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**Departmental Operations Manual 15
Closeout Report of Complaint/Inquiry Review
Team Regarding January 17, 2020 Erroneous
NIBIN Confirmation Complaint**

Introduction

This report summarizes the District of Columbia Department of Forensic Sciences' ("DFS") response to a complaint which alleged a testing error occurred in the DFS Firearms Examination Unit ("FEU") in confirming an association between firearms evidence from two separate criminal cases. After extensive review, DFS determined an error did occur, re-examined the evidence, and issued a re-work report concluding that the presence of significant marks of agreement and disagreement between the two pieces of evidence upon which the original association was based should have resulted in a conclusion of *Inconclusive*, rather than an *Identification*.

This review process was conducted in compliance with DC Code § 5-1501.10; 28 DCMR § 4002; and, DFS Departmental Operations Manual 15, Policy and Procedures for Complaints and Inquiries ("DOM15"). In addition to routine updates to relevant stakeholder agencies and third-party auditors, the substance of this review was discussed and key personnel were made available for question at open public meetings on July 31, 2020, October 16, 2020, and January 15, 2021.

Having reviewed and adopted the DFS's independent Science Advisory Board's ("SAB") approval of FEU updates, the ANSI National Accreditation Board's ("ANAB") certification of DFS's continuing accreditation, and the SAB's confirmation in a public meeting that their review of this matter was closed, the DFS Complaint/Inquiry Review Team hereby closes DFS's review of this matter.



Chronological Summary of Complaint Response Process

I. Receipt of Complaint and Initial Response

On January 17, 2020, DFS received from the United States Attorney’s Office for the District of Columbia (“USAO”) notice of a potential August 8, 2017 National Integrated Ballistic Information Network (“NIBIN”) confirmation error by a former private contract examiner working in FEU¹ (the “Complaint”). The author of that report identified two cartridge casings as having been fired from the same firearm.

The Complaint advised that USAO had contracted with private firearms examiners to examine evidence associated with this NIBIN confirmation, and that two of those contract examiners had reached a different conclusion—that the two cartridge casings² had not been fired from the same firearm. The Complaint further advised that the two casings at issue in the 2017 NIBIN confirmation would be examined by an additional two USAO contract examiners to further verify the conclusion. Unfortunately, the Complaint did not include any information about these contract examiners, or any material from their associated firearms examination reports.

Immediately after DFS received the Complaint, and while the relevant physical evidence was still in the custody of the USAO contract examiners, members of FEU reviewed DFS’s own case files associated with the 2017 NIBIN confirmation. Those records included microscopic comparison photographs taken by the author of the 2017 NIBIN confirmation report, which showed compelling agreement and strong support for her conclusion that the two casings identified in the report shared a common source. This initial review also included a review of the chain-of-custody records of the associated evidence, which showed that—for then-unknown reasons—one of the two cartridge casings examined in the 2017 NIBIN confirmation was numbered unusually.³

On January 20, 2020, DFS responded to USAO advising that the photographic records of the 2017 NIBIN confirmation showed compelling agreement, and requesting the reports of the USAO contract examiners so that the competing conclusions could be evaluated against one another. That request was not granted. To date, neither DFS nor SAB have received copies of the

¹ This confirmation was done as part of a general re-work of an earlier examiner’s work from a period where that examiner was suspected of potential examination errors. The work of that 2016 DFS examiner and his verifier is only discussed herein as it relates to ANAB’s October 2, 2020 complaint closure.

² It is not clear from the materials available to the Complaint/Inquiry Review Team whether the complainant here refers to MPD Item Numbers 45 and 16, or 41 and 7.

³ This casing was MPD Item Number 16, the unusual numbering of which was the result of a departure from proper NIBIN practice which appears to have occurred at the direction of USAO’s Special Counsel for DNA and Forensics before the evidence came into DFS’s custody. Apparently, rather than having a firearms examiner select the casing with the most appropriate markings for NIBIN upload (a process called NIBIN triage), the Special Counsel selected MPD Item Number 16 for NIBIN upload, allowed that item to be sent to DFS for entry into NIBIN, and had all other casings sent to an outside forensic DNA laboratory in an attempt to obtain usable trace DNA material from the casings.



reports of the USAO contract examiners. On January 22, 2020, DFS advised USAO that the Complaint would be processed under DOM15.

Working without the benefit of the USAO contract examiners' identities or reports, members of FEU were able to identify the first USAO contract examiner who examined the evidence associated with the 2017 NIBIN confirmation, and were able to discuss with him the materials he examined. While the 2017 NIBIN confirmation was performed on MPD Item Numbers 45 and 16, FEU learned from the USAO contract examiner that his review of the association between the two cases had been conducted using MPD Item Numbers 41 and 7. To date, neither DFS nor the SAB have received any materials from USAO confirming that the USAO contract examiners performed a direct microscopic comparison of MPD Item Numbers 45 and 16.

Based on the compelling agreement between the microscopic photographs embedded in the 2017 NIBIN confirmation report, the fact that the USAO contract examiner had not compared the items appearing in the microscopic photographs embedded in the 2017 NIBIN confirmation report, and the unusual numbering of MPD Item Number 16; DFS's working conclusion at this stage was that there had been some unknown mix-up of items in the USAO contract examiners' re-examination of the evidence associated with the 2017 NIBIN confirmation.

In compliance with DOM15, on January 23, 2020, DFS provided USAO an update on its investigation of the complaint, expressly conditioned as "the results of our investigation into the complaint, to date." DFS advised USAO that DFS had reached out to the USAO contract examiner, and that he had confirmed that he never performed a comparison of the two casings recorded in the 2017 NIBIN confirmation report. Additionally, DFS requested to be allowed to assist USAO in their contract examiner re-work process.

On January 28, 2020, DFS wrote to USAO to advise that, in compliance with DOM15, the Complaint/Inquiry Review Team for this matter had been assembled. DFS advised, "While our determination based on the evidence currently available to us is that no inconsistency between firearms conclusions exists, we have determined that we will open an investigation into this matter to provide an opportunity to review any supplemental information we receive from USAO, after the fourth external [USAO] examiner completes his or her review."

II. External Notifications

Throughout its response to the Complaint, DFS has provided a constant stream of status updates and disclosures to relevant outside parties. DFS provided formal notice to ANAB of the Complaint, along with all associated materials to which DFS had access, on February 13, 2020. DFS provided regular updates to both SAB and ANAB as new relevant materials became available, and responded to requests for information from defense stakeholders throughout the summer of 2020.



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III. The Underlying Physical Evidence Becomes Available

After the fourth USAO contract examiner completed their review, and the physical evidence associated with the 2017 NIBIN confirmation again became available to DFS; on April 10, 2020, FEU took possession of the evidence to continue its internal quality review. In keeping with DFS Department Operations Manual 7, Practices for Quality Corrective Action, members of the FEU reviewed the physical evidence against the 2017 NIBIN confirmation report and the conflicting conclusion of the USAO contract examiners discussed in the Complaint. It was during this analysis that DFS discovered that the microscopic photographs in the 2017 NIBIN confirmation report purported by the report's author to depict MPD Item Numbers 45 and 16 did not in fact depict MPD Item Numbers 45 and 16.

On April 30, 2020, Members of FEU provided the Complaint/Inquiry Review Team a then-to-date summary of their review, including that it appeared the 2017 NIBIN confirmation and the USAO contract examiners compared different MPD Item Numbers; that the author of the 2017 NIBIN confirmation erroneously inserted the wrong microscopic photographs into her report; and that it appeared the 2017 NIBIN confirmation report, rather than the USAO contract examiners' still unavailable reports, presented the erroneous conclusion. In parallel, DFS Quality, working with the DFS Cyber Operations Section, was able to locate both the source of the microscopic photographs erroneously inserted into the 2017 NIBIN confirmation report, and the original microscopic photographs the author of the 2017 NIBIN confirmation report took of MPD Item Numbers 45 and 16 when she performed her original microscopic comparison. As part of the review, the verifier of the 2017 NIBIN confirmation reviewed his initial conclusion and changed it from *Identification* to *Inconclusive*.

Based on the change of conclusion, FEU assigned two qualified examiners to re-examine the evidence associated with the 2017 NIBIN confirmation report, and to issue a re-work report if necessary. On May 22, 2020, DFS notified MPD, USAO, OAG, The Public Defender Service for the District of Columbia ("PDS"), and the Federal Public Defender of the testing error. On May 27, 2020, DFS FEU issued a re-work report reaching a different conclusion from both the 2017 NIBIN confirmation report and the purported conclusion of the still unavailable USAO contract examiners.

IV. Corrective Action, Audit, and Continuing Accreditation

In response to the error, and as part of corrective action after the root cause analysis, FEU engaged in a "360 Review" of all the unit's policies and procedures from June 16 to June 18, 2020. The 360 Review included training on technical and administrative reviews, practical exercises, and mock cases. With the help of SAB, FEU made updates to its requirements for minimum areas of agreement for elimination factors, case documentation, independent verification, peer review, and case processing. SAB approved the updates on September 8, 2020.

At DFS's request, ANAB performed an on-site interim assessment of DFS FEU from July 6 to July 10, 2020. The interim assessment activity was conducted by two auditors, both of whom



were experienced firearms examiners, current or former laboratory directors, and qualified lead assessors. Shortly following the interim assessment activity, ANAB conducted its regularly scheduled full audit of DFS's forensic laboratories which included further assessment of the FEU. During both the interim assessment activity and the full annual audit, and unknown to DFS at the time, ANAB investigated a complaint made to ANAB by a USAO employee on June 16, 2020 (the "Outside Complaint").

On October 1, 2020, ANAB concluded its assessment activity, confirming DFS's continuing accreditation in all areas where accreditation was sought, including all accredited activities of the DFS FEU. On October 2, 2020, ANAB closed the Outside Complaint, resolving its three allegations as follows:

- The complaint alleged "multiple examiners made an erroneous identification of two cartridge cases."⁴ ANAB found the complaint valid with regard to the initial DFS examination of MPD Item Numbers 45 and 16 (of which the 2017 NIBIN confirmation was a re-work), where that examiner and his verifier concluded MPD Item Numbers 45 and 16 shared a common source.

Concerning the 2017 NIBIN confirmation report that is the subject of this Closeout Report, however, ANAB did not find the complaint valid. After reviewing objective evidence produced by DFS, ANAB found that the examiner and her verifier examined the correct evidence, but ultimately reported on the unrelated evidence that was the depicted in the 2017 NIBIN confirmation report's microscopic photographs.

Concerning the May 27, 2020 DFS re-work which compared MPD Item Numbers 45 and 16, ANAB did not find the complaint valid. ANAB found the May 27, 2020 re-work's determination that the evidence is inconclusive supported by the examiner's technical notes.

- The complaint alleged "the laboratory compared incorrect evidence as part of a 2017 NIBIN verification." ANAB found this allegation not valid. As explained above, the author of the 2017 NIBIN confirmation report examined and photographed the correct evidence, but as the result of an administrative error on her part, issued her report on the two unrelated pieces of evidence depicted in the report's microscopic photographs.
- The complaint alleged "DFS failed to properly investigate the cause of these issues." ANAB found this allegation not valid, and that "DFS has provided objective evidence that the subject matter of this complaint has been appropriately investigated and corrective actions have been implemented."

DFS shared the October 1, 2020 certification of continuing accreditation, and the October 2, 2020 Outside Complaint closure at its next Stakeholder Council meeting. On October 16, 2020,

⁴ It is not clear from the materials available to the Complaint/Inquiry Review Team whether the complainant here refers to MPD Item Numbers 45 and 16, or 41 and 7.



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at its public SAB meeting, DFS presented on the agency's response to-date, including a thorough presentation by the author of the May 27, 2020 re-work report, and made the author available for questions from all in attendance.

On January 15, 2021, DFS held its first public SAB meeting of 2021, and reported on the close-out of its case review process. DFS again opened the floor to questions from anyone present. After the presentation, DFS confirmed with the SAB that the matter was closed.

Findings

Pursuant to DC Code § 5-1501.10(c), 28 DCMR § 4002.3(f), and DOM15 § 5.3.8.2; the Complaint/Inquiry Review Team finds as follows:

- The 2017 NIBIN confirmation report erroneously attributed MPD Item Numbers 45 and 16 to a common source.
- That examiner did examine and photograph the correct items, MPD Item Numbers 45 and 16, on her comparison microscope.
- DFS has retained a copy of those electronic microscopic photographs.
- On May 1, 2020, the verifying examiner on the 2017 NIBIN confirmation report changed his conclusion from an *Identification* to an *Inconclusive*.
- The author of the 2017 NIBIN confirmation report made an administrative error, erroneously attaching microscopic comparison photographs from a separate and unrelated case, instead of the microscopic comparison photographs of MPD Item Numbers 45 and 16 taken by the same examiner.

Quality Departures and Resolution

In response to the Complaint, DFS Quality completed eight Quality Corrective Action Reports ("QCARs"): 12407, 12435, 12436, 12437, 12438, 12439, 12440, and 12573. These QCARs have been made available to DFS's prosecutorial stakeholders pursuant to DFS's standard QCAR disclosure practice.

Reconciling Conflicting Interests of Competing Stakeholders

On April 23, 2020, DFS received a joint request from OAG and USAO to submit to a prosecutor-led, wide-ranging review of FEU. By the time these requests were made to DFS, the proposed three-man review team had already been composed from regular USAO contract witnesses. The proposed three-man review team was composed of two firearms examiners, and a DNA scientist with no firearms training or experience of note.



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On May 19, 2020, DFS responded by letter, explaining that the agency's response to the Complaint would follow the procedure outlined in the DC Code and DC Municipal Regulations. DFS reiterated that the statutorily created SAB, and DFS's statutorily mandated national accrediting body⁵ would be responsible for reviewing the Complaint. DFS expressed concerns about the process by which the proposed three-man review team was assembled, and identified multiple undisclosed conflicts of interest that would disqualify specific proposed review team members from participating in any review of the independent laboratory.

On June 15, 2020, PDS wrote to the Chief Judge of the Federal District Court for the District of Columbia to object to any prosecutor-led review of an independent laboratory, and identified additional undisclosed conflicts of interest in the prosecutors' proposed three-man team.⁶

Notwithstanding DFS's refusal to deviate from the DC Code or DCMR in responding to this complaint, or the defense bar's written objection to the prosecutor-led review, in June 2020, an AUSA began seeking privileged records of DFS's internal and then-ongoing response to the Complaint. Initially, these efforts took the form of an unusual discovery request, ultimately progressing to a subpoena. DFS offered to share all but the attorney/client privileged material, subject to the limitation that the material would not be shared with the prosecutors' three-man review team. The offer was declined.

To resist the subpoena, DFS sought representation from the Civil Litigation Division of OAG, as OAG had already asserted attorney/client privilege over a related matter as part of a litigation hold letter sent by OAG on January 27, 2020. Nevertheless, OAG declined representation on the basis of a conflict it found to have arisen from its involvement in the proposed prosecutor-led review. As a result, DFS was forced to spend \$50,000.00 to hire outside counsel to resist the subpoena.

DFS ultimately prevailed, with the court recognizing DFS's deliberative process and attorney client privileges, and imposing a protective order that limited use of those materials turned over pursuant to the subpoena to the specific case at bar. Shortly after, DFS and USAO negotiated terms by which DFS would allow the protective order to be lifted without objection, to help ensure USAO's ability to make relevant disclosures in other criminal cases.

⁵ This requirement is currently filled by ANAB, one of only two existing organizations whose certificate of accreditation would satisfy our statutory mandate.

⁶ In the fall of 2020, DFS discovered from court documents an apparent and particularly troubling conflict that had never been disclosed to DFS. It appears from publicly available court documents that one of the prosecutors' three-man review team who, as part of the team's Interim Audit Reports had presumed to review the supportability of the May 27, 2020 DFS re-work, had previously prepared a report or verification on the same case. The fact that an examiner who reviewed evidence and reported a conclusion is conflicted out from later reviewing the adequacy of a re-work in the same case which reached a different conclusion, is plain, as any deviation by that examiner from his original reported conclusion would constitute an error. That the examiner not only performed such a review, but did so without explicitly disclosing his earlier conflicting conclusion in the body of the same Interim Audit Report is shocking. Because DFS does not have access to the reports of the prosecution's contract examiners, DFS has not further investigated this matter.



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Though DFS had no direct contact with the prosecutors' three-man review team, the agency has learned that after a review of roughly 60 cases, and an unknown volume of individual pieces of evidence, the *ad hoc* team may have some unresolved concern about the fact that in five other cases DFS firearms examiners reached *Inconclusive* conclusions on pieces of evidence where prosecutors' contract examiners found *Identification*.

Unfortunately, neither DFS nor SAB has been provided the materials necessary to respond to such a concern—including, but not limited to: whether the outside examiners work out of a nationally accredited laboratory, the examiners' quality assurance practices, the examiners' standard operating procedures, the examiners' audit histories, and the examiners' full reports of examination and technical notes. As a result, this Complaint/Inquiry Review Team can offer no response to these concerns.

Recommendations

Based on DFS Quality's resolution of QCARs 12407, 12435, 12436, 12437, 12438, 12439, 12440, and 12573; completion of FEU's 360 Review and SAB's approval of the attendant FEU updates on September 8, 2020; ANAB's complaint closure and certification of continuing accreditation on October 1 and October 2, 2020; and the SAB's closure of its review of this matter without making any recommendations under DC Code § 5-1501.12 in a public meeting on January 15, 2021; all concerns raised by this complaint have been fully addressed. The Complaint/Inquiry Review Team recommends no further action on this complaint. This matter is closed.

(Signature Page to Follow)



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Departmental Operations Manual 15
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Team Regarding January 17, 2020 Erroneous
NIBIN Confirmation Complaint
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