Office of the Attorney General
Washington, D. C. 20530

July 22, 2010

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Napolitano:

Thank you very much for your letter of March 22, 2010, regarding your Department's implementation of DNA sample collection from persons in certain non-convict classes in the federal jurisdiction. I commend your Department's ongoing efforts to implement DNA sample collection under federal law and regulations and look forward to continuing collaboration between our Departments in achieving the public safety benefits of this important reform.

As you know, the policy governing DNA sample collection in the federal jurisdiction for law enforcement identification purposes appears in 28 CFR 28.12, as amended by the rulemaking at 73 FR 74932. The rule exercises statutory authority of the Attorney General under the DNA Fingerprint Act, 42 U.S.C. § 14135a(a)(1)(A). The rule, which went into effect on January 9, 2009, provides that "[a]ny agency of the United States that arrests or detains individuals or supervises individuals facing charges shall 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 CFR 28.12(b). The rule qualifies this requirement by stating that an agency's collection of DNA samples may generally be limited to individuals from whom the agency collects fingerprints and may be subject to other limitations or exceptions approved by the Attorney General. The rule further affords the Secretary of Homeland Security discretion regarding the collection of DNA samples from aliens in certain categories other than arrestees (*i.e.*, those not arrested on criminal charges). *Id.*

Your letter notes specifically that 28 CFR 28.12(b)(4) authorizes the Secretary of Homeland Security, in consultation with the Attorney General, to exempt from DNA sample collection aliens for whom you determine such collection is not feasible because of operational exigencies or resource limitations. You indicated in your letter that you believe that this standard is met by [redacted] and you requested the views

be criminally charged. Given your intent not to collect DNA samples from immigration detainees who are not criminally charged, this concern does not appear to be an issue.

With respect to individuals who are arrested on criminal charges, DHS should contact the Department of Justice if emergencies or unforeseen circumstances or conditions arise affecting the feasibility of collecting DNA samples. It should be noted in this connection that, even if a situation should arise in which DHS cannot collect DNA samples from certain persons arrested on criminal charges as part of the normal booking process, that would not eliminate the need to take a DNA sample from an individual in the affected class. Arrangements would need to be made to take a DNA sample at a later point, either by DHS or by some other agency, and participation by the Department of Justice may be needed to effect or facilitate such later collection. The matter also impacts on litigation, since persons arrested on criminal charges must be promptly brought before a judicial officer, and when that occurs, cooperation in DNA sample collection comes into play as a mandatory condition of their pretrial release if a sample has not previously been collected. See Fed. R. Crim. P. 5(a); 18 U.S.C. 3142(b), (c)(1)(A). Hence, to ensure proper coordination in such situations and consistent collection of DNA samples as the law and the rule require, I think it best to reserve the authority to allow exceptions for persons arrested on criminal charges to the Department of Justice.

Finally, your letter states that DHS intends to pursue discussions with USMS to seek agreements for USMS to collect DNA samples from DHS arrestees in certain circumstances, and that you "may consider requesting additional exceptions to address these circumstances" if satisfactory agreements are not reached.

The current DNA policy requires that DNA regularly be taken from arrestees in booking, generally on the same footing as fingerprinting. See 73 FR at 74933-34. The Department of Justice is assisting in many ways to ensure that this policy is fully and consistently carried out, including the provision of DNA sample collection kits, as well as detailed instruction and guidance to complete the sample collection process. Generally, our assistance does not involve directly carrying out DNA sample collection for other agencies, which are responsible for collecting DNA from their arrestees and cannot transfer that responsibility to USMS unless USMS agrees to assume it. See 73 FR at 74935. This follows the principle that arresting agencies are responsible for booking their own arrestees, a principle not changed by expansion of the identification information taken in booking now to include DNA as well as fingerprints. However, we understand there may be situations in which USMS offices may voluntarily assume or assist in booking individuals arrested by other agencies, such as in exigent circumstances in which the arresting officers would not otherwise have access to booking facilities. In such cases, the assistance provided by USMS in carrying out the booking will include assistance in DNA sample collection.

In closing, I again commend DHS for its efforts in carrying out this important reform, which offers great benefits to law enforcement and public safety. Please do not