



TEXAS FORENSIC  
SCIENCE COMMISSION

*Justice Through Science*

1700 North Congress Ave., Suite 445  
Austin, Texas 78701

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OPINION COMMITTEE

July 15, 2015

FILE # ML-47757-15  
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**RQ-0032-KP**

*Via E-Mail and Inter-Agency Mail*

Texas Attorney General Ken Paxton  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

Dear Attorney General Paxton:

The Texas Forensic Science Commission ("Commission") respectfully requests your guidance on a legal issue regarding the Commission's responsibility to notify relevant parties of exculpatory, impeachment or mitigating information under Article 39.15 of the Texas Code of Criminal Procedure if the Commission receives such information in the course of an investigation pursuant to its enabling statute. TEX. CODE CRIM. PROC. art. 38.01.

In May 2005, the Texas Legislature created the Commission by passing House Bill 1068 (the "Act"). The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition<sup>1</sup> and authority of the Commission. See Act of May 30, 2005, 79<sup>th</sup> Leg., R.S., ch. 1224, § 1, 2005. The Commission is required to "investigate, in a timely manner, any allegation of professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility or entity." TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3). During the 83<sup>rd</sup> Legislative Session, the Legislature clarified and expanded the scope of the Commission's jurisdiction by passing SB-1238, which allows the Commission to investigate forensic disciplines and entities not subject to accreditation. See TEX. CODE CRIM. PROC. § 4(b-1) and (b-2). If the Commission conducts such an investigation, its written reports are limited to the following areas:

- (1) observations of the Commission regarding the integrity and reliability of the forensic analysis conducted;
- (2) best practices identified by the Commission during the course of the investigation; and
- (3) other relevant recommendations, as determined by the Commission.

The Commission does not issue any findings regarding the guilt or innocence of any party. TEX. CODE CRIM. PROC. § 4(g). However, because the Commission receives

<sup>1</sup> The Commission consists of seven scientists, one defense lawyer and one prosecutor. All members are appointed by the Governor of Texas.

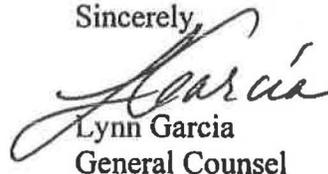
self-disclosures regarding professional misconduct from crime laboratories, and because its statute requires the review of the integrity and reliability of forensic analyses under prong #1 above, the Commission may receive information that could constitute "exculpatory, impeachment, or mitigating" information as the term is described in Article 39.15 of the Texas Code of Criminal Procedure. In many circumstances, the prosecutor and defendant in a particular criminal case would not be aware of the information unless the Commission brings it to their attention.

For example, the Commission is currently investigating a complaint pursuant to its enabling statute involving forensic video analysis, a discipline not subject to accreditation. In the course of investigating the forensic analysis, the Commission received information that, in the opinion of the prosecutor representative on the Commission and Commission's general counsel, may be exculpatory in nature. The questions for which we request legal guidance are the following:

- (1) As a state agency with possession of information that may be covered by Article 39.15 of the Texas Code of Criminal Procedure, what is the Commission's notification responsibility when it receives such information?
- (2) If the Commission notifies the prosecutor with jurisdiction over the case, is that notification sufficient with the understanding the prosecutor will assess the matter and determine whether notification to the defendant is necessary? Or does the Commission need to provide separate defendant notification?
- (3) If a laboratory disclosure involves professional misconduct by a forensic scientist with the potential to impact criminal cases in many different jurisdictions, does the Commission need to notify the prosecutor in each jurisdiction or may it communicate the information to the Texas District and County Attorney's Association for distribution to its membership?
- (4) Are the notification obligations the same for the prosecutor representative on the Commission as the forensic scientists, or does the prosecutor have obligations beyond those of other members because of his unique position?

We would appreciate your guidance on these questions. Thank you in advance for your time and consideration.

Sincerely,



Lynn Garcia  
General Counsel

cc: Robert Kepple, TDCAA Executive Director  
Texas Forensic Science Commission Members