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Informational Testimony

HB 33/HB 807 – Commercial Law – Consumer Protection – Biometric Data
Privacy

Dear Chairman and Members of the Committee:

This submission is to provide information on House Bills 33 and 897 Bill 169 and their impact. This is provided on behalf of Aisha Braveboy, States Attorney for Prince George's County and the Maryland State's Attorney's Association. I am Robert Dean, Special Assistant State's Attorney for Prince George's County assigned to work with the Cold Case Homicide Unit of the Prince George's County Police Department.

Our concern is the potential effect that these bills may have on important law enforcement activity should they become law as is - specifically the effect on the forensic genetic genealogical investigative process. We urge you to consider ways to accomplish your purpose in protecting biometric data privacy, yet at the same time preserving Maryland law enforcement's ability to utilize the forensic genetic genealogy investigative process which has become an essential tool in solving cold cases of homicide and sex offenses. As the bills stand now, they are flawed but we believe the flaws can be fixed.

One and a half years ago, our office was awarded a \$470,000 grant from the Department of Justice to support the investigation of unsolved homicides and sex offenses using forensic genetic genealogy. Working with the county police crime lab we have initially identified approximately 640 cases of unsolved homicides and sex offenses in Prince George's County where forensic genealogy investigation may be useful. (This process is also valuable in identifying human remains). We currently have 15 active cases utilizing the forensic genetic genealogy process and we anticipate increasing that number up to about 20 by the end of this year.

In 2021, the General Assembly enacted a comprehensive regulatory scheme covering some of this field in *Title 17 of the Criminal Procedure Code*. This comprehensive effort, the only one

in the nation so far, governs in considerable detail how investigations utilizing forensic genetic genealogy are to proceed.

Title 17 establishes regulatory criteria, including judicial oversight of the investigative process, and rules governing the composition of the data bases available to law enforcement for this investigative purpose. There are rules requiring confidentiality and destruction protocols, as well as the establishment of regulatory criteria for those involved in the process.

Without getting into all the details of the *Title 17* requirements, our unit must follow the requirements of Title 17 as well as the *Department of Justice Interim Guidelines on Forensic Genetic Genealogy (2019)*. We currently have obtained judicial approval to proceed in approximately 15 cases that occurred from 1972 to 2006.

An initial step in developing leads for investigative purposes is to submit biological samples from the crime scene that are likely to originate from the offender. This sample must have already been submitted to the national CODIS data base to see if there is a match from samples of known offenders that have already been provided into the data base.

Once it is determined that there is no match, the Forensic Genetic Genealogy process involves sending the biological sample of a purported unidentified offender to a private laboratory that performs a SNP extraction (Single Nucleotide Polymorphism) which is then uploaded into a data base of DNA samples that have been voluntarily submitted by consumers to determine their ancestry. The donors to this data base have consciously opted into the database and agreed that their DNA sample could be made available to law enforcement.

Based upon the SNP upload of the suspect sample, a distant relative of the possible suspect may be identified based upon a calculation of familial DNA characteristics. At this point, a genealogist will construct a family tree based upon open-source information.

This process can be very time consuming. But it may provide leads for investigators to follow. In building the family tree, persons of interest may be revealed. Any leads that arise through this process will, of course, need further investigation based upon the specifics of the crime being investigated.

Our concern with HB 33 (cross-filed with SB 169) and HB 807, is that those private entities who develop the SNPs and those private entities that maintain the essential data bases of DNA profiles voluntarily submitted, will likely avoid accepting Maryland cases because of the potential reach of these bills.

A reading of the bills as it defines and regulates biometric data by private entities and the destruction protocols imposed and the cause of action HB 33 affords individuals, has the very real potential of ending the forensic genetic genealogy investigative process in Maryland.

I have spoken to representatives of Othram and BODE technologies who have expressed concern over the potential that such legislation has.

In light of the already existing regulatory scheme of *Criminal Procedure Title 17*, and the chilling effect that these bills would have to the availability of this crime solving technique in

Maryland, we urge this committee to consider amendments to the proposed legislation to exclude from the coverage of these bills those entities that have laboratories developing the appropriate DNA profiles necessary in the forensic genetic genealogy process as well as those entities that maintain those data bases essential to the forensic genetic genealogy process.

Title 17 section 17-101 (c) and (g) provides statutory definitions of those entities that provide the services necessary to the forensic genetic genealogy process. The operative definitions are: (c) Direct to Consumer genetic genealogy services; and (g) publicly available open-data personal genomics database.

Therefore, we urge that these two types of private entities to be excluded from the definition of private entities for purposes of HB 33 found in 14-4501 (E) (2) of the bill. In addition to this amendment, the purpose clause can be amended to explain that nothing in this law should affect the investigative processes regulated in Title 17 of the Criminal Procedure Article.

I have attached to this written testimony possible approaches to amendments to the bills that would address our concerns.

I will be happy to answer any questions.

Robert Dean
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Attachment

Possible Amendments to the SB 169/HB 33.

Purpose: To exclude from coverage of HB 33 and SB 169 those private entities that provide essential services to law enforcement investigating crimes pursuant to Criminal Procedure Article Title 17.

14-4501 (E) (2) "Private Entity" does not include:

Option 1 - (V) Any entity providing services for and on behalf of law enforcement agencies conducting investigative activity covered by Title 17 of the Criminal Procedure Article.

Option 2 - (V) Any entity as defined by Title 17 of the Criminal Procedure Article Section 17-101 (c) and Section 17- 101 (g) providing services for and behalf of law enforcement agencies conducting investigative activity covered by the aforesaid Title 17.

From Illinois: (The Biometric Privacy Act)

740 ILCS 14/25)

Sec. 25. Construction.

(a) Nothing in this Act shall be construed to impact the admission or discovery of biometric identifiers and biometric information in any action of any kind in any court, or before any tribunal, board, agency, or person.

(b) Nothing in this Act shall be construed to conflict with the X-Ray Retention Act, the federal Health Insurance Portability and Accountability Act of 1996 and the rules promulgated under either Act.

(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder.

(d) Nothing in this Act shall be construed to conflict with the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 and the rules promulgated thereunder.

(e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government.

(Source: P.A. 95-994, eff. 10-3-08.)