

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 673 DNA Evidence Collected in Sexual Offense Investigations

SPONSOR(S): Criminal Justice & Public Safety Subcommittee, Slosberg and others

TIED BILLS: IDEN./SIM. **BILLS:** SB 1002

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	17 Y, 0 N, As CS	Frost	Hall
2) Justice Appropriations Subcommittee	14 Y, 0 N	Jones	Keith
3) Judiciary Committee		Frost	Kramer

SUMMARY ANALYSIS

A sexual assault kit (SAK), sometimes referred to as a “rape kit,” is the medical kit used to collect evidence from the body and clothing of a victim of a sexual offense during a forensic physical examination. A SAK is submitted by a law enforcement agency to a crime laboratory for DNA analysis and resulting DNA profiles are uploaded to local, state, and federal DNA databases to attempt to identify the perpetrator.

In September 2019, FDLE completed processing a backlog of 8,023 untested SAKs, resulting in 1,814 Combined DNA Index System (CODIS) matches. Prior to 2016, Florida did not provide uniform requirements for testing SAKs. To prevent a further backlog, the Legislature created s. 943.326, F.S., which requires:

- A reporting victim’s SAK to be submitted for testing within 30 days after it is received by a law enforcement agency, or a victim or his or her representative requests that the evidence be tested.
- An FDLE or regional county laboratory to process evidence from a SAK only if there is an accompanying law enforcement report. SAKs from non-reporting victims must not be tested unless a victim later determines he or she would like to report the offense.
- SAK testing to be completed no later than 120 days after it is submitted to a laboratory.
- A collected SAK to be retained in a secure, environmentally safe manner until the prosecuting agency approves the kit’s destruction.
- The victim, or his or her representative, must be informed of the purpose of testing and of his or her right to demand testing.

While Florida law enforcement agencies and laboratories may internally track the progress of SAK testing, Florida does not currently provide any tracking mechanism that provides access to a victim and other entities.

CS/HB 673 creates “Gail’s Law” to require FDLE, subject to an appropriation and no later than July 1, 2023, to create and maintain a statewide database tracking the location, processing status, and storage of SAKs. The database must be accessible by law enforcement, alleged victims, and alleged victims’ parents, guardians, or other representatives. The database must track the status of a SAK from its collection throughout the criminal justice process all the way through the kit’s destruction. The bill requires FDLE to adopt rules and that specified entities must participate in the database in accordance with those rules. The bill also requires FDLE to ensure that every victim or victim’s representative is notified that the database exists and is provided with instructions on how to use it.

Under the bill, a victim must be notified when the analysis of his or her SAK results in a DNA match, but such notification must not release any identifying information of the match. Such notification may only be delayed up to 180 days if notifying the required persons would negatively affect an investigation. The bill authorizes FDLE to phase in participation according to region, volume of kits, and other criteria, but all entities in the chain of custody must fully participate in the statewide database no later than one year after it is created.

The bill may have a significant negative fiscal impact on FDLE by requiring a statewide SAK tracking database to be completed by July 1, 2023. See *Fiscal Analysis & Economic Impact Statement*.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In Florida, a victim of certain sexual offenses may have a forensic physical examination conducted by a healthcare provider for free, regardless of whether the victim reports the offense to law enforcement.¹ A sexual assault kit (SAK), sometimes referred to as a “rape kit,” is a medical kit used to collect evidence from a sexual assault victim’s body and clothing during a forensic physical examination. A SAK typically contains standardized items including swabs, tubes, glass slides, containers, and plastic bags used to collect and preserve bodily fluids, hair, and fibers that may contain the perpetrator’s DNA or other forensic evidence.² SAKs are submitted by law enforcement agencies to crime laboratories for DNA analysis and resulting DNA profiles are uploaded to local, state, and federal DNA databases to determine whether a match identifying the perpetrator can be made.

According to protocols developed by the Department of Legal Affairs (DLA), healthcare providers conducting a forensic physical examination should complete a Sexual Assault Kit Form for Healthcare Providers (SAK form).³ The SAK form includes an exam consent form that requires the victim or his or her legal guardian to indicate that he or she consents to a forensic physical examination for the preservation of evidence of a sexual offense. DLA protocols provide instructions for sealing the SAK once a victim’s exam is complete and requires that the SAK must stay with the examiner or secured in a locked area with limited access and proper chain of custody procedures until transferred to the proper law enforcement agency.⁴

Previous SAK Backlog

Investigative reporting in the 2000’s revealed that large cities like New York and Los Angeles, among others held large numbers of SAKs that were never submitted to a laboratory for DNA testing.⁵ Florida was among the states with a significant SAK backlog. In response, in 2015, the Legislature allocated \$300,000 to the Florida Department of Law Enforcement (FDLE) to conduct a statewide assessment of untested SAKs, including those that were not yet submitted for analysis.

In January 2016, FDLE reported its findings and began a three-year plan to remedy the backlog of untested SAKs. In September 2019, FDLE completed the three-year project to process untested SAKs submitted by local law enforcement agencies to an FDLE laboratory. In total, 8,023 SAKs were processed, resulting in 1,814 Combined DNA Index System (CODIS) hits. CODIS enables federal, state and local agencies to compare DNA profiles electronically, linking crimes to each other and known offenders.⁶

¹ S. 960.28, F.S.

² The White House, Office of the Press Secretary, *Fact Sheet: Investments to Reduce The National Rape Kit Backlog And Combat Violence Against Women*, (Mar. 16, 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/03/16/fact-sheet-investments-reduce-national-rape-kit-backlog-and-combat-viole> (last visited Apr. 1, 2021).

³ Florida Department of Legal Affairs, Division of Victim Services and Criminal Justice Programs, *Adult and Child Sexual Assault Protocols: Initial Forensic Physical Examination*, (Apr. 2015), pp. 12-13, [https://myfloridalegal.com/webfiles.nsf/WF/JFAO-77TKCT/\\$file/ACSP.pdf](https://myfloridalegal.com/webfiles.nsf/WF/JFAO-77TKCT/$file/ACSP.pdf); Florida Council Against Sexual Violence, *Sexual Assault Nurse Examiner Program Guidance Document, Forensic Exam: Evidence Collection*; (May 29, 2018) <https://www.fcasv.org/sites/default/files/Evidence%20Collection%20Guidance%20Document%205.29.18%20%20FINAL.docx.pdf>; Florida Department of Law Enforcement, *Sexual Assault/Forensic/Medical Exam*, <http://www.fdle.state.fl.us/Documents/SAEKrev5.aspx> (last visited Apr. 1, 2021).

⁴ *Id.* at pp. 20-21. See also Florida Department of Law Enforcement, *Crime Laboratory Evidence Submission Manual*, (Mar. 2020), p. 15, <https://www.fdle.state.fl.us/Forensics/Documents/2020-ESM> (last visited Apr. 1, 2021).

⁵ Madeleine Carlisle, *A New System to Ensure Sexual-Assault Cases Aren’t Forgotten*, *The Atlantic*, (Apr. 7, 2019) <https://www.theatlantic.com/politics/archive/2019/04/many-states-are-adopting-rape-kit-tracking-systems/586531/> (last visited Apr. 1, 2021).

⁶ FBI, *Frequently Asked Questions on CODIS and NDIS*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Apr. 1, 2021).

SAK Submission and Testing

Prior to 2016, Florida did not set statewide standards or expectations for submitting SAKs, and the decision to submit a SAK rested solely with local law enforcement agencies.⁷ To prevent a further backlog of untested SAKs, in 2016, the Legislature created standardized protocols for collecting, testing, storing, and ultimately destroying SAKs.⁸ Under s. 943.326, F.S.:

- A SAK from a reporting victim, received by an agency on or after July 1, 2016, must be submitted to the statewide criminal analysis laboratory system for forensic testing within 30 days after the evidence is received by a law enforcement agency, or within 30 days after the victim or his or her parent, guardian, or representative requests that the evidence be tested.
- An FDLE or regional county laboratory may only process evidence from a SAK if there is an accompanying law enforcement report. SAKs from non-reporting victims⁹ will not be tested unless a victim later reports the offense or requests such testing.
- SAK testing must be completed no later than 120 days after it is submitted to a member of the statewide criminal analysis laboratory system.¹⁰
- A collected SAK must be retained in a secure, environmentally safe manner until the agency prosecuting the associated offense approves the kit's destruction.
- A victim, or his or her representative, must be informed of the purpose of testing and of his or her right to demand testing by either the medical provider conducting the forensic physical examination, or if no SAK is collected or the SAK provides no results,¹¹ by a law enforcement agency that collects the other DNA evidence associated with the offense.¹²

Generally, law enforcement agencies in Florida submit SAKs for DNA testing to the statewide criminal analysis laboratory system, which consists of six laboratories operated by FDLE in Ft. Myers, Jacksonville, Pensacola, Orlando, Tallahassee, and Tampa and five local laboratories in Broward, Indian River, Miami-Dade, Palm Beach, and Pinellas Counties.¹³

The state crime laboratories perform DNA testing on evidence received from a law enforcement agency, comparing the SAK or crime scene DNA evidence to known DNA samples. The DNA samples from the SAK or other crime scene evidence that do not match the victim's DNA may be attributed to the suspect.¹⁴ The suspect's DNA from the SAK or the crime scene may be submitted to the local, state or federal CODIS database to be searched against local, state, and national casework index files and convicted offender profiles, which may reveal the identity of the perpetrator.¹⁵

Statewide SAK Tracking Databases

⁷ *Id.* at pp. 2-3.

⁸ Ch. 2016-72, Laws of Fla.

⁹ A non-reporting victim is one who did not authorize reporting the assault to law enforcement, therefore no police or incident report exists. The medical provider will still carry out the complete forensic and medical examination and the evidence will be preserved and maintained in a manner that protects the identity of the victim. If the victim later chooses to file a report with law enforcement, he or she must sign a release authorizing the medical provider to make their identity known and the forensic examination record available to the law enforcement agency. According to FDLE protocols, testing a non-reporting victim's SAK would violate the confidentiality and privacy of the victim's health records under the Health Insurance Portability and Accountability Act (HIPAA). Florida Department of Law Enforcement, *Sexual Assault Kit Submissions Frequently Asked Questions*, p. 1, https://www.fdle.state.fl.us/Forensics/Documents/Sexual-Assault-Kit-FAQs-for-LEA_Final.aspx (last visited Apr. 1, 2021).

¹⁰ FDLE indicated it has complied with the 120-day requirement for the past three years, and the average completion time for SAK analyses is 85 days, with almost 100 percent compliance. Testing satisfies the statutory timeline when a member of the statewide criminal analysis laboratory system tests the contents of the SAK in an attempt to identify the foreign DNA attributable to a suspect. S. 943.326(4)(b), F.S.

¹¹ If no probative results are obtained from a victim's SAK, other evidence that may carry a suspect's DNA, such as a victim's clothing or bedding, may be accepted for laboratory analysis. Florida Department of Law Enforcement, *Crime Laboratory Evidence Submission Manual*, Mar. 2020, pp. 14-15, <https://www.fdle.state.fl.us/Forensics/Documents/2020-ESM> (last visited Apr. 1, 2021).

¹² S. 943.326, F.S.

¹³ S. 943.32, F.S.

¹⁴ *Id.*

¹⁵ *Id.*

In 2016, Idaho became the first state to create its own statewide SAK tracking system. Since then, Idaho has shared this system with other states for free.¹⁶ SAK tracking typically consists of a software program that provides for the upload of SAK location information by medical, law enforcement, and laboratory personnel. The database does not contain any personal identification information of a potential perpetrator, thereby allowing a sexual assault victim to monitor the progress of his or her SAK through the criminal justice system without compromising an investigation.

The tracking is typically accomplished by checking a randomly assigned bar code matching the bar code used to track the evidence by law enforcement and laboratories.¹⁷ Statewide tracking systems may provide a more comprehensive assessment of the total SAKs throughout a state by showing how many SAKs are in possession of a hospital, in law enforcement custody, or at a state laboratory either awaiting testing or being stored after testing. Currently, 30 states and Washington D.C. have implemented such a statewide tracking database.¹⁸

While Florida law enforcement agencies and laboratories may internally track the progress of SAK testing, Florida does not currently provide a tracking mechanism that provides continuing access to a victim or other entities.

Effect of Proposed Changes

CS/HB 673 amends s. 943.326, F.S., to create “Gail’s Law”¹⁹ to require FDLE, subject to an appropriation and no later than July 1, 2023, to create and maintain a statewide database to track the location, processing status, and storage of SAKs. The database must be accessible by:

- Law enforcement;
- An alleged victim; and
- An alleged victim’s parent, guardian, or legal representative, if the alleged victim is a minor, or an alleged victim’s personal representative if the alleged victim is deceased.

The database must track a SAK’s status throughout the criminal justice process, including the kit’s initial collection at a medical facility and all the way through the kit’s storage and eventual destruction. The bill requires FDLE to adopt rules and requires that law enforcement, medical facilities, crime laboratories, and any other facility that collects, receives, maintains, stores, or preserves SAKs must participate in the database, according to such rules.

The bill requires FDLE to notify every victim or his or her parent, guardian, or legal or personal representative that the database exists and to provide such individuals instructions on how to use the database. The bill also requires that a victim or his or her parent, guardian, or legal or personal representative be notified if the victim’s SAK testing results in a DNA match, but such notification must not release any genetic or other identifying information about the match. The required notification may only be delayed up to 180 days after the date the match is made, and may be delayed only if notification would negatively affect an investigation.

¹⁶ States that have not adopted Idaho’s tracking system have largely contracted with one of several companies providing services like around-the-clock technical support. Madeleine Carlisle, *A New System to Ensure Sexual-Assault Cases Aren’t Forgotten*, The Atlantic, (Apr. 7, 2019), <https://www.theatlantic.com/politics/archive/2019/04/many-states-are-adopting-rape-kit-tracking-systems/586531/>. See also Barbara Sprunt, *Virginia Launches Rape Kit Tracking System To Give Control Back To Survivors*, National Public Radio, WAMU 88.5, (Oct. 4, 2019), <https://www.npr.org/local/305/2019/10/04/767403524/virginia-launches-rape-kit-tracking-system-to-give-control-back-to-survivors>; Nicole Nixon, *Sexual Assault Survivors in California Could Track Their Rape Kit Online Under New Bill*, CapRadio, Feb. 2, 2021, <https://www.capradio.org/articles/2021/02/02/sexual-assault-survivors-in-california-could-track-their-rape-kit-online-under-new-bill/>; and Doug Richards, *New bill introduced in Georgia would create online registry to track rape kits*, 11alive.com, (Feb. 4, 2021) <https://www.11alive.com/article/news/politics/rape-kits-tracking-bill/85-ba8092be-0a65-4241-8d26-2182f38c420f> (last visited Apr. 1, 2021).

¹⁷ *Id.*

¹⁸ End the Backlog, *PILLAR: Create a Rape Kit Tracking System*, <https://www.endthebacklog.org/ending-backlog-our-approach-campaign-end-backlog-2020-end-backlog-goals/pillar-create-rape-kit> (last visited Apr. 1, 2021).

¹⁹ In 1998, Gail Gardner was raped inside her home in Orlando. Gail submitted to a forensic exam following her rape, but for nearly three decades received no answers regarding her attacker’s identity. Gail’s SAK was lost for years and may have been among the untested SAKs that were part of the previous backlog. In 2020, Gail’s SAK was finally located, tested, and revealed that her rapist was a man who was already in prison. Greg Fox, *Gail’s Law could provide tracking information for sexual assault kits for survivors*, WESH2, (Feb. 9, 2021) <https://www.wesh.com/article/gails-law/35465115#> (last visited Apr. 1, 2021).

The bill allows FDLE to phase in participation in the statewide database according to region, volume of kits, or other appropriate classification, but requires all entities in the chain of custody of a SAK to fully participate in the statewide database no later than one year after it is created.

The bill provides an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Provides that the bill may be cited as “Gail’s Law.”

Section 2: Amends s. 943.326, F.S., relating to DNA evidence collected in sexual offense investigations.

Section 3: Creates an unnumbered section of law specifying how FDLE may phase in participation in the statewide database.

Section 4: Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

FDLE indicates the bill may have a fiscal impact of \$932,266, of which \$824,476 is a recurring cost.²⁰

FDLE indicates this cost will include \$600,000 to purchase a commercial off-the-shelf product that can accommodate the state’s needs for a statewide SAK tracking database. FDLE estimates the recurring expenses to maintain the database will be \$500,000 plus an annual percentage increase. FDLE also indicates it will need \$150,000 annually to purchase 15,000 standardized SAKs, designed to include barcodes for tracking, and will need \$182,266, of which \$174,476 is recurring, for two FTE positions responsible for managing, training, and providing support on the new system.²¹

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None. The system should allow local agencies to input data into the system without the need for additional FTE positions or additional equipment.²²

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Although requirements of the bill specify that FDLE must create and maintain a statewide database to track location, processing status, and storage of SAKs, the implementation date is provided as no later than July 1, 2023 and is subject to appropriation. This provision would allow FDLE to further explore

²⁰ 2021 FDLE Legislative Bill Analysis of SB 1002, (Feb. 19, 2021) pp. 3-4.

²¹ *Id.*

²² *Id.*

other economical alternatives and address specific resource needs through the Legislative Budget Request process.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority the counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires FDLE to adopt rules for how specified entities must participate in the statewide SAK kit database. The bill provides FDLE with the authority to adopt such rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 22, 2021, the Criminal Justice and Public Safety Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment clarified that FDLE must adopt rules for how specified entities must participate in the statewide SAK kit database, and that such entities must participate in accordance with those rules.

This analysis is drafted to the committee substitute as passed by the Criminal Justice and Public Safety Subcommittee.