

## SUMMARY OF CONSULTATION RESPONSES

Summary of responses submitted to the Home Office and received in response to the public consultation on the draft statutory guidance governing the powers which permit the police and other relevant law enforcement authorities to extend the period of retention for biometric material (DNA and fingerprints) where it is necessary for the purposes of national security (i.e. the making and renewing of national security determinations). The consultation opened on 26 March 2013 and closed 20 May 2013.

NO.	ORGANISATION	RESPONSE AND SUMMARY OF PURPOSE	ACCEPT/REJECT
1	Lord Advocate, Scotland (statutory consultee)	Welcomed the guidance to police and law enforcement authorities on the exercise of these powers and is content with its terms.	Accept
2	Commissioner for the Retention and Use of Biometric Material (statutory consultee)	<u>General Observations</u> There are a number of ways in which the draft Guidance might more effectively achieve its stated objectives.	Accept
		It should provide more detailed guidance as to the principles upon which those authorised to make or renew NSDs should work and as to the factors which they should take into account.	Accept
		It should also, if possible, include illustrative examples of situations in which the making of NSDs would or would not be appropriate.	Reject – through extensive discussions with the practitioner community, it is not considered that the inclusion of illustrative examples would add to the effectiveness of the guidance and may in some instances present operational risks.
		<u>The Relevant Test</u> Paragraphs on necessity and proportionality in the draft are helpful but as they are would not provide real assistance to those who will have to apply the tests. There is a high risk that inconsistency in exercising the powers will result.	Accept

		<p><u>Other Matters</u></p> <p><i>Definitions and Glossary</i> – commented that the definition of law enforcement authority in this context should reflect that non-UK bodies (such as foreign police forces etc) have no power to make NSDs. Current draft does not do this.</p>	Accept
		<p><i>Chief Officer or Chief Constable</i> – the ability to delegate their powers to make NSDs should be expressly set out in the guidance. Such delegation would only be acceptable provided that the officers in question are of at least ACPO rank.</p>	Accept
		<p><i>The Extent to which the Guidance is Binding</i> - Welcomed the express statements as to the binding nature of the guidance.</p>	n/a
		<p><i>Retention Periods</i> - It would be both helpful and appropriate to set out the various retention periods which, in the absence of a NSD, apply to biometric material which has been collected pursuant to counter-terrorist legislation.</p>	Accept.
		<p><i>Information (General)</i> - It would be helpful if it were also made clear that any information that is produced by or for a Chief Officer or Chief Constable for the purposes of that 'review' function should be shared with the Biometrics Commissioner.</p>	Accept
		<p><i>Keeping of Records</i> - The guidance should make clear who will establish and maintain the 'centrally retrievable record' to which reference is made. Also sensible for</p> <ul style="list-style-type: none"> <li>• provision to be made as regards the obligations which Chief Officers and Chief Constables will owe to provide information to that person; and</li> <li>• that person to be named as being obliged to ensure that access to that record is granted to the Biometrics Commissioner.</li> </ul>	Accept.
		<p><i>Statistical information</i> - The draft Guidance provides for</p>	Accept – the Department will share

		the supply to the Home Office of specified ‘statistical information’; this information should also be supplied to the Biometrics Commissioner.	statistical information with the Commissioner.
		To assist Biometrics Commissioner with their general ‘reviewing’ function it would be helpful if information were retained and made available about the use to which retained material is put and about any benefits which result from that use (including as a result of any speculative searches).	
		<p><i>Other statistical information</i> - the following data should be retained and made available about:</p> <ul style="list-style-type: none"> <li>• biometric material which is currently held for purposes associated with national security but in respect of which no application is made for a NSD; and</li> <li>• biometric material which is taken for such purposes (e.g. pursuant to Schedule 8 of the Terrorism Act 2000) but is not retained.</li> </ul>	Reject – scope of guidance is limited to material subject to a NSD.
3	Office of the Information Commissioner (ICO)	<p><b>General – on making an NSD</b></p> <p>Commented that DNA related information was capable of being ‘sensitive’ personal data within the meaning of the Data Protection Act 1998 (particularly in the policing context) and that as such required additional stringent safeguards (especially in light of section 28 (national security) of the DPA – which provides an exemption.</p> <p>Welcomed that the process of making or renewing a national security determination was to:</p> <ul style="list-style-type: none"> <li>▪ be approached on a case by case basis,</li> <li>▪ apply necessity and proportionality tests; and</li> <li>▪ Require consideration of the potential impact on an individuals’ privacy.</li> </ul>	<p>Reject proposal (1) – guidance does not empower Secretary of State (SofS) to direct Biometrics Commissioner in this way. Refer to Biometrics Commissioner for consideration.</p> <p>Accept proposals (2) – (5).</p>

		<p>Reassured by the specific timescales governing retention of material subject to a national security determination and the requirement to consider each case against necessity and proportionality tests.</p> <p>Welcome duty placed on Chief Officers and Chief Constables to keep under review the continued necessity of retention and the ability to cancel a NSD.</p> <p><b><i>On independent oversight</i></b>  Welcomed independent oversight of the process (including retention and deletion of material) by the Biometrics Commissioner as an important additional safeguard.</p> <p><b><i>Proposals</i></b></p> <p>(1) consideration be given to applying defined retention periods to information held by the Biometrics Commissioner about each case (e.g. where material is deleted from police/law enforcement authority systems, currently, the Biometrics Commissioner may still retain information about the case including personal data);</p> <p>(2) guidance on what security procedures should be adhered to regarding the transmission of information pertaining to an NSD be included in the guidance (or if not included in detail in the guidance, a clear stipulation as to where this information can be found);</p> <p>(3) under the recording requirements, make clear who is responsible for maintaining the 'centrally retrievable record' of every NSD made or renewed (paragraph 67);</p> <p>(4) make clear who the Senior National Counter-Terrorism Coordinator is (paragraph 69);</p>	
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		(5) correct typo – i.e. reference to DPA 1998 at paragraph 72 is incorrect.	
4	Metropolitan Police Service	<p>Have worked closely with the department in developing the draft guidance. The MPS broadly considers the draft provides the appropriate level of guidance to support the NSD process.</p> <p>Raised one substantive issue with the current draft. Consider that there are sound operational reasons for delegating the authority level for making or renewing a national security determination downwards from Chief Constable. Specifically highlights the need for Chief Officer or Chief Constables to have an express authority to delegate the power to make a national security determination to officers of Assistant Chief Constable / Commander rank (i.e. ACPO) or even that of Chief Superintendent and for this to be set out in the guidance.</p>	Accept – agree with proposal to include express ability to delegate power to officers of ACPO rank.
5	Police Scotland	<p>Considers guidance will assist in ensuring consistent approach to NSD process but must also look to strengthen governance and enhance public confidence.</p> <p>Fully supportive of the content of the draft guidance (including safeguards) but considers those safeguards must be flexible in order that collective policing response remains operationally effective.</p> <p>Proposed further guidance be given on ‘ultimate’ responsibly and accountability for submission on a NSD where material is taken by officers outside the lead force or on behalf of other agencies.</p> <p>Stressed the need to ensure accountability and</p>	Accept.

		transparency of the process to enhance public confidence and withstand future scrutiny in potential criminal/civil proceedings.	
6	Northern Ireland Policing Board (NIPB)	<p>Noted that the current draft made little reference to the legislative framework applicable in Northern Ireland (and Scotland) and needed to reference recent legislative changes in NI.</p> <p>Suggested that summaries of the biometrics frameworks for each part of the UK be included (not just England and Wales).</p> <p>Considered clearer guidance required on the test for making or renewing an NSD should be on a case by case basis and not on a blanket basis (e.g. not against all persons fitting into a certain demographic). Each case to be considered on its own merits.</p> <p>The Guidance might usefully also restate the purposes for which material retained and used once a NSD is in place.</p> <p>Annual statistics should be published and in doing so, broken down to show statistics against each of the constituent parts of the UK.</p>	<p>Accept.</p> <p>Accept.</p> <p>Accept.</p> <p>Reject – the purposes for which material subject to an NSD is put are set out on the face of the Protection of Freedoms Act 2012. The guidance should avoid excessive duplication.</p>
7	West Yorkshire Police	<p>Fully supportive of the draft guidance – believing it provides clearly defined, easily understood, ‘fit for purpose’ processes that address the significant issues around the retention, destruction and use of biometric data by the police.</p> <p>Welcomed the clearly defined roles and responsibilities, applicable timescales, monitoring and auditing systems.</p>	Accept.

		Considered guidance delivers workable solution to protect national security in this context – capable of withstanding legitimate independent scrutiny.	
<b>8</b>	General Public (1 response)	The response received focused on wider potential applications / uses of biometric data (e.g. in civil court proceedings, medical arena).	n/a