

AMENDED IN ASSEMBLY APRIL 10, 2014

AMENDED IN ASSEMBLY MARCH 20, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1697**

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**Introduced by Assembly Member Donnelly**

February 13, 2014

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An act to ~~amend Sections 295.1, 299.5, and 299.6 of, and to add Section 295.2 to, add Section 295.2 to~~ the Penal Code, relating to forensic identification.

LEGISLATIVE COUNSEL'S DIGEST

AB 1697, as amended, Donnelly. ~~Forensic identification: informed consent.~~ *DNA and forensic identification database and data bank.*

Existing law, as amended by the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, general election, subjects certain offenders to the collection of buccal swab samples, right thumbprints, a full palm print impression of each hand, and blood specimens or other biological samples for law enforcement identification analysis. The DNA Laboratory of the Department of Justice (DOJ) is required to serve as a repository for blood specimens, buccal swabs, and other biological samples collected, and is required to analyze specimens and samples, and to store, compile, correlate, compare, maintain, and use deoxyribonucleic acid (DNA) and forensic identification profiles and records related to several functions, including, but not limited to, using anonymous DNA records for training, research, statistical analysis of populations, quality assurance, or quality control. Proposition 69

amended these provisions to include buccal swabs as samples and using anonymous DNA records for quality assurance.

*This bill would prohibit the DNA and forensic identification database and data bank and the DOJ DNA Laboratory from being used as a source of genetic material for testing, research, or experiments, by any person, agency, or entity seeking to find a causal link between genetics and behavior or health.*

~~This bill would state that for purposes of these provisions, the terms “research” and “statistical analysis of populations” do not include the use of DNA sequence data for purposes of identifying or characterizing any general correlations between sequence-specific information and behaviors, health, or ethnicity. The bill would state that this type of research or statistical analysis of populations does not serve a forensic identification purpose. The bill also would make conforming changes.~~

Vote: majority. Appropriation: no. Fiscal committee: *yes-no*. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 295.2 is added to the Penal Code, to read:  
2     295.2. The DNA and forensic identification database and data  
3     bank and the Department of Justice DNA Laboratory shall not be  
4     used as a source of genetic material for testing, research, or  
5     experiments, by any person, agency, or entity seeking to find a  
6     causal link between genetics and behavior or health.

7     SECTION 1. ~~The Legislature finds and declares all of the~~  
8     following:

9     ~~(a) In June 2013, the United States Supreme Court upheld the~~  
10    ~~authority of government to collect and analyze deoxyribonucleic~~  
11    ~~acid (DNA) from individuals arrested for a crime, regardless of~~  
12    ~~whether they are ultimately convicted. In his dissent, Justice~~  
13    ~~Antonin Scalia concluded that, “as an entirely predictable~~  
14    ~~consequence of today’s decision, your DNA can be taken and~~  
15    ~~entered into a national DNA database if you are ever arrested,~~  
16    ~~rightly or wrongly, and for whatever reason . . . . Today’s judgment~~  
17    ~~will, to be sure, have the beneficial effect of solving more crimes;~~  
18    ~~then again, so would the taking of DNA samples from anyone who~~  
19    ~~flies on an airplane (surely the Transportation Security~~  
20    ~~Administration needs to know the ‘identity’ of the flying public);~~  
21    ~~applies for a driver’s license, or attends a public school. Perhaps~~

1 the construction of such a genetic panopticon is wise. But I doubt  
2 that the proud men who wrote the charter of our liberties would  
3 have been so eager to open their mouths for royal inspection”  
4 (*Maryland v. King* (2013) 133 S.Ct. 1958, 1989).

5 (b) Also in June 2013, the United States Court of Appeals for  
6 the Ninth Circuit upheld the authority of government to retain  
7 DNA samples indefinitely, long after standard forensic information  
8 has been extracted and entered into a database for criminal  
9 identification purposes. In his dissent, Justice Stephen Reinhardt  
10 noted that “The government has statutory authority to use its  
11 indefinite access to stored blood samples in any capacity justified  
12 by ‘law enforcement identification purposes.’ [citation omitted]  
13 However, ‘law enforcement identification purposes’ have not been  
14 specifically defined or circumscribed by Congress or the courts.  
15 Whatever limitation envisioned by restricting use of blood samples  
16 to only those used for ‘law enforcement identification purposes,’  
17 it does not prevent the reanalysis or testing of stored blood samples  
18 for certain genetic traits . . . . ‘Law enforcement identification  
19 purposes’ could include retesting for certain behavior traits. For  
20 example, behavior geneticists have been researching a purported  
21 ‘crime gene’ that could lead to the use of genetic material for  
22 ‘preventive detentions or other means of social control for those  
23 identified as genetically predisposed to criminality” (*U.S. v.*  
24 *Kriesel* (9th Cir. 2013) 720 F.3d 1137, 1160).

25 (c) The California Department of Justice (DOJ) maintains  
26 indefinite access to more than 1.8 million DNA samples. These  
27 samples contain an individual’s entire genome, and could be tested  
28 to reveal traits related to ethnicity, health, and behavior. While the  
29 DOJ may only perform DNA analysis “for identification purposes,”  
30 this term is not defined, and could include research into the link  
31 between genes and criminal behavior. Existing law authorizes the  
32 DOJ to use its samples for research purposes, and its vast collection  
33 of DNA samples provides the means to study how genetic profiles  
34 could help preemptively identify individuals predisposed to  
35 criminal behavior. This emerging field is known as “behavioral  
36 genomics.”

37 (d) Recent research indicates that more than one-half of the  
38 variance in antisocial behavior can be attributed to genetic factors  
39 (C.J. Ferguson, *Genetic Contributions to Antisocial Personality*  
40 *and Behavior: a Meta-analytic Review from an Evolutionary*

1 Prospective, *Journal of Social Psychology* (March-April 2010,  
2 Volume 150, Issue 2, pp. 160-180)). For example, researchers have  
3 demonstrated that individuals possessing one particular gene  
4 variant are statistically more likely to join a gang, and also more  
5 likely to use a weapon in a fight (Kevin M. Beaver, et al.,  
6 *Monoamine Oxidase A Genotype Is Associated with Gang*  
7 *Membership and Weapon Use*, *Comprehensive Psychiatry* (March  
8 2010, Volume 51, Issue 2, pp. 130-134)). The ability of this  
9 research to identify likely criminals and potential criminals will  
10 increase dramatically as researchers gain the means to track the  
11 interaction of thousands of gene variants across millions of  
12 samples, and correlate these results with known criminal behaviors.  
13 The Department of Justice DNA repository offers that capability.

14 (e) The ability to perform this analysis is increasingly within  
15 reach. According to the National Human Genome Research  
16 Institute, the cost of whole-genome sequencing has decreased more  
17 than 9,000 fold over the past 10 years.

18 (f) It is the intent of the Legislature that nothing in this act shall  
19 limit, or otherwise affect, the forensic activities of the DOJ  
20 unrelated to research, or the use of research for quality control or  
21 quality assurance purposes.

22 (g) This act does not amend the DNA Fingerprint, Unsolved  
23 Crime and Innocence Protection Act, which was adopted as  
24 Proposition 69 at the November 2, 2004, statewide general election.  
25 Statutory authority for the DOJ to perform research using collected  
26 DNA samples predates the adoption of Proposition 69. Pursuant  
27 to Section 9605 of the Government Code, “[w]here a section or  
28 part of a statute is amended, it is not to be considered as having  
29 been repealed and reenacted in the amended form. The portions  
30 which are not altered are to be considered as having been the law  
31 from the time when they were enacted; the new provisions are to  
32 be considered as having been enacted at the time of the amendment.  
33 ...” Accordingly, the Legislature remains free to address the issue  
34 of research, a matter that Proposition 69 itself does not “specifically  
35 authorize or prohibit” (*People v. Kelly* (2010) 47 Cal.4th 1008,  
36 1025-1026; see also *People v. Cooper* (2002) 27 Cal.4th 38, 44,  
37 and *County of San Diego v. San Diego NORML* (2008) 165  
38 Cal.App.4th 798, 830).

39 SEC. 2. Section 295.1 of the Penal Code is amended to read:

1     ~~295.1.— (a) The Department of Justice shall perform DNA~~  
2 ~~analysis and other forensic identification analysis pursuant to this~~  
3 ~~chapter only for identification purposes.~~

4     ~~(b) The Department of Justice Bureau of Criminal Identification~~  
5 ~~and Information shall perform examinations of palm prints pursuant~~  
6 ~~to this chapter only for identification purposes.~~

7     ~~(c) The DNA Laboratory of the Department of Justice shall~~  
8 ~~serve as a repository for blood specimens and buccal swab and~~  
9 ~~other biological samples collected, and shall analyze specimens~~  
10 ~~and samples, and store, compile, correlate, compare, maintain, and~~  
11 ~~use DNA and forensic identification profiles and records related~~  
12 ~~to the following:~~

13     ~~(1) Forensic casework and forensic unknowns.~~

14     ~~(2) Known and evidentiary specimens and samples from crime~~  
15 ~~scenes or criminal investigations.~~

16     ~~(3) Missing or unidentified persons.~~

17     ~~(4) Persons required to provide specimens, samples, and print~~  
18 ~~impressions under this chapter.~~

19     ~~(5) Legally obtained samples.~~

20     ~~(6) Subject to Section 295.2, anonymous DNA records used for~~  
21 ~~training, research, statistical analysis of populations, quality~~  
22 ~~assurance, or quality control.~~

23     ~~(d) The computerized data bank and database of the DNA~~  
24 ~~Laboratory of the Department of Justice shall include files as~~  
25 ~~necessary to implement this chapter.~~

26     ~~(e) Nothing in this section shall be construed as requiring the~~  
27 ~~Department of Justice to provide specimens or samples for quality~~  
28 ~~control or other purposes to those who request specimens or~~  
29 ~~samples.~~

30     ~~(f) Submission of samples, specimens, or profiles for the state~~  
31 ~~DNA Database and Data Bank Program shall include information~~  
32 ~~as required by the Department of Justice for ensuring search~~  
33 ~~capabilities and compliance with National DNA Index System~~  
34 ~~(NDIS) standards.~~

35     ~~SEC. 3.— Section 295.2 is added to the Penal Code, to read:~~

36     ~~295.2.— For purposes of this chapter, the terms “research” and~~  
37 ~~“statistical analysis of populations” do not include the use of DNA~~  
38 ~~sequence data for purposes of identifying or characterizing any~~  
39 ~~general correlations between sequence-specific information and~~

1 behaviors, health, or ethnicity. This type of research or statistical  
2 analysis of populations does not serve a forensic purpose.

3 ~~SEC. 4. Section 299.5 of the Penal Code is amended to read:~~

4 ~~299.5. (a) All DNA and forensic identification profiles and~~  
5 ~~other identification information retained by the Department of~~  
6 ~~Justice pursuant to this chapter are exempt from any law requiring~~  
7 ~~disclosure of information to the public and shall be confidential~~  
8 ~~except as otherwise provided in this chapter.~~

9 ~~(b) All evidence and forensic samples containing biological~~  
10 ~~material retained by the Department of Justice DNA Laboratory~~  
11 ~~or other state law enforcement agency are exempt from any law~~  
12 ~~requiring disclosure of information to the public or the return of~~  
13 ~~biological specimens, samples, or print impressions.~~

14 ~~(c) Non-DNA forensic identification information may be filed~~  
15 ~~with the offender's file maintained by the Sex Registration Unit~~  
16 ~~of the Department of Justice or in other computerized data bank~~  
17 ~~or database systems maintained by the Department of Justice.~~

18 ~~(d) The DNA and other forensic identification information~~  
19 ~~retained by the Department of Justice pursuant to this chapter shall~~  
20 ~~not be included in the state summary criminal history information.~~  
21 ~~However, nothing in this chapter precludes law enforcement~~  
22 ~~personnel from entering into a person's criminal history~~  
23 ~~information or offender file maintained by the Department of~~  
24 ~~Justice, the fact that the specimens, samples, and print impressions~~  
25 ~~required by this chapter have or have not been collected from that~~  
26 ~~person.~~

27 ~~(e) The fact that the blood specimens, saliva or buccal swab~~  
28 ~~samples, and print impressions required by this chapter have been~~  
29 ~~received by the DNA Laboratory of the Department of Justice shall~~  
30 ~~be included in the state summary criminal history information as~~  
31 ~~soon as administratively practicable.~~

32 ~~The full palm prints of each hand shall be filed and maintained~~  
33 ~~by the Automated Latent Print Section of the Bureau of Criminal~~  
34 ~~Identification and Information of the Department of Justice, and~~  
35 ~~may be included in the state summary criminal history information.~~

36 ~~(f) DNA samples and DNA profiles and other forensic~~  
37 ~~identification information shall be released only to law enforcement~~  
38 ~~agencies, including, but not limited to, parole officers of the~~  
39 ~~Department of Corrections and Rehabilitation, hearing officers of~~  
40 ~~the parole authority, probation officers, the Attorney General's~~

1 office, district attorneys' offices, and prosecuting city attorneys'  
2 offices, unless otherwise specifically authorized by this chapter.  
3 Dissemination of DNA specimens, samples, and DNA profiles  
4 and other forensic identification information to law enforcement  
5 agencies and district attorneys' offices outside this state shall be  
6 performed in conformity with the provisions of this chapter.

7 (g) A defendant's DNA and other forensic identification  
8 information developed pursuant to this chapter shall be available  
9 to his or her defense counsel upon court order made pursuant to  
10 Chapter 10 (commencing with Section 1054) of Title 6 of Part 2.

11 (h) Except as provided in subdivision (g) and in order to protect  
12 the confidentiality and privacy of database and data bank  
13 information, the Department of Justice and local public DNA  
14 laboratories shall not otherwise be compelled in a criminal or civil  
15 proceeding to provide any DNA profile or forensic identification  
16 database or data bank information or its computer database program  
17 software or structures to any person or party seeking those records  
18 or information whether by subpoena or discovery, or other  
19 procedural device or inquiry.

20 (i) (1) (A) Any person who knowingly uses an offender  
21 specimen, sample, or DNA profile collected pursuant to this chapter  
22 for other than criminal identification or exclusion purposes, or for  
23 other than the identification of missing persons, or who knowingly  
24 discloses DNA or other forensic identification information  
25 developed pursuant to this section to an unauthorized individual  
26 or agency, for other than criminal identification or exclusion  
27 purposes, or for the identification of missing persons, in violation  
28 of this chapter, shall be punished by imprisonment in a county jail  
29 not exceeding one year or by imprisonment in the state prison for  
30 16 months, or two or three years.

31 (B) Any person who, for the purpose of financial gain,  
32 knowingly uses a specimen, sample, or DNA profile collected  
33 pursuant to this chapter for other than criminal identification or  
34 exclusion purposes or for the identification of missing persons or  
35 who, for the purpose of financial gain, knowingly discloses DNA  
36 or other forensic identification information developed pursuant to  
37 this section to an unauthorized individual or agency, for other than  
38 criminal identification or exclusion purposes or for other than the  
39 identification of missing persons, in violation of this chapter, shall,  
40 in addition to the penalty provided in subparagraph (A), be

1 punished by a criminal fine in an amount three times that of any  
2 financial gain received or ten thousand dollars (\$10,000);  
3 whichever is greater.

4 (2) (A) If any employee of the Department of Justice knowingly  
5 uses a specimen, sample, or DNA profile collected pursuant to this  
6 chapter for other than criminal identification or exclusion purposes,  
7 or knowingly discloses DNA or other forensic identification  
8 information developed pursuant to this section to an unauthorized  
9 individual or agency, for other than criminal identification or  
10 exclusion purposes or for other than the identification of missing  
11 persons, in violation of this chapter, the department shall be liable  
12 in civil damages to the donor of the DNA identification information  
13 in the amount of five thousand dollars (\$5,000) for each violation,  
14 plus attorney's fees and costs. In the event of multiple disclosures,  
15 the total damages available to the donor of the DNA is limited to  
16 fifty thousand dollars (\$50,000) plus attorney's fees and costs.

17 (B) (i) Notwithstanding any other law, this shall be the sole  
18 and exclusive remedy against the Department of Justice and its  
19 employees available to the donor of the DNA.

20 (ii) The Department of Justice employee disclosing DNA  
21 identification information in violation of this chapter shall be  
22 absolutely immune from civil liability under this or any other law.

23 (3) It is not a violation of this section for a law enforcement  
24 agency in its discretion to publicly disclose the fact of a DNA  
25 profile match, or the name of the person identified by the DNA  
26 match when this match is the basis of law enforcement's  
27 investigation, arrest, or prosecution of a particular person, or the  
28 identification of a missing or abducted person.

29 (j) It is not a violation of this chapter to furnish DNA or other  
30 forensic identification information of the defendant to his or her  
31 defense counsel for criminal defense purposes in compliance with  
32 discovery.

33 (k) It is not a violation of this section for law enforcement to  
34 release DNA and other forensic identification information  
35 developed pursuant to this chapter to a jury or grand jury, or in a  
36 document filed with a court or administrative agency, or as part  
37 of a judicial or administrative proceeding, or for this information  
38 to become part of the public transcript or record of proceedings  
39 when, in the discretion of law enforcement, disclosure is necessary  
40 because the DNA information pertains to the basis for law

1 enforcement's identification, arrest, investigation, prosecution, or  
2 exclusion of a particular person related to the case.

3 (l) It is not a violation of this section to include information  
4 obtained from a file in a transcript or record of a judicial  
5 proceeding, or in any other public record when the inclusion of  
6 the information in the public record is authorized by a court, statute,  
7 or decisional law.

8 (m) Subject to Section 295.2, it is not a violation of this section  
9 for the DNA Laboratory of the Department of Justice, or an  
10 organization retained as an agent of the Department of Justice, or  
11 a local public laboratory to use anonymous records or criminal  
12 history information obtained pursuant to this chapter for training,  
13 research, statistical analysis of populations, or quality assurance  
14 or quality control.

15 (n) The Department of Justice shall make public the  
16 methodology and procedures to be used in its DNA program prior  
17 to the commencement of DNA testing in its laboratories. The  
18 Department of Justice shall review and consider on an ongoing  
19 basis the findings and results of any peer review and validation  
20 studies submitted to the department by members of the relevant  
21 scientific community experienced in the use of DNA technology.  
22 This material shall be available to criminal defense counsel upon  
23 court order made pursuant to Chapter 10 (commencing with Section  
24 1054) of Title 6 of Part 2.

25 (o) In order to maintain the computer system security of the  
26 Department of Justice DNA and Forensic Identification Database  
27 and Data Bank Program, the computer software and database  
28 structures used by the DNA Laboratory of the Department of  
29 Justice to implement this chapter are confidential.

30 SEC. 5. Section 299.6 of the Penal Code is amended to read:

31 299.6. (a) Nothing in this chapter shall prohibit the Department  
32 of Justice, in its sole discretion, from the sharing or disseminating  
33 of population database or data bank information, DNA profile or  
34 forensic identification database or data bank information, analytical  
35 data and results generated for forensic identification database and  
36 data bank purposes, or protocol and forensic DNA analysis methods  
37 and quality assurance or quality control procedures with any of  
38 the following:

39 (1) Federal, state, or local law enforcement agencies.

1 ~~(2) Crime laboratories, whether public or private, that serve~~  
2 ~~federal, state, and local law enforcement agencies that have been~~  
3 ~~approved by the Department of Justice.~~

4 ~~(3) The attorney general's office of any state.~~

5 ~~(4) Any state or federally authorized auditing agent or board~~  
6 ~~that inspects or reviews the work of the Department of Justice~~  
7 ~~DNA Laboratory for the purpose of ensuring that the laboratory~~  
8 ~~meets ASCLD/LAB and FBI standards for accreditation and quality~~  
9 ~~assurance standards necessary under this chapter and for the state's~~  
10 ~~participation in CODIS and other national or international~~  
11 ~~crime-solving networks.~~

12 ~~(5) Subject to Section 295.2, any third party that the Department~~  
13 ~~of Justice deems necessary to assist the department's crime~~  
14 ~~laboratory with statistical analyses of population databases, or the~~  
15 ~~analyses of forensic protocol, research methods, or quality control~~  
16 ~~procedures, or to assist in the recovery or identification of human~~  
17 ~~remains for humanitarian purposes, including identification of~~  
18 ~~missing persons.~~

19 ~~(b) The population databases and data banks of the DNA~~  
20 ~~Laboratory of the Department of Justice may be made available~~  
21 ~~to and searched by the FBI and any other agency participating in~~  
22 ~~the FBI's CODIS System or any other national or international~~  
23 ~~law enforcement database or data bank system.~~

24 ~~(c) The Department of Justice may provide portions of biological~~  
25 ~~samples including blood specimens, saliva samples, and buccal~~  
26 ~~swab samples collected pursuant to this chapter to local public law~~  
27 ~~enforcement DNA laboratories for identification purposes provided~~  
28 ~~that the privacy provisions of this section are followed by the local~~  
29 ~~public law enforcement laboratory and if each of the following~~  
30 ~~conditions is met:~~

31 ~~(1) The procedures used by the local public DNA laboratory~~  
32 ~~for the handling of specimens and samples and the disclosure of~~  
33 ~~results are the same as those established by the Department of~~  
34 ~~Justice pursuant to Sections 297, 298, and 299.5.~~

35 ~~(2) The methodologies and procedures used by the local public~~  
36 ~~DNA laboratory for DNA or forensic identification analysis are~~  
37 ~~compatible with those used by the Department of Justice, or~~  
38 ~~otherwise are determined by the Department of Justice to be valid~~  
39 ~~and appropriate for identification purposes.~~

1     ~~(3) Only tests of value to law enforcement for identification~~  
2 ~~purposes are performed and a copy of the results of the analysis~~  
3 ~~are sent to the Department of Justice.~~

4     ~~(4) All provisions of this section concerning privacy and security~~  
5 ~~are followed.~~

6     ~~(5) The local public law enforcement DNA laboratory assumes~~  
7 ~~all costs of securing the specimens and samples and provides~~  
8 ~~appropriate tubes, labels, and materials necessary to secure the~~  
9 ~~specimens and samples.~~

10    ~~(d) Any local DNA laboratory that produces DNA profiles of~~  
11 ~~known reference samples for inclusion within the permanent files~~  
12 ~~of the state's DNA Data Bank program shall follow the policies~~  
13 ~~of the DNA Laboratory of the Department of Justice.~~