

BILL ANALYSIS

C.S.H.B. 1068
By: Driver
Law Enforcement
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Under current law, the Department of Public Safety has the ability to audit and inspect crime labs that are authorized to use the national DNA database operated by the Federal Bureau of Investigation. However, if a crime lab loses its ability to access or is ineligible to operate in the national DNA database, DPS cannot inspect this lab. This statutory situation prevents oversight of all private labs and those governmental labs not taking part in the national DNA database. One purpose of C.S.H.B. 1068 is to authorize DPS to make rules and audit and inspect all crime laboratories operating in Texas.

Additionally, since the establishment of a state DNA database (CODIS) in Texas in January of 1996, there have been a number of bills affecting the database. The varying bills required DNA collection on certain offenses with differing obligations as to whether the sampling was taken upon arrest or upon conviction, whether sampling was done on juveniles, and whether the changes in law applied retroactively. C.S.H.B. 1068 attempts to harmonize the requirements established in each of these Acts.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the public safety director of the Texas Department of Public Safety in SECTIONS 2, 8, 13, and 14 of this bill.

ANALYSIS

SECTION 1. Amends Article 38.35 of the Code of Criminal Procedure as follows:

- For purposes of this Article:
 - Defines "Crime laboratory" as a public or private laboratory or other entity that conducts a forensic analysis subject to this article.
 - Defines "criminal action" to include an investigation, complaint, arrest, bail, bond, trial, appeal, punishment or other matter related to conduct proscribed by a criminal offense.
 - Defines "Director" as the public safety director of the Department of Public Safety.
- Amends subsection (a)(4) to provide that the term "forensic analysis" includes an examination or test requested by a law enforcement agency, prosecutor, criminal suspect or defendant, or court, and excludes digital evidence, certain tests performed for the purpose of determining compliance with a condition of community supervision or parole, and expert examinations conducted principally for reasons unrelated to the connection of physical evidence to a criminal action, such as research.
- Amends subsection (b) to provide that prosecutors and courts may request a forensic analysis of physical evidence by a crime laboratory; provides that the request may be made if the requesting entity controls the evidence, submits the evidence to the lab, or consents to the analysis.
- Amends subsection (d)(1) to provide that, except as provided by subsection (e), a forensic analysis of physical evidence under this article and expert testimony relating to the evidence are not admissible in a criminal action if, at the time of the analysis, the crime laboratory conducting the analysis was not accredited by the director under Section 411.0205, Government Code.

- Adds subsection (d)(2) to provide that, if before the date of the analysis the director issues a certificate of accreditation under Section 411.0205, Government Code, to a crime laboratory conducting the analysis, the certificate is prima facie evidence that the laboratory was accredited by the director at the time of the analysis.
- Amends subsection (e) to provide that evidence regarding a forensic analysis and expert testimony relating to the evidence are not inadmissible based solely on the accreditation status of the crime laboratory conducting the analysis if the laboratory, except for making proper application, was eligible for accreditation at the time of the exam or test and obtains accreditation before the time of testimony about the exam or test.
- Adds subsection (f) to provide that a law enforcement agency, prosecutor, or crime lab may petition the court to require, as a condition of community supervision, or the Board of Pardons and Paroles to require, as a condition of release on parole, that a person reimburse the agency, prosecutor, or laboratory for the cost of confiscation, analysis, storage, or disposal of evidence collected in connection with the offense.
- Removes subsection (c), providing that forensic evidence is not inadmissible based solely on the lab's accreditation status if the lab preserves samples of evidence and agrees to do so until all appeals in the case are final.
- Makes conforming and non-substantive changes.

SECTION 2. Amends Section 411.0205 of the Government Code as follows:

- Amends subsection (a) to add that the term "crime laboratory" has the meaning assigned by Article 38.35, Code of Criminal Procedure and delete a reference to the term "DNA laboratory."
- Amends subsection (b)(1) to delete a reference to DNA laboratories.
- Adds subsection (b)(2) to provide that the public safety director may, by rule, modify or remove a crime lab exemption under this section if the director determines that the underlying reason for the exemption no longer applies.
- Amends subsection (c) to provide that the public safety director may exempt from the accreditation process under subsection (b) a crime lab conducting a forensic analysis or a type of analysis, examination, or test if the director determines that the laboratory is located outside the state or, if located within Texas, is operated by a governmental agency other than the state or a political subdivision thereof, and the lab was accredited at the time of analysis by a process with standards that meet or exceed the standards set by the director under subsection (b).
- Adds subsection (d) to provide that the director may enter and inspect the premises or audit quality assurance matters of crime labs accredited or seeking accreditation under this section.
- Adds subsection (e) to allow the director to collect the costs of accrediting, inspecting, or auditing a crime lab.
- Adds subsection (f) to provide fees the director may charge for copies of audits or other reports made under this section.
- Adds subsection (g) to provide that funds collected under this section shall be deposited in the state treasury to the credit of the state highway fund and may be used only to defray the costs of administering this section or Subchapter G, relating to a DNA database system.
- Makes conforming and non-substantive changes.

SECTION 3. Amends Section 411.141 of the Government Code as follows:

- Defines "CODIS" as the FBI's Combined DNA Index System, including the national DNA index system sponsored by the FBI.
- Defines "conviction" to include conviction by a jury or court, a guilty plea, a plea of nolo contendere, or a finding of not guilty by reason of insanity.
- Defines "criminal justice agency" by reference to Article 60.01, Code of Criminal Procedure, and lists entities that are included and excluded from the definition.
- Defines "DNA database" to include one or more databases that contain forensic DNA records maintained by the director.

- Provides that "DNA laboratory" includes a department crime lab that conducts forensic DNA analysis.
- Provides that "DNA record" includes a DNA profile and related records, which may include an identification code or number referenced to a separate database to locate the originating entity and the other known personally identifying information concerning the individual who is the subject of the analysis, in addition to his or her name.
- Defines "DNA sample."
- Defines "Forensic analysis" by reference to Article 38.35, Code of Criminal Procedure.
- Makes conforming and non-substantive changes.

SECTION 4. Amends Section 411.142, Government Code, as follows:

- Authorizes the public safety director to maintain a database separate from the central DNA database containing personally identifying information cross-referenced and searchable by name, code, or other identifier.
- Provides that a CODIS database may not store a name or other personally identifying information, must be compatible with the national DNA index system to the extent required by the FBI, and may store a code, file, or reference number only if it is necessary for certain purposes.
- Provides that a non-CODIS database may store a name or other personally identifying information and must be compatible with the national DNA index system to the extent possible.
- Amends the types of DNA records a DNA database may contain.
- Makes conforming and non-substantive changes.

SECTION 5. Amends Section 411.143 of the Government Code, as follows:

- Amends subsection 411.143(a) to provide that the principal purpose of the DNA database is to assist in the investigation or prosecution of a criminal offense in which biological evidence is recovered.
- Amends subsections 411.143(b) and (c) to expand the stated purposes of the DNA database.
- Amends subsection 411.143(e) to require a party contracting to carry out a function of another entity under this subchapter to comply with a requirement imposed by this subchapter on the other entity, unless the party or other entity is exempted by the director, as well as any additional requirement imposed by the public safety director on that party.
- Makes conforming and non-substantive changes.

SECTION 6. Amends Section 411.144, Government Code, as follows:

- Amends subsection 411.144(a) to provide that the director shall, by rule, establish for a DNA lab or criminal justice agency procedures regarding DNA samples.
- Amends subsection 411.144(c) to provide that the director may, at any reasonable time, enter and inspect the premises or audit the records, reports, or other quality assurance matters of any DNA laboratory that provides DNA records to the director under this subchapter or conducts forensic analysis.
- Amends subsection 411.144(d) to require a DNA lab conducting a forensic DNA analysis under this subchapter to forward the DNA record of the analysis to the director at the department's crime laboratory or another location as required by the director.
- Deletes the current subsection 411.144(e), relating to the director's authority to provide certain consequences for DNA labs in violation of this subchapter or a rule adopted under it, and redesignates the current subsection (f) as subsection (e).
- Amends subsection 411.144(g) to provide that this subchapter does not apply to collection of evidence from crime scenes by a law enforcement agency.
- Deletes subsection 411.144(h), which allows an institutional division to collect specimens for DNA analysis or contract with another entity for such services.
- Makes conforming and non-substantive changes.

SECTION 7. Amends Section 411.145, Government Code, as follows:

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- Provides fees that may be collected for copy of audits provided by the public safety director.
- Requires that the fees deposited to the state highway fund under this section and under Articles 42.12 and 102.020(h), Code of Criminal Procedure, be used only to defray the cost of administering this subchapter and Section 411.0205, Government Code.
- Makes conforming and non-substantive changes.

SECTION 8. Amends Section 411.146, Government Code, as follows:

- Amends title.
- Amends subsection (a) to prohibit the director from accepting a DNA record or DNA sample collected from an individual who at the time of the collection is alive, unless the director reasonably believes the sample was submitted voluntarily or as required by this subchapter and is a blood sample or other specimen collected by a properly trained individual.
- Requires the director to provide DNA collection kits and training at no cost to persons described by subsection (a).
- Adds subsection (c)(1) to require the director to adopt rules regarding the collection, preservation, shipment, and analysis of a DNA sample taken under this subchapter.
- Adds subsection (c)(2) to allow a criminal justice agency covered by this subchapter to collect DNA samples or contract collection services with certain other entities and require the agency to preserve the sample and maintain a record of its collection.
- Amends subsection (f) to require that a second DNA sample be collected, if possible, if forensic evidence is necessary for the investigation, prosecution, or defense of a case.
- Makes conforming and non-substantive changes.

SECTION 9. Amends Section 411.147, Government Code, as follows:

- Amends subsection (a)(2) to require the director to establish, by rule, procedures for the release from a DNA database a DNA sample, analysis, record, or other information maintained under this subchapter.
- Amends subsection (c) to allow the director to release a DNA sample to a criminal justice agency for criminal justice or law enforcement purposes and to a defendant for criminal defense purposes under certain circumstances, or for another purpose described in Section 411.143 or required under federal law to obtain federal funding.
- Amends subsection (e) to provide that a criminal justice agency may have access to a DNA sample for a law enforcement purpose through a laboratory used by the agency.
- Makes conforming and non-substantive changes.

SECTION 10. Re-enacts and amends Section 411.148, Government Code, as follows:

- Amends title.
- Requires the following individuals to provide one or more DNA samples for the purpose of creating a DNA record:
 - an individual who is placed on community supervision or deferred adjudication following conviction for a felony;
 - an individual who is ordered by a magistrate or court to provide a sample under Section 411.150, 411.154, or other law;
 - an individual who is confined in a penal institution operated by or under contract with the Texas Department of Criminal Justice (TDCJ);
 - a juvenile who is confined in a facility operated by or under contract with the Texas Youth Commission (TYC) after an adjudication for conduct constituting a felony; and
 - a juvenile who is placed on community supervision or deferred adjudication after adjudication for conduct constituting a felony.
- Requires a criminal justice agency to collect a sample ordered by a magistrate or court in compliance with the order.
- Provides that TDCJ shall collect the DNA sample required of an inmate confined in a penal institution operated by or under contract with TDCJ during the diagnostic process or at another time determined by TDCJ.

- Provides that TYC shall collect the DNA sample from a juvenile who, after adjudication for conduct constituting a felony, is confined in a TYC facility or placed on community supervision, either during the initial examination or at another time determined by TYC.
- Requires TDCJ and TYC to notify the director when a release date is approaching; requires TDCJ and TYC to determine the form of notification in consultation with the director.
- Authorizes a medical staff employee of a criminal justice agency to collect a voluntary sample at any time.
- Provides circumstances under which TDCJ or TYC shall cause a DNA sample to be collected from a person as soon as practicable; requires administrators of other penal or juvenile detention facilities to cooperate with TDCJ or TYC to allow them to perform their duties under this subsection.
- Provides circumstances under which an individual from another state or jurisdiction who is in the custody or under the supervision of a criminal justice agency of this state must provide a DNA sample under this subchapter.
- Provides that if it is determined that an acceptable sample has already been received from an individual, additional samples are not required unless requested by the director.
- Provides that a detention, arrest, or conviction based upon database information is not invalid, unlawful, or inadmissible based solely on an error in collection, storage, or retention of the sample unless that error was made intentionally or knowingly.
- Deletes subsection (i), providing the priority for obtaining samples from certain convicts.
- Makes conforming and non-substantive changes.

SECTION 11. Amends Section 411.149, Government Code, to provide that an individual, including an individual required to provide a DNA sample under this subchapter, may at any time voluntarily provide or cause to be provided to a criminal justice agency a sample to be forwarded to the director for purposes of creating a DNA record under this subchapter. Makes conforming and non-substantive changes.

SECTION 12. Amends Section 411.150, Government Code, as follows:

- Authorizes a magistrate or court to order an individual to provide DNA samples to a criminal justice agency for the purpose of creating a DNA record if the individual is the target of an evidentiary search warrant seeking the sample under Article 18.02(10), Code of Criminal Procedure, for any offense, or is released on any form of bail or bond after arrest for a felony offense.
- Requires a court to order a defendant to provide samples for the purpose of creating a DNA record if the individual is indicted or waives indictment for a felony or if he or she is placed on community supervision or deferred adjudication for a felony.
- Requires a magistrate or court to order certain agency employees to collect samples as required or permitted by this section and requires that the magistrate or court order the sample to be forwarded to the director.
- Authorizes an employee of a criminal justice agency to collect a sample under this section and specifies that this subsection does not authorize an otherwise unqualified person to collect a blood sample.
- Provides that if it is determined that an acceptable sample has already been received from an individual, additional samples are not required unless requested by the director.
- Deletes the majority of the former Section 411.150, regarding DNA records of certain juvenile offenders.
- Makes conforming and non-substantive changes.

SECTION 13. Amends Section 411.151, Government Code, as follows:

- Amends the title.
- Provides that this section does not require the director to expunge a record or destroy a sample if the individual is otherwise required to submit a sample under this subchapter.

- Provides that this section does not require the director to destroy an item of physical evidence obtained during the investigation of a criminal action.
- Authorizes the director, by rule, to permit administrative removal of a record, sample, or other information erroneously included in the database.
- Makes non-substantive changes.

SECTION 14. Amends Section 411.152, Government Code, as follows:

- Authorizes the director to adopt rules permitted by this subchapter that are necessary for its administration or enforcement; requires the director to adopt a rule expressly required by this subchapter.
- Adds subsection (b) to allow the director, by rule, to release or permit access to information to confirm or deny the existence of a record under this subchapter; requires that the director deny any pre-existing record where it has been expunged or removed under Section 411.151.
- Adds subsection (c) to allow the director, by rule, to exempt:
 - a non-CODIS lab, procedure, or other matter from a CODIS requirement;
 - a lab conducting non-human forensic DNA analysis from a rule adopted under this subchapter; and,
 - certain categories of individuals from a requirement to provide an additional sample after an acceptable DNA record exists for the individual.
- Adds subsection (d) to allow the director, by rule, to permit a prosecuting attorney in a felony case to establish that the interests of justice or public safety require that an individual provide an additional sample.
- Adds subsection (e) to provide that the director may, by rule, determine whether a sample complies with a collection provision of this subchapter.
- Makes conforming changes.

SECTION 15. Amends Section 411.153, Government Code, to provide an affirmative defense to prosecution under this section, regarding confidentiality of DNA records, that the individual reasonably believed his or her conduct was authorized by this subchapter or a rule adopted thereunder. Makes conforming and non-substantive changes.

SECTION 16. Amends Section 411.154(b), Government Code, to authorize a court to issue an order requiring a person to provide a DNA sample or an additional DNA sample. Makes non-substantive changes.

SECTION 17. Adds Sections 411.155 and 411.156, Government Code, as follows:

- Adds Section 411.155, providing that it is an offense for a person who is required to provide a sample under this subchapter and receives notice of that requirement to knowingly fail or refuse to do so; provides that the offense is a third degree felony.
- Adds Section 411.156, making persons administering this subchapter or ordering, collecting, preserving, possessing, transmitting, receiving, analyzing, releasing, disclosing, using, or maintaining a DNA sample or record under this subchapter immune from civil liability for any act or omission resulting in death, damage, or injury if the person reasonably believes the act or omission was in substantial compliance with this subchapter or a rule adopted under it, collects the sample in a medically or professionally acceptable manner, and acts in the scope of his or her duties under this subchapter or a rule adopted thereunder.

SECTION 18. Amends Article 17.47 of the Code of Criminal Procedure to provide that a magistrate must require, as a condition of release of a defendant on bail or bond, that the defendant provide to a local law enforcement agency one or more specimens for the purpose of creating a DNA record under Subchapter G, Chapter 411, Government Code. Makes conforming and non-substantive changes.

SECTION 19. Amends Article 42.12, Code of Criminal Procedure, to provide that a court may require as a condition of community supervision that the defendant reimburse a law enforcement agency or crime laboratory for the costs of confiscation, analysis, storage, or disposal of evidence, including physical evidence, and any other costs

incurred in the administration of services for the defendant's case under Subchapter G, Chapter 411, Government Code.

SECTION 20. Amends Article 102.020 of the Code of Criminal Procedure as follows:

- Reduces the court cost for a conviction or adjudication for certain offenses relating to failure to provide a DNA sample from \$250 to \$140.
- Requires that payment of a court cost under this article be required as a condition of community supervision under Article 42.12.
- Requires that the comptroller deposit all of the funds collected under this article into the state treasury to the credit of the state highway fund.

SECTION 21. Repeals the following:

- Article 102.056(e), Code of Criminal Procedure, regarding the appropriation of funds to reimburse local law enforcement agencies for the costs of administering certain provisions relating to DNA records,
- Sections 411.0206, 411.143(f), 411.1471, 411.1472, 411.1481, 411.1531, and 411.1532, Government Code, and
- Section 481.160(f), Health and Safety Code.

SECTION 22. Provides for the application of the effective date of this Act.

SECTION 23. Effective date.

EFFECTIVE DATE

This Act takes effect September 1, 2005.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 1068 differs from H.B. 1068 as follows:

- The substitute provides that digital evidence is not included in the definition of "forensic analysis".
- The original bill provides that a criminal suspect, defendant, or legal representative of a suspect or defendant, can request a forensic analysis by a crime lab if the individual controls the evidence, submits the evidence to the lab, or obtains a court order. The substitute removes provisions regarding a suspect or defendant's right to request a forensic analysis by a crime lab and enabling the defendant to petition a court to order a law enforcement agency or prosecutor's office for reimbursement of the defendant's reasonable cost of analysis of evidence.
- The original bill provides that the burden of persuasion on an evidentiary matter under this article is preponderance of the evidence and that a court determination under this article is reviewable as a matter of law. The substitute does not make this provision.
- The substitute makes provisions regarding the admissibility of a forensic analysis of physical evidence under this article and expert testimony relating to the evidence. The original bill made the similar provisions as to admissibility of physical evidence, rather than the analysis of the evidence.
- The original bill incorporated anonymous DNA profiles. The substitute makes no reference to an anonymous DNA profile.
- The original bill defined TDCJ and TYC. The substitute does not.
- The original bill provided that a non-CODIS database should be compatible with the national DNA index system to the extent possible; the substitute requires this compatibility.
- The substitute provides that Subchapter G, Government Code, does not apply to crime scene collection of evidence by a law enforcement agency. The original bill makes no such provision.

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- The substitute requires the director to provide DNA collection kits and training for collection of DNA samples to certain persons at no cost, whereas the original bill permitted the director to provide the kits and training.
- The original bill requires the provision of a DNA sample of a suspect or defendant arrested for a felony. The substitute requires a DNA sample only after conviction of or adjudication for conduct constituting a felony.
- The original bill required the arresting law enforcement agency to collect samples for the purpose of creating a DNA record. The substitute makes no such requirement.
- The original bill provides that an individual may be held past a statutory release date if the individual fails or refuses to provide a DNA sample under this section and until the individual provides an adequate sample; the substitute does not make this provision, but removes the prohibition against keeping an inmate past a statutory release date for failure or refusal to provide a specimen and authorizing a penal institution to take other lawful administrative action against the inmate.
- The original bill requires that TDCJ and TYC notify the director when certain individuals are to be released from custody or supervision, whereas the substitute requires notification upon release from custody only.
- The substitute provides that if it is determined that an acceptable sample has already been received from an individual, additional samples are not required unless requested by the director. The original makes no such provision.
- The original bill authorizes a magistrate or court to order a suspect or defendant to provide one or more DNA samples to a criminal justice agency for the purpose of creating a DNA record if the individual is convicted of or placed on community supervision for any offense. The substitute makes no such provision.
- Whereas the original bill provides that a magistrate or court should order certain law enforcement or community supervision agents to collect samples under Section 411.150, Government Code, the substitute requires the magistrate or court to make such an order.
- The original bill makes provisions for removal of DNA records from a database upon reversal and dismissal of the underlying case or a pardon based on subsequent proof of innocence, and deletes the provision authorizing a person to petition for the expunction of a DNA record under the procedures established under Article 55.02, Code of Criminal Procedure, if the person is entitled to the expunction under Article 55.01. The substitute does not make these changes.
- The original amends subsection 411.151(d), Government Code, to provide that, except as provided by Subsection (e), Chapter 55, Code of Criminal Procedure, does not apply to a record maintained under Subchapter G. The substitute makes no such provision.
- The original bill authorizes the director to adopt rules expressly required by Subchapter G. The substitute requires that the director adopt rules expressly required by Subchapter G.
- The original bill provides that certain agency directors may, by rule, exempt one or more categories of offenses from certain provisions of the subchapter, and provides how the exemption is made. The substitute makes no such provision.
- The original bill provides that the offense of refusal to provide a DNA sample is a state jail felony under certain circumstances, and that it is no defense to prosecution that the sample was taken by force. The substitute makes no such provisions.
- Whereas the original bill authorizes a magistrate to require the provision of a DNA specimen as a condition of release, the substitute authorizes a magistrate to require the provision of a DNA specimen as a condition of release on bail or bond only.
- The original bill amends Article 38.39, Code of Criminal Procedure, to authorize a law enforcement agency or crime lab to destroy evidence in its possession under certain circumstances. The substitute does not amend Article 38.39.
- The original bill provides that conditions of community supervision may include requiring that the defendant reimburse a prosecutor for costs associated with the confiscation, analysis, storage, or disposal of evidence. The substitute does not authorize reimbursement to a prosecutor, and additionally authorizes reimbursement to a law enforcement agency or crime lab for any other costs incurred in the administration of Subchapter G, Chapter 411, Government Code.

- Whereas the original bill reduced the court cost for conviction of or an adjudication for an offense described in Section 411.148, Government Code, from \$250 to \$100, the substitute reduces the fee to \$140, and additionally provides that payment shall be required as a condition of community supervision under Article 42.12, Code of Criminal Procedure.
- The substitute does not amend Article 12.01, Code of Criminal Procedure, regarding limitations periods for offenses, which is amended extensively by SECTION 8 of the original bill.
- The original bill provides that the change in law made by the Act applies to an individual who, on or after the effective date, is under the parole supervision of TDCJ as described in Section 411.148(a)(1)(D), Government Code. The substitute does not make this provision.
- The substitute makes conforming and non-substantive changes not made by the original bill.