

A-Engrossed
Senate Bill 731

Ordered by the Senate March 29
Including Senate Amendments dated March 29

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Modifies obligation of custodian of evidence to preserve biological evidence related to certain crimes. Repeals sunset.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to deoxyribonucleic acid; creating new provisions; amending section 1, chapter 489, Oregon
3 Laws 2009; repealing sections 2 and 3, chapter 489, Oregon Laws 2009; and declaring an emer-
4 gency.

5 **Be It Enacted by the People of the State of Oregon:**

6 **SECTION 1.** Section 1, chapter 489, Oregon Laws 2009, is amended to read:

7 **Sec. 1.** (1) [*Except as provided in subsection (3) of this section,*] A custodian shall preserve bi-
8 ological evidence **in accordance with sections 2 to 6 of this 2011 Act if the evidence:**

9 (a) [*That*] Is collected as part of a criminal investigation into a covered offense; or

10 (b)[*(A) That*] **Is otherwise in the possession of the custodian and** reasonably may be used to
11 incriminate or exculpate any person for a covered offense[; *and*]

12 [*(B) That is in the possession of the custodian before any person is convicted of a covered*
13 *offense*].

14 (2) [*A custodian shall preserve biological evidence described in*] **When a custodian is required**
15 **to preserve biological evidence under** subsection (1) of this section, **the custodian shall preserve**
16 **the evidence** in an amount and manner that is sufficient to develop a DNA profile. **Except as**
17 **otherwise provided in sections 2 to 6 of this 2011 Act, the biological evidence must be pre-**
18 **served:**

19 (a) **If the covered offense is aggravated murder, murder, rape in the first degree, sodomy**
20 **in the first degree or unlawful sexual penetration in the first degree, for 60 years from the**
21 **date each person is convicted of the offense or until each person convicted of the offense has**
22 **died, whichever is earlier.**

23 (b) **If the covered offense is aggravated vehicular homicide, manslaughter in the first**
24 **degree or manslaughter in the second degree, until each person convicted of the offense has**
25 **served the person's sentence.**

26 (c) **If no person is convicted of the covered offense or the law enforcement agency in-**
27 **vestigating the covered offense closes the case for a reason other than the conviction of a**
28 **person, until the expiration of the statute of limitations.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 (3) A custodian is not required to preserve physical evidence solely because the physical evi-
 2 dence contains biological evidence if the physical evidence is of such a size, bulk or physical char-
 3 acter as to render retention impracticable. When the retention of physical evidence is impracticable,
 4 the custodian shall remove and preserve portions of the physical evidence likely to contain biolog-
 5 ical evidence in a quantity sufficient to permit future DNA testing before returning or disposing of
 6 the physical evidence.

7 [(4) *As used in this section:*]

8 [(a) *“Biological evidence” means a sample of an individual’s blood, semen, hair, saliva, skin tissue,*
 9 *fingernail scrapings, bone, bodily fluids or other identifiable biological material or an item that con-*
 10 *tains such material, whether the material or item is stored or cataloged separately or the material is*
 11 *present upon other evidence. “Biological evidence” includes the contents of a sexual assault forensic*
 12 *evidence kit.*]

13 [(b) *“Convicted” includes a finding of guilty or responsible except for insanity, or a finding that a*
 14 *person is within the jurisdiction of the juvenile court under ORS 419C.005.*]

15 [(c) *“Covered offense” means:*]

16 [(A) *Aggravated murder;*]

17 [(B) *Murder;*]

18 [(C) *Manslaughter in the first or second degree;*]

19 [(D) *Criminally negligent homicide;*]

20 [(E) *Aggravated vehicular homicide; or*]

21 [(F) *A sex crime listed in ORS 181.594.*]

22 [(d) *“Custodian” means a law enforcement agency as defined in ORS 131.550 or any other person*
 23 *or public body as defined in ORS 174.109 that is charged with the collection, storage or retrieval of*
 24 *biological evidence in connection with a criminal investigation or criminal prosecution. “Custodian”*
 25 *does not include a court.*]

26 [(e) *“DNA” means deoxyribonucleic acid.*]

27 [(f) *“DNA profile” means the unique identifier of an individual that is derived from DNA.*]

28 **(4) Upon the conclusion of any trial or hearing involving a covered offense, the court**
 29 **shall return any biological evidence in the possession of the court to the custodian respon-**
 30 **sible for preserving the biological evidence under sections 2 to 6 of this 2011 Act, unless the**
 31 **evidence was collected by the defense. If the evidence was collected by the defense, the court**
 32 **shall return the evidence to the attorney for the defendant.**

33 **(5) If a custodian is required to preserve biological evidence under sections 2 to 6 of this**
 34 **2011 Act and the custodian is unable to produce the evidence in a judicial proceeding, the**
 35 **individual to whom the custodian has delegated the duty to preserve the evidence shall pre-**
 36 **pare, sign and file with the court a sworn affidavit that indicates that the custodian is unable**
 37 **to produce the evidence and describes the efforts taken to locate the evidence.**

38 **(6) If a court finds that biological evidence was destroyed in violation of sections 2 to 6**
 39 **of this 2011 Act, the court, after determining whether the evidence was destroyed mali-**
 40 **ciously, may impose appropriate sanctions and order appropriate remedies. The court may**
 41 **not order the reversal of a conviction under this subsection on the sole grounds that the**
 42 **biological evidence is no longer available.**

43 **(7)(a) The Attorney General shall adopt rules establishing:**

44 **(A) Standards for the proper collection, retention, preservation and cataloging of biolog-**
 45 **ical evidence applicable to criminal investigations into, and criminal prosecutions for, cov-**

1 ered offenses; and

2 (B) A standard form for use by custodians in providing the written notice described in
3 section 3 (1) of this 2011 Act.

4 (b) The Attorney General shall consult with the Department of State Police and custo-
5 dians before adopting rules under this subsection.

6 **SECTION 2.** As used in sections 2 to 6 of this 2011 Act:

7 (1) "Biological evidence" means an individual's blood, semen, hair, saliva, skin tissue,
8 fingernail scrapings, bone, bodily fluids or other identified biological material. "Biological
9 evidence" includes the contents of a sexual assault forensic evidence kit.

10 (2) "Convicted" includes a finding of guilty or responsible except for insanity and a find-
11 ing that a person is within the jurisdiction of the juvenile court under ORS 419C.005.

12 (3) "Covered offense" means:

13 (a) Aggravated murder under ORS 163.095;

14 (b) Murder under ORS 163.115;

15 (c) Manslaughter in the first degree under ORS 163.118;

16 (d) Manslaughter in the second degree under ORS 163.125;

17 (e) Aggravated vehicular homicide under ORS 163.149;

18 (f) Rape in the first degree under ORS 163.375;

19 (g) Sodomy in the first degree under ORS 163.405; or

20 (h) Unlawful sexual penetration in the first degree under ORS 163.411.

21 (4) "Custodian" means a law enforcement agency as defined in ORS 131.550, or any other
22 person or public body as defined in ORS 174.109, that is charged with the collection, preser-
23 vation or retrieval of evidence in connection with a criminal investigation or criminal pros-
24 ecution. "Custodian" does not include a court.

25 (5) "DNA" means deoxyribonucleic acid.

26 (6) "DNA profile" means the unique identifier of an individual that is derived from DNA.

27 (7) "Sentence" means a term of incarceration in a correctional or juvenile detention fa-
28 cility, a period of probation, parole or post-prison supervision and the period of time during
29 which a person is under the jurisdiction of the Psychiatric Security Review Board.

30 (8) "Supervisory authority" has the meaning given that term in ORS 144.087.

31 (9) "Victim" has the meaning given that term in ORS 131.007.

32 **SECTION 3.** (1)(a) A custodian may seek to dispose of biological evidence before the pe-
33 riod of time specified in section 1 (2), chapter 489, Oregon Laws 2009, by providing written
34 notice, in the form developed under section 1 (7), chapter 489, Oregon Laws 2009, to the dis-
35 trict attorney having jurisdiction over the prosecution of the covered offense. Upon receipt
36 of the notice, the district attorney shall determine whether to object to the disposal of any
37 of the biological evidence identified in the custodian's notice.

38 (b) If the district attorney objects to the disposal of any of the biological evidence iden-
39 tified in the custodian's notice, the district attorney shall provide written notice of the ob-
40 jection to the custodian that identifies the biological evidence that the district attorney
41 determines must be preserved. The custodian shall preserve any biological evidence identified
42 by the district attorney in the notice until the period of time specified in section 1 (2),
43 chapter 489, Oregon Laws 2009, has elapsed.

44 (c) If the district attorney does not object to the disposal of all or a portion of the bi-
45 ological evidence identified in the custodian's notice, the district attorney shall provide

1 written notice of the intent to dispose of biological evidence, identifying the biological evi-
2 dence that the district attorney has determined may be disposed of, to:

- 3 (A) The defendant;
- 4 (B) The most recent attorney of record for the defendant; and
- 5 (C) The Department of Justice.

6 (2) If evidence that is subject to section 1, chapter 489, Oregon Laws 2009, is the property
7 of the victim, the victim may request that the district attorney determine whether the
8 property may be returned to the victim. The request must be in writing and must identify
9 the property that the victim seeks to have returned. If the district attorney:

10 (a) Objects to the return of any of the property to the victim, the district attorney shall
11 notify the victim of that determination.

12 (b) Does not object to the return of all or a portion of the property, the district attorney
13 shall provide written notice of the intent to dispose of biological evidence, identifying the
14 property the district attorney has determined may be returned, to:

- 15 (A) The victim;
- 16 (B) The defendant;
- 17 (C) The most recent attorney of record for the defendant; and
- 18 (D) The Department of Justice.

19 (3)(a) Not later than 120 days after the date the district attorney provides written notice
20 to the defendant under subsection (1)(c) or (2)(b) of this section, the defendant may file a
21 motion to preserve biological evidence in the convicting court. The defendant shall provide
22 a copy of the motion to the district attorney and the custodian. If the motion is timely filed,
23 the court shall enter an order as provided in section 4 of this 2011 Act.

24 (b) If the defendant fails to file a motion to preserve biological evidence before the expi-
25 ration of the 120-day period specified in paragraph (a) of this subsection, the district attorney
26 shall file with the court a copy of the notice of intent to dispose of biological evidence sent
27 to the defendant under subsection (1)(c) or (2)(b) of this section. Following the filing of the
28 notice, the court shall, without hearing, enter an order authorizing the disposal of the bi-
29 ological evidence described in the notice. The court shall provide a copy of the order to the
30 custodian, the district attorney and each person or entity described in subsection (1)(c) or
31 (2)(b) of this section, as applicable.

32 (c) The 120-day period specified in this subsection begins on the date the notice is mailed.

33 **SECTION 4.** (1) Upon receipt of a timely motion to preserve biological evidence under
34 section 3 (3) of this 2011 Act, the court shall:

- 35 (a) Conduct a hearing to resolve the motion; or
- 36 (b) Enter an order directing the custodian to preserve the biological evidence.

37 (2)(a) In determining whether to order the preservation of biological evidence, the court
38 shall consider, in addition to other factors the court considers appropriate, the following
39 factors:

- 40 (A) Whether the identification of the offender was a disputed issue;
- 41 (B) Whether other biological evidence in the case contains DNA in an amount that is
42 sufficient to develop a DNA profile and will not be disposed of;
- 43 (C) If the biological evidence has not previously been tested, whether it is possible to
44 perform testing on the biological evidence;
- 45 (D) Whether the defendant has served all of the sentence imposed; and

1 (E) Whether the defendant has exhausted the defendant's appellate or post-conviction
2 rights.

3 (b) If the defendant has not exhausted the defendant's appellate and post-conviction
4 rights, there is a presumption that the biological evidence should be preserved.

5 (c) In making the determination described in this subsection, except as otherwise pro-
6 vided in paragraph (b) of this subsection, the court may assign the weight the court deems
7 appropriate to the factors described in paragraph (a) of this subsection and to any other
8 factor the court determines is appropriate.

9 (d) For purposes of subparagraph (2)(a)(A) of this section, the court need not presume
10 that identification of the offender is not a disputed issue solely because the defendant has
11 pleaded guilty or no contest to the crime, has confessed to the crime or has made an ad-
12 mission.

13 (3) If the court enters an order authorizing the disposal of biological evidence, the order
14 may not authorize disposal to occur sooner than 45 days after the date the order is entered.
15 The court shall provide a copy of the order to the custodian, the district attorney and the
16 defendant.

17 (4) Either the state or the defendant may appeal from an order entered under this sec-
18 tion in the manner provided in ORS chapter 19 for appeals from judgments. Notwithstanding
19 ORS 19.330, the filing of a notice of appeal automatically stays an order entered under this
20 section.

21 **SECTION 5.** (1) Upon written request by the defendant, the district attorney shall provide
22 the defendant with an inventory of biological evidence that has been preserved under
23 sections 2 to 6 of this 2011 Act and is related to the covered offense for which the defendant
24 was convicted.

25 (2) A defendant or, if the defendant is represented by an attorney, the defendant's at-
26 torney has the right to reasonably review biological evidence that is the subject of a written
27 notice of intent to dispose of biological evidence under section 3 of this 2011 Act for the
28 purpose of preparing a motion to preserve biological evidence.

29 **SECTION 6.** When a provision of sections 2 to 6 of this 2011 Act requires a district at-
30 torney or the court to provide written notice or an order to the defendant and the defendant:

31 (1) Is incarcerated for any offense in a Department of Corrections institution, the notice
32 must be sent by regular United States mail in an envelope prominently displaying the words
33 "Legal Mail."

34 (2) Is supervised by a supervisory authority for any offense, the notice must be sent by
35 regular United States mail to the defendant's last-known address on record with the super-
36 visory authority.

37 (3) Is no longer supervised by a supervisory authority, the notice must be sent by certi-
38 fied mail to the defendant's last-known address.

39 **SECTION 7.** Section 1, chapter 489, Oregon Laws 2009, is added to and made a part of
40 sections 2 to 6 of this 2011 Act.

41 **SECTION 8.** Sections 2 and 3, chapter 489, Oregon Laws 2009, are repealed.

42 **SECTION 9.** (1) Sections 2 to 6 of this 2011 Act and the amendments to section 1, chapter
43 489, Oregon Laws 2009, by section 1 of this 2011 Act become operative on January 1, 2012.

44 (2) The Department of Justice and any other public body as defined in ORS 174.109 may
45 adopt rules or take any other action before the operative date specified in subsection (1) of

1 **this 2011 Act that is necessary to enable the department or public body to exercise, on and**
2 **after the operative date specified in subsection (1) of this section, all the duties, functions**
3 **and powers conferred on the department or public body by sections 2 to 6 of this 2011 Act.**

4 **(3) Sections 2 to 6 of this 2011 Act and the amendments to section 1, chapter 489, Oregon**
5 **Laws 2009, by section 1 of this 2011 Act apply to biological evidence in the possession of a**
6 **custodian on or after the operative date specified in subsection (1) of this section.**

7 **SECTION 10. This 2011 Act being necessary for the immediate preservation of the public**
8 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**
9 **on its passage.**

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