



**U.S. Customs and  
Border Protection**

**AUG 13 2019**

The Honorable Henry Kerner  
Special Counsel  
Office of Special Counsel  
1730 M Street, Suite 300  
Washington, D.C. 20036

Re: OSC File Nos. DI-18-3920, DI-18-3924, DI-18-3931

Dear Mr. Kerner:

This letter is in response to the Office of Special Counsel's (OSC) request for a supplemental report concerning allegations that U.S. Customs and Border Protection (CBP) is violating the law by failing to collect deoxyribonucleic acid (DNA) samples from persons who are apprehended or arrested by CBP. On June 18, 2019, you and Catherine McMullen, Chief of OSC's Disclosure Unit, met with me and then-Acting CBP Commissioner John Sanders. During the meeting, you and Ms. McMullen made arguments in support of the allegations and asked CBP to collect DNA samples from persons apprehended or arrested by CBP law enforcement officers.

By law, the U.S. Attorney General "may, as prescribed by the Attorney General in regulations, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States." 34 U.S.C. § 40702(a)(1)(A). The law also permits the Attorney General to "authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section." *Id.* Pursuant to U.S. Department of Justice (DOJ) regulations that became effective in January 2009, the Attorney General requires that Federal agencies collect DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States." 28 C.F.R. § 2812.12(b).

The DOJ regulations authorize the Secretary of Homeland Security to waive DNA collection from certain categories of aliens including those "with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or

resource limitations.” 28 C.F.R. § 28.12(b)(4). As you know, in March 2010, then-DHS Secretary Janet Napolitano exercised this authority to waive DNA collection from non-U.S. persons:

- (i) detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18; and
- (ii) currently within DHS custody, pending administrative removal proceedings.

In July 2010, then-Attorney General Eric Holder acknowledged the waiver and the DHS Secretary’s authority to implement the waiver. In light of Secretary Napolitano’s waiver, DHS components are obliged to collect DNA for individuals the Department arrests on criminal charges, referred to throughout as “criminal arrestees.”

During our June 18, 2019 meeting, you argued that the waiver was time-limited because in March 2010 Secretary Napolitano expressed an intent to phase-in DNA collection in “over the next year.” This statement was not an expiration date on the waiver. Rather, it was Secretary Napolitano’s estimated timeline for implementing DNA collection procedures for criminal arrestees who fell outside of the waiver. The Attorney General recognized this in his July 22, 2010 letter, in which he stated “*with respect to criminal arrestees*, you indicate that you intend to ‘phase-in implementation over the next year’” (emphasis added).

The Secretary of Homeland Security has unilateral discretion to, after consultation with the Attorney General, exempt the Department from the requirement to collect DNA in certain circumstances. The Secretary exercised that discretion in March 2010 to exempt certain categories of aliens from DNA collection requirements. Those exemptions did not include express or implied expiration dates, they remain in effect, and have not been rescinded.

In light of these waivers, the requirement to collect DNA applies only as to criminal arrestees. As was discussed in my letter of December 12, 2018, CBP policy requires that detainees be promptly processed and turned over to appropriate law enforcement agencies such as U.S. Immigration and Customs Enforcement (ICE) and the U.S. Marshals Service (USMS). Both ICE and USMS have policies governing DNA collection. For individuals in ICE’s custody who are referred for prosecution, ICE submits DNA samples to the Combined DNA Index System, or works with the USMS to ensure that USMS submits samples.<sup>1</sup>

In OSC’s request for a supplemental report, you also ask CBP to explain why the Office of Professional Responsibility (OPR) did not interview a CBP attorney and other employees regarding the DNA collection allegations. OPR obtained the legal guidance the attorney provided to CBP management. OPR also determined that it was not

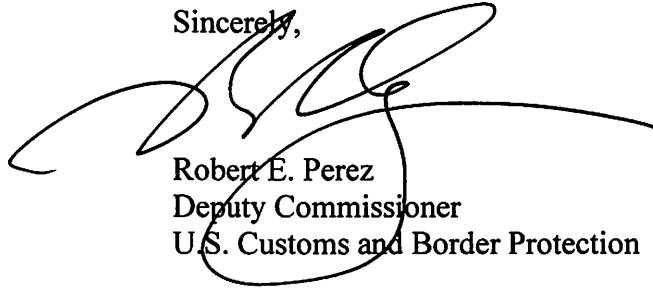
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<sup>1</sup> ICE HSI does not track whether DNA samples are associated with arrests turned over to ICE HSI from U.S. Customs and Border Protection.

necessary to interview the attorney because her role in the matter was limited to providing legal advice and she had no decision-making authority in the matter. In addition, OPR conducted sufficient interviews for sound conclusions regarding the allegations in this case and it was not necessary to interview the additional persons identified.

If you require further information regarding this matter, please contact Associate Chief Counsel Philip Carpio in the Office of Chief Counsel at 202-344-2940.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Perez', is written over the typed name and title. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert E. Perez  
Deputy Commissioner  
U.S. Customs and Border Protection

cc: Secretary, Department of Homeland Security  
General Counsel, Department of Homeland Security