



Home Office

## **Protection of Freedoms Act 2012**

### Guidance on the making or renewing of national security determinations allowing the retention of biometric data

June 2013

This version replaces the version presented to Parliament on 10 June 2013. Copies will be provided free of charge to all known recipients of that version.

# **Protection of Freedoms Act 2012**

## **Guidance on the making or renewing of national security determinations allowing the retention of biometric data**

Presented to Parliament pursuant to Section 22(5)(a) of the Protection of Freedoms Act 2012

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# CHAPTER 1 - INTRODUCTION

## Definitions

1. In this guidance the:
  - “**1984 Act**” or “**PACE**” means the Police and Criminal Evidence Act 1984;
  - “**1989 Order**” or “**PACE(NI)**” means the Police and Criminal Evidence (Northern Ireland) Order 1989;
  - “**1989 Act**” or “**SSA**” means the Security Services Act 1989;
  - “**1995 Act**” or “**CP(S)A**” means the Criminal Procedure (Scotland) Act 1995;
  - “**CJPOA**” means the Criminal Justice and Public Order Act 1994;
  - “**1994 Act**” or “**ISA**” means the Intelligence Services Act 1994;
  - “**2000 Act**” or “**TA2000**” means the Terrorism Act 2000;
  - “**2001 Act**” or “**ICCA**” means the International Criminal Court Act 2001;
  - “**2008 Act**” or “**CTA**” means the Counter-Terrorism Act 2008;
  - “**2010 Act**” or “**CSA**” means the Crime and Security Act 2010;
  - “**2011 Act**” or “**TPIMA**” means the Terrorism Prevention and Investigation Measures Act 2011;
  - “**2012 Act**” or “**the Act**” means the Protection of Freedoms Act 2012;
  - “**2013 Act**” or “**CJA(NI)**” means the Criminal Justice Act (Northern Ireland) 2013.

Terms in *italics* are defined in the Glossary at the end of this guidance.

## Statutory Guidance

### The Guidance

2. This guidance is to provide direction to any **police force** or other **law enforcement authority** about the making or renewing of a **national security determination** (“NSD”) allowing the retention and use of **biometric material** for national security purposes.
3. This guidance is issued pursuant to section 22 of the 2012 Act, which places the **Secretary of State** under a duty to give guidance about making or renewing a NSD under the provisions set out in section 20(2)(a) of the 2012 Act.

4. This guidance is publicly available and, in particular, should be readily accessible by members of any police force or law enforcement authority seeking to extend the permissible period of retention, for national security purposes, of DNA profiles or fingerprints which they have hitherto retained.

### **Effect of guidance**

5. This guidance is admissible as evidence in criminal and civil proceedings. If any provision of this guidance appears relevant to any court or tribunal considering any such proceedings, it may take that into account. In addition, the **Commissioner for the Retention and Use of Biometric Material** (“the Biometrics Commissioner”) may take the provisions of this guidance into account when exercising his review functions under the 2012 Act.
6. A law enforcement authority may be required to justify the retention, destruction or use of material held pursuant to a NSD and reference may be made to this guidance where that is appropriate.

### **Material to which this guidance applies**

7. Part I, Chapter I of the 2012 Act provides for the making or renewing of national security determinations (NSDs) for biometric material acquired under specific legislation. The retention periods and the relevant legislation are set out in provisions in section 20(2)(a) of the 2012 Act and are also set out at Chapter 2 of this guidance.

### **Extent**

8. This guidance extends to the United Kingdom.

### **Purpose of guidance**

9. The purpose of this guidance is to:
  - set out the basic principles that underpin the powers of a **responsible Chief Officer** or **Chief Constable** authorised to make or renew a NSD extending the retention of biometric data;
  - set out the test that should be met to lawfully exercise the power to make or renew a NSD;
  - promote the fundamental principles to be observed by those authorised to make or renew a NSD under provisions mentioned in section 20(2)(a) of the 2012 Act

and to ensure the effectiveness of the use of those powers to retain biometric material for national security purposes;

- ensure that any interference with the right to respect for private and family life (Article 8 of the European Convention on Human Rights<sup>1</sup> (ECHR)) of persons to whom the data belongs is necessary, proportionate and in accordance with the law;
  - ensure that a responsible Chief Officer or Chief Constable can justify the use of such powers to the Biometrics Commissioner or in court.
10. Any misuse of those powers is likely to be harmful to national security (particularly counter-terrorism) and to undermine public confidence in those law enforcement authorities permitted to exercise such powers. All Chief Officers or Chief Constables authorised to make or renew NSDs must be able to explain and justify their decisions to exercise those powers.

### **Basic application of this guidance**

11. Powers to retain biometric data for national security purposes must be exercised fairly and responsibly.
12. Responsible Chief Officers or Chief Constables that make or renew a NSD must apply the basic statutory requirements and in doing so, must have regard to this guidance.
13. Exceptionally, a Chief Officer or Constable may have good reason for not following this guidance and the reasons for any decision to depart from this guidance should be recorded in writing and the Biometrics Commissioner notified of them.

### **Basis for Lawful Retention of Biometric Material**

14. The legislative background for the taking, retention and destruction of fingerprints, footwear impressions, DNA samples and DNA profiles is complex. The legal framework for retention of biometric data was required to be substantially amended or repealed following the decision of the European Court of Human Rights (“ECtHR”) in the case of *S and Marper v United Kingdom* [2008] ECHR 1581.<sup>2</sup>

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<sup>1</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>2</sup> *S. and Marper v United Kingdom* [2008] – see [http://www.echr.coe.int/sites/eng/pages/serach.aspx?i=001-90051#{"itemid":\["001-90051"\]}](http://www.echr.coe.int/sites/eng/pages/serach.aspx?i=001-90051#{)

## **S and Marper v United Kingdom**

15. In December 2008, in the case of *S and Marper v United Kingdom* [2008] ECHR 1581 the European Court of Human Rights (“ECtHR”) ruled that the provisions in the Police and Criminal Evidence Act 1984 (“PACE”) and the equivalent legislation in Northern Ireland, the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE NI”), permitting the ‘blanket and indiscriminate’ retention of DNA from non-convicted individuals violated Article 8 (right to privacy) of the European Convention on Human Rights (“ECHR”). In response to this judgment, provisions were made in sections 14 to 23 of the Crime and Security Act 2010 (“the 2010 Act”) which, amongst other things, allowed for the retention for 6 years of fingerprints and DNA profiles of persons arrested for, but not convicted of, any recordable offence. Sections 14 to 18, 20 and 21 of the 2010 Act established a separate approach to the retention of DNA profiles and fingerprints by the police and other law enforcement authorities for national security purposes and made provision for the extended retention of DNA profiles and fingerprints on national security grounds. The provisions of the 2010 Act have not been brought into force and Part 1 of Schedule 10 to the Protection of Freedoms Act 2012 repeals them.
16. The equivalent legislation in Scotland is contained in sections 18 to 20 of the Criminal Procedure (Scotland) Act 1995 (as amended).

## **The Protection of Freedoms Act 2012**

17. On 20 May 2010, the Coalition Programme for Government<sup>3</sup> was published which stated that the Government “*will adopt the protections of the Scottish model for the DNA database*”. The 2012 Act implements that commitment for England and Wales. The equivalent legislation in Northern Ireland (where responsibility for policing is devolved) is contained in the Criminal Justice Act (Northern Ireland) 2013.
18. Both the 2012 and 2013 Acts provide for a new framework to regulate the retention, destruction and use of biometric data obtained in accordance with defined statutory regimes by the police (and where applicable) other specified law enforcement authorities. The key characteristic of this new framework is that it does not permit the indefinite retention of biometric material unless the person from whom it was taken is, or has been, convicted of an offence. Retained material will be required to be held for a specified period (in most cases 3 years) and then destroyed unless one of a small number of limited extension exemptions

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<sup>3</sup> <http://webarchive.nationalarchives.gov.uk/20100526084809/http://programmeforgovernment.hmg.gov.uk>



applies. In addition, the new framework makes particular provision for material taken from juveniles (i.e. persons under the age of 18 years).

19. As part of these changes, the extended retention of biometric material on national security grounds through the making of NSDs is permitted, subject to the safeguard of independent oversight by the Biometrics Commissioner.
20. The equivalent legislation in Scotland is contained in the Criminal Procedure (Scotland) Act 1995 (as amended).

### **Commencement**

21. The provisions on the powers to make national security determinations are to be commenced in 2013 (for England, Wales and Scotland) and 2014 for Northern Ireland.

## CHAPTER 2 - THE MAKING OF NATIONAL SECURITY DETERMINATIONS

### Powers to make national security determinations (NSDs)

#### Scope

22. This guidance concerns the exercise of powers that permit the making or renewing of national security determinations by a responsible Chief Officer, Chief Constable or any other person so authorised. Those powers, as brought into effect by the relevant commencement order, are:
- a) section 63M of the Police and Criminal Evidence Act 1984 (section 63D material retained for purposes of national security);
  - b) paragraph 20E of Schedule 8 to the Terrorism Act 2000 (paragraph 20A material retained for purposes of national security);
  - c) section 18B of the Counter-Terrorism Act 2008 (section 18 material retained for purposes of national security);
  - d) paragraph 11 of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011 (paragraph 6 material retained for purposes of national security);
  - e) section 18G of the Criminal Procedure (Scotland) Act 1995 (certain material retained for purposes of national security); and
  - f) paragraph 7 of Schedule 1 to the Protection of Freedoms Act 2012 (material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989 retained for purposes of national security) as amended by the Criminal Justice Act (Northern Ireland) 2013.
23. These provisions are reproduced at Annexes **A** to **C**.

#### Retention Periods

24. The Protection of Freedoms Act 2012 prescribes the periods for which certain types of biometric material may be retained. The 2012 Act amends the system in England and Wales governing the retention of DNA and fingerprints taken from those persons who are arrested for, but not convicted of an offence. This is in order to ensure that DNA and fingerprint material is only retained indefinitely where a person has been convicted of crime, or for a specified period where a person has been arrested for, but not convicted of a serious offence.

25. This means that the police and other law enforcement authorities may:
- a) Retain indefinitely DNA profiles and fingerprints taken from those persons who are convicted of a recordable offence (or an offence punishable by imprisonment in Scotland), but may not retain material indefinitely for those who have not been convicted of an offence;
  - b) Retain for a limited period (in most cases up to 3 years) DNA profiles and fingerprints taken from those persons who are arrested but not convicted of a serious offence (i.e. a **qualifying offence**);
  - c) Retain DNA profiles and fingerprints taken from those persons arrested but not convicted of a minor offence (i.e. **non-qualifying offence**), for a reasonable period where this is for the sole purpose of conducting a speculative search against existing holdings of biometric material;
  - d) Retain DNA profiles and fingerprints taken from juveniles (persons under the age of 18 at the time of their arrest or detention) only in certain circumstances;
  - e) Retain DNA profiles and fingerprints given voluntarily but ensure it is destroyed as soon as it has fulfilled the purpose for which it was taken, unless the person to whom it belongs is previously or subsequently convicted of a recordable offence, in which case it can be retained indefinitely; and
  - f) Retain DNA profiles and fingerprints with the consent of the person to whom that material belongs as long as that person consents in writing to its retention (although a person may withdraw his or her consent at any time and if they do such material must be destroyed).
26. In addition, the police and other relevant law enforcement authorities must:
- g) Destroy a DNA sample as soon as a profile has been derived from it or within 6 months of it being taken – whichever is sooner.
27. The broadly equivalent legislation for Northern Ireland (where responsibility for policing is devolved) is contained in the Criminal Justice Act (Northern Ireland) 2013.
28. The broadly equivalent legislation in Scotland (where responsibility for policing is devolved) is contained in the Criminal Procedure (Scotland) Act 1995 (as amended).

## **Extending Retention Periods**

### **DNA Samples**

29. There is one exemption to the otherwise absolute requirement to destroy DNA samples within 6 months.

### **Extended Retention by Application to a District Judge (Magistrates' Court)**

30. The police or other law enforcement authorities may apply to a District Judge (Magistrates' Court) for an order extending the retention period for a DNA sample by an additional 12 months beginning on the date the material would otherwise have been required to be destroyed. Such an application can only be made in respect of DNA samples taken from a person in connection with a qualifying offence and where a responsible chief officer considers that a sample is likely to be needed in any proceedings for the offence for the purposes of disclosure to, or use by, the defendant, or in response to any challenge by the defendant in respect of the admissibility of material that is evidence the prosecution proposes to rely on.

### **DNA Profiles and Fingerprints**

31. There are two ways in which the retention of DNA profiles and fingerprints can be retained for longer than the specified period – either with permission from a District Judge (Magistrates' Court) or on national security grounds.

### **Extended Retention by Application to a District Judge (Magistrates' Court)**

32. The Protection of Freedoms Act 2012 permits the extension on a case by case basis of the standard retention period for material retained under PACE (whether following being charged with a qualifying offence, or arrested for such an offence and a successful application to the Commissioner) or section 41 of TA2000 with the approval of a District Judge (Magistrates' Courts). In any particular case, the police may apply during the last three months of the three-year period to a District Judge (Magistrates' Court) for an order extending the retention period by an additional two years. Such an extension, if so granted, cannot be further extended and retention cannot be extended beyond five years in total under this process. The police may appeal to the Crown Court against a refusal by a District Judge (Magistrates' Court) to grant such an order and the person from whom the material was taken may similarly appeal to the Crown Court against the making of such an order. This guidance does not provide direction on the making of such applications.

33. This guidance only provides direction for cases where the retention period is to be extended for national security purposes through the making or renewing of a NSD.

### **Extended retention for National Security Purposes**

34. The 2012 Act amends the legislation referred to above (paragraph 22) to provide Chief Officers or Chief Constables with the power to make a NSD – i.e. to determine that DNA profiles and fingerprints are retained for an additional period of up to 2 years for the purpose of national security. This period of extension is renewable. Any such NSD is subject to substantive review by the Biometrics Commissioner. The Biometrics Commissioner has the power to order destruction of material retained by reason of a NSD where it is not necessary to retain it unless there is another means of lawfully retaining that material.
35. A summary of the retention periods for England, Wales and Northern Ireland and for the separate system in Scotland is set out at **Annex D**.

### **Effect**

36. A NSD made under provisions set out in section 20(2)(a) of the 2012 Act provides lawful authority for the extended retention and use of DNA and fingerprint material. Responsibility for making a NSD rests with the responsible Chief Officer or Chief Constable.
37. Making a NSD will ensure that further retention and use of biometric material is in accordance with the law.

## CHAPTER 3 - REQUIREMENTS

### National Security - Approach

38. The UK's approach to national security is based on the recognition that it is a necessarily flexible concept which must be capable of evolving over time to take account of the changing threats faced. Accordingly, it is not a term defined anywhere in legislation where it appears (although non-exhaustive indications in some pieces of legislation<sup>4</sup> give broad examples of what the term may 'in particular' include).
39. This guidance is not to be taken as affecting the legally understood meaning of national security in any way.
40. Information on the UK's approach to national security can be found on the relevant pages of the GOV.UK website at <https://www.gov.uk/government/topics/national-security>.

### A national security determination (NSD)

41. The power to extend the period of retention of biometric data for the purposes of national security is contained in section 20(2)(a) of the 2012 Act.
42. This power is an exemption from the requirement to destroy the biometric material in accordance with the 2012 Act. It permits the extended retention of material only for as long as a relevant NSD has effect in relation to that material.

### The test to apply

43. The responsible Chief Officer or Chief Constable should have regard to the right of the individual to privacy, in particular, as provided for by Article 8 of the ECHR. This will include consideration of the rights of the individual to whom the material belongs and any other individual affected by its retention. Making a NSD under any of the statutory provisions listed in section 20(2)(a) of the 2012 Act will only ensure that the retention of that biometric material is a justifiable interference with an individual's Article 8 rights where the retention is both necessary and proportionate.

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<sup>4</sup> See the Security Service Act 1989 and Intelligence Services Act 1994.

## **Necessity**

44. In order to make a NSD under any of the statutory provisions listed in section 20(2)(a) of the 2012 Act the responsible Chief Officer or Chief Constable must have reasonable grounds to believe that a NSD is **necessary** in the circumstances of the particular case for the purposes of national security.
45. The Chief Office or Constable must carefully consider all relevant evidence in order to assess whether there are reasonable grounds for believing that retention is necessary for the purpose of national security. In doing so, they may wish to consider any or all of the following non-exhaustive categories of information:
  - a) Police intelligence
  - b) Arrest history
  - c) Information provided by others concerned in the safeguarding of national security
  - d) International intelligence
  - e) Any other information considered relevant by the responsible Chief Officer or Chief Constable.
46. The responsible Chief Officer or Chief Constable should also take into account factors including but not limited to the nature and scale of the threat to national security if the material is not retained and the potential benefit that would derive from the extended retention of the biometric material in question.

## **Proportionality**

47. In order to make a NSD, the retention of information needs to be proportionate to the aim sought to be achieved – i.e. for the purpose of national security. This will involve balancing the extent and impact of the interference with the right of the individual to whom the material belongs and any other person(s) who might be affected (see paragraph 48 on collateral intrusion) to respect for their private and family life (Article 8 ECHR) against the need to retain such material for the purpose of national security (i.e. the need for retention for intelligence, investigative or operational purposes for the purpose of national security). Accordingly, the Chief Officer or Constable should give careful consideration to any adverse impact which retention of the material might have upon the individuals concerned – bearing in mind any particular circumstances.

## Collateral Intrusion

48. The responsible Chief Officer or Chief Constable must include as part of their consideration the risk of any interference with the right to privacy of persons other than those to whom the biometric material in question belongs (collateral intrusion). Where a meaningful degree of collateral intrusion will occur, this information should be recorded in the written NSD notification (see paragraph 64 below).
49. Any decision to retain biometric material for national security purposes is unlikely to be proportionate where the impact of the interference with the right to privacy upon the individual to whom the material belongs (or any collateral impact) appears to exceed the need to retain the material for national security purposes. It is therefore essential that the Chief Officer or Chief Constable keeps a written record of the reasons for the decision by reference to the evidence of necessity and of any adverse impact caused to individuals.

## Making a national security determination

50. A NSD must be made **in writing** by the responsible Chief Officer or Chief Constable. A NSD has effect for a maximum of **2 years** beginning with the date on which it is made.
51. In Northern Ireland, a NSD has effect for a maximum of **2 years** beginning with the date on which the material would first become liable for destruction.
52. At the end of this period the NSD may be **renewed** subject to the necessity and proportionality tests described above continuing to be met.
53. A NSD may only be made by a responsible Chief Officer or Chief Constable (or nominated deputy) and only where the test for extending retention has been met.
54. The nominated deputy of the responsible Chief Officer or Chief Constable may, in the absence of the responsible Chief Officer or Chief Constable, exercise the powers in respect of making or renewing a NSD. A nominated deputy should be of at least the rank of Assistant Chief Constable or Commander.
55. The Biometrics Commissioner should be informed whenever a NSD is made or renewed by a nominated deputy of the responsible Chief Officer or Chief Constable that this is the case.



### **Preparing an application to a responsible Chief Officer or Chief Constable**

56. Where an officer considers that it is necessary and proportionate to retain material for the purposes of national security, rather than destroy it in accordance with the relevant statutory retention period, they should prepare an application to make or renew a NSD and submit it for consideration to the responsible Chief Officer or Chief Constable as soon as reasonably practicable. They should set out all factors potentially relevant to the making or renewing of a NSD and their reasoned recommendation that the responsible Chief Officer or Chief Constable make or renew a NSD in the case at issue.
57. An officer should include their analysis of any and all categories of information as per paragraph 45 above. The application should set out all relevant factors and considerations including those which may undermine the case for making or renewing a NSD.

### **Submission of an application to a Responsible Chief Officer or Chief Constable**

58. An officer making an application for a NSD to the responsible Chief Officer or Chief Constable should do so within a reasonable period before the expiry of the applicable statutory retention period in order to allow the Chief Officer or Chief Constable sufficient time to give the application full and proper consideration.
59. A responsible Chief Officer or Chief Constable should consider any application made to them and should make a decision on whether to make or renew a NSD before the expiry of the applicable statutory retention period. This decision should be recorded in writing. If an NSD is made then it must be recorded in writing. The responsible Chief Officer or Chief Constable may before making their decision request such additional information or clarification as they consider appropriate.

### **Consulting the Co-ordinator of National Functions Counter-Terrorism**

60. Before taking their decision on whether to make or renew a NSD, a responsible Chief Officer or Chief Constable should consult the Co-ordinator of National Functions Counter-Terrorism in order to ensure that they have considered all relevant information.

## Independent Oversight by the Biometrics Commissioner

### The Biometrics Commissioner's responsibilities

61. The Biometrics Commissioner is appointed by the Secretary of State to provide independent oversight of the exercise of powers to make or renew NSDs and to review the uses to which biometric material, once subject to an NSD, is put. Specifically, under sections 20(2)(a) and 20(2)(b), the Biometrics Commissioner must keep under review:
- every NSD made or renewed; and
  - the uses to which material retained pursuant to a NSD is put.
62. Section 20(4) and (5) of the 2012 Act provide that where the Biometrics Commissioner concludes that it is not necessary for material retained pursuant to a NSD to be so retained, they may order the destruction of the material at issue provided that it may not otherwise be lawfully retained.

### Notifying the Biometrics Commissioner

63. Section 20(3) of the 2012 Act requires that a responsible Chief Officer or Chief Constable making or renewing a NSD must notify the Biometrics Commissioner of any NSD made or renewed within 28 calendar days of it being made.
64. This ***NSD notification*** must include a copy of the written NSD or renewed NSD and the reasons for making or renewing it. The NSD notification should be in writing and should be appropriately protectively marked and transmitted in accordance with applicable security procedures to the Biometrics Commissioner.
65. When considering a NSD notification submitted by a responsible Chief Officer or Chief Constable, the Biometrics Commissioner may seek further information or clarification from the responsible Chief Officer or Chief Constable. A responsible Chief Officer or Chief Constable is under a duty to disclose or provide to the Biometrics Commissioner any documents and information which the Commissioner may require for the purpose of carrying out their functions to review the making or renewing of NSDs and the uses to which material retained pursuant to a NSD is put. The responsible Chief Officer or Chief Constable must therefore provide the Biometrics Commissioner with all documents and information that the Commissioner requires to carry out their oversight function.

66. Compliance with this duty will likely include the provision of all documentation which was considered by the responsible Chief Officer or Chief Constable in making or renewing a NSD. In disclosing or providing documents and information to the Commissioner, the responsible Chief Officer or Chief Constable should ensure that the Biometrics Commissioner's request to do so and any response is centrally recorded (see Chapter 4 – keeping of records).
67. Where the Biometrics Commissioner does not agree that retention of material covered by a NSD made (or renewed) by a responsible Chief Officer or Chief Constable is necessary, the responsible Chief Officer or Chief Constable will be informed.
68. Every person who makes or renews a NSD under provisions set out in section 20(2)(a) of the 2012 Act must comply with an order by the Biometrics Commissioner to destroy material retained pursuant to a NSD in accordance with instructions set out by the Biometrics Commissioner.
69. A responsible Chief Officer or Chief Constable should confirm in writing to the Biometrics Commissioner that destruction has occurred.

### **Cancelling a National Security Determination**

70. A responsible Chief Officer or Chief Constable should keep under review the continued necessity of retaining biometric material pursuant to a NSD.
71. If during the period of a NSD being in effect, the responsible Chief Officer or Chief Constable comes to believe that it is no longer necessary to retain that material, the NSD should be cancelled, and the Biometrics Commissioner notified. The material hitherto retained should then be destroyed as soon as reasonably practicable, unless the material at issue is capable of being retained under other legislation.

### **Requirement to Consult**

72. A responsible Chief Officer or Chief Constable should, before making a decision to cancel a NSD and destroy material retained pursuant to it, consult relevant law enforcement authorities where appropriate. They should also consult the Co-ordinator of National Functions Counter-Terrorism.

### **Renewing a National Security Determination**

73. A NSD may be renewed by a responsible Chief Officer or Chief Constable if they consider it necessary and proportionate to do so.

## The test to apply

74. The test for renewing a NSD is the same as it is for making a NSD. The responsible Chief Officer or Chief Constable must determine that it is **necessary** for material to be retained for the purposes of national security.
75. A NSD may only be renewed where there is information or the existence of circumstances which lead the responsible Chief Officer or Chief Constable to believe that the exercise of those powers is 'necessary' for the purposes of national security. This may involve an assessment of any or all of the categories of information set out in paragraph 45 above.
76. A renewed NSD may be based on the same or substantially the same intelligence used to make the original determination. The absence of new information at the time of renewal does not preclude renewal. The responsible Chief Officer or Chief Constable should also satisfy themselves that an assessment regarding the renewal of a NSD is up to date.
77. A renewed NSD has effect for a maximum of **2 years** beginning with the date on which it is made.
78. Given the enduring nature of some national security threats, it may be necessary to renew a NSD on multiple occasions. There is no limit to the number of times that a NSD may be renewed but each time it is renewed it must be necessary and proportionate to renew.
79. A responsible Chief Officer or Chief Constable should, before making a decision not to renew a NSD, consult any relevant law enforcement authorities and should also consult the Co-ordinator of National Functions Counter-Terrorism.

## Notification of Renewal of a NSD to the Commissioner

80. The Biometrics Commissioner must be notified of the renewal of a NSD by a Chief Officer or Chief Constable within 28 calendar days of a NSD being renewed. This notification of renewal should include the reasons for the renewal and must be in writing, be appropriately protectively marked and transmitted in accordance with applicable security procedures to the Biometrics Commissioner.

## CHAPTER 4 - KEEPING OF RECORDS

### Recording requirements

81. A centrally retrievable record of every NSD made or renewed (including a copy of the NSD notification submitted to the Biometrics Commissioner) should be established and maintained by each police force or other law enforcement authority. A progress log should also be established and maintained by each police force or other law enforcement authority. This progress log should be regularly updated whenever a NSD is made, renewed or cancelled.
82. The log should record:
- The date on which the responsible Chief Officer or Chief Constable (or their nominated deputy) made the NSD, his or her name, organisation and rank;
  - The date on which the NSD notification informing the Biometrics Commissioner of the making of a NSD was sent;
  - The date on which confirmation of receipt of the NSD notification by the Biometrics Commissioner was received;
  - The outcome of the Biometrics Commissioner's consideration of the NSD ('the decision');
  - The date on which any destruction of material held pursuant to a NSD occurred (and whether destruction was by order of the Biometrics Commissioner);
  - The date on which a NSD was cancelled by a responsible Chief Officer or Chief Constable;
  - The same information as regards any subsequent renewals of a NSD.
83. A copy of the central record and progress log should be provided to the Co-ordinator of National Functions Counter-Terrorism (or a nominated person designated for such purposes by the Co-ordinator of National Functions Counter-Terrorism).

### Reporting requirements

84. In order to contribute to the effective oversight of the operation of the powers for retention on national security grounds, each law enforcement authority with Chief Officers or Chief Constables empowered to make or renew a NSD should

record and supply to the Home Office for every 12 month period from the date of commencement (“the reporting period”) the following statistical information:

- Number of applications to make a NSD made to a responsible Chief Officer or Chief Constable that were rejected during the reporting period;
- Number of NSDs made during the reporting period;
- Number of NSDs renewed during the reporting period;
- Number of NDSs overturned by the Biometrics Commissioner during the reporting period;
- Number of orders for destruction received from the Biometrics Commissioner during the reporting period;
- Number of NSDs that have expired during the reporting period;
- Number of NSDs that have been cancelled before the end of the permitted retention period during the reporting period.

85. Each law enforcement authority should ensure that this data is transmitted to the Home Office by a date to be designated by the Home Office.

### **Information management**

86. Information processed by law enforcement authorities for the purposes of making or renewing a NSD must be done in accordance with the Data Protection Act 1998. Information that is held by the law enforcement authority should be handled in accordance with the relevant published guidance on the management of police information.<sup>5</sup>

87. Any and all classified information should be managed in accordance with applicable security procedures as set out in the HMG Security Policy Framework.<sup>6</sup> This means, in particular, that it must be stored and transmitted securely. Authorisation for the use of any classified information owned or supplied by a third party or parties where it is intended to be used to support the making or renewing of a national security determination must be obtained from the originating third party or parties.

88. A responsible Chief Officer or Chief Constable should ensure that access to the centrally retrievable record and progress log by the Biometrics Commissioner is granted as and when requested.

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<sup>5</sup> see <http://www.acpo.police.uk/ProfessionalPractice/InformationManagement.aspx>

<sup>6</sup> see <https://www.gov.uk/government/publications/security-policy-framework>

## CHAPTER 5 GLOSSARY

<p><b>Police Force</b></p>	<p>A police force - meaning,</p> <ul style="list-style-type: none"> <li>▪ the Metropolitan Police Force;</li> <li>▪ a police force maintained under section 2 of the Police Act 1996 (police forces in England and Wales outside London);</li> <li>▪ the City of London Police Force;</li> <li>▪ the Police Service of Scotland;</li> <li>▪ the Police Service of Northern Ireland;</li> <li>▪ the Police Service of Northern Ireland Reserve;</li> <li>▪ the Ministry of Defence Police;</li> <li>▪ the Royal Navy Police;</li> <li>▪ the Royal Military Police;</li> <li>▪ the Royal Air Force Police;</li> <li>▪ the British Transport Police.</li> </ul>
<p><b>Law enforcement authority</b></p>	<p>A police force (as defined above), the Serious Organised Crime Agency, the Commissioners for Her Majesty's Revenue and Customs or any other authority with relevant powers to make or renew a NSD under legislation specified at paragraph 22 of this guidance.</p>
<p><b>Biometric material</b></p>	<p><b>DNA sample</b> - any material that has come from a human body and consists of or includes human cells.</p> <p><b>DNA profile</b> - any information derived from a DNA sample.</p> <p><b>Fingerprints</b> - a record (in any form and produced by any method) of the skin pattern and other physical characteristics or features of a person's fingers or either of a person's palms.</p>
<p><b>National Security Determination (NSD)</b></p>	<p>A determination made by a responsible Chief Officer or Chief Constable (of a law enforcement authority) to extend the retention of biometric material held on national security grounds.</p>

<b>Responsible Chief Officer or Chief Constable</b>	<p>A person within a law enforcement authority who is entitled to authorise the retention of biometric material for national security purposes. They being:</p> <ul style="list-style-type: none"> <li>▪ the Chief Officer of a police force in England and Wales;</li> <li>▪ the Chief Constable of the Police Service of Scotland;</li> <li>▪ the Chief Constable of the Police Service of Northern Ireland;</li> <li>▪ the Chief Constable of the Ministry of Defence Police;</li> <li>▪ the Provost Marshal for the Royal Navy, Royal Military or Royal Air Force police force;</li> <li>▪ the Chief Constable of the British Transport Police;</li> <li>▪ the Director General of the Serious Organised Crime Agency;</li> <li>▪ the Commissioners for Her Majesty's Revenue and Customs.</li> </ul>
<b>Co-ordinator of National Functions Counter Terrorism</b>	<p>The senior Officer with oversight of the Police National CT Network and responsibility for leading the operational and professional development of that network.</p>
<b>NSD application</b>	<p>A written application to a responsible Chief Officer or Chief Constable requesting that they make or renew a national security determination.</p>
<b>NSD notification (notice by responsible Chief Officer or Chief Constable to the Biometrics Commissioner)</b>	<p>A written NSD notification from a responsible Chief Officer or Chief Constable that is sent to the Biometrics Commissioner for review.</p>
<b>Secretary of State</b>	<p>Any Secretary of State (in practice this will generally be the Home Secretary)</p>
<b>Qualifying offence</b>	<p>Offences listed under Section 7 of the Crime and Security Act 2010.</p>
<b>Non-qualifying offence</b>	<p>A recordable offence (or in Scotland an offence punishable with imprisonment) not otherwise listed under section 7 of the Crime and Security Act 2010.</p>



## ANNEX A - SECTION 20(2)(A), PROTECTION OF FREEDOMS ACT 2012

### ***National security: appointment of Commissioner***

(2) It is the function of the Commissioner to keep under review—

(a) every national security determination made or renewed under—

(i) section 63M of the Police and Criminal Evidence Act 1984 (section 63D material retained for purposes of national security),

(ii) paragraph 20E of Schedule 8 to the Terrorism Act 2000 (paragraph 20A material retained for purposes of national security),

(iii) section 18B of the Counter-Terrorism Act 2008 (section 18 material retained for purposes of national security),

(iv) paragraph 11 of schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011 (paragraph 6 material retained for purposes of national security),

(v) section 18G of the Criminal Procedure (Scotland) Act 1995 (certain material retained for purposes of national security), and

(vi) paragraph 8 of Schedule 1 to this Act (material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989 retained for purposes of national security),

## ANNEX B - SECTION 63M, POLICE AND CRIMINAL EVIDENCE ACT 1984

### ***Material retained for purposes of national security***

After section 63L of the Police and Criminal Evidence Act 1984 (for which see section 8) insert—

#### **"63M Retention of section 63D material for purposes of national security**

- (1) Section 63D material may be retained for as long as a national security determination made by the responsible chief officer of police has effect in relation to it.
- (2) A national security determination is made if the responsible chief officer of police determines that it is necessary for any section 63D material to be retained for the purposes of national security.
- (3) A national security determination—
  - (a) must be made in writing,
  - (b) has effect for a maximum of 2 years beginning with the date on which it is made, and
  - (c) may be renewed."

## ANNEX C - PARAGRAPH 20E OF SCHEDULE 8, TERRORISM ACT 2000

### 20E

- (1) Paragraph 20A material may be retained for as long as a national security determination made by the responsible chief officer of police has effect in relation to it.
- (2) A national security determination is made if the responsible chief officer of police determines that it is necessary for any paragraph 20A material to be retained for the purposes of national security.
- (3) A national security determination—
  - (a) must be in writing,
  - (b) has effect for a maximum of 2 years beginning with the date on which the determination is made, and
  - (c) may be renewed.

## ANNEX C(A) - SECTION 18B, COUNTER-TERRORISM ACT 2008

### **18B** *Retention for purposes of national security*

- (1) Section 18 material which is not a DNA sample may be retained for as long as a national security determination made by the responsible officer has effect in relation to it.
- (2) A national security determination is made if the responsible officer determines that it is necessary for any such section 18 material to be retained for the purposes of national security.
- (3) A national security determination—
  - (a) must be in writing,
  - (b) has effect for a maximum of 2 years beginning with the date on which the determination is made, and
  - (c) may be renewed.

## ANNEX C(B) - PARAGRAPH 11 OF SCHEDULE 6, TERRORISM PREVENTION AND INVESTIGATION MEASURES ACT 2011

### 11

- (1) Paragraph 6 material may be retained for as long as a national security determination made by the responsible chief officer of police has effect in relation to it.
- (2) A national security determination is made if the responsible chief officer of police determines that it is necessary for any paragraph 6 material to be retained for the purposes of national security.
- (3) A national security determination—
  - (a) must be in writing,
  - (b) has effect for a maximum of 2 years beginning with the date on which the determination is made, and
  - (c) may be renewed.

## ANNEX C(C) - SECTION 18G, CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

### 6

- (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) In section 18(3), for “18F” substitute “18G”.
- (3) After section 18F insert—

#### **“18G** *Retention of samples etc: national security*

- (1) This section applies to—
  - (a) relevant physical data taken from or provided by a person under section 18(2) (including any taken or provided by virtue of paragraph 20 of Schedule 8 to the Terrorism Act 2000),
  - (b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A) (including any taken by virtue of paragraph 20 of Schedule 8 to the Terrorism Act 2000),
  - (c) any relevant physical data, sample or information derived from a sample taken from, or provided by, a person under section 19AA(3),
  - (d) any relevant physical data, sample or information derived from a sample which is held by virtue of section 56 of the Criminal Justice (Scotland) Act 2003, and
  - (e) any relevant physical data, sample or information derived from a sample taken from a person—
    - (i) by virtue of any power of search,
    - (ii) by virtue of any power to take possession of evidence where there is immediate danger of its being lost or destroyed, or
    - (iii) under the authority of a warrant.
- (2) The relevant physical data, sample or information derived from a sample may be retained for so long as a national security determination made by the relevant chief constable has effect in relation to it.
- (3) A national security determination is made if the relevant chief constable determines that it is necessary for the relevant physical data, sample or information derived from a sample to be retained for the purposes of national security.

- (4) A national security determination—
  - (a) must be in writing,
  - (b) has effect for a maximum of 2 years beginning with the date on which the determination is made, and
  - (c) may be renewed.
  
- (5) Any relevant physical data, sample or information derived from a sample which is retained in pursuance of a national security determination must be destroyed as soon as possible after the determination ceases to have effect (except where its retention is permitted by any other enactment).
  
- (6) In this section, “the relevant chief constable” means the chief constable of the police force of which the constable who took the relevant physical data, or to whom it was provided, or who took or directed the taking of the sample, was a member.”

**ANNEX C(D) - POLICE AND CRIMINAL EVIDENCE (NORTHERN IRELAND)**  
**ORDER 1989**

**7**

(1) This paragraph applies to the following material—

- (a) a DNA profile to which Article 64 of the 1989 Order (destruction of fingerprints and samples) applies, or
- (b) fingerprints to which Article 64 of the 1989 Order applies, other than fingerprints taken under Article 61(6A) of that Order.

(2) If the Chief Constable of the Police Service of Northern Ireland determines that it is necessary for any material to which this paragraph applies to be retained for the purposes of national security—

- (a) the material is not required to be destroyed in accordance with Article 64 of the 1989 Order, and
- (b) Article 64(3AB) of that Order does not apply to the material, for as long as the determination has effect.

(3) 20A determination under sub-paragraph (2) (“a national security determination”)—

- (a) must be made in writing,
- (b) has effect for a maximum of 2 years beginning with the date on which the material would (but for this paragraph) first become liable for destruction under the 1989 Order, and
- (c) may be renewed.

(4) Material retained under this paragraph must not be used other than—

- (a) in the interests of national security,
- (b) for the purposes of a terrorist investigation,
- (c) for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
- (d) for purposes related to the identification of a deceased person or of the person to whom the material relates.

(5) This paragraph has effect despite any provision to the contrary in the 1989 Order.

(6) In this paragraph—

- (a) the reference to using material includes a reference to allowing any check to be made against it and to disclosing it to any person,



- (b) the reference to crime includes a reference to any conduct which—
  - (i) constitutes one or more criminal offences (whether under the law of Northern Ireland or of any country or territory outside Northern Ireland), or
  - (ii) is, or corresponds to, any conduct which, if it all took place in Northern Ireland, would constitute one or more criminal offences, and
- (c) the references to an investigation and to a prosecution include references, respectively, to any investigation outside Northern Ireland of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside Northern Ireland.

(7) In this paragraph—

“the 1989 Order” means the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989/1341 (N.I. 12)S.I. 1989/1341 (N.I. 12));

“DNA profile” means any information derived from a DNA sample;

“DNA sample” means any material that has come from a human body and consists of or includes human cells;

“offence”, in relation to any country or territory outside Northern Ireland, includes an act punishable under the law of that country or territory, however it is described;

“terrorist investigation” has the meaning given by section 32 of the Terrorism Act 2000.

## ANNEX D \_RETENTION PERIODS: SYSTEMS IN THE UNITED KINGDOM BEFORE AND AFTER THE PROTECTION OF FREEDOMS ACT 2012

<b>Occurrence</b>	<b>England, Wales and Northern Ireland (material retained under PACE or PACE(NI))</b>	<b>Scotland</b>	<b>Effect of the Protection of Freedoms Act 2012 in England and Wales<sup>7</sup></b>
ADULT – Conviction – All Offences	Indefinite	Indefinite	Indefinite
ADULT – Arrested but no Conviction – Serious Offences	Indefinite*	3 Years + Poss. 2-Year Extension(s) by a Court	3 Years, plus a possible <u>single</u> 2-Year Extension by a Court
ADULT – Arrested but no Conviction – Minor Offences	Indefinite*	None	None (following conduct of a ‘speculative search’)
UNDER 18s – Conviction – Serious Offences	Indefinite	Indefinite	Indefinite
UNDER 18s – Conviction – Minor Offences	Indefinite	Indefinite	1 <sup>st</sup> Conviction – 5 Years, plus length of any custodial sentence) 2 <sup>nd</sup> Conviction - Indefinite
UNDER 18s – Arrested but No Conviction – Serious Offences	Indefinite*	3 Years + Poss. 2-Year Extension(s) by Court	3 Years + Poss. <u>single</u> 2-Year Extension by Court
UNDER 18s – Arrested but No Conviction – Minor Offences	Indefinite*	None	None (following ‘speculative search’)
<b>Occurrence</b>	<b>England, Wales and Northern Ireland</b>	<b>Scotland</b>	<b>Effect of the Protection of Freedoms Act 2012 across UK</b>
National Security Grounds (including counter-terrorism)	Indefinite	Not covered under Scottish legislation (i.e. a reserved matter). Indefinite under UK-wide legislation.	3 Years plus, Renewable 2-year extension period(s) on National Security grounds
Biological DNA Samples	Indefinite*	As per destruction of profiles	Destroy within six months of sample being taken unless, taken in connection with a serious offence AND likely to be needed in proceedings for purposes of disclosure or use by defendant or in response to a challenge to admissibility or prosecution evidence by the defendant.

\* Removal from the National DNA Database of DNA profiles as well as the destruction of biological samples is allowed in ‘exceptional circumstances’. This requires an application to the Chief Officer or Constable of the relevant police force, removal from the database is then at his/her discretion (subject to any guidance which they must have regard to).

<sup>7</sup> Broadly equivalent provisions for Northern Ireland are set out in the PACE NI as amended by the Criminal Justice Act (Northern Ireland) 2013.



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