



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 080
TRENTON, NJ 08625-0080

JOHN J. HOFFMAN
Acting Attorney General

TO: Elie Honig, Director, Division of Criminal Justice

All County Prosecutors

Colonel Joseph R. Fuentes, Superintendent, New Jersey State Police

All County Sheriffs

All Law Enforcement Chief Executives

FROM: John J. Hoffman, Acting Attorney General

DATE: July 10, 2014

SUBJECT: Directive Revising Procedures for Retaining Sexual Assault Forensic Evidence (SAFE) "Hold" Kits and Extending the Time for Victims to Decide Whether to Report the Crime and Release Collected Forensic Evidence to Law Enforcement Authorities

1. Introduction and Background.

The Attorney General Standards for Providing Services to Victims of Sexual Assault (hereinafter: "Standards") define and safeguard the rights of sexual assault victims, including the right to a timely medical examination to identify injuries and collect forensic evidence. The Standards also recognize a victim's right to decide whether to report the crime to law enforcement authorities and whether forensic evidence collected by healthcare professionals will be released to police and/or prosecutors.¹ This Directive applies only in the limited circumstances in which a victim has yet to decide whether or not to report the crime to law enforcement.

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The information provided by the victim to a sexual assault nurse examiner or other healthcare professional conducting the examination does not constitute a report to law enforcement, and nothing in this Directive shall be construed in any way to affect the confidentiality of information provided by the victim to the nurse examiner or other healthcare professional as part of the examination process.



Pursuant to the Standards, physical evidence collected during the medical examination process is placed in sexual assault forensic evidence (SAFE) kits. These kits are referred to as “hold” kits when the physical evidence has not yet been provided to police and/or prosecutors pending the victim’s decision to report the crime to law enforcement authorities. Standard No. 4 requires that such hold kits be kept for a minimum of 90 days to permit the victim to change her or his mind about reporting the crime and releasing the evidence to law enforcement. The Attorney General Guidelines for the Retention of Evidence² (hereinafter: Evidence Retention Guidelines) likewise require that SAFE hold kits be retained for a minimum of 90 days after collection.³

The Division of Criminal Justice recently conducted a survey of local evidence retention policies and practices across the State. The survey showed that at least seven county prosecutors require that SAFE hold kits be retained for longer than the 90-day minimum set forth in the current Standards and Evidence Retention Guidelines. Even in counties that have adopted a 90-day retention policy, the survey revealed that SAFE hold kits are not automatically destroyed at the expiration of the minimum retention period and often are kept for a longer period of time than the minimum retention period that had been explained to the victim at the time the evidence was collected.⁴

Retaining hold kits beyond the current 90-day minimum period is consistent with the best practices recommended by sexual assault victim advocates. For example, in a May 2013 report, “The Earthquake in Sexual Assault Response: Implementing VAWA Forensic Compliance,” the End Violence Against Women International organization reasoned that, “...it would defeat the purpose of the forensic compliance provisions if it [evidence] were not held long enough to give victims time to make a decision regarding criminal justice participation.”

The current statewide Standard acknowledges that sex crime victims may change their minds about whether to participate in a prosecution. Victims should be afforded more than 90 days to make

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The Evidence Retention Guidelines were promulgated pursuant to Attorney General Law Enforcement Directive No. 2011-1.

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Section 2(e) of the current Evidence Retention Guidelines provides that:

In cases where the victim has signed a waiver of prosecution, has not contacted the police/prosecutor’s office indicating a desire to pursue a prosecution, or has reported as a “Jane Doe” pursuant to the *Standards for Providing Services to Victims of Sexual Assault*, the evidence shall not be authorized for destruction for a minimum of 90 days from the date of the collection of said evidence.

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Standard No. 4 provides that, “[t]he victim will be apprised of county policy regarding time frames for the storage and possible destruction of evidence.”

that difficult decision before forensic evidence may be destroyed. In the event that a victim subsequently decides to report the crime to law enforcement and assist in the prosecution, prosecutors should have the flexibility to decide on a case-by-case basis whether to initiate a prosecution, considering all relevant circumstances, including the likelihood of obtaining a conviction, the interests of justice and public protection, and the rights of both the victim and the defendant(s). The option to prosecute a sex offender should not be foreclosed because relevant inculpatory or exculpatory evidence was destroyed based on the victim's initial reticence to report the crime to law enforcement.

Accordingly, both the Attorney General Standards and Evidence Retention Guidelines should be amended to afford victims more time to decide whether to report the crime to law enforcement. Specifically, the minimum period for retaining SAFE hold kits will be increased to 5 years from the date the evidence was collected, or, in the case of a minor victim, 5 years from the date on which the victim turns 18 years of age.

2. Specific Revisions to the Attorney General Standards for Providing Services to Victims of Sexual Assaults.

a. *Minimum retention period.*

The Standards hereby are amended to provide that where the crime has not been reported to law enforcement or the collected evidence has not otherwise been released by the victim to law enforcement, except as provided pursuant to section (b) of this section, the SAFE collection kit shall be retained for not less than 5 years, and where the victim is a minor, for not less than 5 years after the victim reaches the age of 18. Where, after expiration of the 5-year period, the prosecutor determines to destroy the kit, the prosecutor shall notify the Director of the Division of Criminal Justice, or his designee, to provide the Division the opportunity to take custody of the kit and assume responsibility for its continued retention.

b. *Consent to contact victim about evidence destruction.*

The healthcare provider conducting the examination shall ask the victim whether the victim wants to be notified at or near the expiration of the 5-year minimum retention period, and/or at any other time(s), and if so, the preferred method of contact to ensure confidentiality (*e.g.*, by phone, regular mail, text/email, etc., with explicit instructions on how to ensure that no one other than the victim is alerted to the communication). If the victim at any time notifies the provider that she/he does not wish to receive further communications, the victim's decision to avoid further contact shall be respected. If the victim indicates that she or he wants to be notified prior to the destruction of evidence, notwithstanding any other provision of this Directive, the kit shall not be destroyed unless reasonable efforts have been made to contact the victim to determine whether the victim has changed her or his mind with respect to participating in a prosecution.

3. Specific Revisions to the Evidence Retention Guidelines.

Section 2(e) of the Evidence Retention Guidelines is hereby deleted and replaced with the following paragraphs:

In cases where a prosecution for sexual assault has not been initiated because the victim has signed a waiver of prosecution, has not contacted the police/prosecutor's office indicating a desire to pursue a prosecution, or has reported as a "Jane Doe" pursuant to the *Standards for Providing Services to Victims of Sexual Assault*, the evidence shall not be authorized for destruction for a minimum of 5 years from the date of the collection of the evidence, except that if the victim was a minor at the time of collection, a SAFE collection kit shall be retained for not less than 5 years after the victim reaches the age of 18. In addition, where the victim had indicated that she or he wants to be notified prior to the destruction of the evidence, such evidence shall not be authorized for destruction unless reasonable efforts have been made to notify the victim to provide the victim an opportunity to re-affirm that she or he does not want to participate in the prosecution.

Only the County Prosecutor or the Director of the Division of Criminal Justice, or their designees, may authorize the destruction of this evidence. Where, after the expiration of the 5-year period, the prosecutor determines to destroy the kit, the prosecutor first shall notify the Director of the Division of Criminal Justice, or his designee, to provide the Division the opportunity to take custody of the kit and assume responsibility for its continued retention. If the Director, or his designee, elects to take custody of the kit, the prosecutor shall arrange for its transfer to the Division along with information concerning the identity and contact information of the nurse examiner or other person who had been in contact with the victim. In addition, the prosecutor shall notify the nurse examiner or other person that the hold kit has been transferred to and will be retained by the Division of Criminal Justice in the event that the victim changes her or his mind with respect to participating in a prosecution.

4. Scope of Directive.

This Directive applies only to SAFE "hold" kits where the victim has not reported the crime to law enforcement authorities or otherwise authorized the release of the SAFE kit to law enforcement authorities. In cases where the crime has been reported by the victim and the kit has been released to law enforcement authorities, the evidence therein shall be maintained in accordance with the rules and procedures governing the retention of evidence in a criminal investigation and prosecution. No provision of this Directive shall be construed in any way to amend Section 2(d) of the Evidence Retention Guidelines, which requires indefinite retention of evidence where a DNA profile has been obtained and submitted to CODIS.

5. Prosecutors Authority to Extend the Evidence Retention Period.

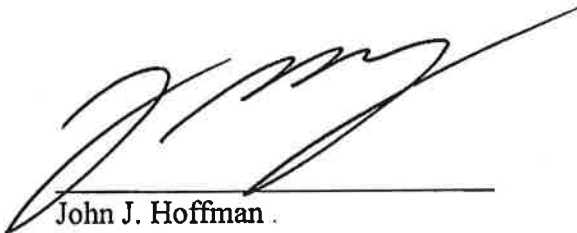
Nothing in this Directive shall be construed in any way to require or encourage a County Prosecutor to destroy a SAFE hold kit at the expiration of the minimum 5-year retention period. Nor shall this Directive be construed to limit the authority of a County Prosecutor to establish within his or her county a longer evidence retention period than that provided for SAFE hold kits under Section 3 of this Directive.

6. Effective Date and Retention of Evidence Collected Before Effective Date.

This Directive shall take effect immediately and remain in force and effect until revised or repealed by Order of the Attorney General. Any SAFE hold kit stored at the time this Directive takes effect shall not be authorized for destruction prior to the expiration of at least 5 years from the time the evidence was collected.

7. Questions.

Any questions concerning this Directive, the revisions to the Standards for Providing Services to Victims of Sexual Assault, and/or the revisions to Attorney General Law Enforcement Directive 2011-1 and the Evidence Retention Guidelines shall be addressed to the Director of the Division of Criminal Justice, or his designee.



John J. Hoffman
Acting Attorney General

DATED: July 10, 2014