

City of Houston Inspector General Releases Report on Anonymous Complaint Filed Against Houston Forensic Science Center

June 10, 2016

FOR IMMEDIATE RELEASE

Following its investigation of an anonymous, 92-page complaint filed with the Texas Forensic Science Commission against the Houston Forensic Science Center, the City of Houston's Office of Inspector General has determined that the complaint's allegations are either inappropriate for investigation, unfounded, or do not present evidence of fraud.

The OIG issued its report (included) on June 9, 2016. Although attorney-client privilege protects the report from disclosure, HFSC has waived the privilege so that the report may be made available to the public and to the Texas Forensic Science Commission, the agency that regulates all forensic laboratories in Texas.

The complaint, filed with the Commission on or about April 1, 2016, focuses on HFSC's Toxicology Section, which provides analyses of blood alcohol for use in criminal proceedings such as charges of driving while intoxicated. Pursuant to the interlocal agreement between HFSC and the City of Houston, Daniel D. Garner, HFSC's chief executive officer, promptly asked the inspector general to investigate the complaint's allegations.

Although the OIG observed that portions of the complaint concern matters that "do not lend themselves to meaningful investigation" (for example, "whether something written on two pages should have been placed in a separate form"), the OIG did discern six allegations worthy of investigation.

Allegation No. 1 was that Toxicology erroneously used an operating procedure to determine the frequency of calibration/performance checks of certain equipment, when

the correct frequency was stated in the Center's Quality Manual. The OIG found that Toxicology had followed the wrong standard but noted that the error "had no substantive effect on ... test results" and that HFSC had remedied the discrepancy. In light of these circumstances, the inspector general made "no further recommendations."

Allegation No. 2 was that, although an April 2015 internal audit by HFSC identified the discrepancy described in Allegation No. 1, the Toxicology Section did not begin performing the calibration/performance checks at the required interval until July 2015. The OIG concluded that Allegation No. 2 was "unfounded."

Allegation No. 3 again focused on the discrepancy described in Allegation No. 1, asserting that HFSC should have reported the error to the Commission. As a result of her office's investigation, the inspector general recommended revisions in terminology used in HFSC's internal audits and in procedures for posting information at the Center's discovery website. The OIG, however, "[did] not sustain the allegation that [the discrepancy] required disclosure" to the Commission.

Allegation No. 4 asserted that in the fall of 2014 an HFSC analyst "made a 'questionable' entry on an HFSC Reagent Preparation Worksheet" The OIG "found insufficient evidence" to discredit the analyst's version of events and declined to sustain "the complaint's implication of fraud."

Allegation No. 5 accused an HFSC analyst of incorrectly documenting a pipette performance verification check in January 2015. The OIG determined, however, that the complainant had conflated two maintenance standards and that the analyst's documentation was correct. Accordingly, the OIG found Allegation No. 5 to be "unfounded" and made no recommendations.

Finally, in **Allegation No. 6** the complainant objected to an HFSC analyst's failure to upload a July 2014 "Analytical Balance Performance Check form" to the Center's discovery website with sufficient promptness. Noting the analyst's candid

acknowledgement of the error, the inspector general sustained the allegation but “found insufficient evidence to support the complaint’s implication of fraud.”

Peter Stout, the Center’s chief operating officer, observed that during the past year the Toxicology Section has replaced equipment, updated methods, and revised record keeping procedures, improvements that HFSC will continue during the remainder of 2016. Stout said HFSC will offer the OIG’s report for consideration by the Commission and thanked the inspector general and her staff for their careful investigation, observing that their task “must have been made more difficult by the complainant’s refusal to identify herself or himself.” Stout also thanked HFSC’s Quality Division for having detected and remedied several irregularities described in the complaint.

HFSC is a local government corporation that provides forensic services to the City of Houston and other local agencies. HFSC is overseen by a Board of Directors appointed by the Mayor of Houston and confirmed by the Houston City Council. Its management structure is responsive to a 2009 report by the National Academy of Sciences that called for crime laboratories to be independent of law enforcement and prosecutorial branches of government. HFSC currently operates in nine forensic disciplines.

CONTACT INFORMATION:

Ramit Plushnick-Masti

Public Information Officer

media@houstonforensicscience.org

<http://www.houstonforensicscience.org/>

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CITY OF HOUSTON

INTER OFFICE CORRESPONDENCE

DATE: June 9, 2016

SUBJECT: **Houston Forensic Science Center
OIG#111160089
(Forensic Analyst #1, Forensic Analyst #2,
and Section Supervisor)**

CONFIDENTIAL ATTORNEY – CLIENT COMMUNICATION/WORK PRODUCT

OFFICE OF INSPECTOR GENERAL REPORT

This Office of Inspector General (OIG) Report responds to an anonymous complaint filed with the Texas Forensic Science Commission (TFSC) against the Houston Forensic Science Center (HFSC) for documentation issues. Specifically mentioned in the complaint are Forensic Analyst #1, Forensic Analyst #2, and Section Supervisor. OIG determined that Forensic Analyst #3 actually prepared one of the documents that the complaint mistakenly identified as having been prepared by Forensic Analyst #1.

A number of the complaints are simply disagreements about how an employee testified in a particular case or a generality about whether something on two pages should be accumulated onto a separate form, which do not lend themselves to meaningful investigation. Therefore, OIG investigated the matters the complaint specifically alleged and provides its findings below.

Allegation No. 1

- (1) During 2014 and 2015, when the eDiscovery website showed no corrective actions or deviations, the Toxicology Section failed to comply with the section of its Quality Manual which states: "Balances undergo annual calibration by an external vendor. Documentation of calibration is kept by the Center. In addition to the annual calibration, sectional personnel complete a calibration/performance check at least monthly. When the use of a balance is infrequent performance checks are not required each month; however a check will be performed prior to use."

Findings and Recommendations on Allegation No. 1

Quality Manuals issued as far back as February 1, 2014 require balance checks of the analytical balance and the top-loading balance on a monthly basis. However, the Toxicology SOP Manual provided for quarterly balance checks, a less frequent standard than the Quality Manual. Toxicology staff followed the SOP Manual quarterly standard, rather than the monthly Quality Manual standard. In fact, Section Supervisor, in court testimony dated July 21, 2015, initially incorrectly stated that “section SOP tops the quality manual” but corrected herself on cross-examination. The root cause of the issue is the difference between these two manuals. However, the less-frequent balance checks are adequate for accuracy because:

- (1) if the quarterly checks did not meet the specifications, the balance would be removed from service awaiting recalibration by the outside vendor;
- (2) the balances are not used for critical measure and do not directly associate with the test results;
- (3) the use of multiple quality control samples with every analysis, where control samples have known drug concentrations, demonstrates whether a test has been performed correctly; and
- (4) with the making of each new solution, the lab conducts a verification evaluating whether performance of the new solution is comparable with the performance of the existing solution.

The Quality Division audit correctly caught the issue in its April 22, 2015 audit and Section Supervisor issued the Corrective Action less than two weeks later on May 5, 2015, before this complaint was filed. Therefore, like the internal audit, OIG sustains that for the period February 1, 2014 through May 5, 2015, the Toxicology staff followed the standard from the wrong manual, though it had no substantive effect on the test results. HFSC has already remedied the difference between the manuals, and OIG makes no further recommendations.

Allegation No. 2

- (2) Although HFSC caught the timeliness issue of the checks in an April 2015 internal audit “it wasn’t until July 2015 that the section began performing the balance checks at the required interval.”

Findings and Recommendations on Allegation No. 2

OIG finds this allegation unfounded based on the Corrective Actions by Section Supervisor and Senior Forensic Analyst dated May 5-6, 2015.

Allegation No. 3

- (3) The non-conformance on the part of the toxicology section in conducting and documenting balance checks constitute “an act or error or omission that has affected the accuracy, reliability, and or integrity of the HFSC’s testing or evidence examination reports,” requiring root-cause analysis, disclosure in discovery and disclosure to the Texas Forensic Science Commission (TFSC).

Findings and Recommendations on Allegation No. 3

The TFSC requires all forensic crime labs to report professional negligence or professional misconduct to the TFSC. Tex. Code. Crim. Proc. 38.01. According to TFSC, “professional misconduct” means:

the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of forensic analysis that an ordinary forensic professional or entity would have exercised, and the deliberate act or omission would substantially affect the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice for a forensic analysis.

“Professional negligence” as defined by TFSC means:

the actor, through a material act or omission, failed to follow the standard of practice generally accepted at the time of forensic analysis that an ordinary forensic professional or entity would have exercised, and the negligent act or omission would substantially affect the integrity of the results of the forensic analysis. An act or omission was negligent if the actor should have been but was not aware of an accepted standard or practice required for a forensic analysis.

TFSC also provides guidelines on when to report an irregularity that may rise to the level of professional negligence or misconduct--a category TFSC describes as “Significant Irregularity in the Laboratory.”

Please note that the outcome of any particular criminal case should not be a consideration in your decision regarding whether to disclose an issue to the Commission. You should disclose any significant laboratory irregularity regardless of the criminal case outcome and regardless of whether the quality controls in the laboratory caught the issue of concern before a final report was issued to the customer. When using the term “significant irregularity,” we refer to facts that, if true, would indicate the existence of negligence or misconduct such that the integrity of the forensic examination, the individual forensic examiner, or the laboratory as a whole would be called into question.

TFSC's new proposed guidelines also provide:

The Code of Criminal Procedure also requires crime laboratories to expressly disclose professional misconduct and professional negligence to the Commission. This self-disclosure requirement applies to the following categories:

[...]Professional negligence, but only in situations where:

- a. Such negligence *was not identified and remediated* by the laboratory *before* making findings or conclusions related to the forensic analysis available to external entities, such as the submitting agency or attorneys;
- b. The professional negligence is part of a repeat pattern of behavior that raises questions about the competency and integrity of the examiner, manager or laboratory as a whole.
- c. The professional negligence required the laboratory to adopt remedial measures in the context of a failed proficiency, competency or other test designed to assess the quality and consistency of analytical work.

To reiterate, for cases in which an individual makes a mistake and fails to follow the generally accepted standard of practice but the mistake is identified and corrected by the laboratory's quality system before analytical findings or conclusions are made available to external entities, notification is not required aside from any normal accreditation communications...

Quality Director reported that her audit findings did not rise to the level of professional negligence or professional misconduct." Because the audit findings are normal-course matters that do not indicate the existence of "professional negligence" or "professional misconduct" such that the integrity of the forensic examination, the individual forensic examiner, or the laboratory as a whole would be called into question, OIG does not sustain the allegation that it required disclosure to the TFSC.

Quality Director also made a distinction between matters discovered and corrected through her internal audits and matters discovered as personnel errors. She reported:

Those documents are kept in the Quality Division as part of the internal audit records. We don't keep them as part of corrective action records. We chose to use the [Corrective Action] form to document the actions to become compliant [with the audit finding]. This April 2015 audit was the first time we had used the Corrective Action forms to report a non-conformance associated with an internal audit. We would normally just do a memo response because with an audit the purpose is to gauge compliance to policies, procedures, or accreditation standards. So when you address the non-conformance in an

**Robin E. Curtis, Inspector General
OIG Report #1111600089**

audit you are looking to come into compliance. When I think of a corrective action associated with an internal audit it is not the same as a corrective action where you are looking to determine what caused that in the first place. The purpose of the corrective action is to make sure something doesn't happen again. With an audit we are trying to get us into compliance with either our policies or accreditation standards. In my opinion that is why those would look different to you. These are handwritten. There is no cause analysis. It is a way to document the action taken to correct the actions highlighted on your copy of the audit.

Quality Director did not realize until the OIG investigation that her April 2015 audit report had been uploaded by an unknown person to the eDiscovery site. Similarly, she did not know that the unknown person who uploaded the audit report did not upload the paperwork addressing the audit findings. As of June 5, 2016, the eDiscovery site remains in that holding pattern. If internal audit reports and paperwork addressing those audit findings are responsive to a discovery request and not subject to a privilege, they should be produced. OIG recommends that HFSC perform the necessary review and if responsive and not privileged upload the Corrective Actions to the eDiscovery website. In addition, where audit responses are substantively different than "Corrective Actions" used as a term of art, OIG recommends HFSC use a different form or method with a different name.

Allegation No. 4

- (4) Forensic Analyst #3 made a "questionable" entry on an HFSC Reagent Preparation Worksheet showing that she performed an n-propanol preparation on September 24, 2014, but she documented it on a form that did not exist until October 6, 2014.

Findings and Recommendations on Allegation No. 4

Forensic Analyst #3 explained that she performed the test on the date indicated [September 24, 2014] and recorded it in very poor handwriting on the form that existed at the time. She stated that when the new form was issued on October 6, 2014 it allowed for typewritten entries to be made. She stated that because of the "sloppiness" of her handwriting she went back and typed the information onto the new form, but did not keep the "sloppy" version. Asked if she had discussed this with Forensic Analyst #3, Section Supervisor stated: "I think we both kind of came to the conclusion that she probably just didn't fill out the form at the time, ...I just remember hearing her say that she probably just made it at a different time and then filled out the form, but I don't know if she had it on paper written down." OIG found insufficient evidence to discredit this report and, therefore, does not sustain the complaint's implication of fraud.

Allegation No. 5

- (5) Forensic Analyst #1 documented a Pipette Performance Verification Check for balance number 1782 on January 9, 2015 showing that the next verification date would not be due until July 2015, impliedly in violation of the balance check standard.

Findings and Recommendations on Allegation No. 5

This allegation incorrectly implies that the pipette verification and maintenance standard is the same as for the balances. The SOP Manual (Section 9) required two verification checks a year for pipettes--one internal and one external. The external calibration occurred in March 2015. The next internal check was scheduled for July 2015 as indicated. OIG finds this allegation unfounded and makes no recommendations.

Allegation No. 6

- (6) Forensic Analyst #2 prepared an Analytical Balance Performance Check form dated July 11, 2014, but the entry only appeared when the document was uploaded to the website and not in response to discovery orders before the upload.

Findings and Recommendations on Allegation No. 6

OIG sustains this allegation based on Forensic Analyst #2 admission that she made a mistake in not scanning the document and uploading it to the eDiscovery website after performing the check. OIG found insufficient evidence to support the complaint's implication of fraud.

Please feel free to call if you have questions or need additional information.

A handwritten signature in blue ink, appearing to read 'R. E. Curtis', is written over a horizontal line.

Robin E. Curtis, Inspector General
Office of Inspector General