

# FORENSIC BIOLOGY ADMINISTRATIVE MANUAL

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## Attorney Requests

### 1 Guiding Principles and Scope:

- 1.1 This document describes the processes by which attorneys may receive documents, etc. pertaining to work performed by the Department of Forensic Biology.
- 1.2 These procedures were established in consultation with the OCME Legal Department.

### 2 Procedure:

- 2.1 In general, the Legal Department, reviews all requests for records which are served upon the OCME. The Legal Department determines who is required to be notified when such requests are received by the Department, how the information will be conveyed and ensures that the necessary notifications are made.

### 3 Requests for Forensic Biology Case Records

- 3.1 An attorney seeking a certified copy of Forensic Biology case and/or suspect records must submit a written request and any other necessary documents as described below to the OCME.
- 3.2 Criminal Matters
  - 3.2.1 Requests from Prosecution. Prosecuting attorneys (e.g., District Attorney's Office, United States Attorney's Office) may submit a "Request for Forensic Biology Case File Certification" form electronically to: [DNACertFileReq@ocme.nyc.gov](mailto:DNACertFileReq@ocme.nyc.gov). Requests should not be faxed. The Legal Department does not need to review the file prior to certification and release of the file by the Forensic Biology Administrative Team.
  - 3.2.2 Requests from Defense Attorneys. Defense attorneys may submit a written request for certified copies of Forensic Biology case files. The request must be made on law firm letterhead and state the name of the case, the party the attorney represents, the court in which the case is pending, the indictment/case number, the Forensic Biology case file number (s), and the requesting attorney's phone number. The request may be made by mail or email and must be approved by the Legal Department. The Administrative Team must provide a copy of the requested case file(s) to the Legal Department for review to make any necessary redactions prior to certification and release of the file(s).
- 3.3 Family Court – Juvenile Delinquency Matters

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- 3.3.1 Requests from the New York City Law Department. The Law Department may submit a “Request for Forensic Biology Case File Certification” form electronically to: [DNACertFileReq@ocme.nyc.gov](mailto:DNACertFileReq@ocme.nyc.gov). Requests should not be faxed. The file does not need to be redacted and the Administrative Team may certify and release the file.
- 3.3.2 Requests from Defense Attorneys. Defense attorneys may submit a written request for certified copies of Forensic Biology case files. The request must be made on law firm letterhead and state the name of the case, the party the attorney represents, the court in which the case is pending, the docket/case number, the Forensic Biology case file number(s), and the requesting attorney’s phone number. The request may be made by mail or email and must be approved by the Legal Department. The Administrative Team must provide a copy of the requested case file(s) to the Legal Department for review to make any necessary redactions prior to certification and release of the file(s).
- 3.4 Family Court – Administration for Children’s Services (ACS) Matters
- 3.4.1 Requests from ACS Attorneys. ACS attorneys must appropriately serve a so-ordered judicial subpoena. The Administrative Team must provide the subpoena to the Legal Department for review. If the Legal Department approves ACS’s request and subpoena, the file does not need to be redacted and the Administrative Team may certify and release the file(s).
- 3.4.2 Requests from Defense Attorneys. Defense attorneys must appropriately serve a so-ordered judicial subpoena. The Administrative Team must provide the subpoena to the Legal Department for review. If the Legal Department approves the defense attorney’s request and subpoena, the Administrative team must provide a copy of the requested case file(s) to the Legal Department for review to make any necessary redactions prior to certification and release of the file(s).
- 3.5 Civil Matters – The defendant in the case is the City of New York
- 3.5.1 Plaintiff’s counsel. Plaintiff’s counsel must appropriately serve a so-ordered judicial subpoena. The Administrative Team must provide the subpoena to the Legal Department for review. If the Legal Department approves plaintiff’s counsel’s request and subpoena, the Administrative Team must provide a copy of the requested case file(s) to the Legal Department for review to make any necessary redactions prior to certification and release of the file(s).
- 3.5.2 Law Department. Law Department attorneys may submit a “Request for Forensic Biology Case File Certification” form electronically to [DNACertFileReq@ocme.nyc.gov](mailto:DNACertFileReq@ocme.nyc.gov). Requests should not be faxed. The form must be provided to the Legal Department. If the Legal Department approves the Law Department’s request, the Administrative Team must provide a copy of the requested case file(s) to the Legal Department

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for review to make any necessary redactions prior to certification and release of the file(s).

- 3.6 Civil Matters – The City of New York is not a party to the proceeding.
- 3.6.1 Plaintiff’s counsel. Plaintiff’s counsel must appropriately serve a so-ordered judicial subpoena. The Administrative Team must provide the subpoena to the Legal Department for review. If the Legal Department approves plaintiff’s counsel’s request and subpoena, the Administrative Team must provide a copy of the requested case file(s) to the Legal Department for review to make any necessary redactions prior to certification and release of the file(s).
- 3.6.2 Defense counsel. Defense counsel must appropriately serve a so-ordered judicial subpoena. The Administrative Team must provide the subpoena to the Legal Department for review. If the Legal Department approves defense counsel’s request and subpoena, the Administrative team must provide a copy of the requested case file(s) to the Legal Department for review to make any necessary redactions prior to certification and release of the file(s).
- 3.7 The OCME will not release any Forensic Biology case file and/or reports that relate to a homicide without (1) the written consent of the prosecutor or (2) so-ordered judicial subpoena. As an alternative to a written request, defense counsel in “Criminal Matters” and “Family Court – Juvenile Delinquency Proceedings” may submit a so-ordered subpoena for certified copies of reports/case files. All subpoenas received by the Administration Team must be directed to the Legal Department for approval. The written request or so-ordered judicial subpoena is incorporated into the associated DNA case record.
- 3.8 The Administrative Team fulfills all requests for certified DNA case records.
- 3.9 Production of a certified copy of a DNA case record takes a minimum of ten (10) business days.
- 3.10 Certified copies of DNA case records will not be mailed to the requesting attorney; they must be picked up by a messenger or representative of the attorney’s office.
- 3.11 In general, all certified copies of DNA case records fulfilled in accordance with a so-ordered judicial subpoena duces tecum will be mailed by a trackable method by the Legal Department to the Court that issued the subpoena.
- 3.12 All inquiries concerning the status of a request for a certified copy of a DNA case record shall be directed to the Administrative Team at 212-323-1200.
- 3.13 All requests that a request for a certified copy of a DNA case record be rushed or expedited shall be directed to the Administrative Team at 212-323-1200.

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## 4 Other Discovery Requests

- 4.1 All requests for documents beyond the DNA case record will be handled/coordinated by the Legal Department.
- 4.2 Items that will be produced only upon proper service (CPLR 2307) of a so-ordered judicial subpoena, if at all, include but are not limited to:
- 4.2.1 Electronic raw data files
- 4.2.1.1 Requests for electronic raw data shall be fulfilled as follows unless special arrangements are made and approved by the Legal Department: The individual data file from the capillary electrophoresis for each sample and the controls (ladder, positive control, amplification negative control, extraction negative control and/or microcon negative control), and the entire contents of the folder generated after running STRmix shall be compiled and transmitted via ShareFile to the email addresses provided by the Legal Department. Only samples and/or controls that were used for interpretation purposes need to be included in the compiled information.
- 4.2.2 Validation studies
- 4.3 Items that will be produced upon written request from an attorney on law firm letterhead stating the case caption, the Forensic Biology case number, the party whom the attorney represents, and attorney contact information include, but are not limited to:
- 4.3.1 Archived OCME protocols
- 4.3.2 Analyst C.V.
- 4.4 All other requests will be evaluated by the Legal Department to determine whether a subpoena is required for production.
- 4.5 The written request or so-ordered judicial subpoena is incorporated into the associated DNA case record.

## 5 In General:

- 5.1 Protocols
- 5.1.1 Current Department of Forensic Biology technical protocols may be found online on the OCME's public website: [www.nyc.gov/ocme](http://www.nyc.gov/ocme) under the tab "Services" → "Laboratories" → "Department of Forensic Biology", under the link "Technical Manuals".

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5.1.2 Requests for any other protocols should be directed to the Legal Department or the Department of Forensic Biology Quality Manager.

5.1.3 The request is incorporated into the associated DNA case record, as applicable.

### 6 Attorney Request to be Present for Testing

6.1 An attorney and/or their technical expert may request to be present for evidence viewing, evidence examination, and/or DNA testing. The Department of Forensic Biology permits an attorney and/or technical expert to be present within a Forensic Biology laboratory to observe the entire process or selected portions of DNA analysis (e.g., an attorney may request to be present only for evidence examination or an expert may solely ask to observe the swabbing of items of crime scene evidence).

6.2 All requests from attorneys to be present for testing must be brought to the attention of the Legal Department.

6.2.1 The attorney must submit a written request to the Legal Department at least one week in advance of the proposed observation date. This request is incorporated into the associated DNA case record.

6.2.2 If evidence or exemplar examination has already commenced prior to receipt of the attorney's written request, Forensic Biology testing will **not** cease unless a Court Order directs the Department of Forensic Biology to do so.

6.2.3 The attorney's written request must include the following identifying information:

6.2.3.1 The case caption (i.e., People v. John Smith, Indictment #1234/12)

6.2.3.2 The name of the presiding Judge;

6.2.3.3 The name of the attorney and/or expert who wishes to observe;

6.2.3.4 The items of evidence [and NYPD voucher number if known] which the attorney or expert believes were submitted to the OCME for DNA analysis.

6.3 In accordance with Department of Forensic Biology protocol, no one is permitted to enter a DNA laboratory without first submitting a DNA sample. Therefore, the attorney and/or expert must complete and sign a Non OCME Employee DNA SAMPLE CONSENT FORM and provide a DNA sample to the Department of Forensic Biology prior to entering the laboratory.

6.4 A criminalist within the Department of Forensic Biology will collect an oral swab from the attorney and/or expert.

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- 6.4.1 A record of the DNA profile(s) generated will be placed into LDIS.
- 6.4.1.1 The original consent form shall be maintained by the Forensic Biology Quality Assurance Group; a copy of the consent form shall be incorporated into the associated DNA case record(s)
- 6.5 The OCME will only permit an attorney or expert(s) to be present for observation during normal business hours: Monday to Friday, 9am to 5pm.
- 6.6 The attorney and/or expert will be escorted by OCME Department of Forensic Biology personnel at all times.
- 6.7 The attorney and/or expert must gown up to OCME specifications prior to entering a laboratory. An attorney or expert who does not follow the OCME gowning specifications will not be permitted to enter the laboratory.
- 6.8 The attorney and/or expert may bring a pen and paper into the laboratory.
- 6.9 The attorney and/or expert are prohibited from bringing cameras, cell phones or recording devices into the laboratory.
- 6.10 The attorney and/or expert are prohibited from photocopying any OCME documents.
- 6.11 The attorney and/or expert may not remove anything from the OCME Department of Forensic Biology laboratories or facility.
- 6.12 The attorney and/or expert will not be given a tour of the OCME DNA Facility. This is not an occasion or opportunity for the attorney and/or expert to question or quiz a criminalist about the testing process or technology or equipment utilized. If an attorney and/or expert wish to speak with the assigned criminalist in advance of trial concerning case-specific DNA testing and results, the attorney and/or expert may return to the OCME DNA Building at a later designated time to speak with the criminalist in person.

### **7 Request for evidence to be sent to a laboratory for testing**

- 7.1 An attorney may request that case or exemplar evidence be sent to a laboratory for testing.
- 7.2 All requests for evidence to be sent to a laboratory for testing must be brought to the attention of the Legal Department.
- 7.3 The Department of Forensic Biology may only forward case evidence or exemplars to a laboratory accredited by the New York State Department of Health (unless a Court Order dictates otherwise).

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- 7.3.1 A list of the private laboratories accredited by New York State Department of Health can be found at <http://www.wadsworth.org/labcert/clep/CategoryPermitLinks/CategoryListing.htm> under the Search Category “Forensic Identity.”
- 7.4 The Technical Leader of the Department of Forensic Biology can also provide a list to any attorney of the private laboratories accredited by NYS DOH.
- 7.5 If the Department of Forensic Biology still possesses the case evidence, the OCME requires a Court Order to effectuate transfer to another laboratory.
- 7.6 If case evidence has been returned to the custody of the New York Police Department, then the attorney must make all arrangements directly with the NYPD.
- 7.7 The Court Order must include the following identifying information:
- 7.7.1 The case caption (i.e., People v. John Smith, Indictment #1234/12) the name and address of the selected laboratory;
  - 7.7.2 Acknowledgement that the selected laboratory is accredited by the New York State Department of Health;
  - 7.7.3 A listing of the precise evidence which the OCME Department of Forensic Biology is directed to forward for testing.
  - 7.7.4 A statement that the laboratory shall return to the OCME Department of Forensic Biology evidence “leftover” subsequent to its testing.
- 7.8 The Court Order must be sent to the Legal Department for review.
- 7.9 The Court Order shall be incorporated into the associated DNA case record(s).
- 7.10 It is suggested that the assigned criminalist and/or supervisor speak with the attorney to come to a specific understanding as to ‘how much’ of each item of evidence will be sent by OCME to the laboratory to enable testing.
- 7.11 The OCME will not assume the cost of mailing evidence to the laboratory named in the Court Order. The selected laboratory must forward the Department of Forensic Biology a prepaid mailing label and any shipping material which the laboratory deems necessary.
- 7.12 The assigned criminalist and/or supervisor will locate the requested evidence and will be responsible for sending to the laboratory named in the Court Order.

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### 8 Request for Testimony / Case Conferences

- 8.1 As a general practice, the OCME does not require a personal appearance subpoena in order to secure the court appearance of any OCME employee.
- 8.2 A criminalist may testify in all manner of proceedings (Grand Jury, criminal or civil trials, depositions) without the need for an attorney to send a personal appearance subpoena.
- 8.3 If a personal appearance subpoena is received, a copy of it is placed in the associated DNA case record.
- 8.4 Typically, the criminalist who authored a case report testifies on behalf of that specific case. If the author of the report is not available for testimony, the Technical Reviewer of the case should testify instead. If neither the criminalist who authored the case report nor the Technical Reviewer of the case is available for testimony, any criminalist may testify to the reported results (specific to whether a DNA Interpreting Analyst is needed for testimony or not). The criminalist testifying is required to review the case record and complete the [CASE RECORD REVIEW-PRIOR TO TESTIMONY](#) form and place the form in the case file.
- 8.5 Attorneys should contact the criminalist directly in advance of grand jury or trial, to coordinate scheduling of testimony.
- 8.6 OCME requires that all attorneys who intend to call a criminalist as a witness before the Grand Jury or at trial have a pre-trial conference with the assigned analyst. That conference may take place either in-person at the OCME, or via telephone. The Legal Department shall be informed of each pre-trial conference at least 24 hours in advance of the scheduled meeting. The criminalist will be notified directly if an OCME attorney will be in attendance at the conference. In general, the pre-trial conference should not exceed an hour. Pre-trials are generally to be restricted to one pre-trial per side per case. The Legal Department must be made aware of any attorney request for a second pre-trial conference. The Legal Department will consult with the criminalist to determine whether the attorney's request for a second pre-trial conference will be granted.
- 8.7 In general, if an attorney wishes to speak with the assigned criminalist concerning reported case-specific DNA results, the attorney is welcome to do so. If the criminalist is a less experienced (less than two trial testimonies) criminalist, a Criminalist III or above must be present for the pre-trial conference. It is good practice to have a criminalist who has testified at trial on multiple occasions to be present during pre-trial meetings simply to ensure that the attorney clearly understands the information and opinions which are being given. Having a fellow criminalist present can be of value if the opposing attorney later files a motion or asks questions at trial which inaccurately describe the statements the assigned criminalist relayed during the pre-trial conference.
- 8.8 Occasionally, criminalists may be contacted by attorneys wishing to conference the case after the trial has concluded. As a general practice, criminalists will not participate in post-trial conferences.



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Rare exceptions may be made at the discretion of the Legal Department and the Chief of Laboratories.

- 8.9 All meetings with attorneys – the date and names of all persons present – shall be documented in the case communication log of the Forensic Biology case record.
- 8.10 If an attorney or expert witness wishes to communicate via the telephone, the criminalist must document the conversation in the case communication log. No criminalist shall discuss results of DNA testing prior to completion of the technical review process.
- 8.11 If an attorney communicates with a criminalist via email, the criminalist must similarly document the communication in the case communication log of the DNA case record.
- 8.12 A criminalist shall not reveal the subject of conversation with one attorney to opposing counsel in the same case.

### 9 Protective Orders

- 9.1 Courts may issue Protective Orders in conjunction with swab orders, which permit law enforcement to collect suspect exemplars for comparison to case evidence. A Protective Order issued by the court places restrictions on what the OCME is permitted to do with the suspect's known DNA profile. Such orders may specify exactly which items of evidence within the evidence file may be compared with the suspect's known profile, or they may simply limit comparison of the known suspect DNA profile with the evidence tested in the specific case. Often, these orders also direct the OCME not to enter the suspect's known DNA profile, generated from the compelled swab, into the local OCME DNA databank (LDIS).
- 9.2 In order to limit testing or comparison in any way, the OCME requires a Court Order specifying the protection(s) to be afforded the DNA.
- 9.3 A telephone call informing the criminalist of a Court's directive, copy of court transcript or letter from a prosecutor or defense attorney is not sufficient.
- 9.4 The Legal Department must review and approve all Protective Orders.
- 9.5 The Legal Department will email the assigned criminalist and supervisor to inform them that a Protective Order exists for the assigned case. The e-mail will specify the terms of the Protective Order that limit the OCME's use of the suspect's known profile.
- 9.6 The assigned criminalist or supervisor shall incorporate a copy of the Protective Order into the associated DNA case record(s) (in the LIMS case record(s) and in a hard copy of the case record(s) if one exists). The assigned criminalist or supervisor shall make an entry in the case communication log (in the LIMS case record(s) and in a hard copy of the case record(s) if one

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exists) detailing the requirements of the Protective Order. Placing a copy of the email received from the Legal Department into the communication log is sufficient for this purpose.

- 9.7 The assigned criminalist and the technical reviewer of the case record(s) shall confirm that a Protective Order does or does not exist pertaining to a defendant's DNA sample by searching the PROTECTIVE ORDERS folder in the general FORENSIC BIOLOGY\_MAIN folder. This search is to be performed in every case where no email from the Legal Department exists in reference to that defendant or case record. This search is to be performed before the report for that case record is finalized and distributed to external agencies.

### 10 Expungement Requests

- 10.1 An attorney may request that a suspect or defendant's known DNA profile be expunged from the local OCME DNA databank (LDIS).
- 10.2 Anyone inquiring as to expungement of a DNA profile **must** be referred to the Legal Department.
- 10.3 The Legal Department will advise the attorney that they may wish to ask for the following:
- 10.3.1 The defendant's known numeric DNA profile be expunged from OCME's local DNA database
  - 10.3.2 The swabs collected from the defendant be destroyed
  - 10.3.3 The associated DNA extracts be destroyed
  - 10.3.4 The associated Forensic Biology S case file be destroyed
- 10.4 The OCME requires a Court Order to effectuate an expungement. A letter of request is not sufficient.
- 10.5 Upon receipt of an Expungement Order, the Legal Department will send an email, with the Expungement Order attached, to the assigned criminalist and supervisor detailing the terms of the order and directing expungement as soon as practicable.
- 10.6 The assigned criminalist and supervisor shall be responsible for ensuring that the Expungement Order is honored.
- 10.7 A copy of the Court Order is incorporated into the associated DNA case record.

### 11 Post Conviction DNA testing

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- 11.1 The OCME will perform post-conviction DNA testing upon Court Order, or the written approval of the District Attorney's Office, or with the approval of the Legal Department and the Chief of Laboratories.
- 11.2 A defense attorney or defendant's written request for post-conviction testing is not sufficient.
- 11.3 The Court Order or written approval of the District Attorney's Office must be sent to the Legal Department.
- 11.4 Any attorney involved in Post Conviction DNA testing is welcome to come to the OCME DNA building to speak with the assigned case criminalist to discuss case-specific testing. If the assigned criminalist is a Criminalist II or III, the criminalist's supervisor must be present for any post-conviction conference.
- 11.5 The Court Order or written approval from the District Attorney's Office shall be incorporated into the associated DNA case record(s).

## 12 Requests for Additional Testing

- 12.1 If a Prosecutor or Defense attorney requests additional testing, including statistical analysis not previously calculated for the case, the request will be reviewed by OCME Management and the Technical Lead team on a case by case basis. The request can be made through the case analyst. The requesting agency will be notified of the decision on whether or not testing will be conducted.