A Note for the 5th Bills Committee meeting on the Dangerous Drugs, ICAC and Police Force (Amendment) Bill 1999 to be held at 9:00 a.m. on 15.3.2000

Under what circumstances will DNA information be stored, be destroyed and who may use the DNA information in the database?

PURPOSE

The purpose of this paper is to set out for Members' information under what circumstances DNA information will be stored, be destroyed and who may use the DNA information stored in the database.

BACKGROUND

2 At the 2nd Bills Committee meeting held on 19 January 2000, Members asked how the DNA database established under the proposed section 59G of the Police Force Ordinance (Cap. 232) would be operated, for instance, when DNA information would be stored in the DNA database. Members also asked if defendants, defendants' lawyers or the person to whom the DNA information relates could use the DNA information in the DNA database; and if so, the related procedures.

DETAILS

Circumstances where DNA information may be stored in the DNA database

3 The DNA database is established under the proposed section 59G(1).

It will be maintained by the Government Chemist on behalf of the Commissioner of Police.

4 The proposed section 59G(1) also sets out clearly under what circumstances may DNA information be stored in the DNA database. The circumstances are where the DNA information must be derived from –

(a) an intimate or non-intimate sample taken from a person pursuant to the proposed sections 59A or 59C of the Police Force Ordinance if the person has been subsequently convicted of any serious arrestable offence. The proposed sections 59A and 59C provide for the procedures and safeguards relating respectively to the taking of intimate samples and non-intimate samples from a person;

(b) a non-intimate sample taken from a person pursuant to the proposed section 10E of the ICAC Ordinance (Cap. 204) if the person has been subsequently convicted of any serious arrestable offence. The proposed section 10E also provides for the procedures and safeguards relating to the taking of non-intimate samples;

(c) a non-intimate sample of buccal swab taken from a person pursuant to the proposed section 59E of the Police Force Ordinance. The proposed section 59E applies to a person who has been convicted of a serious arrestable offence on or after the commencement of that section and the DNA information of the convict will be stored in the DNA database;

(d) a non-intimate sample taken from a person pursuant to the proposed section 59F of the Police Force Ordinance. The proposed section

59F provides that any person may volunteer a non-intimate sample for his DNA information to be, among other things, stored in the DNA database under the proposed section 59F(1)(b).

5 The circumstances where DNA information may be stored in the DNA database are therefore very restrictive. Only DNA information of people who have been convicted of serious arrestable offence, or of people who have volunteered their samples, will be stored in the database. DNA information of suspects prior to conviction will not be kept in the DNA database.

Circumstances where DNA information will be destroyed

6 Under the proposed section 59E of the Police Force Ordinance (Cap.232), the DNA information derived from the buccal swab of a person who has been convicted of a "serious arrestable offence" will be permanently stored in a DNA database. However, if the person has his conviction quashed on appeal (other than an order of re-trial), the DNA information relating to this person needs to be destroyed under the proposed section 59H(5).

7 For DNA information derived from samples taken from suspects under the proposed sections 59A and 59C who are subsequently convicted, section 59H(1)(ii)(C) provides that the DNA information shall be destroyed if the person is acquitted of the offence (or all the offences, as the case may be) on appeal. For those suspects whose samples were taken under the proposed sections 59A and 59C and were not charged, or were charged but the charge was withdrawn, or were discharged before the conviction, the DNA information derived from the samples will also be destroyed.

8 DNA information arising from volunteered samples will also be destroyed if the person to whom the information relates notify the Commissioner of Police under the proposed section 59F(4) to withdraw his previous authorisation for the storage of his DNA information in the DNA database or for the use of his DNA information for forensic comparison and court proceedings purposes.

How will the DNA database be used

9 The use of the DNA database maintained by the Government Chemist is highly restrictive. Under the proposed section 59G(2) of the Police Force Ordinance, the DNA information stored in the DNA database may not be accessed to and such information may not be disclosed or used **except** for four and only four purposes, viz.

(a) forensic comparison;

(b) producing evidence in respect of the DNA information in any proceedings for any such offence;

(c) making the information available to the person to whom the information relates; and

(d) administering the DNA database. We have explained in a separate note that accessing the DNA database is necessary mainly for the purposes of adding DNA information therein resulting from convictions of serious arrestable offence or from volunteered samples, as well as for the purpose stated in sub-paragraphs (a) to (c) above.

10 The proposed section 59D(2)(a) also specifies clearly that the results of forensic analysis of samples (including DNA information) taken from a person may only be used for the purposes of forensic comparison and interpretation in the course of an investigation into an offence and for court proceedings for any such offence. Where the results are of forensic DNA analysis, the DNA information derived may also be used under the proposed section 59D(2)(b) for the purpose of section 59G(1) and (2) (i.e. for the purpose of storing in the DNA database).

11 Based on the above, we consider that the circumstances where DNA information is allowed to be accessed to, disclosed or used are very limited and specified. A contravention to the proposed sections 59D(2)(b) and 59G(2) is liable to a criminal offence under the proposed sections 59D(3) and 59G(3) and is subject to a maximum fine of $25,000 and imprisonment for six months. Any changes in how the DNA information in the database may be used will require legislative changes and are subject to the scrutiny of the Legislative Council.

12 Taking into account that the DNA information is only a string of numbers, we do not subscribe to the view that, somehow, the DNA information stored in the database may be used for any kind of “genetic personality profiling”. Furthermore, samples have to be destroyed after conclusion of proceedings and it would be impossible to manipulate the string of numbers for any forensic or "genetic personality profiling" purpose.

13 We note that some Members are concerned that future DNA technology may advance to such a stage that some form of "genetic testing" or "genetic personality profiling" may be possible even with the string of

numbers. While we do not share such concerns, the Administration undertook at the 2nd Bills Committee meeting held on 19 January 2000 that we would notify the LegCo in advance if there was any change in the DNA profiling technique. We undertake that we will inform the Legislative Council Panel on Security if there are any fundamental changes to the technology used in forensic DNA analysis which could easily allow the DNA information derived therefrom be used for purposes which have not been envisaged before.

Who may use the DNA database

14 Members asked at the 2nd Bills Committee meeting whether defendants, defendants' lawyers or the person to whom the DNA information relates could use the DNA information in the DNA database; and if so, the related procedures.

15 It is clear from the proposed section 59G(2)(iii) that the person from whom the DNA information relates to may have access to the information in the database if he exercises his power under the proposed sections 59A(4)(f), 59C(4)(g) or 59E(2)(d) to make a request to the Police for access to the information. This request, in accordance with the respective provisions, should be made to a Police officer of or above the rank of superintendent. Although the relevant sections do not specify that the request needs to be made in writing, we envisage that only written requests will be entertained.

16 We note that some Members have expressed the view that the construction of "*no person shall have access to … except … for the purposes of …*" in the proposed section 59G(2) may mean that "*any person may … have access to … for the purposes of …*". Members therefore considered

that, by law, defendants or their lawyers might have access to the DNA database. We do not subscribe to this view. There is no provision in the proposed section 59G or elsewhere in the Bill giving any right to a defendant or his lawyer to request or compel the Police, the ICAC or the Government Chemist to disclose or supply a third party's DNA information stored in the DNA database for the purpose of producing evidence in court proceedings.

17 Not allowing the defendants or their lawyers to have access to the DNA database is simply in line with the long-established practice of not allowing the defendants or their lawyers to have access to the records, information or exhibits held by the Government Chemist or the Commissioner of Police unless such information is relevant to the criminal proceedings against the defendants concerned. In the latter event, the defendants and their lawyers would be provided with information relevant to the offence for which the defendant has been charged. In this connection, materials and information, including DNA information, which are relevant to the offence charged, would be disclosed to the defence. Such disclosure is in accordance with the common law duty on the part of the prosecution to disclosure, the purpose of which is to secure for the accused a fair trial.

Challenging DNA information

18 Members also asked whether DNA information in the DNA database might be used by the defendants or their lawyers in case they challenged the DNA information presented to the courts.

19 In this respect, DNA information is no different from other evidence presented by the prosecution to the courts. Any evidence may be subject to challenge from the defence and may be ruled admissible or inadmissible by

the courts. If the accused challenges the DNA evidence and if he wishes to exonerate himself from the suspected offence, he may voluntarily authorize the taking of his sample under the proposed section 59F. There was indeed a case back in 1993 where a man sentenced to 18 years of imprisonment for a charge of rape and robbery committed in 1991 requested a re-examination of relevant exhibits using the then DNA profiling technique. The man was then found to be innocent and made a successful appeal and had his conviction quashed. However, it should be noted that such scenario is not related to allowing defendants to access to or use DNA information in the database.

ADVICE SOUGHT

20 Members are invited to note the content of this paper.

Security Bureau
13 March 2000

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