

## Opinion on the National Police Agency DNA Database System

December 21, 2007  
Japan Federation of Bar Associations

### Summary of the Opinion

1. The DNA Profile Information<sup>1</sup> Database System, currently being operated by the National Police Agency, must be established and operated in accordance with laws, not by regulations, so that the right to privacy and the right to control personal information are not infringed. Hence, National Public Safety Commission Regulation No. 15 should be abolished.
2. Since DNA profile information is the “ultimate form of individual privacy,” legislation should be enacted including provisions on taking, object of registration, retention, use, expungement of data, quality assurance, and a monitoring and relief agency. The law should provide as follows:
  - (1) Taking
    - (i) DNA profile information may be taken only if there is specific necessity for criminal investigation, and may not be taken for the sole purpose of registration to the database without any specific necessity for criminal investigation.
    - (ii) In principle, taking of DNA profile information from suspects shall be based on court warrants. In case of voluntary submission as an exception, police authorities shall give a full written explanation including, but not limited to, the meaning of taking and methods of use.
  - (2) Scope of Registration
    - (i) DNA profile information to be registered shall be limited to currently collected profiles. That is, crime scene DNA profiles, unnatural death DNA profiles, and suspect DNA profiles. The profile information shall not contain genetic information.
    - (ii) Suspect DNA profile information to be registered shall be limited to certain types of crimes, such as felonies against life and physical integrity, including robbery and/or murder, and/or sexual offenses.
    - (iii) If police were to register DNA profile information contained in a biological sample which is voluntarily submitted by a suspect, police shall acquire another written consent from the suspect.
    - (iv) As a basic principle, juvenile suspects shall be excluded from the scope of registration.
  - (3) Retention
    - (i) In order to prevent illicit access to the database or leakage of information, the

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<sup>1</sup> In this opinion, “DNA profile information” refers to the information contained in tandem repeat, which is irrelevant to heredity and different from genetic information.

information administrator shall be clearly identified and his/her rights and duties shall be clearly indicated.

- (ii) Persons who have access to the database shall be limited.
- (iii) Illicit use of the database shall be penalized.
- (iv) The retention period of data shall be limited.

(4) Use

- (i) Purpose of use shall be limited to specific criminal investigations, and any other use shall be prohibited.
- (ii) When a defendant tries to claim innocence or asks for a retrial, use of the database to clarify false charges shall be allowed and the use shall not fall under “other use” set out above.
- (iii) Matching data with information retained by other administrative functions shall be prohibited.

(5) Expungement

- (i) Expungement shall be required when a defendant is acquitted, the prosecution is dismissed, or a suspect is not prosecuted because he or she is cleared of suspicion or there is not enough evidence to prosecute, or the data was found to be “illegally obtained evidence,” or the person dies within the retention period of the information.
- (ii) A right to request expungement or other relevant relief shall be clearly indicated to those who are wrongfully registered to the database.

(6) Quality Assurance

Quality assurance (reliability and/or accuracy) measures for DNA Expert Examination, which extracts DNA profile information in the database, shall be provided.

(7) Monitoring and Relief Agency

Third-party agencies to monitor the establishment and operation of the database system, including DNA profile testing methods and quality assurance, shall be established in order to check infringement of the right to privacy and to provide remedies.

Reasons of the Opinion

Chapter 1: Purpose of the JFBA Opinion

In December 2004, the National Police Agency (“NPA”) began operating the “Crime Scene Sample DNA Profile Information Search System,” in accordance with the “Crime Scene Sample DNA Profile Information Search System Operation Guidelines.” Also, on September 1, 2005, the NPA began operating the “Suspect DNA Profile Information Database,” after the promulgation of the DNA Profile Records Treatment Rules and Regulations, which were set forth by the National Public Safety Committee on August 26, 2005.

Suspect DNA profile information is the personal information of a specific

individual and crime scene DNA profile information is also personal information of a specific individual when it is connected to the said individual. Therefore, one of the ramifications of the database system is control of people's DNA information<sup>2</sup> by police authorities, and there is a danger of invading the right to privacy or the right to control personal information guaranteed under article 13 of the Constitution (as to fingerprints, refer to the Supreme Court judgment on December 15, 1995; KEISHU VOL. 49, NO. 10, PAGE 842).

In particular, since DNA information constitutes the "ultimate form of integral and comprehensive personal information," the JFBA, whose mission is to protect basic human rights, reached its conclusion that problems, if any, in operating the current database system should be corrected, as well as its legal issues should be identified.

## Chapter 2: Current Condition of Forensic DNA Expert Examination<sup>3</sup> in Japan and Its Problems

### 1. About Forensic DNA Expert Examination

DNA expert examination is conducted to identify an individual by analyzing patterns of tandem repeat of loci, which constitute DNA in a cell. The method was invented in 1985 in England, and various methods have been invented and widely used since then. GOTO MARIKO, ADMISSIBILITY OF MCT 118 DNA PROFILE EXPERT EXAMINATION AS EVIDENCE, COMMENTARY ON SUPREME COURT CASES 176, 177 (2000), hereinafter called "Goto *sai-han kaisetsu*."

### 2. About the Current Condition of Forensic DNA Expert Examination in Japan

- (1) In 1992, the National Police Agency in its 4-year plan decided to introduce forensic DNA expert examination to Criminal Investigation Laboratories at the municipal level, using the "MCT 118 profile method" and the "HLADQ- profile method," which was invented and utilized by the National Research Institute of Police Science. The DNA expert examination was supposed to be utilized as a frontline on criminal investigation. Shimizu Kazu, OPERATION OF THE CRIME SCENE SAMPLE DNA PROFILE INFORMATION SEARCH SYSTEM, RESEARCH ON CRIMINAL INVESTIGATION, vol. 645, at 15, hereinafter called "Shimizu *sosa kenkyu*."
- (2) The "MCT 118 profile method" is conducted by examining a part of the chromosome called "MCT 118," where sixteen loci as a one set repeat exist, and the difference in repeat patterns constitutes the difference in profiles. First, separate DNA from samples to refine, add primer and detach targeted loci, extend it by PCR. Then electrophoresis the extended DNA part with DNA markers, whose sizes are already known, and reflect the difference of weight to moving distance. Finally,

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<sup>2</sup> "DNA information" here means entire portion of DNA information, including information related to genetics, whereas "DNA profile information" only means information on specific tandem repeat profiles, allegedly irrelevant of genetic information. The latter is only a small portion of the former.

<sup>3</sup> "DNA expert examination" here means both DNA profile expert examination analyzing tandem repeat as profile, and analyzing differences of loci itself, i.e., Mitochondria analysis.

identify profiles from the result. Goto *sai-han kaisetsu* 176, 177. The method is the same with short tandem repeat expert examination, though in this case, the method is conducted in an automatic way.

- (3) Later, DNA profile expert examination using four kinds of methods began operating, after the “TH 01 profile method” and the “PM method” were newly innovated. However, since reagent used for the “HLADQ profile method” and the “PM method” are not reproduced anymore, instead of these methods, a short-tandem repeat examination method called “fragment-analyzer” was introduced to the Criminal Investigation Laboratory since August 2003. Addendum 3 shows the contents of directions issued by the chief of the Criminal Bureau regarding this new method.

This method uses “Short Tandem Repeat,” which can be extracted even from old blood stains or bleached bones. Fragment-analyzer enables examiners to specify “STR 9 locus,” as well as “TH 01 locus,” and contributes to more accurate identification. It is said that “on calculation, use of ‘STR 9 loci’ makes the frequency of coincidence one out of 1,000,000 at maximum, while combination of ‘STR 9 loci’ and ‘MCT 118 loci’ makes it one out of 180,000,000 at maximum.” (Shimizu, *sosa kenkyu* 15-16).

### 3. Issues on DNA Expert Examination

- (1) A repeated set of four loci (A, C, G, T) is called “Variable Number Tandem Repeat” and a set of 3 to 5 loci is called “Short Tandem Repeat.” They consist of one of the long DNA tandems located on a chromosome. The DNA tandem is destroyed by time lapse or decay. A Short DNA tandem has a smaller possibility of being torn off compared with a long tandem, and thus most of them keep their original form. Therefore, Short Tandem Repeat has a higher possibility to extract DNA profiles from old or decayed samples.
- (2) In conducting expert examination of DNA, DNA is detached from samples and refined; after primer is added, targeted loci are identified. The DNA detached and refined consists of 22 sets of chromosomes and one set of sex-chromosomes, which is called “genome,” and includes all genetic information. This is why it is called the “ultimate form of comprehensive personal information.” Police authorities have insisted only “junk DNA,” which is irrelevant to heredity is used for examination. However, we should note that with the present technical standards, even a part which contains genetic information could also be easily examined by police authorities.

## Chapter 3: Operation of the DNA Profile Database in Japan

### 1. Crime Scene Sample DNA Profile Information Search System

In December 2004, the National Police Agency began operating the Crime Scene Sample DNA Profile Information Search System. The National Police Agency “Summary of Operating the Crime Scene Sample DNA Profile Information Search System.”

In this system, the Director for Criminal Identification for the Criminal Bureau of

the National Police Agency registers the DNA profile information related to crime scene samples sent by Criminal Investigation Laboratories at municipal levels, and the data is used for “same offender inquiries” and “another charge inquiries” described below.

## 2. Current DNA Profile Database System

The Suspect Sample DNA Profile Information Database began operating in September 2005, after National Public Safety Commission Regulation No. 15 (hereinafter called the “Regulations”) was enacted in August the same year. The content of the “Crime Scene Sample DNA Profile Information Search System Guidelines” was also integrated into the Regulations. The Regulations broadened the scope of samples registered to the database, and included suspect samples and unnatural death samples, as well as crime scene samples.

### (1) Flow to be Put into Database

Issues regarding DNA Profile expert examination have been described in chapter 2. The Regulations enable “Particular DNA Profiles” provided in article 2, section 2, which are obtained by expert examination, to be registered in the database. The samples include “suspect samples” obtained from a suspect’s body, “crime scene samples” obtained at the crime scenes etc, and “unnatural death samples” taken from those including unidentified bodies of unnatural death (article 2), but the scope of crimes is not limited.

According to the Regulations, expert examination is done by the Criminal Investigation Laboratory, as well as by other institutions or researchers; in the latter case, results of the expert examination will be sent to the chief of the Criminal Investigation Laboratory (article 3, 4).

### (2) Recording

The Criminal Investigation Laboratory Chief shall create records of the particular DNA profiles and shall electronically send records to the Director for Criminal Identification for the National Police Agency Criminal Bureau (article 3). These records are categorized as (i) Suspect DNA Profile Records, (ii) Crime Scene DNA Profile Records, and (iii) Unnatural Death DNA Profile Records (article 2-4).

### (3) Retention of the Records

The Director for Criminal Identification shall retain DNA profile records and shall take necessary and proper measures to prevent leakage, disappearance, or destruction of the data (article 5). On the other hand, the Criminal Investigation Laboratory Chief shall destroy the records once he has sent them to the Director for Criminal Identification (article 3, 4). In this way, the Director can manage records centrally.

### (4) Comparison of the DNA Profiles (article 6)

Below is a detailed description of the use of the database.

#### (i) Using Suspect Database

For example, a blood stain is taken from a crime scene and the result of the expert examination is obtained. Then the result and data in the suspect sample database are compared. If the result from the crime scene and the DNA profile information of the particular suspect were identified, then the blood stains are supposed to belong to the suspect (“crime scene inquiry”).

#### (ii) Using Crime Scene Database

For example, a blood stain is taken from a crime scene and the result of the expert examination is obtained. Then the result and data in the crime scene database are compared. If the analytical result of the suspect sample and DNA profile information contained in a blood sample taken from the particular case, the latter of which is registered in a crime scene database, were identified, then the suspect is also suspected of being involved in that particular case (“another charge inquiry”).

Also, for example, given that blood stains are taken from a crime scene of case A and the result of the expert examination is obtained, if the result and DNA profile information of a particular case (case B), which is already registered in the crime scene database, were identified, then police authorities can obtain relevant information; i.e., there is a high possibility that case A and case B have been committed by the same offender (“same offender inquiry”).

(5) Expungement of Records (article 7)

The Director for Criminal Identification shall expunge the DNA profile records under following circumstances:

(A) Suspect DNA Profile Records (section 1):

- (a) When the suspect has died.
- (b) When there is no need to retain the said suspect DNA profile records.

(B) Crime Scene DNA Profile Records (section 2):

- (a) When the case has been adjudicated finally and has been closed.
- (b) When there is no need to retain the said crime scene DNA profile records.

(C) Unnatural Death DNA Profile Records (section 1, section 3):

When the Director for Criminal Identification has matched DNA profile data.

(6) Retention and Destruction of Biological Samples Taken from Suspects

There is no provision regarding retention and destruction of biological samples. Also, there is no penalty regarding retention and destruction.

3. Utility of DNA Profile Database System

As of September 2005, 888 crime scene DNA profiles have been registered, while 2,100 suspect DNA profiles have been registered.

- (1) At the end of August 2006, over one year since the establishment of the database system, 4,190 suspect DNA profile records have been registered and 3,652 crime scene DNA profile records are registered, according to the response by the Chief of the Criminal Bureau from the National Police Agency to the JFBA’s inquiry, dated October 19, 2006. Among those registered to the database are 824 rape cases, 674 theft cases, 501 robbery cases and 455 murder cases. “Another charge inquiry<sup>4</sup>” contributed to the matching of 408 suspect samples to 554 crime scene samples, “crime scene inquiry<sup>5</sup>” contributed to the matching of 56 crime scene samples and 56 suspect samples, and “same offender inquiry<sup>6</sup>” contributed to the solving of 684

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<sup>4</sup> “Another charge inquiry” compares a suspect sample and data in the crime scene sample database, in order to find if the suspect committed another crime.

<sup>5</sup> “Crime scene inquiry” compares a crime scene sample and data in the suspect sample database.

<sup>6</sup> “Same offender inquiry” compares a crime scene sample and data in the crime scene sample database,

- cases concerning 252 suspects.
- (2) According to the Asahi-Shinbun Press dated December 26, 2007, 14,949 suspect DNA profile records and 9,104 crime scene profile records have been registered at the end of November 2007.
  - (3) The above clearance rate shows that the DNA database system has certain efficacy in criminal investigation.

#### Chapter 4: Legislation to Operate DNA Database Systems in Other Countries

##### 1. Summary of DNA Database System in Other Countries

Legislation to operate DNA database systems in other countries is shown in Addendum 1 and Addendum 2. Many countries have established and are operating DNA database systems so that police authorities can effectively compare DNA profile information collected in the course of criminal investigation.

However, each country has enacted legislation after giving careful consideration to the establishment and operation of the DNA database system. Legislation is enacted to provide the scope of persons from whom to take biological samples, the scope of crimes, the legal grounds of the database, retention of biological samples, expungement of information, and quality assurance of the database.

##### 2. Democratic Control of DNA Database Systems by Legislation in Other Countries

Enactment of legislation shows the necessity of democratic control of the database system in order to prevent privacy rights invasion, since DNA profile information as the “ultimate form of private information” is becoming a common understanding of international society.

In this regard, in the US and England, not only DNA information collected in the course of criminal investigation is registered, but also the samples taken by suspects or those convicted of felonies are registered. However, these countries have enacted separate legislation regarding DNA databases in the latter case.

#### Chapter 5: Problems of DNA Database System in Japan

On the other hand, in Japan, the National Police Agency already began operating the DNA database system, but police authorities are controlled only by the “National Public Safety Commission Regulations.”

DNA profile information is the ultimate form of personal information, and careful treatment is necessary regarding the taking of information, scope of registration, retention, use, expungement, quality assurance, and establishment of a monitoring and relief agency. The currently operated DNA database system does not fulfill these requirements in every aspect.

In Japan, discussion is occurring about whether to establish or operate a system which collects DNA profile information without any specific need to investigate a specific case, similar to the US and English systems.

Bearing in mind the issues regarding the establishment and operation of the database system, we note that legislation should be enacted. Also we will refer to the

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in order to find if any other crime is committed by the same offender, who left a crime scene sample.

contents of the legislation, such as scope of registration, retention, use, expungement, monitoring agency and other relevant matters, as shown below.

#### Chapter 6: Necessity of Legislation to Establish and Operate DNA Database System

##### 1. Establishment and Operation of DNA Database System Based on Regulations

The National Police Agency has already begun operating a DNA database, and it is obvious that police authorities think legislation is unnecessary. The reasoning seems to be that a fingerprint database is also being operated by another National Public Safety Commission Regulation (Regulations No. 13), and that the DNA database can be treated in the same way. However, we are gravely concerned about this governmental understanding.

##### 2. Crucial Differences Between Fingerprint Information and DNA Information

(1) First of all, the fingerprint database does not necessarily lack legislative grounds. Article 218, section 2 of the Code of Criminal Procedure justifies the taking of fingerprints. The ground for this article is that on one hand, there is a necessity to acquire information to identify suspects who are arrested or detained, for monitoring purposes or to prevent erroneous detention. On the other hand, suspects, who are subject to legal restrictions of important human rights are also subject to minor restrictions. Also, taking fingerprints merely means the taking of appearance, and thus article 218 section 2 allows registration to the database and retention of the fingerprints. However, we are gravely suspicious whether the article allows the use of the database for future investigation.

(2) On the other hand, it is impossible to regard DNA information the same as fingerprint information. The taking of DNA from a suspect requires a court order, whereas the taking of fingerprints does not require a court warrant. Issuing of the court order is based on a need for criminal investigation (article 35 of the Constitution, article 218, 219 of the Code of Criminal Procedure). Thus, the taking of a DNA profile is different from the taking of fingerprints.

Furthermore, in order to obtain profile information, all of the DNA contained in a cell is subject to examination. This means that collected DNA is endangered with searching and collecting of individual information in its ultimate form, even if police authorities insist that only the “junk” part will be used. The National Police Agency explains that only “intron” parts are used, which constitute 98 % of the DNA and which does not contain individual genetic information, and “exson” parts are not used, which constitute 2 % and which relates to genetic information. However, this explanation only asks us to trust police authorities, and there is no assurance that genetic information is not misused by police authorities. Also, some point out the danger of taking genetic information from the “intron” part, due to improvements in the technology (For example, TH01 is pointed out to contain “promoter function”).

Thus, the taking of a DNA profile, which invades deeply into a human cell, is different from the taking of fingerprints.

##### 3. Need for Democratic Control to Protect DNA Profile Information, the “Ultimate



#### Form of Privacy”

It is explained that establishment of the DNA profile information database is necessary in order to improve clearance rate, to solve cases at an earlier stage, or to suppress sexual crimes. It is also explained that international demand exists since the G 8 Summit, which was held in May 2003, confirmed that each country should collect information on DNA and would cooperate on this issue, after the September 11<sup>th</sup> Terrorist Attacks.

For sure, “objective” evidence, other than self confession, has become more important given that a new lay-judge system will be introduced in 2009. However, DNA is called the “ultimate form of personal information,” and the database should be controlled by the democratic process. In other words, as the right to control one’s own personal information constitutes the core of individual dignity ensured by article 13 of the Constitution, it is indispensable to legally justify the system by enacting legislation. In this regard, the “International Declaration on Human Genetic Data,” which was adopted in 2003 by UNESCO also clarifies that DNA shall be collected according to legislation consistent with international human rights law.

#### 4. Danger of Police Authorities Collecting Information

As a reference, currently, police authorities collect information on driver’s licenses, monitoring cameras, information collected through investigations, public safety commission activities, and administrative police functions. Recently, raw data of the “car number database” leaked because of the software “Winny.” Police authorities explained that the data could not be accessed from outside and would be eliminated after a certain period of time, but this incident revealed that the police’s explanation was false.

Given that a danger exists in information collection by police authorities, it is indispensable to establish and operate the database system by legislation. In the future, the establishment of an independent third-party agency for the database should be taken into consideration.

#### 5. Conclusion

In sum, the current DNA database system includes grave concerns about the invasion of the right to privacy provided by article 13 of the Constitution. The Regulations should be abolished and laws should be enacted.

### Chapter 7: Admissibility of Forcible Taking of DNA Profile Information for the Sole Purpose of Registration Without Specific Need for Criminal Investigation

\*In this Opinion, this issue should be discussed once legislation is enacted or at the same time with the enactment.

#### 1. Methods of Taking

In this chapter, we will discuss whether DNA profile information obtained without consent and without specific need for criminal investigation is admissible.

First, DNA profile information includes crime scene DNA profiles, suspect DNA profiles, and general public DNA profiles. Second, there are two categories in taking DNA, with specific criminal investigation purpose and without. Regarding suspect DNA

information, there are two categories, taken with consent and without. The categories are indicated below. The most problematic issue exists in the highlighted block.

	With Specific Need for Criminal Investigation		Without Specific Need for Criminal Investigation	
Crime Scene DNA Information	Data obtained by expert examination conducted with crime scene samples including blood stains.		Not within the scope of criminal investigation	
Suspect DNA Information	Data obtained through biological samples taken from suspect with consent.	Data obtained through biological samples taken from suspect with warrant.	Data obtained through biological samples taken from suspect with consent.	Data forcibly obtained through biological samples taken from suspect.
General Public DNA Information	Data obtained through biological samples taken from general public with consent.	Data obtained through biological samples taken from general public with warrant.	Data obtained through biological samples taken from general public with consent.	Data forcibly obtained through biological samples taken from general public.

## 2. Taking of DNA Profile Information With Specific Need for Criminal Investigation

In cases with a specific need for criminal investigation, forcible taking of DNA from suspects requires court warrants. On the other hand, voluntary submission with the suspect's consent might happen, but since the suspect is under detention, it is doubtful that true consent can be given by the suspect. In principle, DNA taking should be done with a court warrant, and voluntary submission should be exceptional. Even in voluntary submission, ramifications of the taking and purpose of the taking should be fully explained in writing to suspects.

## 3. Taking of DNA Profile Information Without Specific Need for Criminal Investigation

- (1) Some scholars insisted in the symposium held by police authorities that extent of invasion to the human body can be almost the same as obtaining fingerprints, by using a saliva swab, thus the taking of DNA may be conducted based on article 218, section 2 of the Code of Criminal Procedure. However, article 218, section 2 does not seem to include the using of swabs, thus, we strongly oppose this position.
- (2) Enacting new legislation for introducing a system which takes DNA without specific need for criminal investigation seems to have already been considered inside police authorities. One of the members of the police said "A DNA database of arrested suspects will be established, after enacting necessary legislation in the

near future.”

In the US and England, specific legislation is enacted to allow forcible obtaining of biological samples from suspects or those convicted.

In comparative studies, there seems to be two types of legislation which makes submission of biological samples admissible: one is the “English model,” where DNA may be collected from those arrested regardless of the type of crimes committed. The other is “American model,” where DNA may be collected from those convicted of a felony.

Both models are trying to enlarge the database, and could be an option when Japan introduces new legislation. Thus, we will consider the admissibility of those options below.

- (3) Search and seizure without specific suspicion of a specific crime is against article 35 of the Constitution. Also, there are certain types of crimes where use of a DNA profile is not necessary, such as bribery or other administrative charges. Therefore, the “English model” is unconstitutional in our country.
- (4) The next question is the admissibility of obtaining a DNA profile without any specific need for criminal investigation. This goes back to a matter of forensic policy, which calls for balancing with the due process requirement guaranteed by article 31 of the Constitution.

Thus, forcible taking shall be based on law, and the contents shall not violate due process rights. Since the right to privacy is one of the most fundamental human rights, collecting DNA profiles merely for future forensic policy is inadmissible (Article 16, section 1 of the Act on the treatment of detainees provides that “physical examination can be conducted only if it is necessary to identify the person”).

However, it is difficult to include the taking of DNA samples into this article, and it is impossible to make it a legal basis for obtaining biological samples to establish the DNA database<sup>7</sup>.

Broadening the scope of the DNA database is useful in future criminal investigation in some sense. However, obtaining DNA information for the purpose of future criminal investigation constitutes a grave human rights violation, thus it is inadmissible. This position does not change even if the scope of registration is limited to those convicted or recidivists.

## Chapter 8: Contents to be Enacted in Legislation to Establish and Operate DNA Profile Information Database System

Since DNA profile information is the “ultimate form of individual privacy,” legislation to be enacted should cover the object of registration, retention, use and expungement of data, and monitoring agency; the law should provide as follows:

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<sup>7</sup> The Ministry of Justice recently introduced an identification system using finger veins. It could be argued that this method is not intrusive to the human body, but since it is a taking of biological information, it is not appropriate to provide mere regulations.

## 1. Taking

DNA profile information may be taken only when there is a specific need for criminal investigation of a specific case. Suspect DNA profile information may be acquired only when there is a necessity to investigate a specific case; it shall not be allowed to acquire DNA profile information for the sole purpose of registering it to the database without any specific need for a criminal investigation. Also, the taking of DNA from suspects shall require court warrants, and voluntary submission shall accompany a full explanation in writing of the meaning of taking, purpose of use, etc.

## 2. Object of Registration

- (1) DNA profile information in the database shall be limited to currently collected profiles, that is, crime scene DNA profiles, unnatural death DNA profiles, and suspect DNA profiles. Also, the profile information shall not contain genetic information. Since genetic information is the “ultimate form of individual privacy,” penalization of the violation should be considered.
- (2) Collecting of suspect DNA profile information shall be limited to a certain scope of crimes, such as robbery or murder, which constitute a felony against life and physical integrity, or sexual crimes. Also, “suspect” shall be limited to those convicted.
- (3) If police were to register DNA profile information contained in biological samples voluntarily submitted by a suspect, police shall acquire consent from the suspect.
- (4) In general, samples from juveniles shall not be registered to a database; especially samples from juveniles under fourteen years old shall be exempt from the database, since juveniles under fourteen are not criminally responsible.

## 3. Retention

- (1) In order to prevent illegal access to the database or leakage of information, the information administrator shall be clearly specified and his rights and duties shall be clearly indicated.
- (2) Persons who have access to database shall be limited.
- (3) When the information administrator does not adhere to his/her responsibilities and authority or in case of illegal use, illicit access and leakage of information by persons including investigators, such case shall be penalized, including imprisonment with labor.
- (4) The retention period of profile information in the database shall be limited; for example, five years to ten years is preferable, bearing in mind the Canadian Act on DNA Expert Examination (enacted in 1998) and, German DNA Identification Act (enacted in 1998).

## 4. Use

- (1) The database may be used only when there is need for investigation of a specific case and other use shall be prohibited.
- (2) Use of the database by defendants in order to claim innocence shall be allowed and that use shall not fall under “other use” set out above. DNA expert examination

fulfills a strong screening function when samples do not match, thus use of the database is extremely necessary when false conviction is at issue. In the US, many death-row inmates have been saved by use of the database.

For example, a convicted person who claims his innocence might ascertain that a third party who has a similar DNA profile is guilty. In such a case, if the third party's biological sample is retained in the database, the use of the sample should also be made available to the convicted. There should be some system in this regard.<sup>8</sup>

- (3) Matching of information in the database with information retained by other administrative functions shall be prohibited.

#### 5. Expungement

- (1) Expungement shall be required when a defendant is acquitted, or a suspect is not prosecuted because he or she is cleared of suspicion or there is not enough evidence to prosecute, or the person dies within the retention period of the information. In addition, expungement shall be considered as a basic principle, when a defendant is acquitted due to insanity or a suspect's prosecution is suspended.

The JFBA issued a warning on September 17, 1997 to local police and the National Police Agency to dump originals and copies of fingerprints and photos. The JFBA also issued an advisory opinion on the same day to the Ministry of Justice and the Diet to enact legislation which specifies a duty to dump fingerprints and photos of those who are acquitted. The JFBA believes that retention of fingerprints and photos by police authorities even after acquittal constitutes a violation of the right to privacy.

- (2) Also, the right to request expungement in case of erroneous registration to the database shall be clarified, from the perspective of the right to control one's personal information.

#### 6. Quality Assurance

In order to adopt a proper method in extracting DNA profile information, quality assurance measures shall be provided by laws or regulations. Standards for quality assurance shall be established and implemented. This issue leads to the matter of a monitoring agency described below.

- (1) There is no quality assurance by third parties of DNA expert examination conducted by Japanese police authorities. However, quality assurance is indispensable to maintain reliability of the expert examination, as is done in the US and European countries.

- (i) First of all, in the US, the DNA Identification Act of 1994 describes that the chief of the FBI has to appoint a commission regarding quality assurance. The commission shall set, periodically review, and advise on

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<sup>8</sup> In such case, police authorities shall not refuse disclosure of DNA profile information. Thus, legislation shall include a provision which enables disclosure.

quality assurance standards (including technical screening test for criminal investigation laboratory or identification officials).

The commission has provided “quality assurance standards for laboratories conducting forensic DNA testing” in 1998 and “quality assurance standards for laboratories engaged with the DNA database” in 1999.

Also, the chief of the FBI is obligated to issue quality assurance standards (including technical screening test for criminal investigation laboratory or identification officials).

Thus, in the US, observance of these standards becomes a prerequisite of the reliability of DNA expert examination before the courts.

However, in the 2001 review, it turned out that half of the local police authorities do not abide by the FBI standards. Katsumata Yoshinao, DNA EXPERT EXAMINATION-ITS ABILITY AND LIMIT, 139-140, 285.

- (ii) Next, in Europe, a cabinet commission issued an advisory opinion on February 10, 1992, saying that “since analyzing DNA is highly scientific process, only laboratories which have proper institution and adequate experience should conduct it. Each member state should guarantee a listing of approved laboratories or institutions.” The commission also deems a “high level of professional knowledge and proper quality monitoring process” necessary.

- (2) Therefore, to improve reliability in DNA expert examination, quality assurance standards should be set and implemented in Japan. Careful consideration should be given to issues of selecting third parties, who establish standards, and effective implementation methods.

Also, the process of taking samples and the process of expert examination should be preserved as evidence, to allow retesting. Requiring retention of biological samples for retesting should also be considered.

## 7. Monitoring and Relief Agency

A Monitoring agency to check the establishment and operation of the system, such as assuring the method of extracting DNA profile information, and an institution to check for invasion of the right to privacy and provide remedies shall be established.

- (1) Establishing an independent agency such as the “DNA database system monitoring committee” shall be considered. The committee shall monitor whether individual information is properly collected according to laws and regulations, or whether the database is properly retained. See JFBA Opinion on Draft Act on Individual Information Retained by Administrative Agencies, dated April 20, 2002. See also JFBA Opinion on Revised Draft Act on Individual Information Retained by Administrative Agencies, dated January 31, 2003.
- (2) Establishing an independent human rights agency such as the “DNA individual information protection committee” should also be considered (the JFBA has issued “Declaration on Establishment of National Human Rights Institution” on October 6, 2000, which requests the establishment of National Human Rights Institution in accordance with the Paris Principles adopted by the UN General Assembly in 1993).

## Chapter 9: Conclusion

In conclusion, the DNA profile information database system shall be established and operated in accordance with laws, not by regulations, in order to prevent infringement upon the right to privacy or the right to control personal information. Hence, National Public Safety Commission Regulation No. 15 shall be abolished in a timely fashion.

Legislation shall be properly enacted on the taking of profile information, the object of registration, retention, use, expungement, quality assurance, and a monitoring and relief agency.