purpose of comparison to evidence profiles generated from unsolved criminal cases. Preliminarily, we note that while the Act contains a provision governing the collection of samples from covered offenders, those over the age of eighteen who have been arrested for a felony, and unidentified and missing persons, it does not expressly mention deceased individuals with documented felony arrests or convictions. *See* § 29-16-6. Similarly, while the Act contains a provision expressly limiting the scope of DNA searches conducted for the purposes of the missing persons DNA identification system, it does not limit searches conducted for criminal investigatory purposes, except by prohibiting such searches from being conducted against samples collected from unidentified persons or relatives of missing persons. *See* § 29-16-8.1. It therefore is clear that the Act does not, by its terms, either expressly allow or preclude the entry of a DNA

profile generated from a deceased individual with a documented felony arrest or conviction into NMDIS.

Construing the Act in light of its purpose, however, we believe it likely that a court would conclude that the statute permits such a DNA profile to be entered into NMDIS for the purpose of comparison to evidence profiles generated from unsolved criminal cases. Interpreting the statute to the contrary, as impliedly prohibiting the collection or analysis of DNA except as expressly authorized therein, would be inconsistent with the stated purpose of the Act to, in part, utilize DNA records for the “identification, detection or exclusion of persons in connection with criminal investigations.” Section 29-16-2(B)(1). *See also* § 29-16-4(A)(1) (providing that the purposes of NMDIS includes “generation of investigative leads”). Since we interpret the Act in light of this purpose, see *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 353, we conclude that law enforcement agencies may, consistent with the Act,^[3] enter a DNA profile generated from a deceased individual with a documented felony arrest or conviction into NMDIS for the purpose of comparison to evidence profiles generated from unsolved criminal cases.

We reach a similar conclusion as to your second question, which asks whether the Act allows or precludes searches of DNA profiles generated from criminal cases to be compared to DNA profiles generated from reference samples in NMDIS for the purpose of establishing potential familial matches. In general, the Act does not appear to expressly limit the scope of DNA searches conducted for criminal investigatory purposes except by providing that they may not include samples collected from unidentified persons or relatives of missing persons. *See* § 29-16-8.1(B) (“Searches of samples collected from unidentified persons or relatives of missing persons pursuant to the DNA Identification Act shall not be performed against DNA indexes consisting of evidentiary samples resulting from criminal investigations.”). Nothing in the Act specifies that a DNA search conducted for criminal investigatory purposes may only seek an exact match, or that the identification of a specific individual is the only permissible information that may be conveyed through such a search. As a result, we conclude that the Act does not prohibit a law enforcement agency from conducting searches for the purpose of establishing potential familial matches.

This conclusion should be qualified, though, insofar as the administrative rules promulgated by the DNA Identification System Oversight Committee (the “Committee”) do appear, at present, to limit search results in NMDIS to specific DNA matches and not necessarily familial matches. *See* 10.14.200.11(E)(1) NMAC (“If a DNA profile match should occur between the DNA profile from a covered offender or arrestee and an unknown forensic sample, an unidentified person or unidentified human remains, a reanalysis of the stored DNA sample shall be performed, if possible, to verify the generated profile.”). Given that the Committee has the specific authority to “adopt rules and procedures regarding the administration and operation of the DNA identification system,” these administrative rules may need to be amended in order for a law enforcement agency to conduct a search for the purpose of establishing potential familial matches.

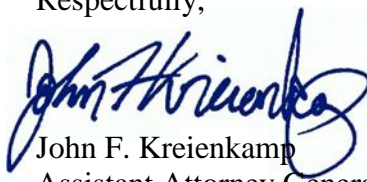
Your third and final question asks whether the Act allows or precludes DNA profiles in NMDIS to be compared to casework evidence profiles or suspect reference profiles generated from law enforcement agencies using RAPID DNA analysis techniques. Here, we note that the Act generally does not itself specify which scientific techniques NMDIS may utilize, instead requiring that the techniques utilized be “compatible with the procedures the federal bureau of investigation has specified, including comparable test procedures, laboratory equipment, supplies and computer software.” Section 29-16-4(A)(1). This same statutory provision also requires that the “[p]rocedures used shall meet or exceed the provisions of the federal DNA Identification Act of 1994 regarding minimum standards for state participation in CODIS.” *Id.* To that end, the Act vests the NMDIS Administrative Center with the administrative rulemaking authority to set specific requirements for “sample collection” and “DNA testing.” Thus, here too it appears that the Act itself neither allows nor precludes the use of RAPID DNA analysis techniques, instead leaving such determinations to the FBI and the NMDIS Administrative Center.[4]

Conclusion

Because the Act is intended to facilitate the use of DNA in criminal investigations, it stands to reason that law enforcement agencies may, consistent with the Act, enter a DNA profile generated from a deceased individual with a documented felony arrest or conviction into NMDIS for the purpose of comparison to evidence profiles generated from unsolved criminal cases. Similarly, law enforcement agencies may also conduct searches for the purpose of establishing potential familial matches. However, because the Act does not itself specify which scientific techniques NMDIS may utilize, the use of RAPID DNA analysis techniques is a question reserved to the NMDIS Administrative Center and the FBI.

Please note that this opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,


John F. Kreienkamp
Assistant Attorney General

[1] The Act also provides that the Center shall (2) coordinate sample collection activities; (3) perform or contract for DNA testing; (4) serve as a repository for samples and DNA records; (5) act as liaison with the federal bureau of investigation for purposes of CODIS; (6) adopt rules and procedures governing: (a) sample collection; (b) DNA testing; (c) the DNA identification system and DNA records; (d) the acceptance, security and dissemination of DNA records; and (e) communication between local, state and federal law enforcement

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agencies, the corrections department and local jails and detention facilities in order to minimize duplicate sample collections from the same individual. § 29-16-4.

[2] Specifically, the sample may be tested if “the arrest was made upon an arrest warrant for a felony; ... the defendant has appeared before a judge or magistrate who made a finding that there was probable cause for the arrest; or ... the defendant posted bond or was released prior to appearing before a judge or magistrate and then failed to appear for a scheduled hearing.” Section 29-3-10(B).

[3] Although a wide range of other laws may speak to the issues involving the collection and use of DNA samples from deceased individuals, our conclusion is limited to the Act.

[4] It appears, at present, that RAPID DNA analysis techniques are not acceptable for use with CODIS (and therefore by extension NMDIS). *See* FBI’s Vision of Rapid DNA, Federal Bureau of Investigation (“For purposes of uploading into CODIS, Rapid DNA systems are **not** authorized for use on crime scene samples.”) (emphasis in original), available at <https://www.fbi.gov/file-repository/rapid-dna-executive-summary-9-25-17-final.pdf/view>.