



**LEGAL ADVOCACY PROJECT**

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Janet Flanagan, Deputy Attorney General  
Division of Criminal Justice  
CODIS Compliance Unit  
25 Market Street  
PO Box 085  
Trenton, NJ 08625-0085

**Re: COMMENTS CONCERNING PROPOSED AMENDMENTS TO DNA  
DATABASE AND DATABANK RULES  
NJAC 13:81 et seq.**

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Dear Ms. Flanagan:

The following are public comments by the Legal Advocacy Project of the Unitarian Universalist Legislative Ministry of New Jersey (“UULMNJ”) submitted in regard to the proposed amendments to the DNA database and databank rules set forth in NJAC 13:81 et seq. (“Regulations”).

**The Unitarian Universalist Legislative Ministry of New Jersey**

The UULMNJ (<http://www.uulmnj.org/>) is a New Jersey not-for-profit corporation representing most of the Unitarian Universalist Congregations of New Jersey. It was formed to give voice to Unitarian Universalist humanitarian values in matters of public policy and public

interest in New Jersey. Unitarian Universalist congregations are members of the Unitarian Universalist Association of Congregations (<http://www.uua.org/>).

Unitarian Universalists share a belief in principles that form the basis of their core humanitarian values. They are not dogma or doctrine, but rather a guide. These principles include a belief in the inherent worth and dignity of every person; a commitment to justice, equity and compassion in human relations; and the right of conscience and the use of the democratic process within our congregations and in society at large.

Accordingly, the Legal Advocacy Project of the UULMNJ is submitting the within comments because the proposed amendments to the Regulations fail to adequately address the rights of the persons who will be subject to inclusion in the database. This will serve to undermine their inherent worth and dignity and create an injustice that can and must be avoided by modifying the amendments accordingly.

### **Expungement of DNA Profiles and Sample**

The Regulations provide for a mechanism by which the DNA profiles, records and identifiable information taken from an arrestee or convicted offender by the CODIS (the Combined DNA Index System of the FBI's national DNA database) Administrator shall be required to be destroyed in the event a Court enters an order of expungement based upon suitable grounds. NJAC 13:81-6.1. This is important insofar as it is a fourth degree crime for an arrestee to refuse to provide a DNA sample. NJAC 13:81-1.4(c).

However, there are at least five practical matters that are not adequately addressed in the amendments to the Regulations. On this basis, the Regulations fail to protect the rights of the person who is providing the DNA sample and they should be modified accordingly.

**1. A Minor Arrestee Cannot Legally Provide Consent for Obtaining the DNA Sample.**

The essence of the Regulations is that an arrestee is required to consent to provide a DNA sample. If he does not, it is a fourth degree crime. *Id.* However, how can a minor be subject to a crime for not providing consent, when the minor is not legally capable of providing consent in the first place? In other words, since that minor cannot provide consent, he also should not be deemed to have refused consent.

I realize that one might argue that the statute makes it a crime for the minor to refuse consent; however, we are pointing out the logical impossibility of that requirement, since minors cannot give that consent. In other words, whether one sees this as a regulatory or statutory issue, if a minor is being charged with a crime for not providing consent that a minor is not capable of providing, that would constitute a deprivation of the minor's civil liberties. Whether fashioned as a lack of due process or an equal protection violation, or in some other manner violative of constitutional or other protections, it should not stand.

We urge the attorney general to examine this issue and take action to implement suitable changes to the statute, Regulations or both. It is a flaw, and it should be rectified. At the very least, the dictates of NJAC 13:81-1.4(c) should specifically exempt minors from its application.

**2. There Should be a Suitable Remedy Afforded to the Arrestee or Convicted Offender if the CODIS Administrator Does Not Comply with the Requirement to Delete the DNA Profiles, Records and Identifiable Information and Undertake All Other Actions Set Forth in NJAC 13:81-6.1 Upon Expungement.**

While admittedly, there is an elaborate mechanism put in place under the Regulations for the government to delete the DNA profiles, records and identifiable information and undertake all other actions set forth in NJAC 13:81-6.1 upon expungement, there is no remedy if it is not done. In other words, there is a right without a remedy.

This is particularly important since there is no practical way for the arrestee to know if the government has complied with its own mandate. There is no requirement that the government confirm it has done so.

The Regulations should be amended to (a) provide that the CODIS Administrator affirmatively supply written proof to the arrestee that his DNA Profiles and other items have been purged in complete accordance with NJAC 13:81-6.1 and (b) in the event this is not completely done, it should be deemed the equivalent (solely for purposes of assessing damages) of a per se violation of the Consumer Fraud Act providing treble damages and attorneys fees.

**3. No DNA Profiles, Records and Identifiable Information Should be Shared by the CODIS Administrator with Another Law Enforcement Agency Unless that Agency Expressly Agrees to Delete All Such Information Upon Entry of an Order of Expungement and Confirm Such Deletion in Writing to the CODIS Administrator Who Shall Forward the Same to the Arrestee.**

The Regulations allow the CODIS Administrator to share DNA profiles, records and identifiable information with other law enforcement agencies. Notably, there does not appear to be a prohibition of such sharing with law enforcement agencies outside the jurisdiction of New Jersey.

The problem with this concerns expungement. If the agency is outside the jurisdiction of New Jersey, it may take the position that it does not have to comply with an order of the New Jersey Superior Court or the requirements of the New Jersey Administrative Code. This could create the anomalous situation of an out of state law enforcement agency (or one outside the United States) not destroying the very items that CODIS is required to destroy in its own database.

This can be remedied by simply requiring any law enforcement agency that obtains the DNA profiles, records and identifiable information to contractually bind itself to submit to the

jurisdiction of the Superior Court of New Jersey and obey the laws and regulations of this state, as they relate to these items.

Setting this aside, at the very least, DNA profiles, records and identifiable information should not be shared until and if there is a finding of guilt.

**4. The Regulations Should Clarify That the CODIS Administrator Shall Not Provide Any Law Enforcement Agency with the Sample Itself.**

The Regulations state that the CODIS Administrator may share with appropriate law enforcement agencies the findings relating to the DNA sample. The Regulations do not address whether the CODIS Administrator has authority to share the samples themselves.

That should be made explicit. There should be a prohibition on sharing the samples themselves. There are many reasons for this. For example, a defendant should have the right to have his own expert test the samples. If the samples are outside the jurisdiction of the CODIS Administrator (or simply lost by another agency), the right of an accused to examine the basis for the evidence against him will be impaired.

**5. The Expungement Motion Should be Automatically Brought by the CODIS Administrator in the Event the Arrestee or Convicted Offender is Exonerated.**

In the event that an arrestee or convicted offender is exonerated, the CODIS Administrator should be required to bring the motion for expungement. I realize that this might involve a statutory change, in addition to a regulatory one. However, such a change should be considered.

The CODIS Administrator is in a far better position than those exonerated of a criminal charge or conviction to handle this. It is a fair and just responsibility to place on the CODIS Administrator in return for its right (under threat of a fourth degree criminal charge) to compel even an innocent person to provide DNA samples.

A person in this situation may not have the knowledge, resources or access to legal assistance to both know his rights and be able to adequately protect them. The expungement motion should be automatically brought by the CODIS Administrator, upon notice to the person who provided the DNA sample, when that person is exonerated.

In the event that this suggestion is not implemented, at the very least, there should be a requirement that the government provide the arrestee with information or forms by which they might be informed of their legal right to apply for an expungement. The affected population will likely have a disproportionate number of people who are of modest means; lack suitable education as to their legal rights; and as stated above, are not adults.

As to the latter point, it should be emphasized that this is another example of the unfortunate result of including minors within the ambit of the statute and these Regulations. How is a minor presumed to have notice of his legal rights or the resources to retain an attorney to assert those rights? As stated above, at the very least, persons who qualify for potential expungement should be both provided with a summary of their rights and basic forms to move for expungement, should they be incapable of hiring a lawyer.

**Conclusion**

Kindly consider the above-suggestions. If you need me to elaborate on any of them, I would be happy to do so.

Thank you.

Respectfully submitted,

LEGAL ADVOCACY PROJECT OF THE  
UNITARIAN UNIVERSALIST LEGISLATIVE  
MINISTRY OF NEW JERSEY

BY: \_\_\_\_\_/s  
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