

State of Texas

Forensic Science Commission

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# **TEXAS FORENSIC SCIENCE COMMISSION**

## **POLICIES AND PROCEDURES**

**ADOPTED SEPTEMBER 8, 2011**

## **1.0 Texas Forensic Science Commission (FSC)**

The mission of the FSC is to strengthen the use of forensic science in criminal investigations and courts by developing a process for reporting professional negligence or misconduct, investigating allegations of professional negligence or misconduct, promoting the development of professional standards and training, and recommending legislative improvements.<sup>1</sup>

### **1.1 Responsibilities**

**(a)** The FSC is charged by statute to:

- (1) develop and implement a reporting system through which accredited laboratories, facilities, or entities report professional negligence or misconduct;
- (2) require all laboratories, facilities, or entities that conduct forensic analyses to report professional negligence or misconduct to the commission; and
- (3) investigate, in a timely manner, any allegation of professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility, or entity.<sup>2</sup>

**(b)** An investigation under Subsection (a)(3):

- (1) must include the preparation of a written report that identifies and also describes the methods and procedures used to identify:
  - (A) the alleged negligence or misconduct;
  - (B) whether negligence or misconduct occurred; and
  - (C) any corrective action required of the laboratory, facility, or entity;and
- (2) may include one or more:
  - (A) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and
  - (B) follow-up evaluations of the laboratory, facility, or entity to review:
    - (i) the implementation of any corrective action required under Subdivision (1)(C); or
    - (ii) the conclusion of any retrospective reexamination under Paragraph (A).<sup>3</sup>

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<sup>1</sup> The FSC was created by Acts 2005, 79th Leg., Ch. [1224](#), sec. 1, eff. September 1, 2005. That express statutory authority is contained in article 38.01 of the Texas Code of Criminal Procedure. Definitions of related terms are contained in article 38.35 of that Code. Further guidance on the scope of the FSC's jurisdiction was provided by Texas Attorney General Greg Abbott in Opinion #GA-0866 issued on July 29, 2011. These written policies and procedures are intended to consolidate a description of that authority and provide a guide for the consistent exercise of the discretion and authority of the Forensic Science Commission.

<sup>2</sup> See Tex. Code Crim. Pro. art. 38.01, sec. 4(a).

## 1.2 Definitions

"Accredited" means a laboratory, facility or entity that conducts forensic analysis of physical evidence for use in a criminal proceeding and that has been recognized for accreditation by the Director of the Department of Public Safety under Section 411.0205(c), Government Code and 37 Texas Administrative Code §§28.131 et seq.<sup>4</sup>

"Criminal action" means an investigation, complaint, arrest, bail, bond, trial, appeal, punishment, or other matter related to conduct proscribed by a criminal offense.<sup>5</sup>

"Forensic analysis" means a medical, chemical, toxicological, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. The term includes an examination or test requested by a law enforcement agency, prosecutor, criminal suspect or defendant, or court. The term does not include:

- (A) latent print examination;
- (B) a test of a specimen of breath under Chapter 724, Transportation Code;
- (C) digital evidence;
- (D) an examination or test excluded by rule under Section 411.0205(c), Government Code;
- (E) a presumptive test performed for the purpose of determining compliance with a term or condition of community supervision or parole and conducted by or under contract with a community supervision and corrections department, the parole division of the Texas Department of Criminal Justice, or the Board of Pardons and Paroles;
- (F) an expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action;<sup>6</sup> or
- (G) the portion of any autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician.<sup>7</sup>

"Physical evidence" means any tangible object, thing, or substance relating to a criminal action.<sup>8</sup>

"Professional Misconduct" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the deliberate

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<sup>3</sup> See Tex. Code Crim. Pro. art. 38.01, sec. 4(b).

<sup>4</sup> See Tex. Code Crim. Pro. art. 38.35.

<sup>5</sup> See Tex. Code Crim. Pro. art. 38.35(a)(2).

<sup>6</sup> See Tex. Code Crim. Pro. art. 38.35(a)(4).

<sup>7</sup> Tex. Code Crim. Pro. art. 38.35(f).

<sup>8</sup> See Tex. Code Crim. Pro. art. 38.35(a)(5).

act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis.<sup>9</sup>

“Professional Negligence” means, after considering all of the circumstances from the actor’s standpoint, the actor, through a material act or omission, negligently failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the negligent act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was negligent if the actor should have been but was not aware of an accepted standard of practice required for a forensic analysis.<sup>10</sup>

## **2.0 Membership**

(a) The FSC is composed of nine members, appointed as follows:

(1) four members appointed by the governor:

(A) two of whom must have expertise in the field of forensic science;

(B) one of whom must be a prosecuting attorney that the governor selects from a list of 10 names submitted by the Texas District and County Attorneys Association; and

(C) one of whom must be a defense attorney that the governor selects from a list of 10 names submitted by the Texas Criminal Defense Lawyers Association;

(2) three members appointed by the lieutenant governor:

(A) one of whom must be a faculty member or staff member of The University of Texas who specializes in clinical laboratory medicine selected from a list of 10 names submitted to the lieutenant governor by the chancellor of The University of Texas System;

(B) one of whom must be a faculty member or staff member of Texas A&M University who specializes in clinical laboratory medicine selected from a list of 10 names submitted to the lieutenant governor by the chancellor of The Texas A&M University System;

(C) one of whom must be a faculty member or staff member of Texas Southern University who has expertise in pharmaceutical laboratory research selected from a list of 10 names submitted to the lieutenant governor by the chancellor of Texas Southern University; and

(3) two members appointed by the attorney general:

(A) one of whom must be a director or division head of the University of North Texas Health Science Center at Fort Worth Missing Persons DNA Database; and

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<sup>9</sup> See 42 U.S.C. § 3797k(4) ; Tex. Code Crim. Pro. art. 38.01, sec 4(a)(1-3).

<sup>10</sup> See 42 U.S.C. § 3797k(4); Tex. Code Crim. Pro. art. 38.01, sec. 4(a)(1-3).

(B) one of whom must be a faculty or staff member of the Sam Houston State University College of Criminal Justice and have expertise in the field of forensic science or statistical analyses selected from a list of 10 names submitted to the lieutenant governor by the chancellor of Texas State University System.<sup>11</sup>

**(b)** Each member of the FSC serves a staggered two-year term subject to reappointment. Members are appointed to terms beginning on September 1<sup>st</sup>. The term of the members appointed under Subsections (a)(1) and (2) expires on September 1 of each odd-numbered year. The term of the members appointed under Subsection (a)(3) expires on September 1 of each even-numbered year.<sup>12</sup>

**(c)** The Governor designates a presiding officer (“Chair”). The Chair may nominate other officers including a vice-chair and committee chairs, subject to the approval of other commission members.<sup>13</sup>

**(d)** The names and terms of the members shall be listed on the FSC website at [www.fsc.state.tx.us](http://www.fsc.state.tx.us).

**(e)** A person who is appointed to and qualifies for office as a member of the FSC shall receive an orientation from the Chair and staff that provides the person with information regarding:

- (1) the legislation that created the FSC and related laws;
- (2) the policies and procedures of the FSC, as described in this document and any associated documents generated by the FSC or staff;
- (3) the current budget for the FSC;
- (4) the requirements of:
  - (A) the open meetings law, Government Code Chapter 551;
  - (B) the public information law, Government Code Chapter 552; and
  - (C) other laws relating to public officials, including conflict of interest laws; and
- (5) the minutes of the meetings of the FSC; and
- (6) any pending complaints or ongoing investigations.

## **2.1 Meetings**

**(a)** The FSC shall hold at least quarterly meetings and additional meetings at the call of the Chair. The Chair of the FSC shall conduct FSC meetings and may designate the dates, times and places of meetings following consultation with commission members. The Vice Chair shall conduct FSC meetings in the Chair’s absence.

**(b)** Notice of the Meeting and the Meeting Agenda shall be made available to the FSC members, advisory members, and other interested parties in advance of each FSC

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<sup>11</sup> See Tex. Code Crim. Pro. art. 38.01, sec. 3(a).

<sup>12</sup> See Tex. Code Crim. Pro. art. 38.01, sec. 3(b).

<sup>13</sup> See Tex. Code Crim. Pro. art. 38.01, sec. 3(c).

meeting and shall be posted with the Office of Secretary of the State and on the FSC meeting webpage.

**(c)** A quorum of the FSC is five members. A quorum is required for formal action by the FSC. Formal action may be approved by a majority vote of the members present and voting.

**(d)** The Chair shall establish the agenda for each meeting after consultation with the full FSC.

## **2.2 Committees**

**(a)** The FSC shall have three standing committees: Complaint Screening, Forensic Development, and Legislative. The FSC Chair shall nominate three members of the FSC for each standing committee, subject to the approval of the full FSC. Each committee shall elect a member to serve as chair of the committee. The FSC Chair also may form additional committees or workgroups as needed.

**(b)** A quorum of a committee is two members, and a quorum is required for a committee to meet and take action. The actions of any committee are not final and serve only as recommendations to the full FSC.

## **3.0 Processing of Complaints**

**(a)** The FSC shall approve forms for alleging professional negligence or misconduct and make them available on the FSC website. Any complainant must be identified by name and provide all contact information specified in the complaint form. As further described in this section and Section 4, complaints are initially reviewed by the Complaint Screening Committee, approved for investigation by the full FSC, investigated through an Investigation Panel, which may include outsourced investigative resources, and completed in the form of a report adopted by the full FSC.

**(b)** Complaints shall be considered initially through the Complaint Screening Committee. The chair of the Complaints Screening Committee shall present the complaints before the FSC with a recommendation for disposition. The Complaint Screening Committee may recommend the following dispositions:

- (1) dismiss the complaint;
- (2) accept the complaint and submit for action by an Investigation Panel; or
- (3) take such other action as appropriate.

**(c)** The Complaint Screening Committee may assign staff to collect preliminary information related to a complaint, including research into the status of any underlying criminal or civil case and whether the complaint addresses a forensic analysis subject to investigation by the FSC. In addition, the actor named in the complaint and the involved accredited laboratory, facility or entity may be given an opportunity to provide a brief, written reply to the complaint, offering any reasons for or against accepting the complaint for investigation. The following factors may be considered when a complaint is screened by the Committee and considered by the FSC:

- (1) whether the FSC has jurisdiction pursuant to the opinion of the Texas Attorney General issues on July 29, 2011;
- (2) the availability of the person who was the defendant in the criminal action associated with the forensic evidence;
- (4) the availability of any actor who conducted any part of the forensic analysis;
- (5) the length of time between the forensic analysis and the complaint;
- (6) the availability of records in connection with the forensic analysis and any associated litigation;
- (7) the status of any criminal case or civil litigation associated with the forensic analysis;
- (8) the potential for additional relevant forensic analysis;
- (9) any other factor that would enhance or detract from a complete and accurate investigation of the forensic analysis and the alleged negligence or misconduct;
- (10) the availability of funds to complete an investigation; and
- (11) the opportunity for the investigation and report to educate the forensic science community, advance the standards and training associated with such a forensic analysis or identify legislative recommendations for strengthening a field of forensic science.

**(d)** Upon reaching a recommended initial disposition for a complaint, the Complaint Screening Committee shall provide a summary of the recommendation to the FSC Chair for presentation to the full FSC.

**(e)** Following action by the full FSC regarding the disposition of a complaint, the FSC shall notify the complainant, actor involved in the forensic analysis and the laboratory, facility or entity of the disposition.

**(f)** A member of the Commission may, by formal motion, request that the full Commission reconsider a dismissed complaint if the member identifies new evidence of negligence or professional misconduct that was not previously considered by the Commission. The new evidence may be derived from either:

1. Information in the existing record that the movant believes was not considered by the Commission previously; or
2. New information submitted by the complainant that was not previously considered by the Commission.

**(g)** A motion described in this section may be made only if the Commissioner believes in good faith that the information will have a material impact on the Commission's analysis of the complaint pursuant to the screening criteria set forth in 3.0(c).

**(h)** After considering the member's motion, the Commission shall vote to:

1. Affirm the original decision to dismiss the complaint; or
2. Re-open the complaint.

**(i)** The Commission shall notify the complainant in writing of the results of the Commission's vote under Subsection (h).

**(j)** The Commission shall conduct an appropriate investigation of a complaint reopened under Subsection (h)(2).

**(k)** Each dismissed complaint is limited to one motion for reconsideration under this section.

#### **4.0 Investigation Panels**

**(a)** The Chair, after the full FSC votes to accept a complaint for investigation, shall nominate three members of the FSC to an Investigation Panel subject to the approval of the full FSC, and the investigation panel shall elect one of the members as chair of the panel.

**(b)** An Investigation Panel shall coordinate an investigation into a complaint approved by the FSC for investigation. The Panel initially shall specify the focus of the investigation, request a full response to the complaint from the entity or actor that is the subject of the complaint, and collect any appropriate records related to the complaint. The Panel also may initiate contact with any governmental agency, individual or entity to inquire about assistance in a full investigation. Upon completion of the initial investigation, the Panel may recommend that the FSC dismiss the complaint or approve a full investigation, including a proposed budget, to be completed by:

- (1) conducting a paper review of the forensic analysis;
- (2) referring the case to or collaborating with a governmental agency or accrediting body, pursuant to a memorandum of understanding or other appropriate agreement between the agencies;
- (3) contracting with an individual or entity;<sup>14</sup> or
- (4) taking such other action as appropriate.

**(c)** If the full FSC approves dismissal of the complaint, the FSC shall notify the complainant, the actor and the laboratory, facility or entity involved in the forensic analysis. If FSC approves a full investigation, the Investigation Panel previously appointed to the case shall coordinate the completion of the investigation and draft a written report pursuant to Section 1.1(b) and include a recommendation for final disposition to the full FSC. A complaint, investigation or recommendation is not final and does not represent the conclusions of the FSC until a final report is adopted and

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<sup>14</sup> Tex. Code Crim. Pro. art. 38.01, sec. 4(c).



issued by the full FSC. Following consideration of the recommendation for final disposition from the Investigation Panel, the FSC may:

(1) find there is insufficient credible information to conclude that professional negligence or misconduct occurred in the forensic analysis;

(2) find the forensic analysis met the standard of practice that an ordinary forensic analyst would have exercised at the time the analysis originally took place;

(3) find clear and convincing evidence that professional negligence or misconduct occurred in the forensic analysis; or

(4) take such other action as appropriate.

**(d)** A finding is not a comment upon the guilt or innocence of any individual and is not necessarily a basis for relief in litigation or in any other forum. The final report itself is not prima facie evidence of the information or findings contained in the report.<sup>15</sup>

**(e)** The FSC shall make the final report available to the public<sup>16</sup> on the FSC website and provide a copy, as applicable, to the:

(1) prosecutor, judge, defendant and defense attorney involved in the underlying criminal case, if any;

(2) Board of Pardons and Paroles;

(3) Director of the Department of Public Safety;

(4) Governor;

(5) Lieutenant Governor;

(6) Speaker of the House of Representatives;

(7) Complainant; and

(8) Actor(s) and accredited laboratory, facility or entity involved in any part of the forensic analysis.<sup>17</sup>

## **5.0 Forensic Development Committee**

The Forensic Development Committee shall develop, subject to the approval of the full FSC, plans to strengthen the use of forensic science in criminal courts in Texas. Such plans must include implementing a reporting system through which accredited laboratories, facilities, or entities are required to report professional negligence or misconduct. Such plans may include collection and dissemination of funding opportunities for forensic science, support for training and the development of professional standards and the collection of information that supports programs for strengthening forensic science.

## **6.0 Legislative Committee**

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<sup>15</sup> Tex. Code Crim. Pro. art. 38.01, sec. 4(e).

<sup>16</sup> Tex. Code Crim. Pro. art. 38.01, sec. 4(e).

<sup>17</sup> Tex. Code Crim. Pro. art. 38.01, sec. 7.

The Legislative Committee shall study the ongoing work of the FSC and be prepared to monitor legislation and testify on the application of statutes within the purview of the FSC. The committee shall also review and recommend a legislative appropriations request to the full FSC and monitor the appropriations process as it affects the FSC.

## **7.0 Records**

(a) Complaints received shall be assigned a unique number to be used for subsequent documentation in that matter. Mere receipt of a complaint does not imply any opinion by the FSC as to the merits of the allegations in the complaint.

(b) FSC records shall be centralized and organized by staff for simplicity of access and ease of response to open records requests. To the extent feasible, records should be digitized and stored electronically.

(c) Staff shall coordinate responses to requests for records with the Chair of the FSC.

## **8.0 Budget**

The FSC shall adopt an operating budget each fiscal year. The Chair shall approve expenditures not specified within the budget.

## **9.0 Authority of Sam Houston State University**

(a) Commission staff are employees of Sam Houston State University, but operate under the supervision of the Chair of the FSC. Staff includes a Commission Coordinator and General Counsel and any other such staff necessary to complete the duties of the FSC. The duties of staff shall be summarized in separate job descriptions.

(b) Sam Houston State University may contract for goods and services on behalf of FSC. The Commission Coordinator and the FSC Chair jointly monitor contract activities that are engaged for FSC.

## **10.0 Additional Assistance**

(a) As needed, the FSC shall seek the assistance of the Texas Legislative Council, the Legislative Budget Board, and the University of Texas at Austin.<sup>18</sup>

(b) As needed, the FSC may delegate the duties related to developing and implementing the reporting system described in 1.1(a)(1) to any person the FSC determines to be qualified to assume those duties.<sup>19</sup>

(c) The FSC shall develop a memorandum of understanding with each assisting entity or person.

## **11.0 Public Comment**

(a) The FSC shall include "public comment" as a topic on the agenda for each regularly scheduled meeting of the full FSC. The FSC reserves the right to eliminate, reduce or

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<sup>18</sup> Tex. Code Crim. Pro. art. 38.01, sec. 6.

<sup>19</sup> Tex. Code Crim. Pro. art. 38.01, sec. 3(c).

postpone the public comment period if deemed necessary due to time constraints or other exigent circumstances.

**(b)** During the public comment period, any member of the public, subject to the restrictions of this policy, may address the Commission regarding any matter related to the business of the Commission. Persons who attend or participate in the Commission meeting are expected to act in a manner that is respectful of the conduct of public business and conducive to orderly and polite public discourse. Public comment will typically occur at the end of the FSC meeting.

**(c)** Members of the public shall complete a public participation form before the FSC meeting and deliver the form to the FSC coordinator.

**(d)** Each speaker generally shall be provided three minutes to present public comment. The Commission reserves the right to expand or reduce the time allotted to each speaker and/or to set an overall time limit for the public comment period, dependent upon the particular circumstances and requirements of each meeting.

**(e)** Pursuant to Chapter 551 of the Texas Government Code, relating to open meetings, the Commission may respond to an inquiry regarding a subject not listed on the agenda only with:

**(1)** a statement of specific factual information in response to the inquiry; or

**(2)** a recitation of existing policy in response to the inquiry.

Any deliberation or of decision about a subject not listed on the agenda must be limited to a proposal to place the subject on the agenda for a subsequent meeting.

**(f)** Members of the public are encouraged to submit written comments to the FSC at any time.

## **12.0 Communications Policy**

### **(a) Legislative Hearings**

(1) An employee who attends or testifies at any public hearing shall obtain advance authorization from the FSC Chair.

(2) Employees who elect to voluntarily (without permission from the Chair) attend or testify at a hearing shall take personal leave to attend the hearing,

- (i) notify the Chair no later than three business days prior to the hearing and
- (ii) must use their own personal travel funds to attend.

(3) Commission members shall notify the FSC Coordinator no later than three business days prior to any hearing at which they intend to testify in their capacity as a board member of the FSC

(4) Commission members who elect to voluntarily attend or testify at a hearing outside of their capacity as a FSC board member shall use their own personal travel funds and

- (i) notify the FSC Coordinator no later than three business days prior to the hearing.

**(b) Media**

(1) Employees shall direct all inquiries from the media to the FSC Chair or other board members, as appropriate.

(2) To the extent feasible, Commission members and employees shall inform the FSC Coordinator of all FSC-related media inquiries for interviews, so that the inquiries may be properly organized, recorded and assigned for reply. Commission members may inform the media of this policy and direct media inquiries to the FSC Coordinator.

(3) Commission members and employees shall avoid discussing the details of pending matters with the media, except upon final disposition of those matters.

**13.0 Conflicts Policy**

(1) Any member of the FSC who has a personal or private interest in a matter pending before the FSC shall publicly disclose the fact to the FSC during an open meeting. The Commissioner may not vote or otherwise participate in the matter in which he or she has an interest. The disclosure shall be entered in the minutes of the meeting.

(2) In this section, "personal or private interest" has the same meaning as is given to it under Article III, Section 22, of the Texas Constitution governing the conduct of members of the legislature.

(3) The scope of the term "personal or private interest" has not been clearly defined under either the constitutional provision or the Government Code section. Therefore, the question of whether a member has a personal or private interest in a matter pending before the FSC is a fact question to be analyzed on a case-by-case basis. Any questions should be brought to the attention of the FSC general counsel, who may in turn consult the Texas Ethics Commission and/or the Texas Attorney General as appropriate.

(3) For purposes of this section, an individual does not have a "personal or private interest" in a measure, proposal, or decision if the individual is engaged in a profession, trade, or occupation and the individual's interest is the same as all others similarly engaged in the profession, trade, or occupation.

#### **14.0 Staff Contact Information**

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