

Introduction

When the relevant provisions of the Protection of Freedoms Act 2012 ('POFA') come into force in October of this year, one of my principal responsibilities as Biometrics Commissioner will be to determine applications which are made under (new) section 63G of the Police and Criminal Evidence Act 1984 ('PACE'). Those applications will relate to the retention of biometric material which has been obtained from individuals who have been arrested but not charged.

In summary:

- (i) by (new) section 63E of PACE, fingerprints and DNA profiles ("section 63D material") 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 (new) section 63G, make an application to the Biometrics Commissioner to extend the retention period in respect of that material; and
- (iii) if that application is successful, that retention period will, by (new) section 63F(5) and (6), be extended until 3 years after the taking of the relevant fingerprint or sample.

I set out below my preliminary proposals as to how I should approach such applications and as to the factors to which I should attach significance when determining them. I would welcome the views and suggestions of others as regards those proposals.

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

(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.

Observations

Generally

1. There is a clear public interest in the prevention and detection of crime and that interest may clearly be served by the retention of biometric material. As regards such material – and in the light of the judgment in *S and Marper v U K*¹ - the central purpose of POFA appears to be to strike what is considered to be a proper and proportionate balance between the public interest in the prevention and detection of crime and the individual’s right to privacy, particularly in circumstances where that individual is entitled to be presumed innocent.

2. Section 63G deals only with the retention of the fingerprints or DNA profiles of individuals who have been arrested for, but not charged with, a "qualifying" offence and who have not previously been convicted of a "recordable" offence.² As a general rule such fingerprints and profiles ('biometric material') may only be retained until "the conclusion of the investigation" of the relevant offence. By section 63G, however, an application may be made to the Commissioner to extend that retention period until 3 years after the date on which the relevant fingerprint or DNA sample was taken.³

3. Applications may only be made to the Commissioner under section 63G in the circumstances specified in subsections (2) and (3). Any such application must be made by “the responsible chief officer of police”⁴, notice of it must be given to the

¹ [2008] ECHR 1581

² A “qualifying” offence is, broadly speaking, a serious violent, sexual or terrorist offence or burglary: see section 65A(2) of PACE. A “recordable” offence is, broadly speaking, any offence which is punishable with imprisonment: see section 118 of PACE.

³ I recognise:

(i) that there is scope for debate as to the precise meaning in this context of the term "the conclusion of the investigation"; and

(ii) that in some circumstances a relevant "investigation" may not reach a "conclusion" until after that 3-year period has expired.

Neither of those issues, however, falls within the intended ambit of this consultation exercise.

⁴ A “chief officer” is, broadly speaking, a Chief Constable: see section 101(1) of the Police Act 1996. Although it seems reasonable to assume that he or she may properly delegate that power to a more junior officer, it seems equally reasonable to assume that that delegate should be of at least ACPO rank.

person to whom the material relates, and that person ('the arrestee') must be informed of his or her right to make representations to the Commissioner. Faced with such an application - and having considered any representations from the arrestee - the Commissioner may "consent to the retention of the material to which the application relates if the Commissioner considers that it is appropriate to retain the material." The Act nowhere specifies the factors which the Commissioner should take into account when deciding whether or not it is "appropriate" for material to be retained.

Section 63G(2)

4. The circumstances in which an application may be made under section 63G(2) are very different in type from those in which an application may be made under section 63G(3). In particular, whereas an officer who wishes to make an application under section 63G(3) must consider that the retention of the material "is necessary to assist in the prevention or detection of crime", section 63G(2) makes no express reference to any anticipated public interest in the retention of the material. On the face of things an officer may make an application under that subsection provided merely that he or she considers that the alleged victim of the alleged offence was, at the time of the offence, under 18, "vulnerable" or "associated with" the arrestee.⁵

5. It appears widely to be believed that section 63G(2) was primarily intended to cater for cases of alleged sexual or other violence in a domestic context and sprang from a perception that in such cases there is a greater than usual risk:

- that although the arrestee has in fact committed the offence in question, the victim of that offence will withdraw the complaint and/or the available evidence will be insufficient to justify the institution of criminal proceedings; and
- that the arrestee will commit similar offences in the future.

Whether or not the origins of section 63G(2) lie in thinking of that sort, however, it is clear that the wording of that subsection is capable of covering a much wider range of cases.

6. There may well be a particularly strong public interest in the prevention and detection of crimes against young or vulnerable victims. Where someone has been arrested for such a crime – or for a crime against a victim with whom the arrestee is "associated" - there may also often be a greater than usual risk that the test for charging him or her will not be met. However:

- the policy underlying this part of the legislation appears to be that biometric material which has been obtained from an individual who has been arrested but not charged (and who has no previous convictions) should only be retained beyond the conclusion of the relevant investigation - and that such retention will only be proportionate – where there are compelling reasons to believe that the public interest will be served by its retention;

⁵ These terms are defined at section 63G(10).

- the public interest in the retention of biometric material – and the proportionality of its retention - must largely turn on the extent to which there are cogent reasons to believe that that retention may assist in the detection or prevention of crime; and
- there is clearly no necessary connection between the age, vulnerability or family relationships of an alleged victim of an alleged offence and the likely usefulness or otherwise of retaining for an extended period biometric material from someone who has been arrested for, but not charged with, that alleged offence.⁶

7. One possible approach to applications under section 63G(2) would be for the Commissioner to deem it “appropriate” for the relevant material to be retained provided only that he or she is satisfied that the applying officer has reasonable grounds for considering that the criteria set out in that subsection are met. Such an approach would have the merit of simplicity but would seem difficult to reconcile with the underlying policy of the legislation or with the decision-making process provided for by it (i.e. one whereby the arrestee must be notified of the application and will be entitled to make representations to the Commissioner about it). As regards the criteria set out in section 63G(2), after all:

- there will rarely be scope for argument as to the victim’s age, vulnerability or family relationships at the time of the alleged offence; and
- it is not difficult to conceive of cases in which the fact that the alleged victim satisfied one of the specified criteria at the time of the alleged offence could have no sensible bearing whatsoever on the strength of the public interest in – or on the likely usefulness or otherwise of - retaining the arrestee’s biometric material.⁷

8. In those circumstances it is difficult to know what significance should be attached to the fact that the legislation expressly provides that an application for extended retention may be made in cases where, at the time of an alleged offence, the victim was under 18, “vulnerable” or “associated with” the arrestee. Whatever may have been the thinking which gave rise to section 63G(2), however, it would seem clear that the Commissioner should, at the very least, be particularly alert to the possibility that the extended retention of biometric material may be “appropriate” in cases where the criteria set out in that subsection are satisfied.

Section 63G(3)

9. An application for extended retention may only be made under section 63G(3) if the applying officer considers that, at the time of the alleged offence, the alleged victim did *not* have any of the characteristics set out in section 63G(2). Unlike section

⁶ Indeed, since the identity of the alleged offender will rarely be an issue in cases of alleged sexual or other violence in a domestic context, it may be that the extended retention of biometric material is actually less likely to assist in the prevention or detection of such offences than of others.

⁷ It would seem likely, for example, that this will usually be true in cases of burglary.

63G(2), however, section 63G(3) makes clear on its face that the applying officer must expressly address the purpose for which extended retention of biometric material is being sought (i.e. “to assist in the prevention or detection of crime”) and that he or she must be satisfied that retention is “necessary” for that purpose.

10. Differing views have been expressed as to the connotations of the word “necessary” in this context. In particular, it has been suggested to me:

- that the word should be read as indicating that the threshold which must be passed before an application can properly be made is a very high one (i.e. as indicating that the applying officer must be satisfied that the retention of the material is more than merely ‘desirable’ or ‘useful’ to assist in the prevention or detection of crime);
- that it should be read as reflecting the language of Article 8 of the ECHR and in the light of the observation which was made at paragraph 101 of the judgment of the Grand Chamber in *Marper* (i.e. “an interference [with Article 8 rights] will be considered ‘necessary in a democratic society’ ... if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued ...”); and
- that since DNA profiles or fingerprints can only assist in the prevention or detection of crime if they are retained (and are thus available to be searched against), no particular significance should be attached to the use of the word ‘necessary’ in this context (i.e. that section 63G(3) could equally well have provided that an application may be made “if the responsible chief officer considers that the material ... should be retained to assist in the prevention or detection of crime”).

11. Although arguments could be advanced in support of each of those propositions, it seems to me right to proceed on the basis that in this context a chief officer may reasonably consider that “the retention of the material is necessary to assist in the prevention or detection of crime” if he or she reasonably considers that, in the circumstances of the particular case, there are compelling reasons to believe that the public interest will be served by the retention of that material.

Numbers of Applications

12. Whatever may be the proper construction of section 63G(3), it is of course impossible to predict how many cases are likely to arise each year in which a chief officer might reasonably consider that the extended retention of biometric material obtained from an arrestee is “necessary to assist in the prevention or detection of crime” within the meaning of that subsection. As regards section 63G(2), however, it has been estimated that there are currently between 8000 and 60000 cases each year in England and Wales in which someone without previous convictions is arrested for, but not subsequently charged with, a qualifying offence against a victim who satisfies one or more of the criteria set out in that subsection.⁸ If chief officers

⁸ Victim criteria are not easily captured from police records and, as is apparent from their range, these estimates have inevitably been both ‘ballpark’ and speculative.

were to feel obliged to make, and/or were to make, an application under section 63G(2) in respect of each of those cases, the associated financial and other resource implications for police forces – and, indeed for the Commissioner - would clearly be very considerable indeed. This is particularly so since in each case (a) the police would have to notify (or at least take reasonable steps to notify) the relevant arrestee of the application and of his or her right to make representations to the Commissioner and (b) the Commissioner would have to consider any representations made by that arrestee.

When Will Retention Be ‘Appropriate’?

13. Whatever uncertainties may arise as regards the wording of section 63G(2) and (3), those subsections do no more than set out the circumstances in which chief officers may seek the Commissioner’s consent to the retention of biometric material which has been obtained from an individual who has been arrested but not charged and who has no previous convictions. It is section 63G(4) which provides for the making of decisions on such applications and that section imposes no express restriction on the Commissioner’s discretion as to whether or not to accede to such applications. Nor does that section provide express guidance as to the factors which he or she should take into account in that connection.

14. It must be right, however, that the Commissioner’s decisions under section 63G(4) should be informed by – and consistent with - the concept of proportionality and the purpose and underlying policy of this part of the legislation. As is mentioned above, that underlying policy would appear to be that biometric material which has been obtained from an individual who has been arrested but not charged (and who has no previous convictions) should only be retained beyond the conclusion of the relevant investigation - and that such retention will only be proportionate – where there are compelling reasons to believe that the public interest will be served by its retention. In my view that underlying policy must apply as much to applications under section 63G(2) as it does to applications under section 63G(3).

Relevant Factors

15. Quite apart from the matters specified in section 63G(2), a number of factors would seem to be of obvious relevance to any assessment of the public interest in - and the proportionality of - the retention of biometric material which falls within the ambit of section 63G. Those factors will often overlap but may conveniently be summarised as including:

- (i) the nature, circumstances and seriousness of the alleged offence in connection with which the individual in question was arrested;
- (ii) the strength of, and grounds for, suspicion in respect of the arrestee;
- (iii) the reasons why the arrestee has not been charged;

(iv) the cogency 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; and

(vi) the age and other characteristics of the arrestee.

16. As to the first of those factors (*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 most such offences are, broadly speaking, serious ones. However:

- the list of ‘qualifying offences’ is a long one and ranges from murder to voyeurism; and
- the gravity of any offence will vary depending on the particular circumstances of the case (e.g. robbery may range from an armed bank hold-up to the snatching of a handbag).

The less grave the offence, the less likely it would seem that retention will be appropriate.

17. As to the second and third of the factors referred to at paragraph 15 above (*the grounds for suspicion in respect of the arrestee and the reasons why he/she was not charged*), it would seem clear that 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 it will be 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 hard to see how retention of his or her biometric material could be appropriate; whereas
- 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 might well militate in favour of retention.

18. As to the fourth of the factors referred to at paragraph 15 above (*the likely usefulness of the material*), relevant considerations would appear to include:

- (i) the extent of the risk that the arrestee will commit further offences;
- (ii) whether those feared future offences are of a type in relation to which DNA or fingerprint evidence is commonly of significance; and
- (iii) 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; and

- if evidence later emerges which casts further suspicion on the arrestee in relation to the offence at issue, it may well be open to the police to re-arrest him or her and to obtain fresh biometric material in that context.⁹

If, for example, the alleged offence is one of attempted 'stranger' rape on a woman met in a nightclub and (a) the arrestee has twice before been arrested for such an offence and (b) on five recent occasions complaints have been made to the police about his unwanted sexual advances to other women in or near that nightclub, retention might well seem more 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 (a) that husband has since died of natural causes and (b) nothing else is known or suspected to the discredit of the arrestee.

19. As to the fifth of the factors referred to at paragraph 15 above (*the nature and seriousness of the feared future offences*), it would seem clear that 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 must be unlikely that this will point strongly in favour of retention.

20. As to the sixth of the factors referred to at paragraph 15 above (*the age and other characteristics of the arrestee*), it has been authoritatively observed that "the retention of ... unconvicted persons' data may be especially harmful in the case of minors"¹⁰ and that thinking is to some extent reflected in the new legislative regime.¹¹ Equally, however, 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.

21. I recognise that it could be argued that, if factors such as those referred to at paragraph 15 above are indeed to be taken into account when assessing the appropriateness of extended retention, there will be a risk of 'stigmatisation' in any case where an application under section 63G is approved by the Commissioner. I also note, however:

- that one of the principal criticisms of the pre-existing retention regime which was made by the Grand Chamber in *Marper* was that there was "no provision for independent review of the justification for the retention according to defined criteria, including factors such as the seriousness of the offence,

⁹ (though note in this connection section 63(3A)(b) of PACE)

¹⁰ See *Marper* at para 124.

¹¹ See e.g. (new) section 63K of PACE.

previous arrests, the strength of suspicion against the person and any other special circumstances.”¹²; and

- that the risk of stigmatisation would seem to be very limited, not least because the making and upshot of an application for extended retention will be known only to the police, to the Commissioner and to the individual concerned.

The risk of stigmatisation will, of course, be one of the factors to be borne in mind when assessing the proportionality of extended retention. So also will be the fact that, since only limited information about an individual can be derived from a DNA profile or fingerprint, the retention of such material will constitute a significantly lesser interference with an arrestee's right to privacy than will the retention of a cellular sample.

Summary

22. The new legislative scheme assumes that it will not normally be appropriate to retain for an extended period biometric material which has been obtained from someone without previous convictions who has been arrested for, but not charged with, a ‘qualifying’ offence. That scheme also assumes that, in the context of applications under section 63G(2) or (3), the appropriateness of extended retention will depend upon the particular facts of the case at issue. In the light of the various matters which are referred to above it appears to me that I should accede to such an application – and that I should consider the extended retention of such material ‘appropriate’ - only if I am 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.

Information

23. When making applications under section 63G(2) or (3), chief officers will no doubt want to point to any statistical evidence which lends supports to the contention that, in circumstances such as those at issue, the public interest will be served by the extended retention of an arrestee’s biometric material. It appears, however:

- that no reliable statistical evidence is currently available as regards the usefulness or otherwise of retaining biometric material which falls within the ambit of section 63G; and
- that the evidence relied on by such officers will therefore almost invariably be ‘case specific’.

¹² See *Marper* at para 119.

Although further criminological research in this field would clearly be desirable, the conduct and funding of such research cannot, in my view, sensibly be matters for the Commissioner.¹³

24. If as Commissioner I am to be able to make an informed decision on an application which is made to me under section 63G(2) or (3), I must clearly be able to obtain relevant information as regards the offence and arrestee at issue. To that end – and since there is no express provision in the legislation which deals with that point¹⁴ - it seems to me right that I should require any such application to be made on a form which includes an undertaking by the applying officer to provide me with whatever relevant information or documentation I may reasonably request.

Disclosure

25. It is clear that the arrestee concerned must be notified of any application under Section 63G and that he or she must be provided with an opportunity to make representations to the Commissioner. If that opportunity is to be a fair and worthwhile one the arrestee must also, in my view, be informed – at least ‘on request’ and at least in general terms - of the reasons for the application and of the information upon which it is based.¹⁵

26. I recognise that difficulties may well arise in this connection in circumstances where the reasons for making an application include the existence of intelligence about the arrestee which the applying officer wishes to keep confidential. In my view, however, fairness requires that, even in those circumstances, a similar approach should be adopted (i.e. that disclosure should be made of at least the gist of any intelligence information that is relied on).

Timing of Applications

27. In the absence of an application to the Commissioner under section 63G, biometric material from a relevant arrestee may only be retained until “the conclusion of the investigation of the offence” in which the arrestee is suspected of being involved.¹⁶ There is scope for debate as regards the precise meaning of that term in this context and difficulties could clearly arise as a result of its arguable uncertainty/elasticity.¹⁷ One practical difficulty which arises is that, whatever may be meant by “the conclusion of the investigation of the offence”, it may well be difficult for a chief officer to foresee when that time will arrive. This is in marked contrast to the foreseeability of the expiry of other retention periods in relation to which the legislation provides that applications for extended retention (to a District Judge) must

¹³ I intend, however, to consult about the scope for such research with the Home Office, the NDNAD Strategy Board and others.

¹⁴ (cf section 20(3)(b) of POFA as regards ‘national security determinations’)

¹⁵ Note also in this regard section 63F(7) – (10).

¹⁶ See section 63E.

¹⁷ See eg Footnote 3(ii) above and note also (new) sections 63D(3) and 63T(2) of PACE. I am of course looking further into the issues which arise in connection with this definitional uncertainty.

be made within the period of three months ending with that expiry.¹⁸ As a matter of common sense, however, applications to the Commissioner under section 63G should be made as soon as it is reasonably practicable to make them.

Guidance

28. Although the decision on any individual application under section 63G(2) or (3) will inevitably turn on its own facts, it is clearly desirable that the Commissioner should adopt a consistent, predictable and transparent approach to such applications. To that end – and in the light of, among other things, the responses to this consultation exercise - I hope to publish before October the principles upon which I intend to decide such applications.

29. It is also clearly desirable that chief officers should adopt a consistent approach with regard to applications under section 63G and, in particular, to the identification of cases in which it may be right to make such an application. In that connection (new) sections 63AB(3) and (4) of PACE¹⁹ provide that, after consultation with the Commissioner, the National DNA Strategy Board ('the Strategy Board') "may issue guidance about the circumstances in which applications may be made to the Commissioner ... under section 63G". Although not binding on chief officers,²⁰ any such guidance would clearly be helpful and I have asked the Strategy Board to issue some.

30. The content of any such guidance must of course be a matter for the Strategy Board. On the face of things, however, it might usefully include guidance as to:

- the circumstances in which it may be right to make an application under section 63G(2) or (3);²¹
- when and by whom such applications should be made;²²
- the information and factors which should be considered by applying officers in connection with such applications;
- the disclosure of information to the Commissioner and to the individual concerned;²³ and
- the keeping of records about the uses to which any retained material is put and about any benefits which result from that use.²⁴

¹⁸ See section 63F(8).

¹⁹ (inserted by section 24 of POFA)

²⁰ (in marked contrast to the position as regards any guidance about 'early destruction': see section 63AB(3))

²¹ Note in this regard Paragraphs 14-21 above.

²² Note in this regard Paragraph 27 and Footnote 4 above.

²³ Note in this regard Paragraphs 23-26 above.

²⁴ The keeping of proper records in this connection and more generally will, of course:

- be necessary if I am properly to discharge my 'general review' functions under section 20(6) of POFA; and
- provide useful underpinning to any further criminological research such as is referred to at Paragraph 23 and Footnote 13 above.

Proposals

Against that background I am currently inclined to the view – and provisionally propose – that I should proceed as follows as regards applications under section 63G(2) or 63G(3).

1. I should accede to an application under section 63G(2) or (3) only if I am persuaded that the applying officer has reasonable grounds for believing that the criteria set out in those subsections are satisfied. Equally, however, I should not accede to such an application merely because I am so persuaded. I should 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. I should accede to such an application – and I should consider the extended retention of such material ‘appropriate’ – only if I am 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. I should 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 factors which I should take into account when considering whether or not it is appropriate to retain material should 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 age and other characteristics of the alleged victim;
- (iii) the strength of, and grounds for, suspicion of the arrestee;
- (iv) the reasons why the arrestee has not been charged;
- (v) the cogency of any reasons for believing that retention may assist in the prevention or detection of crime;
- (vi) the nature and seriousness of the crime or crimes which that retention may assist in preventing or detecting;
- (vii) the age and other characteristics of the arrestee; and
- (viii) any representations by the arrestee as regards those or any other matters.

5. I should require any application under section 63G(2) or (3) to be made on a form which includes an undertaking by the applying officer to provide me with whatever relevant information or documentation I may reasonably request.

6. I should require that the arrestee be informed – at least ‘on request’ and at least in general terms - of the reasons for any such application and of the information upon which it is based.

7. I should publish the principles upon which I intend to decide such applications.

8. I should consult with the Strategy Board on the production by that Board of guidance about the circumstances in which applications may be made under section 63G(2) or (3) and, in particular, guidance as to:

- the circumstances in which it may be right to make such applications;
- when and by whom such applications should be made;
- the information and factors which should be considered by applying officers in connection with such applications;
- the disclosure of information to the Commissioner and to the individual concerned;
- the keeping of records about the uses to which any retained material is put and about any benefits which result from that use.

RESPONSES

I would welcome the views and suggestions of others as regards the proposals which are set out above.

Responses should be sent to me at Alastair.MacGregor@homeoffice.gsi.gov.uk and should reach me by Friday 21 June 2013.

Alastair R MacGregor QC
Biometrics Commissioner

ANNEX A

List of Consultees

The following people or organisations have been invited to respond to this consultation:

- ACPO Criminal Records Office
- Association of Chief Police Officers
- Big Brother Watch
- Black Mental Health UK
- Dr. Elizabeth Campbell
- Professor Ed Cape
- Criminal Bar Association
- Criminal Cases Review Commission
- Crown Prosecution Service
- Christopher David (Wilmer Hale)
- Genewatch
- HM Inspectorate of Constabulary
- Home Office: Crime and Policing Group
- Home Office: Office for Security and Counter Terrorism
- Information Commissioner's Office
- Justice
- Law Society Criminal Law Committee
- Liberty
- Dr. Carole McCartney
- Metropolitan Police Service
- National DNA Database Strategy Board
- National DNA Database Ethics Group
- Privacy International
- Protection of Freedoms Act Implementation Board
- Andrew Rennison, Forensic Science Regulator
- Professor Clive Walker
- Professor Michael Zander