



Home Office

Lord Bates
Lords Minister
2 Marsham Street
London
SW1P 4DF
www.gov.uk/home-office

Mr Alastair MacGregor QC
Biometrics Commissioner
Ground Floor Seacole
2 Marsham Street
London
SW1P 4DF

March 2015

REVIEW OF THE RETENTION AND USE OF BIOMETRIC MATERIAL PROVIDED BY THE PROTECTION OF FREEDOMS ACT 2012

Thank you for your annual report on the Retention and Use of Biometric Material pursuant to Section 21(4) (b) of the Protection of Freedoms Act 2012 (PoFA).

Since the biometric retention provisions of PoFA came into force on 31 October 2013, a significant amount of work has taken place to prepare for the commencement of these provisions, including the development and embedding of new processes in order to implement the new framework. I am grateful to you for your engagement across the spectrum of organisations who either exercise the biometric powers contained in PoFA or are affected by them; the significant time you have dedicated to support these new processes in what is clearly a complex area; and the independent scrutiny your role provides, including through your annual report. The thorough and comprehensive nature of your report is a reflection of the considered approach you have taken to the role and provides the Government and public with a useful analysis of the operation of this legislation.

I welcome your findings that overall the relevant provisions of the Act have been properly implemented and that there is effective regulation of the retention and use by the police and other law enforcement authorities of: DNA samples; DNA profiles; and fingerprints. However, as your report highlights, I recognise there continue to be areas that require further attention.

I have given careful consideration to the recommendations and other detailed observations in your report and sought to respond to each of these. I write now to respond formally on behalf of the Government.

Applications under S63G of the Police and Criminal Evidence Act 1984 (PACE)

When a person without previous convictions is arrested for, but not charged with, an offence, their fingerprints and DNA profile must normally be destroyed once the investigation of that offence is complete. However, under S63G of PACE, if that offence is a 'qualifying' offence, chief officers of police may apply to you for consent to retain the fingerprints and profile for three years. You review issues arising from the exercise of that power.

List of Qualifying Offences

The judgment of the European Court of Human rights in the case of **S and Marper**, found that the blanket retention of DNA taken from innocent people posed a disproportionate interference with the right to private life, in violation of Article 8 of the European Convention on Human Rights. Through PoFA, this Government introduced a new framework to govern the retention and use by the police in England and Wales of DNA samples, profiles and fingerprints. This new framework was broadly modelled on the Scottish approach – which applied a more selective regime. The current list of qualifying offences under PoFA was developed at that time in line with the existing arrangements in Scotland.

In your report you have suggested that it would be useful to revisit the list of qualifying offences¹ and recommend that possession of offensive weapons (such as firearms, knives and other bladed articles), and importation of Class A drugs and their possession with intent to supply, should be added to the list.

On the basis of discussions with operational partners we recognise that there are some offences which it would be useful to include within the existing list of qualifying offences, including those identified in your report. Any change to existing provisions will require secondary legislation to bring into force. I have therefore asked my officials to give this matter further consideration with a view to amending the list during the term of the next Parliament.

Foreign Convictions

You have expressed concern about the scope of police powers to retain biometrics on the basis of convictions for qualifying offences outside England and Wales, and the restricted circumstances in which such convictions can be recorded on the Police National Computer (PNC).

Where an individual is arrested for an offence in England and Wales, and no further action is taken against them for that offence, provided that they have a previous conviction for a recordable offence in England and Wales (which is not an excluded offence), their DNA and fingerprints can be held indefinitely.

¹ 'Qualifying' offences are listed under section 65A of the Police and Criminal Evidence Act 1984 (PACE) as inserted by section 7 of the Crime and Security Act 2010. The list consists mainly of serious sexual and violent offences.

If, however, they only have a conviction from another country, or from Scotland or Northern Ireland, their DNA and fingerprints can only be held if three conditions are met. These are that:

- the conviction is equivalent to a qualifying offence in England and Wales;
- they were not taken previously, or were 'insufficient'², under the sections of PACE allowing taking for a foreign conviction (61(6D) and 63(3E) for fingerprints and DNA respectively). The fact that it was taken previously under other sections of PACE (e.g. allowing taking on arrest) does not prevent taking again under these sections.
- a police inspector explicitly approves their taking.

Therefore, even where they were taken on arrest, another set needs to be taken for retention. Primary legislation would be needed to remove the need to take another set and to allow retention of DNA and fingerprints taken in England and Wales on the basis of any Scottish or Northern Irish offence. The Northern Ireland Assembly are legislating to make this change for the parallel situation in their jurisdiction. The Government will consider making these changes during the lifetime of the next Parliament.

The European Union limits the right to request foreign convictions broadly to a current investigation or a serious threat to public security. In 2010, the Home Secretary drew up a list of offences which constituted such a threat.

This Government has widened the cases in which information can be retained on the PNC beyond that agreed by the previous government. There will therefore be more situations in which the foreign conviction is available to the police. Where a person is arrested for an offence here and has DNA and fingerprints taken, but they are not proceeded against for that arrest offence, or proceeded against but not found guilty, the fact they have a foreign conviction equivalent to a qualifying offence provides a legal basis for retaining the DNA profile and fingerprints taken on arrest. The more often foreign convictions are available to the police, the more often the DNA profile and fingerprints can be retained in this situation.

Section 63G applications

You have recommended that the PNC be amended so as to indicate when a police force may make an application to you for the retention of their DNA and fingerprints, where these would otherwise fall to be deleted³.

You noted that 88 of the 91 applications for extended retention you received between 31 October 2013 and 31 August 2014 came from the Metropolitan Police Service (MPS).

² Defined under section 65(2) as 'the loss, destruction or contamination of the whole or any part of the sample, any damage to the whole or a part of the sample, or the use of the whole or a part of the sample for an analysis which produced no results or which produced results some or all of which must be regarded, in the circumstances, as unreliable'.

³ Under section 63D of PACE as inserted by section 1 of PoFA.

You suggested a change to the PNC to flag to forces when DNA and fingerprints, which might be eligible for s.63G applications (i.e. taken from individuals arrested for but not charged with qualifying offences), were due to be deleted. This could facilitate applications from forces other than the MPS.

The Government agrees that such a change is desirable and will discuss its implementation with the police service.

National Security Determination and Related Matters

Your report also sets out your responsibilities in relation to the retention of biometrics for the purposes of National Security. PoFA provides that a Chief Officer or Chief Constable may, by making a National Security Determination, extend the retention period of an individual's biometric data when they deem it 'necessary for the purposes of national security'. A NSD has effect for a maximum of two years (renewable).

I welcome your observations on how this process has been set up, on the co-operation you have received across the range of stakeholders involved in this work, and your acknowledgment that in the early days of this process you are satisfied that Chief Officers and their deputies, charged with taking these decisions, are doing so in a considered way. While you make no formal recommendations, I have sought to address the points you have raised in this area and respond to each of these below.

Access to underlying information

Your report highlights the importance of you being provided with sufficient information to enable you to discharge your statutory review function. I understand that considerable work has been undertaken to ensure that this is the case, including work to agree the content of NSDs themselves, detailed briefings with operational teams who handle NSDs and the associated processes, and dip sampling arrangements being put in place.

Given the sensitive nature of some of that underlying material, there will be careful handling processes to be followed, but I am clear that this must be done in a way that enables you to carry out your role. I hope that the existing arrangements strike an appropriate balance, but I am content to keep these matters under review as the throughput of applications begins to increase and invite you to bring to my attention any further concerns you have in this regard.

Legacy Material

As you will be aware, the police are currently in the process of reviewing all material that was taken and held on the CT database prior to the commencement of the biometric retention provisions of PoFA, to decide whether it is necessary to retain that material by way of a NSD application. The transitional arrangements order which came into force on 31 October 2013⁴ provided a two year transitional period for the police to complete this work (which will end on 31 October 2015).

⁴ <http://www.legislation.gov.uk/uksi/2013/1813/contents/made>

I note your observations in your report with regards to the assessment of legacy material and your concern that this work may be less advanced than you would have hoped. Officials are working closely with operational partners to progress this work against the deadline of 31 October and will continue to keep this matter under review.

Publishing statistics

While you have chosen not to include statistical information relating to NSDs in this report, I note your intention to return to this matter in the future, once the processes are more established. The Government is committed to increasing transparency in the work we do; however, it is important that we balance this against the very real need to protect sensitive matters of national security. With regards to your intention to keep the issue of statistics under review, I have asked my officials to work with your office to take this matter forward as you begin preparations for your next report.

The Destruction and/or Deletion of Biometric Material

As part of your role as the Biometrics Commissioner you reviewed the arrangements made for handling of DNA samples, DNA profiles and fingerprints, to check that they are being destroyed or deleted as required by the new regime introduced by PoFA.

Samples retained under the Criminal Procedure and Investigations Act 1996 (CPIA)

You recommend that the Home Office should review guidance issued to forces on retention of samples under CPIA; that a more informative consent form is introduced for individuals providing elimination samples; and that forces are reminded that they have an obligation to destroy the samples belonging to both arrestee and elimination samples as soon as the CPIA exemption expires.

The current law⁵ requires that DNA samples taken from an individual are destroyed within six months unless the sample is likely to be required in proceedings⁶.

Elimination samples⁷ are DNA samples and fingerprints taken from individuals during an investigation in order to progress the case. They must be destroyed when they are no longer required.

I agree that further guidance on this issue, together with revised application forms, would be beneficial. Officials have already put in place arrangements and set up an expert group to discuss the approach and provide advice on this issue. I will keep this matter under review and welcome any further observations.

⁵ Section 63R of PACE as added by section 14 of PoFA.

⁶ Under the Criminal Procedure and Investigations Act 1996 and its code of practice as specified under section 146 of the Anti-social Behaviour, Crime and Policing Act 2014.

⁷ These fall under the provisions on voluntary samples as set out under section 63N of PACE as inserted by section 10 of PoFA.

Police National Computer (PNC) Issues

Your report highlights your concern that the operation of certain “Wanted/Missing” reports used on the PNC, and some disposals codes i.e. “proceedings – stayed” and “Discontinued” can sometimes lead to the erroneous retention of an individual’s DNA and fingerprints.

When an individual is arrested, their DNA and fingerprints are usually taken and a record is added to the PNC. The PNC records the status of a case as it passes through the criminal justice system (e.g. whether no further action is being taken against the individual or whether the subject is being prosecuted through the courts etc.). Various disposal code and other entries made on the PNC define the status of the case and allows the PNC software to calculate the point at which a person’s DNA and fingerprints must be deleted to comply with the law (if at all).

I understand that some of these issues have already been resolved. However, some have yet to be addressed and therefore I have therefore asked my officials to explore the outstanding issues in further detail with the police and other stakeholders to develop a way forward.

Early Deletion Process

The Early Deletion Guidance⁸ sets out the circumstances under which individuals may apply for their DNA and fingerprints to be removed from the databases (i.e. the National DNA Database (NDNAD) and IDENT1 for fingerprints) earlier than would otherwise happen. There are two circumstances under which an application may be made:

- those with no prior convictions whose material is held after they have been given a Penalty Notice for Disorder (PND) (though deletion under these circumstances is likely to be very rare); or
- those with no prior convictions whose DNA and fingerprints are held as a result of them being arrested and charged with a qualifying offence, but where they were not subsequently convicted.

I note your observations that the circumstances under which an individual can apply for early deletion of their DNA and fingerprints are too limited. I have asked my officials to give this matter further consideration and discuss the issue with police and other relevant stakeholders to consider a way forward.

⁸ The Early Deletion Guidance was published by the Home Office in January 2014 and is available at <https://www.gov.uk/government/publications/dna-early-deletion-guidance-and-application-form>

The Use to Which Biometric Material Is Being Put

Time limit for deleting DNA and fingerprints taken in relation to non-qualifying offences

Where the retention regime set out under PoFA requires DNA profiles and fingerprints to be deleted, the Act allows for a speculative search against the DNA and fingerprint databases to take place first⁹. Where the fingerprints and DNA were taken in relation to a qualifying offence, once the search against NDNAD has been completed, assuming that there is no match, they are held for 14 days before being deleted. This is to ensure that there is sufficient time to complete a search against both NDNAD and IDENT1. However, where they were taken in relation to a non-qualifying offence, as soon as a search of the NDNAD reveals no match, both the DNA **and** the fingerprints are deleted within 24 hours.

You have highlighted a concern raised by the Metropolitan Police Service that this means that, in some cases, the DNA and fingerprints are deleted before the fingerprint result is known.

The Government will consult with stakeholders and consider carefully the arguments for and against extending the 14-day retention period for qualifying offences to non-qualifying offences.

Under Investigation markers

You have asked whether or not police can retain the DNA and fingerprints belonging to an individual where a match is made against the databases without first arresting that individual. I have asked my officials to look into this matter further.

Other Matters

Contamination of samples

You note that Cellmark, the Forensic Science Provider commonly used by Thames Valley Police, have rejected a number of samples supplied by them, because of contamination by fibrous material.

Thames Valley Police have confirmed that they are in the process of re-sampling individuals. The supplier of the DNA testing kit, WA products, has carried out an investigation into the source of the contamination which found the presence of some microscopic fibres during the assembly of the swabs for the kit. Although, this fibre contamination is undesirable, it doesn't impact on any DNA profiling work or results and continues to be acceptable to the NDNAD. The NDNAD Delivery Unit continues to work with Cellmark on this issue. The Forensic Science Regulator, who oversees quality control issues, is aware of the position.

⁹ Section 63D (5) of PACE as inserted by section 1 of PoFA.

Governance of Fingerprints

In your report, you describe the governance arrangements around fingerprints as “at best opaque” though you note that steps are being taken to address that weakness particularly by a Fingerprint Governance Group chaired by Chief Constable David Shaw, the National Policing Lead on fingerprints. My officials are fully engaged with Chief Constable Shaw’s on this work.

Subject Access Requests

I note the concerns you raise in your report about Subject Access Requests (SAR) – a process by which individuals can access personal data held about them. Your report highlights the length of time it has taken to formulate responses and how difficult it has been to make progress on this. While I acknowledge your concerns, it is important to ensure that we get this process right and that all of those handling subject access requests have relevant support and the appropriate guidance to enable them to respond effectively to any such request. The Association of Chief Police Officers (ACPO) has therefore developed comprehensive guidance which has now been circulated within the police network, and this guidance will be incorporated within the Authorised Professional Practice (APP) framework at the earliest opportunity. I understand that the police have been engaging you in this work and recently presented to your office to take you through the approach. I hope you agree that this issue is now resolved.

Research

You have suggested in your report that the Government carry out independent academic research into the effectiveness of the retention regime for DNA and fingerprints as set out under PoFA. Whilst I recognise it is important to assess the effects and impact of this new legislation, as you will appreciate, resourcing pressures mean we have to operate with limited resources. I am therefore presently unable to commit to any formal research for this purpose. However, these provisions will be subject to existing review mechanisms, including, post legislative scrutiny which will consider the effectiveness of the legislation within three to five years of the Act receiving Royal Assent.

Custody Photographs and Facial Recognition Technology

You express concern that police force custody image collections have been loaded onto the Police National Database (PND) and that an automated facial search facility has been added to the database. You mention the case of *R (RMC and FJ) v Commissioner of Police for the Metropolis* in which the Court held that the retention of custody images “in application of the existing [national police] policy” was unlawful.

The PND was created for the express purpose of enabling police forces and other law enforcement agencies of sharing intelligence to protect the public. The development of automated facial searching is a logical development in the use of intelligence to identify investigative leads.

I am grateful for the valuable contribution you have made to discussions over this issue, including the evidence you provided to the House of Commons Science and Technology Committee's inquiry into the current and future use of biometric data and technologies. We are in agreement that custody images are of value in the detection and prevention of crime and for purposes of public safety, and that they must be used in accordance with the law.

This is a complex issue which needs careful consideration of the balance between public protection and civil liberties. That is why we are currently reviewing the framework through which the police use custody images, and expect to be able to report in the spring. As part of the review, my officials will be seeking your views and those of other regulators on the legal and operational framework and on options for change where this appears necessary.

Resources, Accommodation and Web Presence

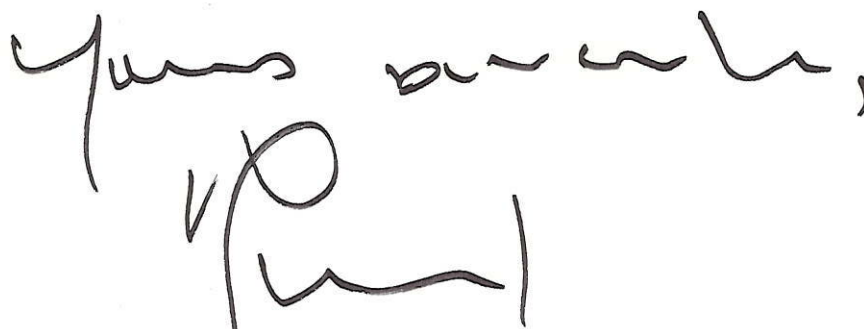
I understand that since you took up post in March 2013, there have been some changes to your working arrangement and resource for your office, and an associated increase to the budget to accommodate these requirements. However, given the financial constraints we are operating in and which are likely to become increasingly challenging in future years, budgets will become under growing pressure.

This is something we will keep under regular review and I have asked my officials to work with your office to ensure you have the necessary level of resources and the support you need to discharge the responsibilities of your role.

With regards to your concerns about having an independent website, I understand that my officials pursued this issue on your behalf through all available channels. I am aware that you now have a suitable web presence on the Gov.UK platform and I hope this is acceptable to you.

Thank you once again for your comprehensive and considered report. As your report highlights, there remain areas that require further consideration and I look forward to engaging with you on these issues.

I will be placing a copy of the Government's response in the Library of the House.


Lord Bates