

FORENSIC BIOLOGY ADMINISTRATIVE MANUAL

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Attorney Requests

GUIDING PRINCIPLES AND SCOPE:

This document describes the processes by which attorneys may receive documents, etc pertaining to work performed by the Department of Forensic Biology.

These procedures were established in consultation with the OCME Legal Department.

PROCEDURE:

The OCME Legal Department, in general, reviews all requests for records which are served upon the Office of Chief Medical Examiner.

A. Requests for Forensic Biology Case Records

An attorney who wishes to receive a certified copy of the Forensic Biology case and/or suspect records must submit a written request directly to the OCME Legal Department.

Prosecuting attorneys (e.g., District Attorney's Office, United States Attorney's Office) or the presentment agency (New York City Law Department/Corporation Counsel) may submit a form request which can be obtained from either the Legal Department or the Forensic Biology Administrative Team. All such requests shall be submitted electronically to: DNACertFileReq@ocme.nyc.gov. Requests should not be faxed.

Defense attorneys may submit a written request for certified copies of Forensic Biology case files or reports. That written request must be made on law firm letterhead and must 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 number, and a telephone number for the requesting attorney. That written request may be made either by mail or by email and must be approved by the Legal Department. Once the request is approved and the records are ready for distribution, the Administrative Unit will provide the records to the Legal Department for review. Only once Legal has reviewed and approved the production of the documents will they be provided to the defense attorney.

If the reports/case files relate to a homicide, OCME will NOT release any records absent a so-ordered judicial subpoena or absent the express written consent of the prosecutor.

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As an alternative to a written request, defense counsel may submit a so-ordered judicial subpoena for certified copies of reports/case files. All subpoenas must be directed to the Legal Department for approval. As with written requests, Legal must review all documents prepared pursuant to a defense subpoena prior to distribution.

New York State Criminal Procedure Law states when a subpoena is directed to any department, bureau or agency of the state, it may only be issued on behalf of a defendant upon order of a court. CPL§ 610.20[3]; CPLR §2307

The written request or judicial subpoena duces tecum is incorporated into the associated DNA case record.

The Administrative Team fulfills all requests for certified DNA case records.

Production of a certified copy of a DNA case record takes a minimum of ten (10) business days.

Certified copies of DNA case records will not be mailed to the requesting prosecutor; they must be picked up by a messenger or representative of the prosecutor's office.

All certified copies of DNA case records fulfilled in accordance with a judicial subpoena duces tecum will be mailed by the OCME Legal Department to the Court which issued the subpoena.

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.

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.

B. Other Discovery Requests

All requests for documents beyond the DNA case record will be handled/coordinated by the Legal Department.

Items that will be produced only upon proper service (CPLR 2307) of a so-ordered judicial subpoena include, but are not limited to:

- Electronic raw data files
- Validation studies

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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.

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

IN GENERAL:

Protocols

Department of Forensic Biology protocols may be found online on the OCME's public website: www.nyc.gov/ocme under the tab "Forensic Biology", under the tab "Technical Manuals".

Any other requests for protocols, please contact the Legal Department.

C. Attorney Request to be Present for Testing

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).

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

1. The attorney must submit a written request to the OCME Legal Department at least one week in advance of the proposed observation date.
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.

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3. The attorney's written request must include the following identifying information:
 - a. The case caption (i.e., People v. John Smith, Indictment #1234/12)
 - b. The name of the presiding Judge;
 - c. The name of the attorney and/or expert who wishes to observe;
 - d. The items of evidence [and NYPD voucher number if known] which the attorney or expert believes were submitted to the OCME for DNA analysis.
4. 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.
5. A criminalist within the Department of Forensic Biology will collect an oral swab from the attorney and/or expert.
6. A record of the DNA profile(s) generated will be placed into LDIS.
7. The original consent form shall be maintained by the Forensic Biology Exemplar Group; a copy of the consent form shall be incorporated into the associated DNA case record(s).
8. 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.
9. The attorney and/or expert will be escorted by an OCME Department of Forensic Biology personnel at all times.

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10. 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.
11. The attorney and/or expert may bring paper and pen into the laboratory.
12. The attorney and/or expert are prohibited from bringing cameras, cell phones or tape recording devices into the laboratory.
13. The attorney and/or expert are prohibited from photocopying any OCME documents.
14. The attorney and/or expert may not remove anything from the OCME Department of Forensic Biology laboratories or facility.
15. 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.

D. Request for evidence to be sent to a laboratory for testing

An attorney may request that case or exemplar evidence be sent to a laboratory for testing.

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

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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).

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 section "Forensic Identity."

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.

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

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.

The Court Order must include the following identifying information:

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

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

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

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.

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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.

The assigned criminalist and/or her/his supervisor will locate the requested evidence and will be responsible for sending to the laboratory named in the Court Order.

E. Request for Testimony / Case Conferences

As a general practice, the Office of Chief Medical Examiner does not require a personal appearance subpoena in order to secure the court appearance of any OCME employee.

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.

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 in their stead. If neither the criminalist who authored the case report nor the Technical Reviewer of the case are 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.

Attorneys should contact the criminalist directly in advance of grand jury or trial, to coordinate scheduling of testimony.

OCME requires that all attorneys who intend to call a criminalist as a witness at trial have a pre-trial conference with the assigned analyst. That conference may take place either in-person at OCME, or via telephone. The OCME 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 Legal will be in attendance at the conference. Pre-trials are to be restricted to one pre-trial per side per case. Should additional pre-trials be requested by either side, the request should be forwarded to OCME Legal Department who will discuss the request with Forensic Biology Management.

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

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has testified at trial on multiple occasions to be present during pre-trial meetings simply to ensure that the attorney understands clearly 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.

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.

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.

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.

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.

A criminalist shall not reveal the subject of conversation with one attorney to the opposing counsel involved in the same case.

F. Protective Orders

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 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 associated with that specific case. Often, these orders also direct OCME not to enter the suspect's known DNA profile, generated from the underlying swab order, into the local NYC DNA databank (LDIS).

The OCME requires a Court Order specifying the protection(s) to be afforded the DNA.

A telephone call informing the criminalist of a Court's directive or copy of court transcript or letter from a prosecutor or defense attorney is not sufficient.

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The OCME Legal Department must review and approve all Protective Orders.

The OCME Legal Department will email the assigned criminalist and their Assistant Director supervisor that a Protective Order exists for their assigned case and in what manner the Protective Order is directing the OCME in reference to the DNA profile of the defendant.

The assigned criminalist or her/his Assistant Director 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 her/his Assistant Director 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 directive of the Protective order. Placing a copy of the email received from OCME legal Department into the communication log is sufficient.

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 BIOLOGYLOGY_MAIN folder. This search is to be performed in every case where no email from OCME 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.

G. Expungement Requests

An attorney may request that a suspect or defendant's known DNA profile be expunged from the local OCME DNA databank (LDIS).

Anyone inquiring as to expungement of a DNA profile **must** be referred to the OCME Legal Department.

The OCME Legal Department will advise the attorney that they may wish to ask for the following:

1. The defendant's known numeric DNA profile be expunged from OCME's local DNA database
2. The swabs collected from the defendant be destroyed
3. The associated DNA extracts be destroyed

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- The associated Forensic Biology S case file be destroyed

The OCME requires a Court Order. A letter of request is not sufficient.

Upon receipt of an Expungement Order, the OCME Legal Department will send an email, with the Expungement Order attached, to the assigned criminalist or her/his supervisor.

The assigned criminalist or her/his supervisor shall be responsible for ensuring the “terms” of the Expungement Order are honored.

H. Post Conviction DNA testing

The Office of Chief Medical Examiner 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.

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

The Court Order or written assent of the District Attorney’s Office **must** be sent to the OCME Legal Department.

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.

The Order or written assent from the District Attorney’s Office shall be incorporated into the associated DNA case record(s).

I. Requests for Additional Testing

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.