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April 13, 2010

U.S. Senator Richard Shelby (R-Ala), today sent a letter to FBI Director Robert Mueller expressing his concern regarding recently announced procedural changes relating to the technical review of DNA data contained within the National DNA Index System (NDIS).

In a press release issued March 22, 2010, the FBI announced its intention to revisit procedures related to outsourced DNA analysis conducted by for-profit private laboratories. Senator Shelby is concerned about the motivation behind this sudden change in policy, as the FBI contradicts the position of virtually every state and local crime lab in the United States.

“I have serious reservations about how this abrupt change in policy came about, and I am deeply concerned that this action was possibly influenced by private DNA vendors exerting pressure upon the new leadership of the FBI laboratory,” said Shelby.

“State and local public crime labs are not a billion dollar industry, nor can they hire lobbyists to pressure the White House, the Department of Justice and Capitol Hill to change laws and regulations in their favor. While this industry is attempting to privatize law enforcement and influence policy for a profit, the insight and experience of all state and local crime lab directors is being ignored. Ultimately, the welfare of victims and the morale of law enforcement officers could potentially be sacrificed by succumbing to the short term needs of for-profit companies when this is a long term problem that must be addressed in terms of increased capacity for public labs.”

The full text of the letter is below.

April 13, 2010

Via Electronic Transmission

The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Mueller,

On March 22, 2010, the FBI issued the attached press release indicating plans to revisit procedures relating to the technical review of DNA data contained within the National DNA Index System (NDIS). While seemingly minor, this is an abrupt and extraordinary change in policy that facilitates increased DNA testing by for-profit private DNA laboratories and lessens the ability of public labs to build capacity and minimize backlogs in the future. This policy

change contradicts the previous position the FBI has conveyed, and could have a devastating impact on the integrity of the DNA data residing within NDIS, potentially compromising the outcome of criminal investigations and prosecutions. This sudden policy shift may very well affect the public trust of the National Index, the well-being of victims, the morale of law enforcement officers, and the security of U.S. citizens' confidential information stored in DNA databases.

The FBI Laboratory's decision blatantly defies the position of an overwhelming majority of state and local crime lab directors and Combined DNA Index System (CODIS) administrators who have exponentially more years of combined forensic, law enforcement, and investigative experience than those at the FBI Laboratory who made this decision. The FBI Laboratory director, appointed less than two years ago, with no forensic laboratory experience, would surely have benefited from engaging the opinions of crime laboratory directors, CODIS state administrators, district attorneys, and other criminal justice professionals. These are the very individuals who are most affected by this proposed policy shift and the loosening of the FBI requirements. I have serious reservations about how this abrupt change in policy came about, and I am deeply concerned that this action was possibly influenced by private DNA vendors exerting pressure upon the new leadership of the FBI laboratory.

In relation to the threat to the privacy of American citizens' genetic information, it is important to note that private DNA labs are not bound by the FBI or federal statute to keep sensitive the information they generate. Strict penalties for misuse of DNA profiles are in place and pertain only to government labs. Private lab analysts and employees do not have to undergo the extensive FBI background check that every government lab analyst with access to CODIS has to pass, and these labs do not have to submit their audit documents to the FBI for review, as is required for all state and local public crime laboratories participating in NDIS.

These private DNA vendors are for-profit companies and have no federal restrictions on whom they employ or what profit-driven activities in which they engage. Other private industries would savor having access to raw DNA data for research purposes. This information could potentially be sold among private entities, and the FBI and the individuals whose genetic information was sold would have no way of knowing or preventing this type of behavior.

This is an extremely complicated and technical issue, and while I am not necessarily against evaluating and improving the current policy, I do believe this decision was hastily made, without appropriate evaluation of the potential unintended consequences by the inexperienced leadership of the FBI Laboratory. This issue must be more carefully examined by the FBI Laboratory and the leadership of all the state and local laboratories it directly affects before something of this magnitude is implemented.

In an effort to fully understand this change in FBI Laboratory policy and what prompted this sudden policy change, I request that you provide the answers to the following questions and produce all documents and information requested in a timely manner.

- The FBI laboratory is one of the few executive board members of American Society of Crime Lab Directors (ASCLD), who issued the aforementioned position statement in support of the

status quo and restricting access to NDIS to public labs. Explain why the FBI Laboratory, who has representation on this body's executive board, contradicts the position so soon after ASCLD's release its position statement. Did undue pressure change the FBI position?

- The FBI's Scientific Working Group on DNA Analysis Methods (SWGDM), CODIS State Administrators, and ASCLD have all issued positions strongly supporting the status quo and restricting access to NDIS. With these and other subject matter experts supporting the current FBI procedures and national standards, who specifically at the FBI decided to move towards loosening these standards and made the decision to change this policy?
- Provide the names, dates, and attendees of any meetings held between the FBI Laboratory director or his representative, and representatives of vendor DNA laboratories prior to this press release.
- Did the FBI issue this press release because of pressure from Congress, lobbyists, or industry representatives?
- Was the FBI told by Congress, lobbyists, or industry representatives that if the FBI does not move in this direction, changes will be legislated? If so, who?
- Has the FBI attended any meetings with the National Institute of Justice (NIJ) and discussed vendor laboratories? If so, please provide details and all documentation of the items discussed.
- Provide specific details of the FBI's past experience with vendor DNA laboratories, to include the name of the vendor laboratory and the results of any lab errors that were detected by the FBI after the vendor review was conducted.
- Provide specific details on the architecture and scope of what the FBI plans to do after this press release. What will the process entail? How long will this evaluation last?
- Once the evaluation is completed, who at the FBI will decide whether any procedures should be changed?
- If any changes are recommended, will the FBI require the CODIS State Administrators to unanimously endorse the proposed changes as it is the individual states who are affected most by a reduction in the review of vendor DNA data? If not, why is the FBI ignoring the opinions and concerns of these experts?
- Federal law directs SWGDM to oversee changes to the FBI's quality assurance standards. Newly revised standards were just completed last year. At that time, did the Office of General Counsel of the FBI review the new standards and indicate that the FBI should loosen the standard of review for vendor labs? Will the FBI require a unanimous endorsement from SWGDM on any proposed changes? If not, why not?
- The FBI's CODIS Unit reports that the current framework has aided approximately 100,000 investigations - and to date, has never incorrectly identified an offender to law enforcement. The FBI is now implementing the new federal law where a DNA sample will be collected from

federal arrestees. By the FBI's own estimate, it will receive more than a million additional DNA samples a year. Provide the justification on why the FBI is considering loosening the quality standards when the number of samples the FBI will be putting into the database is going to increase dramatically.

- Do you plan to outsource any of the testing related to the increase in federal DNA collections, and if so, why?

The key to the success of the forensic DNA community reducing the backlog and continuing to solve crime is to increase the capacity and capability of public crime labs – not succumbing to the pressures of profit-driven, private DNA companies with no law enforcement experience to be a regular participant in evidence analysis.

The Department of Justice began cultivating this trend of catering to the private DNA industry's sense of entitlement during the previous two Administrations. Because many of these DNA companies are represented by, and employ former DOJ/NIJ staff, they are given carte blanche access to important information which drives a profit driven agenda, rather than one focused on quality and integrity. Some of these same lobbyists were awarded sole source contracts (as cited in the DOJ Inspector General's Audit Reports GR-40-09-006 and 09-38 September 2009). Lobbyists secured contracts while representing DNA companies and entities who would substantially gain from grant solicitations catered to their specific areas of expertise. Some of these DNA lobbyists were also contracted by DOJ to conduct crime laboratory surveys (thereby gaining market-share and inside information about literally every crime lab in the country), named official speakers at DOJ functions and conferences, and labeled as DNA experts by NIJ (with one firm being mentioned 373 times on NIJ's website) while also on contract lobbying Congress and DOJ for DNA funding. To date, with much more influence than state and local crime lab directors, DNA lobbyists have participated in shaping DNA policy for the Department of Justice and the entire country- while at the same time lobbying Congress for more DNA funding which would benefit the companies they represent.

In light of the recent FBI press release, I understand there exists correspondence from a private DNA laboratory executive taking credit for this "project" his company "initiated a few months ago to change the FBI rule requiring private labs to review the forensic DNA testing work completed by public labs," and also stating, "We could even have our lobbyists connect you with some of the key players on this issue while you are in DC." Yesterday, the same DNA vendor even issued a celebratory statement praising "FBI Re-Evaluation of Requirements for Outsourcing DNA Forensic Testing to Private Laboratories."

State and local public crime labs are not a billion dollar industry, nor can they hire lobbyists to pressure the White House, the Department of Justice and Capitol Hill to change laws and regulations in their favor. While this industry is attempting to privatize law enforcement and influence policy for a profit, the insight and experience of all state and local crime lab directors is being ignored. Ultimately, the welfare of victims and the morale of law enforcement officers could potentially be sacrificed by succumbing to the short term needs of for-profit companies when this is a long term problem that must be addressed in terms of increased capacity for public labs.

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Given the previous problems cited by the Inspector General with private DNA vendors influencing the National Institute of Justice, the FBI Press release of March 22 dealing with the same subject matter, and the presence of private labs and their lobbyists trying to influence the Department of Justice, the White House and Congress for the loosening of the DNA standards and gaining access to NDIS, and the potential impact it could have, I trust you understand and share my concerns. I look forward to expeditious answers to these questions.

Sincerely,

Richard Shelby

Cc: The Honorable Glenn A. Fine
Inspector General

Enclosure