



Legislative Affairs  
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## 2019 – 2020 Legislative Memorandum

**Subject: In relation to establishment of a single computerized state DNA identification index, and requiring municipalities to expunge any DNA record stored in a municipal DNA identification index S.6009 (Hoylman) / A.7818 (Wright)**

**Position: SUPPORT**

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Government collection and maintenance of DNA samples presents significant privacy concerns. To address these concerns, state law sets forth substantive and procedural limitations that prescribe the conditions and circumstances necessary to safeguard against misuse of DNA information.<sup>1</sup> However, the municipal DNA identification indices that have been established in localities throughout New York ignore crucial limitations imposed by state law. Because they conflict with overriding state policy, these municipal indexes are invalid on state pre-emption grounds. Such indices also unreasonably burden the fundamental privacy rights of individuals, in violation of the Fourth and Fourteenth Amendments.

S.6009/A.7818 would clarify that the index maintained by the New York State Department of Criminal Justice is the only permanent DNA identification index authorized under state law.<sup>2</sup> This legislation would also prohibit local governments from establishing or maintaining any such index, and require expungement of all improperly collected DNA samples. It is well past time for lawmakers to finally make clear that local governments are prohibited from establishing or maintaining municipal DNA identification indices. **The New York Civil Liberties Union strongly supports S.6009/A.7818 and urges lawmakers to pass it.**

The most prominent municipal DNA identification index in New York was established by the New York City Office of the Chief Medical Examiner (“OCME”). OCME’s so-called “Linkage Database” is a “usual suspect database” or “suspect elimination database,” created and existing outside the permissible scope of DNA databases authorized by state law. It maintains a broad array of both arrestee samples and “elimination samples,” a vast category of DNA records capturing the information of suspects, crime scene bystanders, and anyone else police ask to provide a biological

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<sup>1</sup> N.Y. Exec Law Art. 49-B.

<sup>2</sup> Pursuant to N.Y. Exec. L. § 995 et seq.

specimen. For example, in the investigation of a homicide the police may well collect elimination samples from many individuals who are not suspects. As a result, much of the information maintained in the Linkage Database comes from people who have never been convicted of, or charged with, or even suspected of, a crime.

However, the Linkage Database does not conform itself to state law standards for DNA record maintenance and use. For example, even after DNA testing excludes an individual, their DNA profile remains in the Linkage Database forever; there is no policy for purging such profiles from the system. The database also permits DNA material that was provided pursuant to court order in a criminal proceeding to be used for totally unrelated investigative purposes. There are no privacy protections for subjects whose DNA materials are contained in the database, and it exists without any independent oversight. Absent any controls, samples within it can be analyzed for information far beyond that provided by standard investigative comparisons.<sup>3</sup>

Wherever such municipal indices exist across New York, they are administered outside the authority of the important standards and protections set forth in state law. In enacting Executive Law Article 49-B, lawmakers developed a comprehensive – and exclusive – statutory regime governing testing and data-banking of DNA samples. This body of law represents a thoughtful, legislatively crafted series of compromises that balance the rights of individuals and the interests of law enforcement – and it contains clear provisions designed to limit abuse.

The State DNA Index System database (“SDIS”) is maintained in accord with article 49-B by the State Police Forensic Investigation Center in Albany. It contains all forensic DNA profiles uploaded by each of the eight state-authorized laboratories. This enables routine comparisons of crime scene evidence DNA profiles across New York.<sup>4</sup> OCME’s Linkage Database, and other systems like it, largely replicate tasks performed under the New York State DNA Database system – but without all of the state’s protections for the subjects whose DNA materials are contained within.

S.6009/A.7818 will clarify that state law only authorizes a single state DNA index; expressly bar localities from establishing or maintaining rogue DNA indices; clarify that convicted offenders are the only people who can be required to give a DNA sample for indexing; ensure that DNA provided for an investigation is expunged where charges are dismissed or brought in a non-criminal proceeding; and require expungement of improperly maintained DNA information.

**This legislation is a long overdue remedy for reckless mistreatment of countless New Yorkers’ most sensitive personal information. The New York Civil Liberties Union calls for its prompt passage.**

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<sup>3</sup> Where testing is not limited to standard 13-loci STR analysis, DNA material can be mined for a wealth of information, including a subject’s skin pigmentation, bio-geographical origin, gender, and eye color, but also sensitive information about a host of medical diseases, behavioral and medical predispositions, and even potential indicators of sexual orientation.

<sup>4</sup> See e.g. *N.Y.S. Div. of Crim. Justice, Office of Forensic Svcs., N.Y.S. DNA Databank Frequently Asked Questions*, <https://www.criminaljustice.ny.gov/forensic/dnafaqs.htm>