

**DHS Law Enforcement
Components Did Not
Consistently Collect
DNA from Arrestees**





OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

May 17, 2021

MEMORANDUM FOR: The Honorable Alejandro Mayorkas
Secretary
Department of Homeland Security

FROM: Joseph V. Cuffari, Ph.D.
Inspector General

JOSEPH V
CUFFARI

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JOSEPH V CUFFARI
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SUBJECT: *DHS Law Enforcement Components Did Not
Consistently Collect DNA from Arrestees*

Attached for your information is our final report, *DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees*. We incorporated the formal comments provided by your office.

The report contains four recommendations aimed at improving DNA collection by the Department of Homeland Security. Your office concurred with all four recommendations. Based on the information you provided in your response to the draft report, we consider recommendations 1, 2, and 3 open and resolved. Once your office has fully implemented the recommendations, please submit a formal closeout letter to us within 30 days so that we may close the recommendations. The memorandum should be accompanied by evidence of completion of agreed-upon corrective actions. Recommendation 4 is resolved and closed. Please send your response or closure request to OIGAuditsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act of 1978, as amended*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with questions, or your staff may contact Thomas Kait, Acting Deputy Inspector General for Audits, (202) 981-6000.

Attachment



DHS OIG HIGHLIGHTS

DHS Law Enforcement Components Did Not Consistently Collect DNA From Arrestees

May 17, 2021

Why We Did This Audit

The *DNA Fingerprint Act of 2005* authorized the Department of Justice (DOJ) to direct Federal law enforcement agencies to collect DNA samples from persons arrested or detained under U.S. authority. We conducted this audit to determine whether DHS law enforcement components collected DNA samples as the *DNA Fingerprint Act of 2005* and subsequent DOJ regulations require.

What We Recommend

We recommend DHS oversee and guide its law enforcement components to ensure they comply with requirements of the *DNA Fingerprint Act of 2005* and 28 C.F.R. § 28.12.

For Further Information:

Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

Department of Homeland Security law enforcement components did not consistently collect DNA from arrestees as required by the *DNA Fingerprint Act of 2005* and the Code of Federal Regulations. Of the five DHS law enforcement components we reviewed that are subject to these DNA collection requirements, only United States Secret Service consistently collected DNA from arrestees. U.S. Immigration and Customs Enforcement and the Federal Protective Service inconsistently collected DNA, and U.S. Customs and Border Protection and the Transportation Security Administration collected no DNA.

DHS did not adequately oversee its law enforcement components to ensure they properly implemented DNA collection. Based on our analysis, we project that DHS law enforcement components we audited did not collect DNA for about 212,646, or 88 percent, of the 241,753 arrestees from fiscal years 2018 and 2019. Without all DHS arrestees' DNA samples in the Federal Bureau of Investigation's criminal database, law enforcement likely missed opportunities to receive investigative leads based on DNA matches. Additionally, DHS did not benefit from unity of effort, such as sharing and leveraging processes, data collection, and best practices across components.

DHS Response

DHS concurred with the four recommendations. Appendix C contains DHS' management response in its entirety.



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Abbreviations

| | |
|--------|--|
| CBP | U.S. Customs and Border Protection |
| C.F.R. | Code of Federal Regulations |
| CODIS | Combined DNA Index System |
| DOJ | Department of Justice |
| ERO | Enforcement and Removal Operations |
| FBI | Federal Bureau of Investigation |
| FPS | Federal Protective Service |
| HSI | Homeland Security Investigations |
| ICE | U.S. Immigration and Customs Enforcement |
| LE | law enforcement |
| MOA | Memorandum of Agreement |



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| | |
|------|--|
| OFO | Office of Field Operations |
| OSC | Office of Special Counsel |
| TSA | Transportation Security Administration |
| USBP | U.S. Border Patrol |
| USMS | U.S. Marshals Service |



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Background

The *DNA Fingerprint Act of 2005* authorized the Attorney General to direct Federal law enforcement (LE) agencies to collect DNA samples from arrestees and non-U.S. detainees under the authority of the United States.¹ An arrestee refers to a U.S. citizen or non-U.S. citizen arrested on Federal criminal charges. Conversely, a non-U.S. detainee is a person who is not a U.S. citizen and not lawfully admitted for permanent residence, held for an administrative violation of law. For example, the Department of Homeland Security considers a person held for deportation but not charged with a criminal offense to be a non-U.S. detainee held for an administrative violation of law.

In January 2009, DOJ updates to Title 28 Code of Federal Regulations (C.F.R.) § 28.12 took effect, giving additional DNA collection guidance to Federal LE agencies. According to 28 C.F.R. § 28.12, Federal LE agencies must collect DNA samples from arrestees and non-U.S. detainees.² The C.F.R. further allows a Federal agency to establish a Memorandum of Agreement (MOA) with another LE agency to collect DNA samples on the agency's behalf.

Law Enforcement Components and DHS Arrests

The U.S. Marshals Service (USMS), a component of the Department of Justice (DOJ), assumes custody for persons charged with a Federal offense, no matter which agency made the arrest. According to USMS booking data, DHS LE officers and agents arrested more than 823,000 persons for Federal offenses from fiscal years 2012 through 2019, which accounted for nearly 54 percent of more than 1.5 million Federal arrestees booked into USMS custody. See Figure 1 for Federal arrestees booked into USMS from FYs 2012 to 2019. DHS' significant percentage of Federal arrests presents its LE components with additional opportunities to collect and match DNA samples to solve crimes.

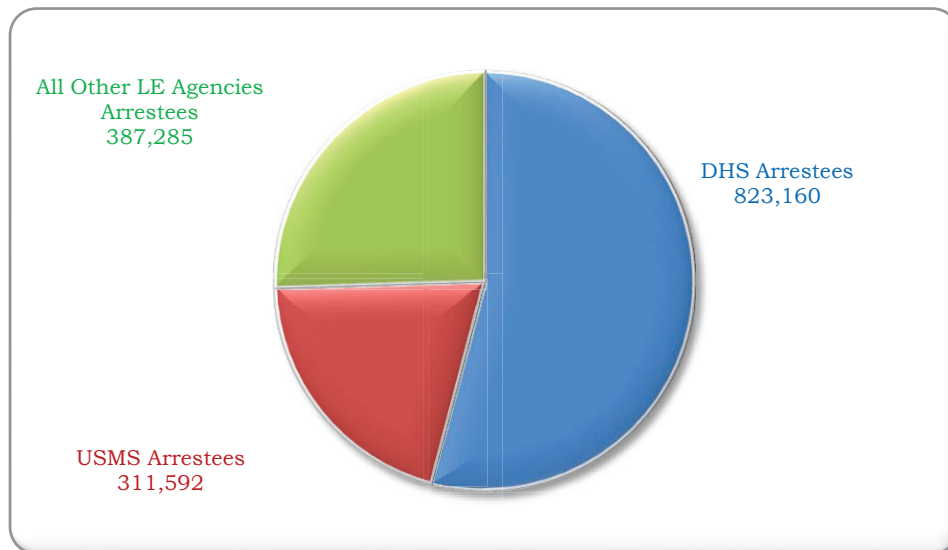
¹ See Appendix B, January 5, 2006, *DNA Fingerprint Act of 2005*, Pub. L. No. 109-162 (2006) (codified as 42 U.S.C § 14135a and transferred to 34 U.S.C. § 40702(a)(1)).

² See Appendix B, January 9, 2009, DOJ Collection of DNA Samples, 28 C.F.R. § 28.12 (2009).



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Figure 1. FYs 2012–2019 Federal Arrestees Booked into USMS Custody



Source: USMS book-in data

The five DHS LE components we reviewed that are subject to DNA collection law are:

- U.S. Customs and Border Protection (CBP) and its two sub-components — U.S. Border Patrol (USBP) and Office of Field Operations (OFO)
- U.S. Immigration and Customs Enforcement (ICE) and its two sub-components — Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI)
- Federal Protective Service (FPS)
- Transportation Security Administration (TSA)
- United States Secret Service (Secret Service)

Timeline for Key DHS DNA Collection Events

In March 2009, DHS directed its components to create DNA implementation plans by April 2009.³ These plans were to identify processes and procedures for ensuring compliance with 28 C.F.R. § 28.12. However, in July 2010, DHS Secretary Napolitano and Attorney General Holder agreed to exempt DHS DNA collection requirements for non-U.S. detainees.⁴ Secretary Napolitano

³ See Appendix B, March 25, 2009, DHS Secretary Napolitano Memorandum Directing DHS Operational Component Heads to Plan Implementation of DNA Sample Collection Rule.

⁴ See Appendix B, March 22, 2010, DHS Secretary Napolitano Letter to Attorney General Holder Proposing DHS Exemptions from Collecting DNA from Detainees and July 22, 2010 Attorney General Holder Letter Acknowledging Secretary Napolitano Letter and Authority to Exempt Collecting DNA from Detainees at the Present Time.



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explained the volume of persons falling within the targeted class for DNA collection posed severe organizational, resource, and financial challenges. DHS estimated the new regulation would result in collecting about a million samples from aliens detained and criminally charged. This would severely strain DHS resources needed to perform its broader mission because Congress had not appropriated additional funding for DNA collection or training costs.

In the July 2010 exemption for non-U.S. detainees, Attorney General Holder did not exempt DHS from collecting arrestees' DNA. During their correspondence, Secretary Napolitano indicated, and the Attorney General agreed, DHS would phase in DNA collection of arrestees "over the next year." Accordingly, in 2012 and 2013, FPS, ICE, and Secret Service implemented DNA collection programs for arrestees. CBP and TSA did not implement DNA collection programs. In February 2018, DOJ met with CBP officials to request CBP start collecting DNA from non-U.S. detainees. CBP officials claimed the 2010 exemption was still in effect and it did not plan to begin collecting DNA from non-U.S. detainees.

In July 2018, the Office of Special Counsel (OSC) referred a whistleblower complaint to DHS Secretary Nielsen, alleging CBP failed to meet Federal DNA collection requirements.⁵ Additionally, in August 2019, OSC sent a letter to the President of the United States "rebuking" CBP for not complying with DNA collection law.⁶ The OSC letter alerted DOJ of CBP's failure to collect DNA samples from arrestees.

Thereafter, DOJ informed DHS that it intended to implement a rule change to 28 C.F.R. § 28.12, which would remove the provision allowing the DHS Secretary to exempt DNA collection requirements for non-U.S. detainees. This DOJ interaction with DHS led CBP to implement DNA collection pilot programs at two locations in January 2020.

In April 2020, after we initiated our audit, DOJ's final rule change to 28 C.F.R. § 28.12 went into effect.⁷ The rule change eliminated DHS' authority to exempt collecting DNA from non-U.S. detainees. In May 2020, in response to the rule change, ICE implemented a pilot program at one location to expand its DNA

⁵ See Appendix B, July 23, 2018, Office of Special Counsel Investigation Referral Letter to DHS Secretary Nielsen.

⁶ See Appendix B, August 21, 2019, Office of Special Counsel Letter to the President Reporting CBP's failure to meet DNA Collection Requirements.

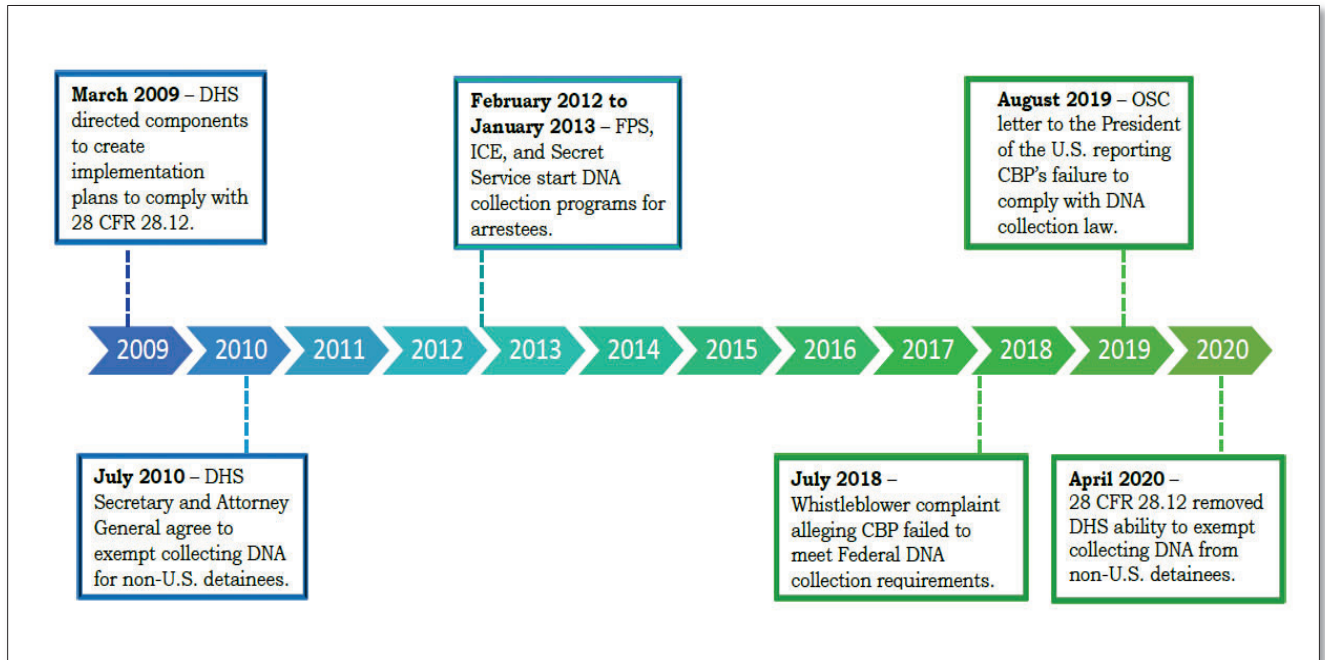
⁷ See Appendix B, March 9, 2020, DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483 (Mar. 9, 2020)(revising 28 C.F.R. § 28.12).



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collection to include non-U.S. detainees along with arrestees. Figure 2 shows a timeline for these key DHS DNA collection events.

Figure 2. Timeline for Key DHS DNA Collection Events



Source: DHS Office of Inspector General (OIG) analysis

DNA Collection Process and Use

DOJ's Federal Bureau of Investigation (FBI) furnishes DNA sample collection kits to LE agencies. The kits contain supplies needed for the agencies to collect DNA samples using a buccal (cheek) swab, along with a FD-936 Form, Request for National DNA Database Entry, and a postage paid envelope for returning the collected DNA and form to FBI. Figure 3 is an example of an FBI DNA collection kit.



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Figure 3. FBI DNA Collection Kit

Source: DHS OIG photo of the kit from a CBP field office

After collecting the DNA sample, the LE agency sends the sample to the FBI for processing. The FBI reconciles information between the FD-936 form and DNA sample. If the information does not match or the FD-936 form is missing, the FBI rejects the sample. If the information matches and the swab contains sufficient DNA, the FBI adds the DNA sample to the Combined DNA Index System (CODIS) — its criminal database — and compares it to DNA profiles of unsolved crimes or missing persons already in CODIS. If the FBI finds a match, it could identify a suspect for an unsolved crime.

Federal, state, and local forensic laboratories exchange and compare DNA profiles electronically through CODIS, a critical process for those crimes in which perpetrators did not leave fingerprints but left biological residue (DNA). DNA analysis offers an avenue to solve crimes that LE could not otherwise solve if biometric information was limited to fingerprints. Therefore, DNA matching furthers the criminal justice system objective to bring timely justice and prevent future crimes.

The FBI published examples of crimes solved using DNA matching. For example, in February 2017, a Federal Detention Center in Houston, Texas, collected a DNA sample from a person incarcerated for illegal entry into the United States and sent the sample to the FBI. Two days after loading the DNA sample into CODIS, the FBI received a match linked to a 2009 homicide in Denver, Colorado. The incarcerated person had previous interactions with LE, including a 2009 ICE arrest in Denver, Colorado, and a 2014 CBP arrest in Grand Forks, North Dakota. If ICE or CBP had collected a DNA sample during those encounters, investigators could have received the investigative lead years earlier.



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In another example, a criminal alien was arrested by CBP and deported five times from 2009 to 2018 before the DOJ Bureau of Prisons collected his DNA and sent it to the FBI in 2019. His DNA matched DNA recovered from two unsolved sexual assaults committed 22 years prior. The police department arrested the suspect in April 2019, 4 days before his scheduled release from Bureau of Prisons' custody. The suspect is in custody and awaiting trial.

Results of Audit

DHS LE components did not consistently collect DNA from arrestees as required by the *DNA Fingerprint Act of 2005* and 28 C.F.R. § 28.12.⁸ Of the five DHS LE components we reviewed that are subject to these DNA collection requirements, only Secret Service consistently collected DNA from arrestees. ICE and FPS inconsistently collected DNA, and CBP and TSA collected no DNA.

DHS did not adequately oversee its LE components to ensure they properly implemented DNA collection. Based on our analysis, as shown in Table 2, we project that DHS LE components did not collect DNA for about 212,646, or 88 percent, of the 241,753 arrestees from FYs 2018 and 2019. Without all DHS arrestees' DNA samples in the FBI's criminal database, LE officials likely missed opportunities to receive investigative leads based on DNA matches. Additionally, DHS did not benefit from unity of effort, such as sharing and leveraging processes, data collection, and best practices across components.

DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees as Required

Although DHS had an exemption for collecting DNA samples from non-U.S. detainees until April 2020, Federal regulations still required DHS to collect DNA samples from arrestees. Secret Service collected DNA from most of its arrestees, but four other DHS LE components we reviewed that are subject to the *DNA Fingerprint Act of 2005* and 28 C.F.R. § 28.12 — ICE, FPS, CBP, and TSA — did not consistently collect DNA from arrestees.

Secret Service Collected DNA from Most Arrestees

Secret Service policies and procedures require the collection of DNA samples from persons the Secret Service fingerprints, as Federal regulations allow. Specifically, Secret Service requires agents to either collect a DNA sample or

⁸ See Appendix B, January 5, 2006, *DNA Fingerprint Act of 2005*, Pub. L. No. 109-162 (2006) (codified as 42 U.S.C § 14135a and transferred to 34 U.S.C. § 40702(a)(1)) and January 9, 2009, DOJ Collection of DNA Samples, 28 C.F.R. § 28.12 (2009).



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document a reason for not collecting the DNA sample, such as another LE agency having already collected DNA. Secret Service’s booking system requires agents to enter information regarding DNA collection before closing a case file.

We reviewed 2,571 Federal arrest records from Secret Service’s booking system for FYs 2018 to 2019 to determine whether agents recorded DNA collection information into the booking system as required by Secret Service policy. We found that Secret Service agents collected DNA samples from arrestees and recorded information related to the DNA collections in their booking system, as Secret Service policy required. The booking system indicated Secret Service agents collected DNA samples from 2,175 (85 percent) of the total arrestees but did not collect DNA from 213 (8 percent). In 155 (73 percent) of the 213 cases in which Secret Service agents did not collect DNA, the data showed another LE agency had already collected DNA. Secret Service agents did not record DNA collection information for 183 (7 percent) of the 2,571 arrests. See Table 1 for a summary of Secret Service booking system data for FYs 2018 to 2019.

Table 1. Secret Service Data

| Secret Service Booking System Data FYs 18-19 | | |
|---|--------------|-------------|
| DNA Collected | 2,175 | 85% |
| DNA Not Collected | 213 | 8% |
| No Indicator | 183 | 7% |
| Total | 2,571 | 100% |

Source: Secret Service data

Additionally, we statistically sampled 246 of the 2,571 cases to verify whether Secret Service collected DNA samples according to its DNA collection policy and submitted those samples to the FBI. We found that Secret Service agents followed the DNA collection policy by either collecting DNA samples or documenting a reason for not collecting samples for 226 cases, about 92 percent.

Secret Service has an effective DNA collection program because it implemented adequate policies and procedures to ensure agents collected DNA samples. Further, Secret Service agents followed these policies and procedures by entering information regarding DNA collection into the booking system before closing case files. Secret Service is the only DHS LE component we reviewed with consistent DNA collection information in its booking system. DHS could use Secret Service as a model for establishing effective DNA collection programs



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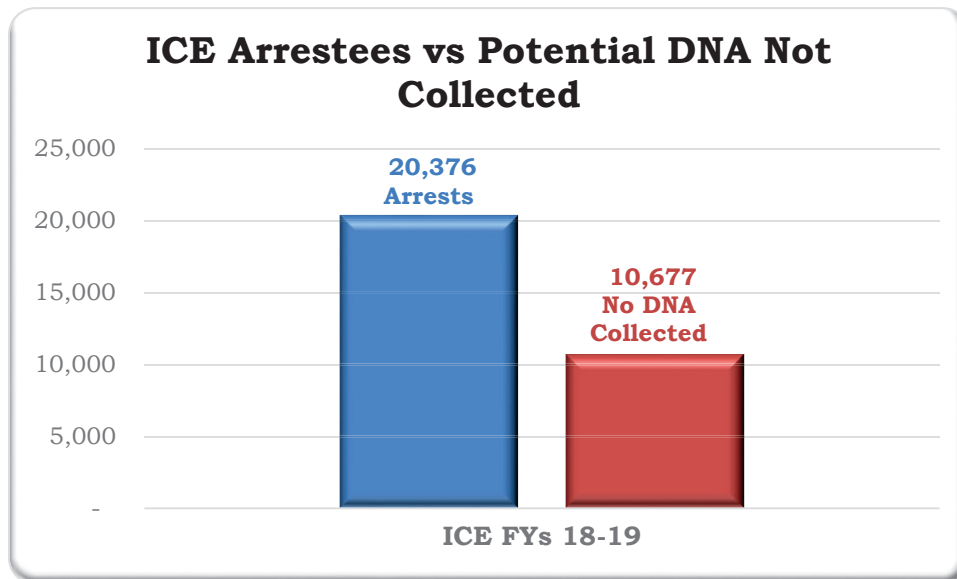
in its other LE components.

ICE and FPS Did Not Consistently Collect DNA from Arrestees

ICE and FPS did not consistently collect DNA from their arrestees as required by 28 C.F.R. § 28.12. In addition, even though allowed by the C.F.R., these components did not establish MOAs with other Federal agencies to collect DNA samples from arrestees on their behalf.

ICE instituted a DNA collection program and has policies and procedures for DNA sample collection, but did not consistently collect DNA samples from arrestees. Specifically, from a total of 20,376 ICE arrestees from FYs 2018 to 2019, we analyzed a statistical sample of 530. Of the 530 arrestees, ICE did not collect DNA samples for 279 arrestees (52 percent). Based on our analysis of the statistical sample, we project ICE did not collect DNA samples from 10,677 of its 20,376 arrestees in FYs 2018 to 2019, as shown in Figure 4.

Figure 4. OIG Analysis and Projection of ICE Data, FYs 2018–2019



Source: DHS OIG analysis

Although FPS has DNA collection policies and procedures, it did not consistently collect DNA samples from arrestees. FPS could not timely produce a complete, reliable list of FYs 2018 to 2019 arrests because it cannot differentiate between arrests and detainments without manually manipulating data in its database. Therefore, we used the only data available for our analysis — USMS data. We selected an initial statistical sample of 70 arrestees for FYs 2018 to 2019 from the USMS data. FPS claimed it arrested only 33 of



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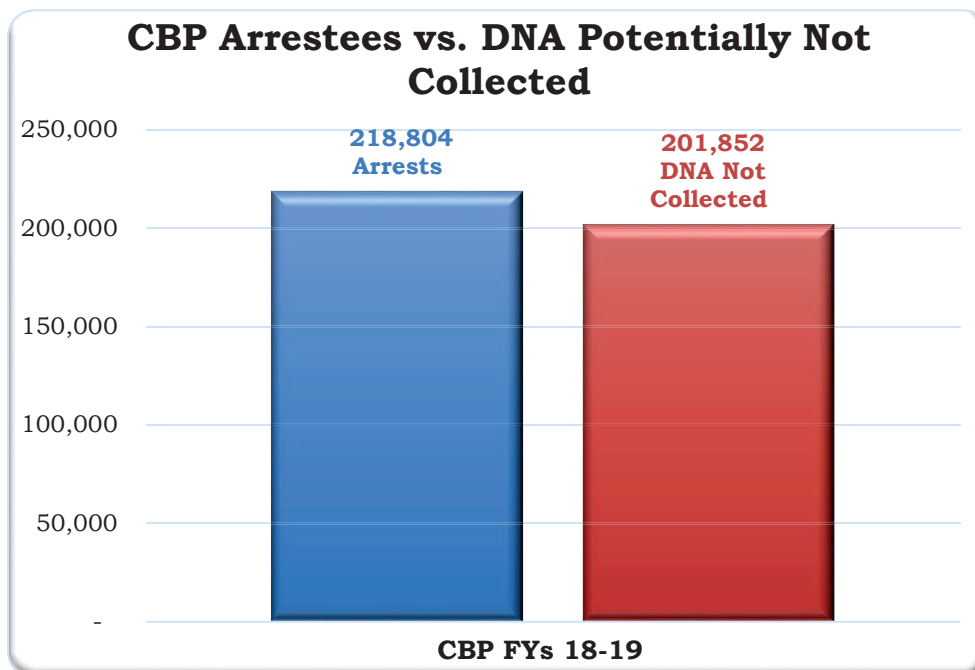
the 70. For these 33 arrests, FPS did not collect DNA samples for 19, about 58 percent. Because FPS could not produce its total number of arrests for FYs 2018 to 2019, we could not project the number of arrestees from whom FPS did not collect DNA.

CBP and TSA Did Not Collect DNA from Arrestees

CBP and TSA had no programs to collect DNA samples from their arrestees. The two components also did not establish MOAs with other Federal agencies to collect DNA samples from arrestees on their behalf.

From a universe of 218,804, we examined a statistical sample of 502 CBP arrest records from FYs 2018 to 2019 to determine whether its arrestees had DNA samples on file in CODIS. We determined CBP did not collect DNA from 454 (92 percent). We were unable to verify whether 5 of the 502 arrestees (1 percent) had DNA profiles in CODIS. The remaining 43 CBP arrestees (7 percent) had DNA profiles in CODIS, but the FBI confirmed that CBP did not collect these DNA samples. Based on our analysis, we project CBP did not collect DNA from 201,852 of its total 218,804 arrestees in FYs 2018 to 2019, as shown in Figure 5.

Figure 5. OIG Analysis and Projection of CBP Data, FYs 2018–2019



Source: DHS OIG analysis



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TSA also did not collect DNA or establish MOAs with other Federal agencies to collect DNA from arrestees on its behalf. According to TSA officials, their Investigations Office handles both civil and criminal matters. Officials stated that TSA arrests most criminals as part of a joint task force with other LE agencies and rarely arrests unilaterally. We reviewed TSA arrest data and determined TSA unilaterally processed 2 of its 10 arrests for FYs 2018 to 2020, but did not collect DNA for the 2 unilateral arrestees. To meet 28 C.F.R. § 28.12 requirements and help solve crimes, TSA should collect DNA samples from its unilateral arrests or enter into MOAs with other agencies to collect DNA on its behalf.

DHS Did Not Provide Adequate Oversight to Ensure Law Enforcement Components Collected DNA from Arrestees

DHS did not monitor its LE components to ensure they collected DNA from their arrestees as required. Officials from the DHS Office of Strategy, Policy and Plans believed the 2010 DNA collection exemption waived the requirement to collect DNA samples. For this reason, officials did not consider oversight of component compliance necessary. Consequently, DHS did not designate an office responsible for overseeing component compliance with DNA collection laws and regulations. Rather than DHS establishing department-wide policy, its LE components used different policies and procedures to collect DNA. Some LE components did not establish a DNA collection program or any policies and procedures.

However, DHS' view of the 2010 exemption and the corresponding lack of oversight were inappropriate because the 2010 exemption only applied to non-U.S. detainees, not arrestees. Specifically, Attorney General Holder stated in his July 2010 exemption approval memo:

With respect to criminal arrestees, you [DHS] indicate that you [DHS] intend to 'phase-in implementation over the next year, with certain DHS Components to begin the process more quickly than others All federal agencies that have not already done so, including the DHS agencies, should complete their implementation of arrestee DNA sample collection as expeditiously as possible.

In the absence of central department-level oversight and direction, DHS LE components understood requirements differently and took various approaches to collect DNA. Specifically:

- Secret Service established its own policy and procedures for DNA collection, as well as a process to track DNA collection data in its booking system.



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- ICE had policies and procedures for DNA collection, but did not ensure personnel collected DNA as required by Federal law and internal policies. Neither ICE HSI nor ICE ERO required data collection to complete the booking process. ICE ERO began using its booking system to collect limited information on DNA collection in 2017. However, we found personnel did not consistently collect DNA sample information. Finally, ICE did not evaluate the effectiveness of its DNA collection program by taking actions such as tracking DNA collection data or internally auditing the program. To comply with updates to 28 C.F.R. § 28.12,⁹ ICE ERO began a pilot in May 2020 to collect DNA samples from non-U.S. detainees. As of August 2020, ERO planned to expand DNA collection for arrestees and non-U.S. detainees to the remaining ERO field offices by December 2020. ICE HSI plans to issue guidance to the field to expand DNA collection to non-U.S. detainees.
- FPS established its own DNA collection policy, *Detention and Arrest Directive*, but it did not align with 28 C.F.R. § 28.12, which requires DNA collection from persons arrested or facing charges. Rather, the FPS policy limited DNA collection to the 28 C.F.R. § 28.2 short list of determinable offenses for the Bureau of Prisons. During our audit, FPS updated and implemented its DNA collection policy in an effort to comply with 28 C.F.R. § 28.12. However, FPS did not establish internal controls to ensure DNA collection or steps to evaluate the effectiveness of its DNA collection program, such as tracking DNA collection data or internally auditing the program.
- CBP did not implement a DNA collection program or policies and procedures for DNA collection. CBP also did not have adequate internal controls to ensure compliance with DNA collection laws and regulations. CBP operated as though the 2010 DNA collection exemption included arrestees. In addition, in its response to OSC, CBP explained that it immediately transferred arrestees to ICE or USMS and those agencies collected DNA. However, CBP did not establish agreements with the other agencies to collect DNA on its behalf. In January 2020, CBP piloted its DNA collection to comply with the updates to 28 C.F.R. § 28.12, including DNA collection from detainees. As of November 2020, USBP implemented DNA collection at all sectors and OFO planned to implement it at all locations by December 2020.

⁹ See Appendix B, March 9, 2020, DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 28 C.F.R. § 28.12 (2020).



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- TSA did not implement a DNA collection program or policies and procedures. It also did not have adequate internal controls to ensure compliance with DNA collection laws and regulations. TSA relied on other LE agencies to collect DNA samples for its arrestees but did not establish agreements with the other agencies to collect DNA on its behalf.

Conclusion

DNA analysis is a powerful tool for biometric identification, which helps bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused. DNA analysis offers an avenue to solve crimes that LE could not otherwise solve in a comparable manner. LE agencies send DNA samples to the FBI for analysis, and the FBI compares the samples to DNA profiles of unsolved crimes or missing persons already in CODIS. Consistently capturing DNA from arrestees could help maximize the effectiveness of the FBI’s analysis and comparison.

In FYs 2018 and 2019, the five audited DHS LE components arrested about 241,753 people for criminal offenses. However, based on our analysis, we project DHS components did not collect DNA from about 212,646 arrestees, or 88 percent. See Table 2 for our analysis of DHS’ DNA collection and projections for the number of arrests for which DNA was not collected.

Table 2. DHS LE Component DNA Data, FYs 2018–2019

| DNA Verification Summary | | | | | |
|---------------------------------|------------------------------|------------------|--|--------------|--|
| Component | Arrests FYs 2018-2019 | # Sampled | Verified DNA not Collected by Component | | Projected # Arrests DNA not Collected |
| | | | # | % | |
| Secret Service | 2,571 | 246 | 11 | 4% | 115 |
| ICE | 20,376 | 530 | 279 | 52%** | 10,677 |
| FPS | UNKNOWN* | 33 | 19 | 58% | UNKNOWN |
| CBP | 218,804 | 502 | 454 | 92%** | 201,852 |
| TSA | 2 | 2 | 2 | 100% | 2 |
| Total DHS | 241,753 | 1,313 | 765 | 88%** | 212,646 |

Source: DHS OIG analysis

* FPS was unable to determine the number of arrests.

** The percentage is a weighted average of the component’s DNA collection analysis.



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Lacking central DHS oversight and direction, LE components took different approaches and did not consistently collect DNA from arrestees for inclusion in CODIS. Therefore, LE likely missed opportunities to receive investigative leads based on DNA matches. Moreover, DHS did not benefit from unity of effort for increased effectiveness across DHS LE components, such as sharing and leveraging each other's DNA collection processes, data, and best practices.



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Recommendations

Recommendation 1: We recommend the DHS Office of the Secretary establish an oversight structure with central policy guidance and direction to ensure DHS law enforcement components comply with the *DNA Fingerprint Act of 2005* and 28 C.F.R. § 28.12.

Recommendation 2: We recommend the DHS Office of the Secretary ensure ICE, FPS, CBP, and TSA fully implement DNA collection for arrestees and non-U.S. detainees to comply with the *DNA Fingerprint Act of 2005* and 28 C.F.R § 28.12.

Recommendation 3: We recommend the DHS Office of the Secretary ensure ICE, FPS, CBP, and TSA implement internal controls, including modifying booking systems to track and verify DNA collection. If components pursue memorandums of agreement with other agencies to collect DNA samples, they must implement internal controls to track and verify DNA collection.

Recommendation 4: We recommend the FPS Policy Division update the FPS *Detention and Arrest Directive* to align with 28 C.F.R. § 28.12.

DHS Comments and OIG Analysis

We included a copy of DHS' management response in its entirety in Appendix C. We also received technical comments from DHS and revised the report where appropriate.

DHS concurred with our four recommendations. A summary of DHS' responses to our recommendations and our analysis follows.

DHS Comments to Recommendation 1: DHS concurred with this recommendation. In its response, DHS said it plans to issue a management directive and instruction to DHS LE components to develop policies aligning with the *DNA Fingerprint Act of 2005* and 28 C.F.R. § 28.12. The directive will include specific guidance on internal controls for ensuring compliance with the DNA collection laws and regulations. Further, the DHS Office of Strategy, Policy and Plans will review the DNA collection policies for the DHS LE components. Estimated Completion Date: December 31, 2021.

OIG Analysis: DHS' proposed actions are responsive to the intent of the recommendation. This recommendation will remain open and resolved pending submission of documentation showing completion of the proposed corrective action plan.



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DHS Comments to Recommendation 2: DHS concurred with this recommendation. In its response, DHS officials said once it issues the management directive and instructions for developing DNA collection policies, each DHS LE component will review the guidance, change established DNA collection programs as necessary, and submit to DHS for review. Estimated Completion Date: June 30, 2022.

OIG Analysis: DHS' proposed actions are responsive to the intent of the recommendation. This recommendation will remain open and resolved pending submission of documentation showing completion of the proposed corrective action plan.

DHS Comments to Recommendation 3: DHS concurred with this recommendation. DHS officials said once it issues the management directive and instructions for developing DNA collection policies, each LE component will change its respective internal controls for DNA collection as necessary. Estimated Completion Date: June 30, 2022.

OIG Analysis: DHS' proposed actions are responsive to the intent of the recommendation. This recommendation will remain open and resolved pending submission of documentation showing completion of the proposed corrective action plan.

DHS Comments to Recommendation 4: DHS concurred with this recommendation. FPS updated the *Detention and Arrest Directive* to align with 28 C.F.R. § 28.12 during the course of the audit. FPS published the updated directive on June 29, 2020. DHS officials requested the OIG consider this recommendation resolved and closed.

OIG Analysis: We reviewed the FPS *Detention and Arrest Directive* dated June 29, 2020. The revisions of the directive fulfill the intent of the recommendation. Therefore, we consider this recommendation resolved and closed.



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Appendix A

Objective, Scope, and Methodology

The Department of Homeland Security Office of Inspector General was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

The objective of our audit was to determine whether DHS LE components collect DNA samples from arrested or detained persons as the *DNA Fingerprint Act of 2005* and DOJ regulations require.

To answer our objective, we:

- interviewed officials from DHS, Secret Service, ICE, FPS, CBP, TSA, United States Coast Guard, DOJ, FBI, USMS, and three whistleblowers to obtain information about DNA collection;¹⁰
- reviewed the DHS' proposed exemption and DOJ's response to determine the requirements for DHS DNA collection;
- reviewed OSC reports, DHS and CBP emails, and whistleblower claims to identify challenges with DNA collection;
- researched Federal laws, regulations, and internal policies to identify applicable criteria governing DNA collection;
- reviewed DHS budget documents to identify funds allocated for DNA collection;
- analyzed USMS arrest data and FBI DNA sample collection statistics for FYs 2012 to 2019;
- reviewed FBI data for Secret Service DNA sample kits to determine whether the FBI received or rejected the sample; and
- visited two CBP DNA pilot locations — USBP's Detroit Sector and OFO's Eagle Pass Port of Entry — to interview officials and observe their DNA collection processes.

We requested and received FYs 2018 to 2019 arrest data from Secret Service, ICE ERO, ICE HSI, CBP OFO, CBP USBP and TSA. We consulted the OIG Office of Audits Statistician to identify a statistical sample for each component, using a 90 percent confidence level, 5 percent sample error, and a 50 percent population proportion. We identified the following sample quantities needed to statistically project to its universe:

- Secret Service – 246 of 2,571

¹⁰ We excluded the OIG Office of Investigations from this audit.



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- ICE – 530 of 20,376 (ERO – 266 of 11,312 and HSI – 264 of 9,064)
- CBP – 502 of 218,804 (OFO – 230 of 1,477 and USBP – 272 of 217,327)
- TSA – 2 of 2

FPS could not differentiate between arrestees and detainees without manually manipulating data in its database. Therefore, we used USMS arrest data for FPS resulting in the review of 33 FPS arrests for FYs 2018 to 2019.

We gathered National Crime Information Center criminal history reports to verify whether the DNA indicator showed DNA on file in CODIS. The OIG Statistician assisted and approved our statistical sample results to the universe of arrestees.

In July 2020, we requested that the FBI identify which Federal agency collected DNA and the date of DNA collection for CBP, ICE, and FPS arrestees with DNA on file in CODIS. The FBI returned the data for CBP and FPS arrestees in October 2020 and we included the analysis in our draft report. In April 2021, after our exit conference with DHS, the FBI returned the data for ICE arrestees which we included in our final report. As part of our analysis, we determined whether the arrestee had DNA on file in CODIS before the arrest date in our data. If the arrestee had DNA collected before the arrest date, or if the DHS LE component collected DNA during the arrest, we gave the DHS LE component credit for the collection. If another LE agency (other than the arresting component) collected DNA after the arrest date, we determined the DHS LE component did not collect DNA for the arrest. We consulted with the OIG Office of Audits Statistician to ensure our statistical sample and projections remained valid and accurate.

We assessed data reliability. We interviewed and distributed questionnaires to agency officials knowledgeable about the data, tested the data to identify anomalies such as incomplete or missing data, and compared component data to National Crime Information Center. We determined the data to be sufficiently reliable for our audit purposes.

In planning and performing our audit, we identified the following internal control components and underlying internal control principles as significant to the audit objective: Demonstrate Commitment of Integrity and Ethical Values; Exercise Oversight Responsibility; Establish Structure, Responsibility, and Authority; Design Control Activities; Design Activities for the Information System; Implement Control Activities; and Perform Monitoring Activities. We assessed the design of these internal controls, as well as implementation and operating effectiveness of the last four internal controls.



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We identified internal control deficiencies that could affect DHS's ability to effectively and efficiently operate and to ensure compliance with laws and regulations. We discussed these internal control deficiencies in the body of this report. However, because we limited our review to DNA collection aspects of these internal control components and underlying principles, other internal control deficiencies may have existed at the time of our audit.

We conducted this performance audit between November 2019 and November 2020 pursuant to the *Inspector General Act of 1978, as amended*, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to support a reasonable basis for our findings and conclusions based upon our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objectives.



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Appendix B
Verbatim Excerpts from DNA Collection Laws, Regulations, and Documents

January 5, 2006

DNA Fingerprint Act of 2005, Pub. L. No. 109-162 (2006) (codified as 42 U.S.C § 14135a and transferred to 34 U.S.C. § 40702(a)(1)).:

SEC.1004 Authorization to Conduct DNA Sample Collection from Persons Arrested or Detained Under Federal Authority –

- a. In General--Section 3 of the *DNA Analysis Backlog Elimination Act of 2000* (42 U.S.C. 14135a) is amended—(1) in subsection (a)—(A) in paragraph (1), by striking “the Director” and inserting the following:

The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested or from non-United States persons who are detained under the authority of the United States. The Attorney General may delegate this function within the Department of Justice as provided in section 510 of title 28, United States Code, and may also authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section.

December 10, 2008

DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932 (Dec. 10, 2008)

A new paragraph (b) is inserted in section 28.12 to implement the new authority to collect DNA samples from federal arrestees, defendants, and detainees. As discussed above, agencies of the United States that arrest or detain individuals or supervise individuals facing charges will be required to collect DNA samples if they collect fingerprints from such individuals, subject to any limitations or exceptions the Attorney General may approve.



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January 9, 2009

DOJ Collection of DNA Samples, 28 C.F.R. § 28.12 (2009)

- (b) Any agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. For purposes of this paragraph, “non-United States persons” means persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p). Unless otherwise directed by the Attorney General, the collection of DNA samples under this paragraph may be limited to individuals from whom the agency collects fingerprints and may be subject to other limitations or exceptions approved by the Attorney General. The DNA-sample collection requirements for the Department of Homeland Security in relation to non-arrestees do not include, except to the extent provided by the Secretary of Homeland Security, collecting DNA samples from:
- (1) Aliens lawfully in, or being processed for lawful admission to, the United States;
 - (2) Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings;
 - (3) Aliens held in connection with maritime interdiction; or
 - (4) Other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations.
- (c) The DNA-sample collection requirements under this section shall be implemented by each agency by January 9, 2009.
- (d) Each individual described in paragraph (a) or (b) of this section shall cooperate in the collection of a DNA sample from that individual. Agencies required to collect DNA samples under this section may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual described in paragraph (a) or (b) of this section who refuses to cooperate in the collection of the sample.



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- (e) Agencies required to collect DNA samples under this section may enter into agreements with other agencies described in paragraph (a) or (b) of this section, with units of state or local governments, and with private entities to carry out the collection of DNA samples. An agency may, but need not, collect a DNA sample from an individual if—
 - (1) Another agency or entity has collected, or will collect, a DNA sample from that individual pursuant to an agreement under this paragraph;
 - (2) The Combined DNA Index System already contains a DNA analysis with respect to that individual; or
 - (3) Waiver of DNA-sample collection in favor of collection by another agency is authorized by 42 U.S.C. 14135a(a)(3) or 10 U.S.C. 1565(a)(2).

- (f) Each agency required to collect DNA samples under this section shall—
 - (1) Carry out DNA-sample collection utilizing sample-collection kits provided or other means authorized by the Attorney General, including approved methods of blood draws or buccal swabs;
 - (2) Furnish each DNA sample collected under this section to the Federal Bureau of Investigation, or to another agency or entity as authorized by the Attorney General, for purposes of analysis and entry of the results of the analysis into the Combined DNA Index System; and
 - (3) Repeat DNA-sample collection from an individual who remains or becomes again subject to the agency's jurisdiction or control if informed that a sample collected from the individual does not satisfy the requirements for analysis or for entry of the results of the analysis into the Combined DNA Index System.

- (g) The authorization of DNA-sample collection by this section pursuant to Public Law 106-546 does not limit DNA-sample collection by any agency pursuant to any other authority.



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March 25, 2009

DHS Secretary Napolitano Memorandum Directing DHS Operational Component Heads to Plan Implementation of DNA Sample Collection Rule

The following are quotations from the memorandum significant to this audit:

This memorandum directs each Department of Homeland Security (DHS) Operational Component to create an implementation plan that identifies any processes or procedures that will be modified or created to ensure compliance with the DNA sample collection obligations set forth in 28 C.F.R. § 28.12, and to provide the plan to the points of contact listed below not later than April 16, 2009.

ACTION REQUIRED

This Department is required to institute or modify relevant procedures to enable the collection of DNA samples from individuals described in the rule once DOJ has provided the collection kits. Once obtained, Operational Components must furnish the samples to the Federal Bureau of Investigation for the purposes of analysis and entry into the Combined DNA Index System.

I hereby direct each DHS Operation Component to create an implementation plan that identifies any processes or procedures that will be modified or created in order to ensure compliance with the DNA sample collection obligations set forth in 28 C.F.R. § 28.12. At a minimum, each implementation plan should identify 1) a timetable for implementation of these requirements; 2) an estimate of any costs associated with implementation; 3) a proposed training program for impacted law enforcement personnel and other staff; 4) any interagency agreements that would be contemplated as part of the DNA sample collection process, as described in 28 C.F.R. § 28.12(c); and 5) any activities or programs to which DNA sample collection requirements will not be applicable based on one or more of the exemptions set forth in 28 C.F.R. § 28.12(b).

Pursuant to 28 C.F.R. § 28.12(b)(4), the Department may consult with the Attorney General to seek an exemption from the rule for any other activities or programs for which DNA sample collection is “not feasible because of operational exigencies or resource



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limitations.” Accordingly, please provide in writing a list of such activities or programs for which your component seeks an exemption along with sufficient background information and analysis in anticipation of consultation with DOJ....

March 22, 2010

Proposed Exemption—DHS Secretary Napolitano Letter to Attorney General Holder Proposing DHS Exemptions from Collecting DNA from Detainees

The following are quotations from the letter significant to this audit:

On December 10, 2008, the U.S. Department of Justice (DOJ) published in the *Federal Register* a final rule entitled “DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction.” The purpose of this letter is to consult with you regarding the Department of Homeland Security’s (DHS) proposed exemptions from these requirements, as contemplated by the regulations.

Due to the volume of individuals falling within the targeted class for DNA collection, implementation of this process poses severe organizational, resource, and financial challenges for this Department. The DNA processing of what DHS estimates may be close to a million aliens detained and individuals criminally arrested would severely strain the resources of the agency to perform its broader mission. Congress has not appropriated any additional funding to DHS for DNA sample collection or associated training costs for its law enforcement personnel, which underscores the financial burden DHS faces. Moreover, certain exceptions could help reduce the impact of privacy and civil liberties concerns. For these reasons, DOJ and DHS agreed to include certain exceptions in the December 2008 rule amending § 28.12(b)(1)-(3) of Title 28 of the Code of Federal Regulations. As set forth at § 28.12(b)(4), as revised by the rule, DNA collection from aliens not specified in subsection (b) may also be excepted from the collection requirement if I determine, after consultation with you, that collection of the sample from detained aliens is not feasible because of “operational exigencies or resource limitations.”



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I believe that taking DNA samples from the following classes of aliens meets this standard and would like the views of DOJ on excepting them:

1. Non-U.S. persons detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18....
2. Non-U.S. persons currently within DHS custody, pending administrative removal proceedings.

In addition to the above, pursuant to 28 C.F.R. § 28.12(b), you have discretion to permit additional “limitations or exceptions” to DNA sampling requirements. For reasons described further below, I request that you exercise this discretion to except the following scenario from the collection requirement at this time:

1. All persons, alien or otherwise, detained or arrested by DHS in the event of emergency or unforeseen circumstances or conditions, including mass migrations, natural or man-made disasters, medical emergencies, and other operational emergencies.

We intend to phase-in implementation over the next year, with certain DHS Components to begin the process more quickly than others. DHS wishes to pursue further discussions with DOJ regarding training options for DHS law enforcement officers and agents, as training is needed in the initial stage of the broader DHS implementation of this process. In addition to the training requirement, for example, both ICE and CBP must negotiate with their unions to bargain on impact and implementation due to this proposed change in working conditions. Finally, DHS intends to pursue discussions with the USMS to seek agreements by which the USMS would agree to undertake, in certain circumstances, DNA sample collection of arrestees on our behalf. Should satisfactory agreements not be reached, we may consider requesting additional exceptions to address these circumstances....



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July 22, 2010

Exemption—Attorney General Holder Letter Acknowledging DHS Secretary Napolitano Letter and Authority to Exempt Collecting DNA from Detainees at the Present Time

The following are quotations from the letter significant to this audit:

...Your letter notes specifically that 28 CFR 28.12(b)(4) authorizes the Secretary of Homeland Security, in consultation with the Attorney General, to exempt from DNA sample collection aliens for whom you determine such collection is not feasible because of operational exigencies or resource limitations. You indicated in your letter that you believe that this standard is met by aliens not facing criminal charges who are “detained for processing under administrative proceedings” or who are “currently within DHS custody...pending administrative removal proceedings,” and you requested the views of the Department of Justice on excepting them from DNA sample collection. The proposed policy reflects your judgment that extending DNA sample collection by DHS to such immigration detainees would not be feasible at the present time because of operational exigencies and resource limitations. It is within your authority as Secretary to make such a judgment under 28 CFR 28.12(b)(4), and the consultation with the Attorney General that the rule requires in such decisions has been effected by our present communication.

With respect to criminal arrestees, you indicate that you intend to “phase-in implementation over the next year, with certain DHS Components to begin the process more quickly than others.” You mention that DHS wishes to pursue further discussions with DOJ regarding training options for such implementation, and that the obstacles to quicker implementation include that “both ICE and CBP must negotiate with their unions to bargain on impact and implementation due to this proposed change in working conditions.”

The principal Department of Justice investigative agencies—FBI, DEA, ATF, and USMS—have already implemented the DNA Fingerprint Act and 28 CFR 28.12 and are collecting DNA samples from their arrestees. All federal agencies that have not already done so, including the DHS agencies, should complete their implementation of arrestee DNA sample collection as expeditiously as possible....



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Your letter also requests that I authorize, pursuant to 28 CFR 28.12(b), a general exception to DNA sample collection under which DHS officials could exempt from such collection individuals in the following class: “All persons, alien or otherwise, detained or arrested by DHS in the event of emergency or unforeseen circumstances or conditions, including mass migrations, natural or man-made disasters, medical emergencies, and other operational emergencies.” I have decided to reserve to the Department of Justice the authority to allow exceptions to DNA sample collection from criminal arrestees....

July 23, 2018

Office of Special Counsel Investigation Referral Letter to DHS Secretary Nielsen

The following are quotations from the letter significant to this audit:

Pursuant to 5 U.S.C. § 1213, I am referring to you for investigation a whistleblower disclosure that employees at the Department of Homeland Security (DHS), Customs and Border Protection (CBP), Washington, D.C., engaged in conduct that may constitute a violation of law, rule, or regulation, and a substantial and specific danger to public safety. A report of your investigation in response to the allegations and any related matters is due to the Office of Special Counsel (OSC) on September 21, 2018.

[Redacted] (The whistleblowers), who consented to the release of their names, alleged that CBP has failed to meet DNA collection requirements imposed by the DNA Fingerprint Act of 2005 and subsequent Department of Justice regulations. The allegations to be investigated include:

- CBP has not collected DNA samples from individuals detained since 2008;
- A 2010 exception request did not contemplate the permanent waiver of DNA collection; and
- CBP is not collecting DNA from individuals detained for violations of 8 U.S.C. § 1325, despite current DOJ policy requiring the criminal prosecution of such persons.



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Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses violations of law, rule or regulation; and a substantial and specific danger to public safety. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report along with the whistleblowers' comments and any comments or recommendation I may have, to the President and congressional oversight committees and making these document publicly available....

August 21, 2019

Office of Special Counsel Letter to the President Reporting CBP's Failure to Meet DNA Collection Requirements

The following are quotations from the letter significant to this audit:

I am forwarding reports from the Department of Homeland Security (DHS), Customs and Border Protection (CBP), Washington, D.C. I take serious issue with CBP's conduct in this matter, and I have determined that its findings appear unreasonable. The whistleblowers...who consented to the release of their names, alleged that CBP has failed to meet DNA collection requirements imposed by the DNA Fingerprint Act of 2005 and subsequent Department of Justice regulations.

The agency's noncompliance with the law has allowed subjects subsequently accused of violent crimes, including homicide and sexual assault, to elude detection even when detained multiple times by CBP or Immigration and Customs Enforcement (ICE). This is an unacceptable dereliction of the agency's law enforcement mandate.



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The Special Counsel's Findings

CBP has failed to fulfill its responsibilities under the law and in so doing has compromised public safety. The failure to collect DNA clearly inhibits law enforcement's ability to solve cold cases and to bring violent criminals to justice. Furthermore, although CBP was granted a one-year exemption, as stated in the language of the exemption itself, CBP was supposed to use that period to begin complying with DNA collection. The passage of nearly a decade without compliance is unacceptable.

CBP's decision not to comply has had a negative effect on law enforcement's ability to solve crimes. This is evidenced by the FBI's regular and independent assessment of federal DNA collection efforts, which detail violent crimes likely committed by suspects who were repeatedly detained by CBP and ICE but released without detection. It is disturbing that this would occur even once, let alone routinely for approximately a decade. Many cold cases might have been solved - and victims of violent crimes granted closure - by now if CBP had complied with its obligations under the law.

Further, the assertion that ICE collects DNA from persons transferred to its custody thereby obviating CBP's obligation is refuted by data published by the FBI and provided by the whistleblowers. To justify this failure as the result of inadequate resources is also disingenuous. The FBI maintains a robust infrastructure for receiving and analyzing DNA samples, and advances in technology have simplified and protected the collection process and chain of custody. The whistleblowers accurately note that CBP staffing and budget levels have also increased significantly since the passage of the DNA Fingerprint Act.

I seriously question CBP's conduct in this matter, and I have determined that its findings appear unreasonable. Given the significant public safety and law enforcement implications at issue, I urge CBP to immediately initiate substantive efforts to begin DNA collection from detained criminal subjects. I also urge the Department of Justice to review the status and continued applicability of the 2010 correspondence that CBP uses as a basis for its inaction.



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The finding of an agency report as unreasonable, and this letter detailing OSC's reasoning, is the strongest possible step OSC can take to rebuke the agency's failure to comply with the law. I write this letter to inform both the President and congressional oversight committees of this misconduct, and it is my hope that further action can be taken to bring CBP into compliance with the law. I strongly urge Congress to continue its robust oversight efforts in this area, with a particular focus on accountability for DHS and CBP officials who have known for years that this situation existed, but chose not to act. I note that a number of CBP officials central to agency inaction were identified by the whistleblowers but never interviewed in the investigation because CBP dismissed the extent of their involvement....

March 9, 2020

DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 28 C.F.R. § 28.12 (2020)

The Department of Justice is amending regulations that require DNA sample collection from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. The amendment removes a provision authorizing the Secretary of Homeland Security to exempt from the sample collection requirement certain aliens from whom collection of DNA samples is not feasible because of operational exigencies or resource limitations...This rule finalizes a proposed rule, DNA-Sample Collection from Immigration Detainees...to amend regulations requiring DNA sample collection...Specifically, the rule removes 28 CFR 28.12(b)(4), which authorizes the Secretary of Homeland Security to exempt certain detained aliens from the DNA-sample collection requirement. As a result, the rule restores the Attorney General's plenary authority to authorize and direct all relevant Federal agencies, including the Department of Homeland Security ("DHS"), to collect DNA samples from such individuals.



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Department of Homeland Security

Appendix C
DHS Comments to the Draft Report

U.S. Department of Homeland Security
Washington, DC 20528



March 30, 2021

MEMORANDUM FOR: Joseph V. Cuffari, Ph.D.
Inspector General

FROM: Jim H. Crumpacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

SUBJECT: Management Response to Draft Report: "DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees" (Project No. 20-001-AUD-DHS)

JIM H CRUMPACKER
Digitally signed by JIM H CRUMPACKER
Date: 2021.03.30 15:53:05 -04'00'

Thank you for the opportunity to comment on this draft report. The U.S. Department of Homeland Security (DHS or the Department) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

The Department is pleased to note the OIG's positive recognition of the U.S. Secret Service as a model for establishing an effective deoxyribonucleic acid (DNA) collection program, with policies and procedures that ensure agents collect DNA samples when appropriate. The OIG also reported on steps taken by other DHS Components and lines of business to implement pilot programs and establish policies and procedures for collecting DNA samples.

DHS remains committed to faithfully enforcing the immigration laws of the United States in a manner that mitigates potential threats to our Nation and the safety and security of the American people.

The draft report contained four recommendations with which DHS concurs. Attached find our detailed response to each recommendation. DHS previously submitted technical comments addressing several accuracy, contextual, and other issues under a separate cover for OIG's consideration.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Attachment



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Attachment: Management Response for Recommendations Contained in OIG-20-001-AUD-DHS

OIG recommended that the DHS Office of the Secretary:

Recommendation 1: Establish an oversight structure with central policy guidance and direction to ensure DHS LE components comply with the DNA Fingerprint Act of 2005 and 28 C.F.R. § 28.12.

Response: Concur. The Acting Under Secretary for DHS' Office of Strategy, Policy and Plans (PLCY) will prepare, and forward to the Management Directorate (MGMT) for review and issuance, a management directive and instruction to DHS law enforcement (LE) Components to develop policies aligning with the DNA Fingerprint Act of 2005 (Pub L. No. 109-162) and 28 C.F.R. § 28.12. Further, this management directive and instruction will include specific guidance regarding internal controls for ensuring compliance with DNA collection laws and regulations. The instruction will direct Components to send their policies to PLCY for review, as well as implement internal controls. Estimated Completion Date (ECD): December 31, 2021.

Recommendation 2: Ensure ICE [U.S. Immigration and Customs Enforcement], FPS [Federal Protective Service], CBP [U.S. Customs and Border Protection], and TSA [Transportation Security Administration] fully implement DNA collection for arrestees and non-U.S. detainees to comply with the DNA Fingerprint Act of 2005 and 28 C.F.R. § 28.12.

Response: Concur. Once Acting Under Secretary for PLCY prepares, and MGMT reviews and issues, the planned management directive and instruction to develop policies aligning with the DNA Fingerprint Act of 2005 and 28 C.F.R. § 28.12, ICE Office of Policy and Planning, FPS Operations and Policy, Communications & Engagement, CBP Office of Field Operations (OFO), Tactical Operations Division, and U.S. Border Patrol (USBP) Immigration Prosecution and Custody Operations, and TSA Offices of Investigations (INV) and Law Enforcement/Federal Air Marshal Service (LE/FAMS) will each review the guidance, make any necessary changes to their respective DNA collection policies, and submit them to PLCY for review and clearance.

It is important to note, however, that DHS LE Components have already made significant progress to ensure their policies comply with the DNA Fingerprint Act of 2005 and 28 C.F.R. § 28.12. For example, on December 28, 2020, the Acting ICE Director signed ICE Directive 10092.1, "DNA Sample Collection," which establishes ICE's policies and procedures for the collection of DNA samples from subjects in ICE custody, in accordance with the regulations implementing the DNA Fingerprint Act of 2005. In addition, on December 30, 2020, CBP issued Directive 3410-001, "DNA Sample



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Collection for CODIS,” which outlines CBP policy and procedures concerning the collection of DNA samples from certain persons in CBP custody for submission to the Department of Justice (DOJ)/Federal Bureau of Investigations (FBI) Combined DNA Index System (CODIS). Following this guidance, CBP OFO and USBP Immigration Prosecution and Custody Operations implemented CODIS DNA efforts at all Air, Land and Sea Ports of Entry and all Sectors.

ECD: June 30, 2022.

Recommendation 3: Ensure ICE, FPS, CBP, and TSA implement internal controls, including modifying booking systems to track and verify DNA collection. If components pursue memorandums of agreement with other agencies to collect DNA samples, they must implement internal controls to track and verify DNA collection.

Response: Concur. Once the Acting Under Secretary for PLCY’s planned management directive and instruction to develop policies aligning with the DNA Fingerprint Act of 2005 and 28 C.F.R § 28.12 is issued, ICE Enforcement and Removal Operations (ERO) and Homeland Security Investigations, FPS Operations and Policy, Communications & Engagement, CBP OFO Tactical Operations Division, and USBP Immigration Prosecution and Custody Operations, and TSA INV and LE/FAMS will review the guidance and make any necessary changes to their respective internal controls for DNA collection.

It is important to note, however, that DHS LE Components have already made significant progress to implement strengthened internal controls. Examples include:

- In February 2021, ICE ERO issued a Quick Reference Guide that implemented internal controls on ICE DNA sample collection process requirements for completing booking transactions in the Enforcement Integrated Database Arrest Graphical User Interface for Law Enforcement (EAGLE), which is the electronic database used by ICE ERO workforce. ICE ERO Supervisors and Deportation Officers are responsible for: (1) assessing and documenting any DNA collection exemptions in EAGLE; (2) collecting DNA samples from all non-exempt illegally present immigrants; (3) documenting DNA collection information in EAGLE during normal processing; (4) completing booking and enrollment in EAGLE after DNA collection; (5) printing required FD-936 forms – “Request for National DNA Database Entry” – from the EAGLE Biometrics screen after booking and enrollment; and (6) ensuring accuracy of items placed in DNA sample return mailing envelopes. The ICE ERO Criminal Alien Program is the main Component overseeing the collaboration between ICE ERO DNA sample collection and internal and external stakeholders to ensure compliance with DOJ’s 28 C.F.R. § 28.12 and implementation of 34 U.S.C. § 40702.



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- On December 17, 2019, CBP OFO and Office of Information and Technology modified its Unified Secondary (USEC) Subsystem to track the number of CODIS DNA samples collected and facilitate information sharing via hard copy printouts shared with the FBI Federal DNA Database Unit. This unity of effort ensures timely transference of information to and from each entity, assuring actions are taken in a timely manner. Additionally, U.S. Border Patrol uses e3 NextGen, which provides a mechanism to digitally submit a Form FD-936 to the FBI DNA Database.
- In July 2019, FPS also took action to migrate to its new Law Enforcement Information Management System (LEIMS), which is the system of record for all FPS law enforcement and protective activity reporting. Not only does LEIMS differentiate between physical arrests and citations, but it also has an indicator and automated validation for tracking of DNA collection. When documenting an arrest in LEIMS, FPS users are required to enter whether DNA was collected in specific fields for data entry and, if so, provide specifics about the DNA collection. LEIMS users are not able to submit a given report for approval without completing these fields. The submitted report is then reviewed by an FPS supervisor to ensure accurate data is captured.

ECD: June 30, 2022.

OIG recommended that the FPS Policy Division:

Recommendation 4: Update the FPS Arrest and Detention Directive to align with 28 C.F.R. § 28.12.

Response: Concur. During the course of this audit, FPS Policy Division completed a review and update of its “Detention and Arrest Directive” (15.6.2.3) to incorporate revisions to align with 28 C.F.R § 28.12. The updated directive was published on June 29, 2020, and subsequently distributed to all FPS Law Enforcement Officers nationwide.

DHS requests that the OIG consider this recommendation as resolved and closed, as implemented.



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Appendix D
Report Distribution

Department of Homeland Security

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Under Secretary, Office of Strategy, Policy, and Plans
Assistant Secretary for Office of Public Affairs
Assistant Secretary for Office of Legislative Affairs
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Department of Homeland Security
Office of Inspector General, Mail Stop 0305
Attention: Hotline
245 Murray Drive, SW
Washington, DC 20528-0305