

Secretary

U.S. Department of Homeland Security
Washington, DC 20528



Homeland
Security

March 22, 2010

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
Washington, DC 20530

Dear Attorney General Holder:

On December 10, 2008, the U.S. Department of Justice (DOJ) published in the *Federal Register* a final rule entitled "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction."¹ The purpose of this letter is to consult with you regarding the Department of Homeland Security's (DHS) proposed exemptions from these requirements, as contemplated by the regulations.

On January 12, 2009, in connection with the implementation of this rule, former DHS Deputy Secretary Paul Schneider advised former Attorney General Michael Mukasey that commencement of DNA sample collection by DHS Components would be contingent on the provision of DNA sample collection kits by DOJ. Several months ago, DOJ staff informed the DHS Office of the General Counsel that the DNA sample collection kits had become available for use by DHS. Since then, our Department has been working to develop an implementation plan for DNA sample collection with respect to individuals arrested or aliens detained by our Department. During this time, Federal Bureau of Investigation (FBI) laboratory personnel and other DOJ officials have conducted several site visits at DHS facilities, and officials from DHS have held discussions with FBI and other DOJ staff regarding this process.

Due to the volume of individuals falling within the targeted class for DNA collection, implementation of this process poses severe organizational, resource, and financial challenges for this Department. The DNA processing of what DHS estimates may be close to a million aliens detained and individuals criminally arrested would severely strain the resources of the agency to perform its broader mission. Congress has not appropriated any additional funding to DHS for DNA sample collection or associated training costs for its law enforcement personnel, which underscores the financial burden DHS faces. Moreover, certain exceptions could help reduce the impact on privacy and civil liberties concerns. For these reasons, DOJ and DHS agreed to include certain exceptions in the December 2008 rule amending § 28.12(b)(1)-(3) of Title 28 of the Code of Federal Regulations. As set forth at § 28.12(b)(4), as revised by the rule, DNA collection from aliens not specified in subsection (b) may also be excepted from the collection requirement if I determine, after consultation with you, that collection of the sample from detained aliens is not feasible because of "operational exigencies or resource limitations."

¹ See 73 Fed. Reg. 74932. The rule, which took effect on January 9, 2009, implements the requirements of § 1004 of the DNA Fingerprint Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, and § 155 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (both codified at 42 U.S.C. § 14135a (2000)).

I believe that taking DNA samples from the following classes of aliens meets this standard and would like the views of DOJ on excepting them:

1. Non-U.S. persons detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18.

Rationale: DHS typically processes over 750,000 non-U.S. persons in administrative proceedings annually. Although DHS typically takes fingerprints in these instances, the collection of DNA samples from this class would create significant "operational exigencies" that would diminish the ability of this agency to accomplish its primary mission. For example, incorporating this activity into the U.S. Customs and Border Protection's (CBP) Border Patrol operations, which often take place at remote locations under harsh conditions and severe time constraints, would divert critical resources from border security and immigration enforcement. Implementation of the unfunded DNA sampling requirement for this class of persons would also further exacerbate the challenging resource limitations this Department already faces in conducting its mission.² DHS estimates significant costs for training, collecting, processing, and shipping samples, establishing a tracking system to eliminate redundant collections, implementing health and safety considerations and precautions, and establishing policies and procedures for chain of custody, individual refusal, logging, and tracking. For these reasons, DHS proposes to exclude this class of individuals from its DNA sample collection activities.

2. Non-U.S. persons currently within DHS custody, pending administrative removal proceedings.

Rationale: At any given time, there are approximately 30,000 non-U.S. persons being detained pending administrative removal proceedings. These individuals are well-past the typical "booking" stage, and undertaking DNA sample collection from this group would pose substantial operational exigencies for DHS. Collecting DNA samples from this population would require diverting already limited U.S. Immigration and Customs Enforcement (ICE) resources, thus decreasing DHS's ability to deal with law enforcement matters with a nexus to the border. For the same reasons that DOJ has exempted the U.S. Marshals Service (USMS) from DNA collection requirements for persons in its custody when beyond the booking stage, DHS faces similar operational burdens. Moreover, because DHS deports aliens within an average of 29 days, this operational timeframe would challenge our ability to collect DNA samples. The alien detention system is presently undergoing a broad review, with significant changes expected over the coming months and years. Incorporating the DNA sample collection requirement for existing detainees would be an additional challenge to that process. In addition, because all resources associated with DHS detention and removal operations are

² Based on data obtained from relevant DHS Components, DHS estimates the cost of effectuating the DNA sampling requirements without the proposed exceptions to be approximately \$35-40 million annually. If the proposed exceptions are approved, DHS estimates the annual cost to be approximately \$2-3 million. While DHS expects to reprogram currently allocated resources in either case, DHS believes approval of the proposed exceptions would lessen the impact on the overall ability to achieve the DHS mission.

expected to be used in the context of the broader effort to streamline the existing processes, it would be difficult to isolate additional resources for the DNA sample collection requirement.

In addition to the above, pursuant to 28 C.F.R. § 28.12(b), you have discretion to permit additional "limitations or exceptions" to the DNA sampling requirements. For reasons described further below, I request that you exercise this discretion to except the following scenario from the collection requirement at this time:

1. All persons, alien or otherwise, detained or arrested by DHS in the event of emergency or unforeseen circumstances or conditions, including mass migrations, natural or man-made disasters, medical emergencies, and other operational emergencies.

Rationale: In emergency or unforeseen circumstances, DHS resources are typically stretched very thin due to the numbers of individuals engaged in unlawful activity or others impacted by emergency circumstances. We expect that often it will not be operationally feasible for DHS to collect DNA samples in these types of scenarios without diverting resources needed to suppress or respond to any unlawful activities, unrest, or other unforeseen circumstances. DHS Component heads or I would make determinations to exercise this exception upon an assessment of the specific facts and circumstances of the incident or situation involved. I expect that DHS would rely on this exception only in extraordinary circumstances.

We intend to phase-in implementation over the next year, with certain DHS Components to begin the process more quickly than others. DHS wishes to pursue further discussions with DOJ regarding training options for DHS law enforcement officers and agents, as training is needed in the initial stage of the broader DHS implementation of this process. In addition to the training requirement, for example, both ICE and CBP must negotiate with their unions to bargain on impact and implementation due to this proposed change in working conditions. Finally, DHS intends to pursue discussions with the USMS to seek agreements by which the USMS would agree to undertake, in certain circumstances, DNA sample collection of arrestees on our behalf. Should satisfactory agreements not be reached, we may consider requesting additional exceptions to address these circumstances.

Thank you and your organization for your assistance in working through these implementation issues for this important program. If you or your staff desire additional consultations on these matters, we are available at your convenience. Should you need additional assistance, please contact Associate General Counsel (b)(6), (b)(7)c at (202) 447-(b)(6), (b)(7)c Assistant General Counsel Ellen McClain at (202) 282-(b)(6), (b)(7)c, or contact me at (202) 282-(b)(6), (b)(7)c

Yours very truly,



Janet Napolitano