

July 15, 2015

Via US Mail

Mr. Gregory A. Bowman
14303 Hartshill Drive
Houston, Texas 77044

RE: FSC Complaint #14-22 NMS Laboratories (Toxicology)

Dear Mr. Bowman:

At its April 10, 2015 meeting, the Commission reviewed the complaint referenced above and all supporting documentation and voted unanimously to dismiss the complaint, with one member absent and one member recusing himself from deliberations.

The Commission's statute requires it to investigate allegations of negligence and misconduct that *would substantially affect the integrity of the results of a forensic analysis conducted by a crime laboratory*. [emphasis added.] See Tex. Code Crim. Proc. § 38.01 Sec. 4(a)(3). The Commission is expressly prohibited from investigating complaints regarding the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician. *Id.* at 38.01 § 2(4). It is against this statutory backdrop that the Commission determines whether to accept or dismiss a complaint for investigation.

Commissioners understood your complaint to contain the following allegations:

1. NMS Labs failed to follow proper procedures regarding the color of the test tube in which they accepted blood specimens for testing.
2. NMS Labs failed to follow proper protocol regarding the storage conditions and acceptable length of storage for the blood specimens.
3. The conclusions reached by NMS Labs were outside the laboratory toxicologist's expertise and should never have been proffered to the forensic pathologist.

As a preliminary matter, your complaint alleges negligence and/or misconduct related to toxicology testing performed by an accredited laboratory that falls within the Commission's jurisdiction. See TEX. CODE CRIM. PROC. art. 38.01 § 4(3)(b). However,

any forensic analysis performed by a medical examiner or other forensic pathologist who is a licensed physician as a portion of an autopsy is expressly excluded from the Commission's jurisdiction. *See* TEX. CODE CRIM. PROC. art. 38.01 § 2(4). In reviewing your complaint, the Commission was strictly limited to the toxicology testing performed by NMS Labs, and did *not* review the autopsy findings by the forensic pathologist.

To address the first allegation above, Commissioners reviewed the associated material provided by you as well as the response provided by the NMS Labs. You allege NMS Labs performed toxicological analyses for the presence of thiosulfate in tubes with tops not acceptable for the requested test, and that NMS Labs' test information sheets affirm that gray top tubes are not appropriate for thiosulfate testing.

Commissioners discussed the issue of the tube top coloring—specifically that two of the blood samples were submitted for thiosulfate analysis in gray top tubes. Commissioners found, in light of the explanation provided by the laboratory and input from the Commission's toxicology expert, that the instructions regarding tube top coloring apply to clinical samples and not forensic samples. As a result, Commissioners did not find any grounds for investigating negligence or misconduct by the laboratory related to this issue.

Regarding the second allegation, Commissioners discussed whether alleged chain of custody and storage issues could have impacted the integrity and reliability of the testing. Commissioners found the storage protocols employed prior to the forensic analysis were the responsibility of the forensic pathologist in the period leading up to the testing request submitted to NMS labs. The laboratory did not have control over the storage conditions when the blood was in the custody of the forensic pathologist, and the Commission does not have authority to investigate the storage conditions under the forensic pathologist's control, nor does it have authority to investigate or opine on whether the forensic pathologist should have refused to issue an opinion or otherwise adjusted his opinion based on storage conditions and/or time frames. With respect to the allegation that NMS should have rejected the testing request because the storage duration exceeded the time limitations cited in your April 4, 2015 letter, the cited limitations are applicable to clinical samples, not forensic samples. The storage conditions and timelines could potentially impact a toxicologist's interpretation of results but any potential impact would fall within the analytical discretion of the toxicologist. Forensic laboratories have no control over the storage conditions or timelines of post-mortem blood samples and would not reject a forensic testing request using the conditions and timelines designated for clinical samples.

With respect to the third allegation, Commissioners discussed whether any of the toxicologist's findings were outside her expertise. The toxicologist in this case was asked to provide interpretive assistance and was provided with a history for each case. The toxicologist used the request and supporting information to produce her report. The opinions proffered are within the range of acceptable analysis and testimony for a toxicologist. The toxicologist made no finding as to the cause and/or manner of death, but rather submitted her analysis to the pathologist as requested. It was then incumbent

upon the pathologist to use his medical training in reaching critical determinations regarding cause and/or manner of death, including affording appropriate weight to the information provided by the toxicologist given all relevant information in the case.

In sum, Commissioners did not find sufficient cause to investigate the laboratory for professional negligence or misconduct in conducting the forensic analyses in question. The forensic pathologist's interpretation and utilization of the toxicology results in reaching a cause and manner of death determination is outside the investigative jurisdiction of the Commission.

If you have any further questions for us, please feel free to contact the Commission office at (512) 936-0661. Absent material new information, the Commission will not review this matter further.

Sincerely,

Lynn Robitaille García