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March 8, 2023

Informational Testimony

SB 698 – Consumer Protection – Biometric Data Privacy

Dear Madame Chair and Members of the Committee:

This submission is to provide information on Senate Bill 698 and its potential negative impact on Maryland law enforcement efforts to solve open homicide and sex offense cases. 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. On February 8, 2023, I testified before this committee on a somewhat related bill, SB 169 and provided written testimony as well. This written testimony tracks the written testimony that I provided previously as our concerns are the same.

Our concern is the potential effect that this bill may have on important law enforcement activity should it 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 bill stands now, it is 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 SB 698 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 this bill as well as other similar bills proposed.

A reading of the bill as it defines and regulates biometric data by private entities and the destruction protocols imposed and the cause of action SB 698 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 this bill could have to the availability of this crime solving technique in Maryland, we urge this committee to consider an amendment to the proposed legislation to exclude from the bill's coverage 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 entities and the essential process of Forensic Genetic Genealogy that they perform for law enforcement be excluded from the coverage of the law. The operative exclusion section for this legislation is 14-4503(A). Options for possible amendments which would address our concerns are provided in the attachment to this written testimony. In addition to an amendment to this section of the bill, 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 will be happy to answer any questions or discuss further.

Respectfully,

Robert Dean

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Attachment

March 2023

To: Interested Parties

From: Robert Dean – ASA – Prince George’s County State’s Attorney’s Office

Re: SB 698 (cross-filed with HB 807). – Options for Recommended Amendment.

Purpose: To exclude from coverage of SB 698 (and HB 807) those private entities that provide essential services to law enforcement investigating crimes pursuant to Criminal Procedure Article Title 17.

Options:

14-4503 (A) This subtitle does not apply to:

(7) Option 1 - 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 – Any entity or process 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.

Option 3 - A contractor, subcontractor, or agent of a state agency or local unit of government when working for or on behalf of that State agency or a local unit of government.

Note: Current Language from Annotated Code of Maryland – Criminal Procedure Article - Title 17 Definitions: 17-101:

(c) “**Direct-to-consumer genetic genealogy services**” means genetic genealogy services that are offered by private companies directly to members of the public and law enforcement agencies rather than through clinical health care providers, typically via customer access to secure online websites.

(g) “**Publicly available open-data personal genomics database**” means a database in which persons voluntarily submit their genomics data or genetic profiles, typically processed through genetic genealogy services, for the purposes of comparison or searching against the genetic profiles of other individuals to evaluate potential familial relationships between the reference sample and other service user samples.

Note - Option 3 above is derived From Illinois (The Biometric Privacy Act)

740 ILCS 14/25)

Sec 25 Construction

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(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 a local unit of government.

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