



## **Applications to the Biometrics Commissioner under PACE**

### **Introduction**

1. Under the Protection of Freedoms Act 2012 (PoFA) it is generally the case that DNA profiles and fingerprints of persons arrested in the course of an investigation will be deleted after a decision has been made that they will not be charged (assuming they have no previous convictions justifying the retention of their profile).
2. However, there are many reasons why those arrested for offences may not subsequently be charged. In some cases removing the DNA profile or fingerprints of the suspect from the databases could give rise to a risk, impacting upon the ability of the police to prevent and detect crime in the future.
3. PoFA therefore provides a mechanism whereby in exceptional circumstances Chief Officers of police can apply for the DNA profile and/or fingerprints obtained from a person ('the subject') arrested but not subsequently charged with an offence to be retained for a period of three years from the date on which the relevant sample or fingerprints were taken. Such applications are made under section 63G of PACE to the Commissioner for the Retention and Use of Biometric Material (the 'Biometrics Commissioner'), who may consent to such retention if they consider it appropriate.
4. Under section 63AB of PACE (as amended by PoFA), the National DNA Database Strategy Board (now the FIND Strategy Board) may issue guidance about the circumstances in which applications may be made to the Biometrics Commissioner under section 63G. This document replaces previous guidance issued by the Strategy Board and the Office of the Biometrics Commissioner.
5. For the purpose of this guidance a Chief Officer is defined as anyone holding a rank above that of Chief Superintendent within the police service of England and Wales.

## **Criteria**

6. Where there are compelling reasons to justify it, and only in cases where:
  - the subject has no previous convictions and was arrested for a qualifying offence  
and
  - the subject has not been charged or convicted,

a Chief Officer may consider making an application to the Biometrics Commissioner for extended retention of biometric material. They should only make such an application if they believe that extended retention of that material is both necessary for the prevention or detection of crime and proportionate in all the circumstances of the case.

7. There are two bases set out in PACE [sections 63G (2) and (3)] for making such applications. One specifies victim-based criteria, and one more general criteria.
8. Section 63G (2) – an application may be made if a Chief Officer considers that the material was taken in connection with the investigation of an offence where any alleged victim of the offence was, at the time of the offence:
  - (a) under the age of 18,
  - (b) a vulnerable adult, or
  - (c) associated with the person to whom the material relates.

[In this section ‘victim’ includes intended victim, ‘vulnerable adult’ means a person aged 18 or over whose ability to protect himself or herself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise, and the reference in subsection (2)(c) to a person being ‘associated with another person’ is to be read in accordance with section 62(3) to (7) of the Family Law Act 1996, which may include relatives, partners and other cohabitants.]

9. Section 63G (3) – The responsible Chief Officer of police may make an application under s63G (3) if they consider that the victim criteria above do not apply, but that the retention of the material is necessary to assist in the prevention or detection of crime.
10. Before they make an application under Section 63G(2) or Section 63G(3) Chief Officers should satisfy themselves that they have reasonable grounds for believing that the criteria set out in the relevant section are satisfied. Chief Officers should however recognise – particularly as regards section 63G(2) – that applications should not be made simply because there are reasonable grounds for believing that those criteria are satisfied. The general rule under PoFA is that biometric material can no longer be retained if the subject is not charged with an offence. It is only in exceptional circumstances that retention will be justifiable in cases where the subject is not charged.

## **Core Principles**

11. In the view of the Biometrics Commissioner and of the Strategy Board the retention of biometric material from a subject who has been arrested but not charged will only be appropriate where, in the circumstances of the particular case:
  - there are compelling reasons to believe that the retention of the material at issue may assist in the prevention or detection of crime and would be proportionate;and

- the reasons for so believing are more compelling than those which could be put forward in respect of most individuals without previous convictions who are arrested for, but not charged with, a 'qualifying offence'.

This is the case for applications under both section 63G(2) and section 63G(3).

12. In light of this, Chief Officers should only submit an application under either of those sections if they consider that in the particular circumstances of the case: (i) the criteria set out in section 63G(2) or (3) are satisfied; (ii) there are unusually compelling reasons to believe that the retention of the material at issue may assist in the prevention or detection of crime and would be proportionate and (iii) non-retention of the material would give rise to an unacceptable risk to the public.

### **Relevant Factors**

13. A number of factors may be relevant in considering whether retention is proportionate and in the public interest, and Chief Officers should in particular review the following factors when considering whether to submit an application to the Biometrics Commissioner under section 63G:
  - (i) The nature, circumstances and seriousness of the alleged offence in connection with which the subject was arrested;
  - (ii) The grounds for suspicion in respect of the subject (including any previous complaints and/or arrests);
  - (iii) The reasons why the subject has not been charged;
  - (iv) The strength of any reasons for believing that retention may assist in the prevention or detection of crime;
  - (v) The nature and seriousness of the crime or crimes which that retention may assist in preventing or detecting;
  - (vi) The age and other characteristics of the subject; and
  - (vii) Any representations by the arrestee as regards those or any other matters.
14. Regarding 13 (i) above (*the nature and seriousness of the offence at issue*), the legislation makes clear that extended retention can only be appropriate if the alleged offence is a 'qualifying offence' and although such offences are generally serious ones, the list ranges from murder to voyeurism. Furthermore, the gravity of any offence will vary depending on the particular circumstances of the case (e.g. robbery may range from an armed bank robbery to the snatching of a handbag). The less grave the offence, the less likely that retention will be appropriate.
15. Regarding 13 (ii) and (iii) above (*the grounds for suspicion in respect of the subject and the reasons why he/she was not charged*), the less compelling the reasons for suspecting that the subject committed the offence in connection with which he or she was arrested, the less likely that it will be appropriate to retain any biometric material which was obtained from him or her.
16. For example, if the subject has been arrested for similar offences in the past, or if the reason that the subject has not been charged is that the apparently credible victim has withdrawn the accusation in circumstances where there are good grounds to suspect that the subject (or someone associated with the subject) has coerced him or her into withdrawing it, this will militate in favour of retention.
17. Regarding 14 (iv) above (*the likely usefulness of the material*), relevant considerations may include:

- (a) the extent of the risk that the subject will commit further offences; and
  - (b) whether those feared future offences are of a type in relation to which DNA or fingerprint evidence is commonly of significance.
18. If, for example, the alleged offence is one of attempted 'stranger' rape on a woman met in a nightclub and (a) the subject has previously been arrested for such an offence and (b) on recent occasions complaints have been made to the police about his unwanted sexual advances to other women in or near that nightclub, retention is more likely to be appropriate than if, for example, the alleged offence was one of threatening to kill the subject's then estranged husband in the course of a custody dispute and that husband has since died of natural causes.
19. When considering the usefulness of retaining a DNA profile, it should be recognised that in any case which falls under section 63G a speculative search on the NDNAD will already have been carried out (by virtue of section 63D(5)), which would identify whether there are matches to any crime scene profiles already loaded to the database.
20. In addition, it should be recognised that if evidence emerges which casts suspicion on the subject in relation to a new offence, it may well be open to the police to arrest him or her and to obtain fresh biometric material in that context.
21. Regarding 13 (v) above (*the nature and seriousness of the feared future offences*), the more serious the feared future offence or offences, the greater will be the public interest in its or their prevention or detection. For example, even if there is good reason to suspect that an individual arrested on suspicion of an indecent assault which has later been 'no crimed' is also an occasional shoplifter, it is unlikely that this will point strongly in favour of retention.
22. Regarding 13 (vi) above (*the age and other characteristics of the subject*), it has been observed that the retention of the data of unconvicted persons may be especially harmful in the case of minors and that premise is reflected in the legislative regime. Equally, however, the fact that a subject is vulnerable (perhaps because he or she suffers from mental illness) and/or may feel unusually threatened or distressed if his biometric material is retained, may well have a bearing on the proportionality and thus appropriateness of retention.
23. A further relevant factor in every application under Section 63G will be the age and other characteristics of the alleged victim, not least as they will dictate whether an application is made under Section 63G(2) or Section 63G(3).
24. In cases which fall within the ambit of Section 63G(2) the manner in which the victim criteria are met may have a bearing on a number of the other factors which are listed at Paragraph 14 above. For example, where the alleged offence is one of indecent assault on a very young child, the reasons why the subject was not charged may have been influenced by the age of the victim and/or their relationship to the subject. Those factors, when seen in the light of all the other circumstances of the particular case, may lend weight to the contention that there are unusually compelling reasons to believe that the retention of the subject's biometric material may assist in the prevention or detection of crime and would be proportionate.

### **Notice of Applications and Reasons**

25. The Protection of Freedoms Act (PoFA) sets out the following process that must be followed where an application to the Biometrics Commissioner for retention of the subject's DNA profile and/or fingerprints is made.
26. The Chief Officer must give the subject notice in writing, informing them of that application and of their right to make representations against the retention to the Biometrics Commissioner within 28 days of the date the notice is given.

27. Section 63G(7) provides that such a notice may, in particular, be given to a person by:
- (a) Leaving it at the person's usual or last known address (whether residential or otherwise),
  - (b) Sending it to the person by post at that address, or
  - (c) Sending it to the person by email or other electronic means.

This requirement does not apply if the whereabouts of the person to whom the material relates is not known and cannot, after reasonable inquiry, be ascertained by the responsible Chief Officer of police.

28. A subject should be notified of an application and of the grounds for it by a letter in the form at Annex C ('the Notification Letter'). That Letter must inform the subject of the reasons for the application and the information upon which it is based so that the subject is in position to challenge the application if they so wish. The reasons for the application and information upon which it is based given to the subject must be sufficiently detailed, so that the subject has a fair opportunity to make representations about these reasons and information upon to the Biometrics Commissioner.
29. If the subject is not so informed of any reasons or information which the Chief Officer seeks to rely upon, the Biometrics Commissioner will attach no weight to them.
30. The Notification Letter should normally be given to the subject at the same time as the application is made to the Commissioner. A standard form for any representations which the subject may wish to make (at Annex D), and a FAQ sheet (at Annex E) should be enclosed with the Notice Letter.
31. Disclosure difficulties may arise where a Chief Officer wishes to rely on sensitive intelligence. In those cases the Chief Officer may, if unsure about what would count as fair disclosure to the subject:
- (i) submit the completed application form to the Biometrics Commissioner together with the proposed Notification Letter in advance of notifying the subject (a 'Preliminary Application'); and
  - (ii) seek a ruling on the disclosure which the Commissioner will require to be made to the subject.

In the light of that ruling the Chief Officer may decide to proceed with the application or to abandon it. Information about the making of a Preliminary Application in such circumstances is set out in the Explanatory Notes at Annex B.

## **Applications**

32. In applying to the Biometrics Commissioner, a standard application form must be used (at Annex A). The form should be completed in line with the Explanatory Notes (at Annex B). The form and the supporting documents should be submitted via secure email.
33. When submitting an application, the Chief Officer must provide the Biometrics Commissioner with sufficient information to enable them to reach a decision and must enclose sufficient documentation for that purpose. The Chief Officer must also undertake to make available to the Commissioner any additional documents or information which he may reasonably request. If the information provided on the application form is insufficient for the Commissioner to reach a decision the application may be refused. Further, if additional documents and/or information are not provided as requested the Commissioner will consider the application as it stands, which may result in the application being refused.

34. Applications by Chief Officers must be submitted promptly after the decision has been reached that the subject will not be charged. This is because such a decision will instigate the destruction of the DNA and fingerprints held, and the destruction process may be completed within two weeks of that decision unless an application is being made. Following an individual being recorded as No Further Action (NFA) on PNC, the force has a maximum of 14 days in which to decide whether to make an application to the Biometrics Commissioner and update the PNC record accordingly. They then have a further 14 days to submit the application to the Commissioner. In the absence of a reasonable explanation for the delay, an application will be rejected by the Commissioner if it is submitted more than 28 days after the date of the decision that the subject will not be charged.
35. The Biometrics Commissioner will inform the Chief Officer and the subject of the outcome of the application. The Chief Officer must then update the PNC. If the application is unsuccessful, the update to the PNC will trigger deletion. The Chief Officer must inform the Biometrics Commissioner of the updating of the PNC and of the deletion of the biometric material within 28 days of the Biometrics Commissioner's decision.
36. Each force should have a system in place to coordinate and collate all applications, to monitor their quality, to inform the subject that an application is being made, to update the PNC with the result of any applications made, and to inform the Biometrics Commissioner of relevant deletions. Individual Chief Officers will be required to maintain records in relation to any successful applications they make to the Biometrics Commissioner. The records must show what subsequent use has been made of the retained material, and any benefits in preventing and detecting crime which have resulted from that use.

***Forensic Information Database Strategy Board - 27 September 2018***

**ANNEX A**

Form BC1 – Application for Biometric Retention for police force

**ANNEX B**

Explanatory Notes for Completion of application form

**ANNEX C**

Notification Letter to Subjects

**ANNEX D**

Form BC3 – Representations to the Biometrics Commissioner for Subject

**ANNEX E**

Applications for Biometric Retention: What You Should Know for Subject