
Principles for
Assessing
Applications for
Biometric
Retention

Office of the
Biometrics
Commissioner

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Introduction

Under the Protection of Freedoms Act 2012 ('POFA') one of the principal responsibilities of the Biometrics Commissioner is to determine applications which are made under section 63G of the Police and Criminal Evidence Act 1984 ('PACE'). Those applications relate to the retention of biometric material which has been obtained from individuals who have been arrested but not charged.

In summary:

- (i) By section 63E of PACE, fingerprints and DNA profiles taken from an arrested person may be retained until the conclusion of the investigation of the offence in which the arrestee is suspected of being involved;
- (ii) if that person is not charged with that offence and that offence is a "qualifying offence", the "responsible chief officer of police" may, pursuant to section 63G, make an application to the Biometrics Commissioner to extend the retention period in respect of that material;¹ and
- (iii) if that application is successful, that retention period will, by section 63F(5) and (6), be extended until 3 years after the taking of the relevant fingerprint or sample.

This document sets out the principles which will inform the Commissioner's approach to such applications and the factors to which he will attach significance when determining them.

The Relevant Statutory Provisions

Section 63G of PACE (which was inserted by section 3 of POFA) provides as follows.

(1) The responsible chief officer of police may apply under subsection (2) or (3) to the Commissioner for the Retention and Use of Biometric Material for consent to the retention of section 63D material which falls within section 63F(5)(a) and (b).

(2) The responsible chief officer of police may make an application under this subsection if the responsible chief officer of police considers that the material was taken (or, in the case of a DNA profile, derived from a sample 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

¹ A "qualifying" offence is, broadly speaking, a serious violent, sexual or terrorist offence or burglary: see section 65A(2) of PACE.

(c) associated with the person to whom the material relates.

(3) The responsible chief officer of police may make an application under this subsection if the responsible chief officer of police considers that -

(a) the material is not material to which subsection (2) relates, but

(b) the retention of the material is necessary to assist in the prevention or detection of crime.

(4) The Commissioner may, on an application under this section, consent to the retention of material to which the application relates if the Commissioner considers that it is appropriate to retain the material.

(5) But where notice is given under subsection (6) in relation to the application, the Commissioner must, before deciding whether or not to give consent, consider any representations by the person to whom the material relates which are made within the period of 28 days beginning with the day on which the notice is given.

(6) The responsible chief officer of police must give to the person to whom the material relates notice of -

(a) an application under this section, and

(b) the right to make representations.

(7) A notice under subsection (6) 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.

(8) The requirement in subsection (6) 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.

(9) An application or notice under this section must be in writing.

(10) 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.

Other relevant statutory provisions are set out at sections 1 – 3, 16, 20 and 24 of POFA. Further information on the implementation of the Act can be found in the commencement and transitional orders published on www.legislation.gov.uk.

Core Principles

1. The Commissioner will grant an application under section 63G(2) or (3) only if he is persuaded that the applying officer has reasonable grounds for believing that the criteria set out in those subsections are satisfied. Equally, however, he will not grant such an application merely because he is so persuaded. He will treat compliance with those criteria as a necessary, but not as a sufficient, condition for any conclusion that it is “appropriate” to retain the material at issue.

2. The Commissioner will grant such an application – and will consider the extended retention of such material ‘appropriate’ – only if he is persuaded that in the circumstances of the particular case which gives rise to that application:

- 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.

3. This will be the case for applications under both section 63G(2) and section 63G(3). The Commissioner will, however, be particularly alert to the possibility that extended retention may be appropriate in cases in which the criteria set out in Section 63G(2) are satisfied.

4. The Commissioner will require that the arrestee be informed – at least in general terms – of the reasons for any application and of the information upon which it is based. If the arrestee is not so informed of any reasons or information which the applying officer seeks to rely upon, the Commissioner will attach no weight to them.

Relevant Factors

5. The factors which the Commissioner will take into account when considering whether or not it is appropriate to retain material will include the following:

- (i) the nature, circumstances and seriousness of the alleged offence in connection with which the individual in question was arrested;
- (ii) the grounds for suspicion in respect of the arrestee (including any previous complaints and/or arrests);
- (iii) the reasons why the arrestee 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 arrestee; and

- (vii) any representations by the arrestee as regards those or any other matters.

6. As to the first of the factors referred to at paragraph 5 above (*the nature and seriousness of the offence at issue*), the less grave the offence, the less likely that the Commissioner will consider retention appropriate.

7. As to the second and third of the factors referred to at paragraph 5 above (*the grounds for suspicion in respect of the arrestee and the reasons why he/she was not charged*), the less compelling the reasons for suspecting that the arrestee committed the offence in connection with which he or she was arrested, the less likely that the Commissioner will consider it appropriate to retain any biometric material which was obtained from him or her. For example:

- if further investigations have established that no offence occurred and/or that the arrestee simply could not have committed it, then it is unlikely that retention of his or her biometric material will be considered appropriate; whereas
- if the arrestee has been arrested for similar offences in the past, or if the reason that the arrestee 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 arrestee (or someone associated with the arrestee) has coerced him or her into withdrawing it, this will militate in favour of retention.

8. As to the fourth of the factors referred to at paragraph 5 above (*the likely usefulness of the material*), relevant considerations will include:

- the extent of the risk that the arrestee will commit further offences;
- whether those feared future offences are of a type in relation to which DNA or fingerprint evidence is commonly of significance; and
- that in any case which falls within the ambit of section 63G, it will - by virtue of section 63D(5) – already have been open to the police to arrange for a speculative search to be carried out in relation to the material at issue.

If, for example, the alleged offence is one of attempted 'stranger' rape on a woman met in a nightclub and (a) the arrestee 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 considered appropriate than if, for example, the alleged offence was one of threatening to kill the arrestee's then estranged husband in the course of a custody dispute and that husband has since died of natural causes.

9. As to the fifth of the factors referred to at paragraph 5 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 be seen as pointing strongly in favour of retention.

10. As to the sixth of the factors referred to at paragraph 5 above (*the age and other characteristics of the arrestee*), the Commissioner will bear in mind that "the retention of ... unconvicted persons' data may be especially harmful in the case of minors."² Equally, however, he will bear in mind that the fact that an arrestee 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 significant bearing on the proportionality – and thus appropriateness – of extended retention.

11. A further factor which the Commissioner will take into account when considering an 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). 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 5 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.

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² *S and Marper v UK* [2008] ECHR 1581 at para 124