

## **Article - Criminal Procedure**

§17-102.

(a) (1) FGGS may not be initiated without judicial authorization and without certifying before the court that the forensic sample and the criminal case satisfy the criteria set forth in this section.

(2) If an FGGS is certified before a court in accordance with this section, the court shall authorize the initiation of the FGGS.

(b) A sworn affidavit shall be submitted by a law enforcement agent with approval of a prosecutor from the relevant jurisdiction asserting that:

(1) the crime is the commission of, or the attempt to commit, murder, rape, a felony sexual offense, or a criminal act involving circumstances presenting a substantial and ongoing threat to public safety or national security;

(2) the forensic sample to be subjected to the FGGS is biological material reasonably believed by investigators to have been deposited by a putative perpetrator and that the forensic sample was collected from:

(i) a crime scene;

(ii) a person, an item, or a location connected to the criminal event; or

(iii) the unidentified human remains of a suspected homicide victim;

(3) an STR DNA profile has already been developed from the forensic sample, was entered into the statewide DNA database system and the national DNA database system, and failed to identify a known individual; and

(4) unless the crime being investigated presents an ongoing threat to public safety or national security concerns, reasonable investigative leads have been pursued and failed to identify the perpetrator.

(c) Biological samples subjected to FGG DNA analysis, whether the forensic sample or third party reference samples, may not be used to determine the sample donor's genetic predisposition for disease or any other medical condition or psychological trait.

(d) FGGS may only be conducted using a direct-to-consumer or publicly available open-data personal genomics database that:

(1) provides explicit notice to its service users and the public that law enforcement may use its service sites to investigate crimes or to identify human remains; and

(2) seeks acknowledgement and consent from its service users regarding the substance of the notice described in item (1) of this subsection.

(e) The laboratory conducting SNP or other sequencing-based testing and the genetic genealogist participating in FGGS shall be licensed by the Office of Health Care Quality in accordance with § 17-104 of this title.

(f) (1) (i) Subject to subparagraph (ii) of this paragraph, informed consent in writing shall be obtained from any third party whose DNA sample is sought for the purpose of assisting an FGGS and all statements made in obtaining the informed consent shall be documented from beginning to end by video or audio recording.

(ii) If the use of informed consent will compromise the investigation as demonstrated under subsection (g)(1)(ii) of this section and the third party has not already refused to consent, investigators may seek authorization to covertly collect a DNA sample in accordance with subsection (g) of this section.

(2) The person obtaining the informed consent shall have training from a genetic counselor approved by the Office of Health Care Quality under § 17-104 of this title within 1 year after the Office of Health Care Quality has identified and approved a genetic counselor or within 1 year after the person joins the investigative unit conducting the investigation, whichever is later.

(3) The third party shall be informed, at a minimum, of the following before giving informed consent in writing:

(i) the investigation involves a crime specified under subsection (b)(1) of this section;

(ii) the third party is not a suspect in the investigation and has the right to refuse to consent to the collection of a DNA sample;

(iii) the law prohibits the covert collection of a DNA sample if the third party refuses to consent to the collection of a DNA sample;

(iv) the third party has been identified through a search of a direct-to-consumer or publicly available open-data personal genomics database as a potential relative of an individual believed to have committed a crime specified under subsection (b)(1) of this section;

(v) investigators are seeking the third party's DNA to assist in identifying the person or persons who committed the crime, or to identify the victim of a homicide, and for no other purpose; and

(vi) 1. the third party's DNA sample and any information obtained from its analysis will be kept confidential in accordance with a court order during the course of the investigation;

2. the DNA sample and any data obtained from it will be destroyed when the investigation or any criminal case arising from the investigation ends; and

3. in accordance with a court order, the third party will receive notice by certified delivery that the destruction has occurred.

(4) If the third party does not consent to providing a reference sample for an FGGS investigation, law enforcement may not collect a covert reference sample from the individual.

(g) (1) If investigators determine that one or more persons are putative perpetrators of the crime under investigation and it is necessary to collect a covert DNA sample from the putative perpetrator or a third party:

(i) the authorizing court shall be notified prior to the covert collection of the putative perpetrator's or the third party's reference sample;

(ii) subject to paragraph (2) of this subsection, for a covert collection of a DNA sample of a third party, investigative authorities shall provide an affidavit to the court demonstrating that seeking informed consent from a third party creates substantial risk that a putative perpetrator will flee, that essential evidence will be destroyed, or that other imminent or irreversible harm to the investigation will occur;

(iii) investigative authorities shall make a proffer to the court explaining how they plan to conduct the covert collection in a manner that avoids unduly intrusive surveillance of individuals or invasions to their privacy and follows the laws of the State;

(iv) for a covert collection of a DNA sample of a putative perpetrator, any putative perpetrator DNA sample that is collected covertly may only be subjected to an STR test to see if it matches an STR DNA profile obtained from a forensic sample;

(v) any covertly collected DNA sample, including SNPs and other genetic profiles or related information, that does not match the STR DNA profile obtained from a forensic sample shall be destroyed and may not be uploaded to any DNA database, including local, state, or federal DNA databases within CODIS, or any DNA database not authorized by local, state, or federal statute; and

(vi) 1. the law enforcement officer conducting the covert collection shall report back to the authorizing court every 30 days about the progress of the covert collection and shall make a proffer about future plans in accordance with item (iii) of this paragraph; and

2. without good cause shown, covert collection efforts to obtain a sample shall cease after 6 months.

(2) The fear that a third party will refuse informed consent may not constitute a basis for seeking covert collection of a DNA sample from the third party.

(h) (1) (i) Except as provided in subparagraph (ii) of this paragraph, on completion of an FGGS investigation that does not result in a prosecution or results in an acquittal, or on completion of a sentence and postconviction litigation associated with a conviction obtained through the use of FGGS, or on completion of any criminal prosecution that may arise from the FGGS, the authorizing court, or any court that ultimately has jurisdiction over any criminal case that arose from the FGGS, shall issue orders to all persons in possession of DNA samples gathered in the FGGS and all genetic genealogy information derived from the FGG analysis of those samples to destroy the samples and information.

(ii) 1. On the completion of an FGGS investigation, the genetic genealogist participating in the FGGS shall turn over to the investigator all records and materials collected in the course of the FGGS, including material sourced from public records, family trees constructed, and any other genetic or nongenetic data collected in the FGGS.

2. The genetic genealogist may not keep any records or materials in any form, including digital or hard copy records.

3. The genetic genealogist shall ensure that all records described under this subparagraph have been deleted or removed from any FGG website.

4. The prosecutor shall retain and disclose any records or materials as required under the Maryland Constitution or the United States Constitution and the rules of discovery as provided in Maryland Rules 4–262 and 4–263, but may not otherwise use or share the records or materials.

(2) The court orders shall include the removal and destruction of any FGG profiles previously uploaded to direct-to-consumer or publicly available open-data personal genomics databases.

(3) All individuals who were not the source of the STR DNA profile obtained from the forensic sample and whose DNA was collected through informed consent or covertly during the course of the FGGS shall receive notice of that destruction by certified delivery.

(i) (1) A person may not disclose genetic genealogy data, FGG profiles, or DNA samples not authorized by a court order in the course of an FGGS, or in the course of any criminal proceeding that arises from an FGGS.

(2) A person who violates this subsection is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding \$5,000, or both.

(j) (1) A person may not willfully fail to destroy genetic genealogy information, FGG profiles, or DNA samples that are required to be destroyed in accordance with subsection (h) of this section.

(2) A person who violates this subsection is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding \$1,000 or both.

(k) A person whose genetic genealogy information, FGG profile, or DNA sample is wrongfully disclosed, collected, or maintained in violation of this title has a private right of action under relevant State law guiding tort claims, and is entitled to minimum liquidated damages of \$5,000 for a violation.

(l) A prosecutor in a criminal case that involves an FGGS investigation may file with the Court of Special Appeals an appeal from an interlocutory order by a court that excludes or suppresses evidence in the form of an STR DNA profile obtained from the FGGS.