

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Enrolled

House Bill 240
Judiciary

(Delegate Shetty)

Judicial Proceedings

Criminal Procedure - Forensic Genetic Genealogical DNA Analysis, Searching,
Regulation, and Oversight

This bill establishes requirements and procedures for forensic genetic genealogical DNA analysis and related searches of publicly accessible databases using genetic profiles. The bill also includes provisions regarding regulation and oversight of testing connected to this analysis and direct-to-consumer genetic genealogy services.

Fiscal Summary

State Effect: General fund expenditures for the Maryland Department of Health (MDH) increase by an indeterminate, but likely significant, amount beginning in FY 2022, as discussed below. Potential increase in general fund expenditures for the Governor’s Office of Crime Prevention, Youth, and Victim Services (GOCPYVS), as discussed below. Revenues are not materially affected.

Local Effect: Potential increase in local expenditures to comply with the bill’s requirements. Revenues are not materially affected.

Small Business Effect: None.

Analysis

Bill Summary: “Forensic genetic genealogical DNA analysis and search” or “FGGS” means the forensic genetic genealogical DNA analysis of biological material using single-nucleotide polymorphisms or other sequencing techniques to develop an “FGG profile”; a subsequent search using the FGG profile in a publicly available open-data personal genomics database or a direct-to-consumer genetic genealogy service to find

individuals related to the source of the FGG profile; and a genealogical search using public records and other lawful means to obtain information in accordance with the bill's provisions.

Prohibitions and Judicial Authorization of FGGS: The bill prohibits law enforcement from initiating FGGS without first obtaining judicial authorization and certifying before the court that the forensic sample and the criminal case meet specified criteria. If an FGGS is certified in accordance with the bill, the court must authorize the initiation of the FGGS. As part of this process, a law enforcement agent must submit a sworn affidavit, with prosecutorial approval, asserting specified facts regarding the crime being investigated, testing that has already been conducted on the forensic sample, and the progress of the investigation. The bill restricts FGGS to direct-to-consumer or publicly available open-data personal genomics databases meeting specified notice requirements. The bill establishes informed consent requirements that must be met before law enforcement can obtain a DNA sample from a third party to assist in FGGS. Law enforcement may not collect a covert reference sample for an FGGS investigation from any third-party individual who has refused consent. However, investigators may seek authorization to obtain a covert sample from a third party if obtaining informed consent from the third party presents specified risks to the investigation and the third party has not already refused informed consent. The fear that a third party will refuse informed consent may not constitute the basis for seeking a covert sample. The person obtaining the informed consent must have training from a genetic counselor approved by the Office of Health Care Quality (OHCQ), as specified.

Collection of Covert DNA Samples by Law Enforcement: The bill requires law enforcement seeking to collect a covert DNA sample from a potential putative perpetrator or a third party to meet specified criteria, including (1) required notification to the authorizing court prior to collection of the covert sample; (2) with respect to a covert sample from a third party, an affidavit submitted by investigative authorities to the court that seeking informed consent from a third party presents specified risks to the investigation; and (3) a proffer by investigative authorities to the court of their plan to collect the sample without unduly intrusive surveillance and invasions of privacy. The bill also specifies requirements regarding testing, use, and destruction of the sample. The law enforcement officer conducting the covert collection must report back to the court every 30 days about the progress of the covert collection, as specified. Absent a showing of good cause, efforts to collect a covert sample must cease after six months.

Required Destruction of DNA Samples and Prohibited Disclosures: The bill (1) requires DNA samples and genetic genealogy information to be destroyed in compliance with specified requirements; (2) requires a genetic genealogist participating in an FGGS to turn over to investigators all records and materials collected in the course of the FGGS on the completion of an FGGS investigation, prohibits a genetic genealogist from keeping any

records or materials, and requires a genetic genealogist to ensure that specified records have been deleted or removed from any FGG website; and (3) requires the prosecutor to retain and disclose any records or materials as required under the Maryland Constitution, U.S. Constitution, and the rules of discovery under Maryland Rules 4-262 and 4-263, but prohibits the prosecutor from otherwise using or sharing the records or materials. A person who discloses genealogical or DNA information without authorization of a court order is guilty of a misdemeanor, punishable by imprisonment for up to five years and/or a \$5,000 maximum fine. A person who willfully fails to destroy DNA and genetic information as required under the bill is guilty of a misdemeanor, punishable by imprisonment for up to one year and/or a \$1,000 maximum fine. The bill also establishes a private right of action under State law guiding tort claims for a person whose genetic genealogy information, DNA sample, or genetic profile is wrongfully disclosed, collected, or maintained. The person is entitled to minimum liquidated damages of \$5,000 for a violation.

Requests for FGGS by Defendants: A defendant charged with a crime of violence or convicted of a crime of violence who seeks postconviction DNA testing is entitled to seek judicial authorization for an FGGS by filing an affidavit with an appropriate court certifying that specified factors are met. The State must be notified of a defendant's application for judicial authorization for an FGGS, and the bill establishes related procedural requirements. A court must issue the order for an FGGS on a showing that testing has the scientific potential to produce exculpatory or mitigating evidence and the defendant has complied with all other requirements related to the authorization for an FGGS.

If defense counsel or a postconviction counsel determines that one or more persons are putative perpetrators and there is a need for collection of covert DNA samples from a putative perpetrator or a third party, the authorizing court must be notified prior to collection of the sample and specified procedural requirements must be met. The bill's requirements regarding destruction of DNA samples and related information and prohibited disclosures of information also apply to an FGGS conducted on behalf of a defendant.

Certification and Regulation of Services and Laboratories: The bill requires OHCQ in MDH to (1) establish a licensing program for laboratories performing "SNP" or other sequencing based testing on evidence in support of an FGGS by October 1, 2022, and (2) establish a licensing program for individuals performing genetic genealogy by October 1, 2024. Prohibitions may not be placed on any laboratory conducting specified types of testing or on genetic genealogists participating in an FGGS before the relevant required licensing program is established. However, laboratories and genetic genealogists must apply for the required license within one year after OHCQ establishes the relevant licensing program.

OHCQ must also develop a training program on obtaining informed consent for a DNA sample from a third party and identify and approve one or more genetic counselors to administer the training. The bill also requires the Maryland Forensic Laboratory Advisory Committee to perform related functions, as specified.

Annual Report: By June 1 annually, GOCPYVS must submit a publicly available report on the number of requests for FGGS and related information to the Governor and the General Assembly. A panel that includes specified stakeholders must review the report each year and make policy recommendations.

Current Law:

Statewide DNA Database System, DNA Samples, State Police Crime Laboratory, Etc.

The statewide DNA database system consists of DNA samples collected from individuals convicted of a felony, fourth-degree burglary, or breaking and entering a vehicle. DNA samples for individuals charged with a “crime of violence” or felony burglary or an attempt to commit those crimes are also included within the statewide database. State law defines a “crime of violence” to include several specific crimes, including abduction, arson, kidnapping, manslaughter, murder, rape, carjacking, first- or second-degree sexual offense, and various types of assault.

The State Police Crime Laboratory is required to store and maintain each DNA identification record in the statewide DNA database. Matches between evidence samples and database entries may only be used as probable cause and are not admissible at trial unless confirmed by additional testing.

A person is prohibited from performing a search of the statewide database for the purpose of the identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired.

A person may not willfully test a DNA sample for information that does not relate to the authorized identification of an individual, as specified. A violation is punishable by up to five years imprisonment and/or a \$5,000 fine. In addition, a person is prohibited from willfully failing to destroy a DNA sample for which notification has been sent stating that the DNA sample has been destroyed or for which destruction has been ordered. Violators are subject to imprisonment of up to one year or a maximum fine of \$1,000.

The Department of State Police (DSP) is required to submit an annual report to the Governor and the General Assembly on the status of the statewide DNA database system. Local law enforcement agencies are required to annually report related information to DSP. Statute outlines the required contents of the annual report.

Forensic Laboratories

Chapter 147 of 2007 required the Secretary of Health to adopt regulations that set standards and requirements for forensic laboratories. In addition, to assure compliance with these standards and requirements, the Secretary must conduct (1) an inspection of each forensic laboratory for which a license to operate is sought and (2) an inspection of each forensic laboratory for which a license has been issued. Chapter 147 also established the Maryland Forensic Laboratory Advisory Committee to advise the Secretary on matters relating to the implementation of specified provisions of law related to forensic laboratories.

OHCQ's Forensic Laboratory Unit oversees the regulation of accredited and nonaccredited laboratories that perform forensic analyses. Responsibilities of the unit include investigating complaints related to the laboratories; conducting annual surveys and revisit surveys of nonaccredited forensic laboratories; reviewing all self-reported incidents that occur at both accredited and nonaccredited laboratories; reviewing all proficiency tests administered at the forensic laboratories; and all associated activities required for licensure, including on-site inspection and review of documentation from the forensic laboratories and external accreditation organizations.

State Expenditures: General fund expenditures for MDH increase by an indeterminate, but likely significant, amount beginning in FY 2022. General fund expenditures may increase for GOCPYVS to comply with the bill's reporting requirements.

Maryland Department of Health

The bill requires OHCQ to (1) establish a new licensing program for laboratories that complete forensic genetic genealogical DNA analysis and (2) create a licensing program for individuals performing genetic genealogy.

MDH advises that the licensing program for genetic genealogical laboratories under the bill would be the first of its kind, since there are currently no accreditation organizations or other jurisdictions that license these laboratories. MDH further advises that OHCQ has historically partnered with local jurisdictions or accreditation organizations to license laboratories outside of Maryland that analyze or process Maryland samples. However, since there are no accreditation organizations or jurisdictions that license these types of laboratories, OHCQ needs to visit and license all forensic genetic genealogical laboratories that process and analyze Maryland samples. MDH notes that based on its research, there are 48 of these laboratories located throughout the world, and none of these laboratories is located in Maryland.

MDH estimates costs of approximately \$279,000 in fiscal 2022 and approximately \$241,000 annually by fiscal 2026 for compliance with the bill's licensing requirements.

This estimate includes travel expenses, one-time start-up costs and ongoing operating expenditures, and the addition of two additional highly specialized staff (with annual salaries and fringe benefits totaling approximately \$200,000 per year) to establish and maintain the licensing programs under the bill. MDH incurs additional indeterminate expenditures to develop a training program for informed consent and to identify and approve at least one genetic counselor to administer the training.

The Department of Legislative Services agrees that there is a need for potentially significant additional resources, but advises that, without actual experience under the bill, it is impossible to determine a reliable estimate as no other entities, including federal and state governments, currently regulate laboratories specifically for forensic genetic genealogical DNA analysis. Furthermore, it is unclear what level of interest laboratories will have in obtaining Maryland-specific licensure.

Governor's Office of Crime Prevention, Youth, and Victim Services

The bill requires GOCPYVS to prepare and submit an annual report regarding requests for forensic genetic genealogical analysis and engage with a panel of stakeholders tasked with reviewing the report each year and making policy recommendations. To the extent that GOCPYVS requires additional resources to comply with the bill's requirements, general fund expenditures for GOCPYVS increase. Such resources likely include the development and maintenance of a database for law enforcement and *potentially* a staff person to report FGGS-related activities and prepare the annual report, including collaboration with stakeholders. However, without information regarding how often law enforcement agencies use FGGS, the level of need for additional resources cannot be reliably validated beforehand.

Local Expenditures: Local expenditures may increase for local law enforcement agencies and affiliated entities to comply with the bill's requirements. Based on information provided by local governments, the fiscal impact of the bill cannot be quantified in advance. Examples of potential costs cited in local responses include increased testing to comply with the bill's procedural requirements, expert testimony, training, and compliance assurance.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 187 (Senator Sydnor) - Judicial Proceedings.

Information Source(s): Maryland Commission on Civil Rights; Anne Arundel, Charles, Frederick, and Montgomery counties; City of Havre de Grace; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of Public Safety and Correctional Services; Maryland Department of Health; Governor’s Office of Crime Prevention, Youth, and Victim Services; Department of State Police; Department of Legislative Services

Fiscal Note History: First Reader - February 3, 2021
rh/jkb Third Reader - March 26, 2021
Revised - Amendment(s) - March 26, 2021
Revised - Updated Information - March 26, 2021
Enrolled - April 19, 2021

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