

# FORENSIC BIOLOGY ADMINISTRATIVE MANUAL

<b>Attorney / Customer Requests</b>		
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## Attorney / Customer 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. Questions regarding requests for Forensic Biology case files can be directed to [Legal@ocme.nyc.gov](mailto:Legal@ocme.nyc.gov).

### 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, how the information will be conveyed and ensures that the necessary notifications are made.

### 3 Requests for Forensic Biology Case Records Under NYS Law 245

- 3.1 Pursuant to New York State Criminal Procedure Law 245, various materials generated by the Department of Forensic Biology in connection to DNA testing performed on a criminal matter or investigation are turned over to the NYC prosecutorial community upon request for dissemination to the case defense attorney as discovery. Such materials include:

- Case Report
- Certified copy of the case record(s)
- Non-conforming work (related to the case record unless specified differently by the court)
- Raw data files (.fsa, hid) -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)
- STRmix run files- the entire contents of the folder generated after running STRmix
- Summary of proficiency testing results for the past 10 years (applicable to the testifying analyst unless specified differently by the court)
- Curriculum Vitae (of the testifying analyst unless specified differently by the court)
- LIMS audit trail

The Laboratory Information Management System (LIMS) audit trail is a quality control measure that logs the entry and modification of data in the LIMS. The LIMS audit trail captures changes made in the LIMS and is a by-product of any such electronic system. Information contained within the LIMS audit trail is retained in the background of the system.

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- Each time a transaction is saved in the system, LIMS creates a line of entry in its audit trail. These entries consist of either information that is decipherable or code that is non-decipherable to analysts or laypeople. The saved transactions show the person who performed the entry and the date when it was made. The audit trail can include the creation or modification of records and/or can consist of a simple action of clicking “Save” in the system without any changes made to the record.
- The audit trail is a dynamic entity that changes in real-time as analysts continue to use the system; it is not the final work product. The analyst does not use the information contained in the LIMS audit trail nor is it needed to interpret and report scientific conclusions. Analysts do not use the audit trail as part of their management of a case.
- All relevant information captured in the audit trail that is or could be used by the analyst in reaching such conclusions is already contained in the case file.
- The audit trail is not transformed into a document until a request for the audit trail is made and a user actively selects the case record within the LIMS to produce such a record.

3.2 All Discovery requests, except for the LIMS audit trail, are to be made via the [Forensic Biology Discovery Request Form](#). LIMS audit trail requests are made via the [Request for Forensic Biology LIMS Audit Trail Form](#). These forms are received and processed by the Department’s Discovery Team, which is overseen by the Forensic Biology Customer Liaison.

3.3 The Discovery Team consists of Forensic Coordinators who check the [FBiologydiscovery@ocme.nyc.gov](mailto:FBiologydiscovery@ocme.nyc.gov) mailbox for incoming Discovery requests.

3.4 Requests pertaining to completed case records will be processed accordingly. One Discovery request is sufficient for all current and future work performed on a matter.

3.5 Production of Discovery materials takes a minimum of ten (10) business days.

3.6 The Discovery request form will be incorporated into the associated case record.

3.7 Requests pertaining to cases not yet completed will be rejected and the rejection conveyed to the requestor via email.

## 4 Requests for Certified Case Records Not Under NYS Law 245

4.1 An attorney requesting a certified copy of Forensic Biology case and/or suspect records, unrelated to NYS Criminal Procedure Law 245, must submit a [Forensic Biology Case File Certification Request Form](#) to the OCME.

4.2 The [DNAcertfilereq@ocme.nyc.gov](mailto:DNAcertfilereq@ocme.nyc.gov) or [DNAlab@ocme.nyc.gov](mailto:DNAlab@ocme.nyc.gov) mailbox is monitored by the Forensic Biology Administrative Team.

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- 4.3 Requests are processed in the order in which they are received. One certification request is sufficient for all current and future work performed on a matter.
- 4.4 The request will be incorporated into the associated case record.

### 5 Requests for Certified Case Records By Subpoena

- 5.1 Requests for certified Forensic Biology Case Records pursuant to a court-ordered subpoena are to be directed to the Legal Department.
- 5.2 Family Court – Administration for Children’s Services (ACS) Matters
  - 5.2.1 Requests from ACS Attorneys. ACS attorneys must 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 will be provided to the Legal Department for review. Once the Legal Department approves of the request, the Administrative Team will then certify and release the file(s) without redactions. If redactions are needed, please specify this on the request form.
  - 5.2.2 Requests from Defense Attorneys. Defense attorneys must properly serve a so-ordered judicial subpoena in-person to the OCME, located at 421 East 26<sup>th</sup> Street, NY, NY 10016. The Legal Department will review the subpoena and if there are no objections to the subpoena, the request will be approved and submitted to the Administrative Team. The Administrative Team will then provide a copy of the requested case file(s) to the Legal Department for review for any necessary redactions prior to certification and release of the file(s).
- 5.3 **Civil Matters – The City of New York is a defendant.**
  - 5.3.1 Plaintiff’s counsel. Plaintiff’s counsel must properly serve a so-ordered judicial subpoena in-person to the OCME, located at 421 East 26<sup>th</sup> Street, NY, NY 10016. The Legal Department will review the subpoena and if there are no objections to the subpoena, the request will be approved and submitted to the Administrative Team. The Administrative Team will then provide a copy of the requested case file(s) to the Legal Department for review for any necessary redactions prior to certification and release of the file(s).
  - 5.3.2 Law Department. Law Department attorneys must 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 will then be provided to the Legal Department for review. If the Legal Department approves of the Law Department’s request, the Administrative Team will then certify and release the file(s) without redactions. If redactions are needed, please specify this on the request form.
- 5.4 **Civil Matters – The City of New York is not a party to the proceeding.**

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- 5.4.1 Plaintiff's counsel. Plaintiff's counsel must properly serve a so-ordered judicial subpoena in-person to the OCME, located at 421 East 26<sup>th</sup> Street, NY, NY 10016. The Administrative Team will provide the subpoena to the Legal Department for review. The Legal Department will review the subpoena and if there are no objections to the subpoena, the request will be approved and submitted to the Administrative Team. The Administrative Team will then provide a copy of the requested case file(s) to the Legal Department for review for any necessary redactions prior to certification and release of the file(s).
- 5.4.2 Defense counsel. Defense counsel must properly serve a so-ordered judicial subpoena in-person to the OCME, located at 421 East 26<sup>th</sup> Street, NY, NY 10016. The Legal Department will review the subpoena and if there are no objections to the subpoena, the request will be approved and submitted to the Administrative Team. The Administrative Team will then provide a copy of the requested case file(s) to the Legal Department for review for any necessary redactions prior to certification and release of the file(s).
- 5.5 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 review and approval. The written request or so-ordered judicial subpoena will be incorporated as part of the associated DNA case record.
- 5.6 The Administrative Team fulfills requests for certified DNA case records.
- 5.7 Production of a certified copy of a DNA case record takes a minimum of ten (10) business days.
- 5.8 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.
- 5.9 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.
- 5.10 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.

## 6 Other Discovery Requests

- 6.1 All requests for documents beyond the DNA case file will be reviewed by the Legal Department.
- 6.2 Items that will be produced upon proper service (CPLR 2307) of a so-ordered judicial subpoena, in addition to approval of the Legal Department, include but are not limited to:
- Validation studies

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6.3 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:

- Archived OCME protocols
- Analyst C.V.

6.4 All other requests will be evaluated by the Legal Department to determine whether a subpoena is required for production.

6.5 The written request or so-ordered judicial subpoena is incorporated into the associated DNA case record.

## 7 In General:

7.1 Protocols

7.1.1 Current and historical Department of Forensic Biology technical protocols may be found online on the OCME's public website: <https://www1.nyc.gov/site/ocme/services/technical-manuals.page>

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

7.1.3 The request will be incorporated into the associated DNA case record, as applicable.

## 8 Attorney Request to be Present for Testing

8.1 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).

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

8.3 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.

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- 8.4 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.
- 8.5 The attorney's written request must include the following identifying information:
- The case caption (i.e., People v. John Smith, Indictment #1234/12)
  - The name of the presiding Judge;
  - The name of the attorney and/or expert who wishes to observe;
  - The items of evidence [and NYPD voucher number if known] which the attorney or expert believes were submitted to the OCME for DNA analysis.
- 8.6 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.
- 8.7 A criminalist within the Department of Forensic Biology will collect an oral swab from the attorney and/or expert.
- 8.8 A record of the DNA profile(s) generated will be placed into LDIS.
- 8.9 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)
- 8.10 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.
- 8.11 The attorney and/or expert will be escorted by OCME Department of Forensic Biology personnel at all times.
- 8.12 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.
- 8.13 The attorney and/or expert may bring a pen and paper into the laboratory.
- 8.14 The attorney and/or expert are prohibited from bringing cameras, cell phones or recording devices into the laboratory.
- 8.15 The attorney and/or expert are prohibited from photocopying any OCME documents.
- 8.16 The attorney and/or expert may not remove anything from the OCME Department of Forensic Biology laboratories or facility.

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8.17 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 after first contacting the Legal Department.

### 9 Request for evidence to be sent to a laboratory for testing

9.1 An attorney may request that evidentiary items or exemplars be sent to a laboratory for testing.

9.2 All requests for evidence to be sent to a laboratory for testing must be brought to the attention of the Legal Department.

9.3 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).

9.4 A list of the private laboratories accredited by New York State Department of Health can be found at <http://www.wadsworth.org/labcert/lep/CategoryPermitLinks/CategoryListing.htm> under the Search Category "Forensic Identity."

9.5 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.

9.6 If the Department of Forensic Biology still possesses the case evidence, the OCME requires a Court Order to effectuate transfer to another laboratory.

9.7 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.

9.8 The Court Order must include the following identifying information:

- The case caption (i.e., People v. John Smith, Indictment #1234/12) the name and address of the selected laboratory.
- Acknowledgement that the selected laboratory is accredited by the New York State Department of Health.
- A listing of the precise evidence which the OCME Department of Forensic Biology is directed to forward for testing.
- A statement that the laboratory shall return to the OCME Department of Forensic Biology evidence "leftover" subsequent to its testing.

9.9 The Court Order must be sent to the Legal Department for review.

9.10 The Court Order shall be incorporated into the associated DNA case record(s).

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- 9.11 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.
- 9.12 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.
- 9.13 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.

### 10 Request for Testimony / Case Conferences

- 10.1 As a general practice, the OCME does not require a personal appearance subpoena in order to secure the court appearance of any OCME employee.
- 10.2 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.
- 10.3 If a personal appearance subpoena is received, a copy of it is placed in the associated DNA case record.
- 10.4 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.
- 10.5 Attorneys should contact the criminalist directly in advance of grand jury or trial, to coordinate scheduling of testimony.
- 10.6 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.
- 10.7 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

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(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.

- 10.8** 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. Rare exceptions may be made at the discretion of the Legal Department and the Chief of Laboratories.
- 10.9 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.
- 10.10 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.
- 10.11 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.
- 10.12 A criminalist shall not reveal the subject of conversation with one attorney to opposing counsel in the same case.

## 11 Protective Orders

- 11.1 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).
- 11.2 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.

**11.2.1** Please note the difference between “Court Ordered” and “Court Ordered Protective Order” in case paperwork. If paperwork indicates that a sample is “Court Ordered”, this does not mean that a protective order has been issued, just that an order to collect the sample has been issued.

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- 11.3 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. Please email protective orders to [protectiveorders@ocme.nyc.gov](mailto:protectiveorders@ocme.nyc.gov).
- 11.4 The Legal Department must review and approve all Protective Orders.
- 11.5 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.
- 11.6 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 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.
- 11.7 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.
- 11.8 Comparison of a suspect sample with a protective order attached does not preclude the ability of the analyst to compare the results of DNA testing of the current suspect sample to any results previously obtained for that same individual (true or abandonment samples). This is done as a QC measure to ensure the sample received is for the listed suspect.

## 12 Court Ordered Expungement Requests

- 12.1 An attorney may request that a suspect or defendant's known DNA profile be expunged from the local OCME DNA databank (LDIS).
- 12.2 Anyone inquiring as to expungement of a DNA profile **must** be referred to the Legal Department. The Legal Department will review the order to determine which of the following actions are requested in the order:
- The defendant's known numeric DNA profile be expunged from OCME's local DNA database
  - The swabs collected from the defendant be destroyed
  - The associated DNA extracts be destroyed
  - The associated Forensic Biology S case file be destroyed

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- 12.3 The OCME requires a Court Order to effectuate an expungement. A letter of request is not sufficient.
- 12.4 Upon receipt of an Expungement Order, the Legal Department will send an email, with the Expungement Order attached, to the assigned criminalist and/or supervisor detailing the terms of the order and directing expungement as soon as practicable.
- 12.4.1 The QA/QC Group may be contacted to aid in disposal of associated extract(s).
- 12.4.2 The LIMS Manager may be contacted to aid in the LIMS case record destruction. The assigned criminalist and/or supervisor shall be responsible for ensuring that the Expungement Order is honored.
- 12.5 A copy of the Court Order is incorporated into the associated DNA case record if one exists. A copy of the Court Order is also maintained by the Legal Department.

### 13 NYPD Profile Removal Request

- 13.1 The NYPD may request that a suspect, or series of suspects' or defendants' known DNA profile(s) be removed from the local OCME DNA databank (LDIS).
- 13.2 The request is referred to the laboratory Director.
- 13.2.1 An email or letter requesting removal of the sample(s) is sufficient.
- 13.3 The Director will forward the request to the CODIS Manager who will coordinate the removal of the profile(s) from LDIS. The Legal Department will be informed of the request at the same time.
- 13.4 A copy of the request is maintained by the CODIS Group.

### 14 Request for LDIS Search

- 14.1 Requests to determine whether an individual's DNA profile is in the Laboratory's Local DNA Index System must be sent to the Legal Department. The "Request to Search for DNA Profile" form must be sent to [Legal@ocme.nyc.gov](mailto:Legal@ocme.nyc.gov). The form can be located on the Forensic Biology website <https://www1.nyc.gov/site/ocme/services/departement-of-forensic-biology.page>.

### 15 Post-Conviction DNA testing

- 15.1 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.
- 15.2 A defense attorney or defendant's written request for post-conviction testing is not sufficient.

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- 15.3 The Court Order or written approval of the District Attorney's Office must be sent to the Legal Department.
- 15.4 Any attorney involved in Post-Conviction DNA testing is welcome to visit 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.
- 15.5 The Court Order or written approval from the District Attorney's Office shall be incorporated into the associated DNA case record(s).

### 16 Requests for Additional Testing and/or Statistical Analyses

- 16.1 If a Prosecutor or Defense attorney requests additional testing not previously performed on the case, the request will be reviewed by the Forensic Biology Customer Liaison on a case by case basis. The request can be made through the case analyst. The requesting agency will be notified of the decision as to whether testing will be conducted.
- 16.2 Requests for additional statistical analyses must be submitted with sufficient information to warrant additional interpretations and/or statistical analyses. The request will be reviewed by Forensic Biology Management and/or 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 as to whether testing will be conducted.
- 16.3 Requests for additional testing will be incorporated into associated DNA case record.
- 16.4 Requests for any additional testing must conform to Forensic Biology operating procedures.

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