
Consultation Paper on Applications to the Biometrics Commissioner under s.63G PACE Summary of Responses

Office of the Biometrics Commissioner

August 2013

Organisation	Response and Summary of Purpose	Accepted / Acknowledged / Rejected
Association of Chief Police Officers (ACPO): CC Christopher Sims	<p>The document reads well and, from the way it is written, sets the tone for applications out extremely simply and well. Agrees with the principles outlined.</p>	<p>Acknowledged.</p>
Association of Chief Police Officers Criminal Records Office (ACRO)	<p>The Commissioner should consider the collection of data to inform his Annual Report to the SSHD. Additional data could include:</p> <ul style="list-style-type: none"> i. The number of Chief Officer extension applications to a District Judge (following initial extension period). ii. How many persons who have had biometric material retained for 3 years following a successful application by a Chief Officer have been arrested and/or convicted of a recordable offence (qualifying offence or minor offence) within the retention period, and whether the retention of that material was an element to the arrest or conviction. iii. How many persons who have not had biometric material retained following an unsuccessful application by a Chief Officer have subsequently been arrested and/or convicted of a recordable offence within a period of 3 years? 	<p>Accepted. Proper statistics should be kept – including statistics of the types suggested. The Biometrics Commissioner will engage with ACRO and others in that connection.</p>
	<p>Information provided by Chief Officers to the Commissioner during the application process is likely to contain greater detail than that provided to the subject of the biometric data when notified of an application being made.</p>	<p>Acknowledged. It is recognised that difficult issues may arise as regards disclosure.</p>
	<p>Chief Officers would be keen to protect sources of certain information and ensure measures are in place should an application for disclosure under the Freedom of Information Act (FOI) or the Data Protection Act (DPA) for a subject access request be made. The Biometric Commissioner's office should ensure they engage with Home Office FOI and DPA departments to ensure safeguards to protect information are in place.</p>	<p>Accepted. The Office of the Biometrics Commissioner (OBC) has consulted the ICO in this regard. The OBC is not currently subject to FOI requests.</p>
	<p>Recommends issuing guidance to Chief Officers on dealing with sensitive public interest immunity (PII) intelligence or information which may need to be disclosed as part of the</p>	<p>Accepted. As far as practicable, at least the gist of</p>

	<p>application process where PII issues may arise. This may of course mean that the Chief Officer will need to take a view on whether or not to proceed with an application.</p>	<p>any sensitive information should, in the Commissioner's view, be disclosed to the subject. Should the Chief Officer wish not to disclose information where the Commissioner deems it appropriate to do so, the Chief Officer will need to take a view as to whether to proceed with an application for retention.</p>
	<p>Suggests an option for a personal verbal briefing to the Commissioner where PII issues arise.</p>	<p>Acknowledged. The option of a verbal briefing seems unlikely to be necessary but will be considered if requested.</p>
	<p>Recommends the issue of clear guidance to Chief Officers on the process of making an application, including a process map, national application form (rather than Force specific) and an outline of what information and supporting documentation is required. ACRO would be able to provide assistance to develop this for the Biometrics Commissioner's Office if required.</p>	<p>Accepted. The Biometrics Commissioner welcomes any assistance ACRO may offer.</p>
	<p>The Commissioner may have a view on what crimes are considered to be serious. This may include all offences which are classified as qualifying offences. However there are other offences which could also be considered which are not within the qualifying offences list such as drug manufacture or possession with intent to supply or offences of dishonesty. It is difficult to accurately identify which offence types would benefit from retention of biometric material. The Commissioner may consider issuing a list of offences considered sufficiently serious for an application to be considered. A number of serious offence lists already exist and may be used as a point of reference or assist in compiling a new list.</p>	<p>Rejected. PoFA is prescriptive in this regard and "Qualifying Offences" are defined by Statute. It is for a Chief Officer to decide whether or not to make an application on a case by case basis.</p>
	<p>It is difficult to accurately identify which offence types would benefit from retention of biometric material. For example biometric material taken from a suspect accused of rape may or may not</p>	<p>Acknowledged.</p>

	be likely to prevent or detect future offending of the same offence type.	
	Suggests providing a Frequently Asked Questions (FAQ's) document to Chief Officers to assist in providing guidance and advice.	Acknowledged. Guidance and advice on making applications to the Commissioner will be contained within the Guidance issued by the National DNA Database Strategy Board. The Commissioner expects to have significant input into that Guidance.
Metropolitan Police Service (MPS): Mr Gary Pugh	The issues are well summarised and the adopted approach is logical.	Acknowledged.
	The PoFA legislation does not recognise the purpose of the National DNA Database (NDNAD). Section 63G(2) takes account of the circumstances of victims, specifically with regards to instances of domestic violence. Invariably in such cases the suspect is known so the NDNAD is of little relevance as its primary purpose is the identification of potential suspects or a line of enquiry. While those who commit domestic violence may have a propensity to violence this is more often than not directed to their partner and not to the public at large.	Acknowledged.
	The public interest is best served by retaining the fingerprints and DNA of those individuals who pose a risk of harm to society and on this basis their retention can be justified following an arrest for a recordable offence. This should lead to a reasoned, balanced and justifiable basis for retention of fingerprints and DNA from those who are arrested and not charged for a qualifying offence.	Acknowledged.
MPS: Additional Response	The spirit of the section has been captured. The MPS could assist in devising examples of cases where retention might be appropriate.	Acknowledged.
	Factors (Proposal 4): Factor (iv) " <i>likely usefulness of the material</i> ": In cases of Domestic Violence, parties are known and the extent to which DNA or fingerprints are useful could be questioned. A speculative search will detect previous offending; however, a suspect may commit	Acknowledged. The Commissioner recognises that the likely usefulness of the

	<p>further offences of a sexual or violent nature against strangers. Offending is not homogenous and the fact that an individual is arrested for a DV incident does not necessarily mean that they will only commit offences against known parties.</p> <p>Whilst the usefulness of retaining DNA may be limited in relation to certain types of offences, that material may be of value when investigating other types of offences.</p>	<p>material will not be an easy factor to determine in all cases, but takes the view that it is nonetheless an appropriate factor for consideration.</p>
	<p>The likely relevance or significance or usefulness of DNA/fingerprints should not be a factor for consideration.</p>	<p>Rejected (see above).</p>
<p>The Crown Prosecution Service (CPS)</p>	<p>General Comment:</p> <p>Recognises that these new legislative provisions on the destruction and retention of fingerprints and DNA profiles, introduced by the Protection of Freedoms Act 2012, seek to strike a balance between the public interest in the prevention and detection of crime and the individual's Article 8 right to privacy. In doing so, they give legislative effect to the decision in S and Marper v UK [2008] ECHR 1581.</p>	<p>Acknowledged.</p>
	<p>Notes that the role of the Biometrics Commissioner, in adjudicating on applications for longer than normal retention of biometric material, is pivotal to ensuring that this balance between the public interest and the right to privacy is properly met.</p>	<p>Acknowledged.</p>
	<p>Proposal 1:</p> <p>The CPS agrees with this approach.</p>	<p>Acknowledged.</p>
	<p>Proposal 2:</p> <p>Although the CPS acknowledge the arguments put forward in the Consultation paper for a single test for deciding whether a longer retention period is "appropriate", consideration may be given to applying two separate but similar tests.</p> <p>e.g. For application under 63G(3) the first part of the proposed test that "<i>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</i>" could apply.</p> <p>However for applications under s63G(2), the test could be re-worded so as to reflect the apparent assumption in the statutory regime that retention of material relating to a s63G(2) application will assist in the prevention or detection of crime:</p> <p><i>"The Commissioner would accede to an application, and consider an extended retention period "appropriate":</i></p> <p><i>unless there are compelling reasons to believe that the retention of the material at issue</i></p>	<p>Rejected.</p> <p>It is considered that the correct approach is as set out in proposal 3 and it is anticipated that, in cases where the criteria under s.63G(2) are satisfied, chief officers will be particularly alert to the possibility that an application should be made (subject to a consideration of issues of proportionality/necessity). It is noted, moreover, that in such</p>

	<p><i>is unlikely to assist in the prevention or detection of crime or would not be proportionate</i>".</p> <p>Such a test would still ensure unmeritorious applications did not succeed.</p>	<p>cases the manner in which those victim criteria are met may have a bearing on other relevant factors.</p>
	<p>Questions whether it is necessary to have the second part of the proposed test, "<i>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</i>":</p> <ul style="list-style-type: none"> i. once the Commissioner has determined that the retention of material may assist in the prevention or detection of crime, and is proportionate, it would seem to be "appropriate" to consent to the retention. ii. it may be difficult in practice to make the comparison with reasons that could be put forward in respect of "most individuals". 	<p>Rejected. It could be – and has been – argued that, as regards anyone arrested for a qualifying offence, extended retention might assist in the prevention and detection of crime and would be proportionate. The Commissioner is satisfied that however 'compelling' such an argument might be, something more is required if extended retention is to be appropriate in respect of someone without previous convictions who is arrested for, but not charged with, a qualifying offence.</p>
	<p>Proposal 3:</p> <p>Agrees with the proposal to differentiate the approach with respect to s.63G(2) and s.63G(3) applications.</p>	<p>Acknowledged.</p>
	<p>Consideration may be given to a further differentiation of approach (see proposal 2).</p>	<p>Rejected. (See above).</p>
	<p>Proposal 4:</p> <p>Agrees that all factors listed would be relevant.</p> <p>The examples given at paragraphs 15-21 of the consultation paper are particularly helpful. It would be useful if these examples were included in the published principles.</p>	<p>Acknowledged.</p> <p>Accepted.</p>
	<p>Proposal 5:</p> <p>Agrees that the Commissioner will require relevant information in order to make an informed decision.</p>	<p>Acknowledged.</p>

	<p>Proposal 6:</p> <p>Since there is a statutory obligation to give notice and to consider any representations, the arrestee should be supplied with this information.</p> <p>Agrees that where possible disclosure should be made, albeit in summarised or redacted form where necessary.</p> <p>In cases where disclosure of sensitive material may risk prejudice to an important public interest, consideration may be given to a procedure enabling the police to exert public interest immunity and apply for nondisclosure of the material.</p>	<p>Acknowledged.</p> <p>Acknowledged</p> <p>Acknowledged. As far as practicable, at least the gist of any sensitive information should, in the Commissioner's view, be disclosed to the subject. Should the Chief Officer wish not to disclose information where the Commissioner deems it appropriate to do so, the Chief Officer will need to take a view as to whether to proceed with an application for retention.</p>
	<p>Proposal 7:</p> <p>Agrees that principles should be published to:</p> <ul style="list-style-type: none"> i. assist those making applications and those opposing them; ii. provide for consistent adjudication; and iii. ensure transparency. 	<p>Accepted.</p>
	<p>Proposal 8:</p> <p>It is desirable that chief officers are assisted by guidance in deciding for which cases to make an application. Guidance could also ensure that the number of applications is not excessive.</p> <p>Welcomes the proposal that the Commissioner will consult with the Strategy Board.</p>	<p>Acknowledged.</p>
<p>Big Brother Watch</p>	<p>Broadly welcome the proposals. Recent reforms in the Protection of Freedoms Act are a welcome step forward, but more could be done to protect the liberties of innocent people. The role of the Biometrics Commissioner is critical to this process.</p>	<p>Acknowledged.</p>

	<p>Proposal 1: Wholly agree with a two stage approach that examines both the necessity of the request to retain and if necessary, whether it is also appropriate to do so.</p>	Acknowledged.
	<p>Proposal 2: The wording ‘prevention or detection of crime’ could be misleading in the context of the DNA database, as the DNA database’s primary function is to assist in the identification of an offender after a crime has occurred and been detected.</p> <p>Deeply concerned if material was retained as part of an effort to deter someone from committing an offence, as then the consideration shifts from evidential necessity to speculative deterrence. Such a threshold is too low to be compliant with <u>Marper</u>.</p> <p>The Commissioner should apply a higher test, with a stricter interpretation based upon whether it is both proportionate and necessary to retain the material. As such, it is agreed that the test should be for retention to be more compelling where the offence is not a qualifying one.</p>	<p>Rejected. An increased likelihood of detection may contribute to the prevention of crime.</p> <p>Rejected. Detection and prevention can properly be considered in tandem.</p> <p>Rejected. Applications can only be made to the Biometrics Commissioner where an individual has been arrested but not charged with a qualifying offence.</p>
	<p>Proposal 3: The Commissioner should be alert to attempts to classify material under s.63G(2) where the threshold is not met in s.63G(3).</p>	Accepted.
	<p>Proposal 4: The list of criteria seems relatively strong.</p>	Acknowledged.
	<p>Consideration should also be given to other evidential routes and the likelihood of DNA being a critical factor in securing a conviction.</p>	Accepted.
	<p>Proposal 5: The initial application should contain enough information to satisfy the process and if it does not, the application should be refused.</p>	Accepted. It is envisaged that any applications received without sufficient detail will be rejected or referred back to the applying officer.

	There is a need to consider within this process a double-jeopardy style consideration where officers are not able to make repeated but slightly varied applications for the retention of the same material.	Acknowledged. The OBC will seek to ensure that the evidential standards for retention are clear and that applications are made correctly and in a timely manner.
	Proposal 6: The application form should include provision for the scope of the application being made to be communicated and an outline of how the arrestee can make representations, particularly in terms of the assessment framework.	Accepted.
	Proposal 7: Agrees with the proposal.	Acknowledged.
	Suggests that police forces also make clear their processes for deciding whether to make an application and the framework used in making that decision.	Acknowledged. This will be a matter for the National DNA Database Strategy Board Guidance.
	Proposal 8: Agrees with this proposal.	Acknowledged.
	Suggests that as part of this guidance the provision for statistical recording be introduced to ensure on-going public confidence in the operation of this process. In particular a force-by-force breakdown would allow issues in local authorisation to be identified and dealt with.	Accepted.
British Naturism	It is when an arrest is made that the danger of data retention occurs to members. Typically the sequence of a case is - arrest for Public Nuisance, changed to section 66 Sexual Offences Act 2003, changed to section 5 Public Order Act 1986, charges dropped. Section 5 is a recordable rather than a qualifying offence, but since the original arrest was, mistakenly, for a qualifying offence (s.66 SOA) it is possible that application would be made for the retention of data. This would be totally inappropriate.	Acknowledged.
	Where an inappropriate arrest is made and there is no charge because no offence has	Acknowledged.

	been committed data should not be retained.	If an arrest is unlawful, the material would fall to be destroyed / deleted under s 63D(2) of PACE.
	Where a case is dropped, or a not-guilty verdict returned, data should not be retained.	Acknowledged. The relevant regime has been established by PoFA.
	The response received focused on wider potential implications of soft information being disclosed on CRB checks. Considered that the safeguards against abuse must be strengthened considerably before data is retained.	Not applicable to this consultation exercise.
GeneWatch UK	GeneWatch UK is supportive of the proposed approach to implementing the legislation.	Acknowledged.
	It is recommended that general statistics are published annually on the number of applications made by each police force and approved by the Commissioner. Reported statistics should include the start and expiry dates of any approvals of retentions.	Accepted. Rejected. The Commissioner is not persuaded that any useful purpose would be served by publishing such data.
	The retention of an unconvicted person's records on police databases impacts on their right to privacy and must be necessary and proportionate to the need to tackle crime. It is therefore important that the power to retain DNA profiles of persons who have merely been arrested is exercised with maximum restraint.	Acknowledged.
	In the context of the Act, biometrics 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 their retention.	Accepted.
	Agree with the list of relevant factors to consider.	Acknowledged.
	The extent to which retention of a DNA profile may be regarded as necessary and proportionate relates to an assessment of whether the arrested individual poses a risk of committing an offence for which DNA evidence may be relevant in the future, especially where evidence identifying them might be difficult to obtain other than	Accepted. This will be taken into account when assessing the appropriateness of retaining

	through a 'cold hit' on the DNA database. For example, even a serious crime such as murder or rape of a close relative does not require the perpetrator to have their DNA profile stored on a DNA database if they are likely to be identified as a potential suspect in other ways (e.g. as the partner or parent of the victim) because a DNA sample can be taken from them when they are suspected of the crime. Conversely, if the individual poses a risk of committing acts of violence against strangers, perhaps in places far from their home, a cold hit on the DNA database might be the best means of identifying them as the perpetrator of such an act.	biometric material on a case by case basis.
	The seriousness of the potential future offence is also relevant.	Accepted.
	Agrees with the view that special attention must be paid to the impact of DNA profile retention on children and vulnerable adults.	Acknowledged.
	Agrees with the proposal in relation to disclosure.	Acknowledged.
The Information Commissioner (ICO)	<p>General Comments:</p> <p>Commented that DNA related information was capable of being 'sensitive' personal data within the meaning of the Data Protection Act 1998.</p> <p>The processing of sensitive personal data requires additional stringent safeguards and it is welcome that the process for deciding whether biometric material should be retained is being approached on a case by case basis, factoring in important elements such as necessity and proportionality and the potential impact on individuals' privacy when retaining personal data of this type.</p> <p>Independent oversight by the Biometrics Commissioner provides an important additional safeguard and is welcomed.</p>	Acknowledged.
	<p>Relevant Legislation:</p> <p>It would be welcome to have clarity on the wording 'until the conclusion of the investigation of the offence' to ensure that there are no circumstances where categorisation as an 'un-concluded investigation' justified retention even though the police had no on-going concerns about criminal activity.</p>	Accepted. The Commissioner recognises the definitional problem and will be alert to this risk. He considers, however, that in practice he has no real option but to treat the making of a decision to 'NFA' an arrestee as being, in most cases, the step which should trigger any application for

		extended retention.
	Expressed concerns regarding cases where the police investigation may continue for more than 3 years. Given that the Biometric Commissioner's remit only allows for the material to be retained for three years from the date that it was taken, it seems that there will be a number of cases where there will be no application for an extension of the retention period but the material will be retained for three years or more until the end of the investigation.	Accepted. This appears to be the effect of the relevant provisions of PoFA.
	S.63G(2) is a wide provision and indicates that there may be a substantial number of applications to the Biometrics Commissioner.	Acknowledged.
	Welcomed that the data subject will be given the opportunity to make representations. Care needs to be taken with regards to what information is disclosed to the individual.	Acknowledged.
	Consideration will need to be given to how long the representations and associated documents are retained for by the Commissioner.	Accepted. The OBC has consulted the ICO on this issue.
	Expressed concerns regarding s.63G(7) of PACE regarding service of the notice of application. Serving the notice by "leaving it at a person's usual or last known address" would be inappropriate given the sensitive nature of the data and the correspondence. Suggests that any guidance should ensure notices / decisions to be served on data subjects should be sent securely.	Acknowledged. The OBC have consulted the ICO on this issue and it is accepted that postal delivery would generally be a suitable method of service.
	Number of Applications: There will need to be a process in place to ensure applications are dealt with within a reasonable timescale.	Accept. KPIs will be published to ensure transparency and accountability but much will clearly depend on the numbers of applications made and the resources available to the OBC.
	The decision making process must factor in how decision are to be communicated to the data subject.	Accepted. Decisions will usually be communicated by post.

	<p>Relevant Factors:</p> <p>Reassured by the proposal that there are a number of factors to be taken into consideration when deciding an application including the gravity of the offence.</p>	<p>Acknowledged.</p>
	<p>(iv) <i>Likely usefulness of material</i> – it is not clear how the risk could be weighed that the arrestee will commit further offences. Such an application on these grounds would need to be supported by appropriate evidence.</p>	<p>Acknowledged. It is clearly desirable that there should be research which generates reliable statistical evidence in this connection.</p>
	<p>Under paragraph 21 it is not clear what is meant by risk of stigmatisation. The statement at page 10 that an application for retention has been made will only be known to the individual concerned, the police and the Biometrics Commissioner is incorrect. Such information may be more widely disclosed in the context of the Disclosure and Barring Service regime and other relevant information which a chief constable may include on an Enhanced Certificate. The fact that material continues to be retained could therefore be disclosed to a potential employer.</p>	<p>Acknowledged. Chief Constables are responsible for disclosures on Enhanced Certificates and for ensuring that such disclosures are relevant and in compliance with current legislation.</p> <p>The Commissioner cannot immediately envisage a situation where disclosure of such information would be considered relevant. This matter has been raised with the Disclosure and Barring Service.</p>
	<p>Information / Disclosure:</p> <p>The proposal that an officer provide whatever relevant information / documentation is a wide requirement. Consideration will need to be given to the types of relevant information to be provided to avoid reviewing irrelevant information.</p>	<p>Accepted.</p>
	<p>Guidance:</p> <p>Welcomes the decision to publish the principles on which decisions will be made. That guidance will be issued by the Strategy Board is also welcomed.</p>	<p>Acknowledged.</p>
	<p>Proposals:</p>	

	Supports the 8 proposals set out in the consultation paper.	Acknowledged.
	It is not clear what individuals can do if they are unhappy with the Biometric Commissioner's decision. It would be useful to provide information as to the action that may be taken by individuals in any guidance to be published.	Rejected. There is no appeal process. Remedy will be by way of the Judicial Review process and this will be made clear to any arrestee who seeks information in this connection.
Justice	<p>Regrets the decision in PoFA to depart from the Scottish Model. The decision to provide for the continuing retention of DNA taken from individuals on arrest, even in circumstances where no charge results, will, in their view, be extremely difficult to justify.</p> <p>Concerned that the Act provides a quasi-judicial role for the Biometrics Commissioner which will lead in practice to identification of a group/class of individuals as more suspicious or likely to offend.</p> <p>Questions whether the underlying statutory framework will be capable of withstanding challenge on human rights grounds.</p>	Acknowledged.
	Welcomes the Biometrics Commissioner's principled and considered approach to the design of his role and the publication of his key principles.	Acknowledged.
	Proposes that underlying decisions made pursuant to section 63G – determining whether the retention of any innocent person's DNA is "appropriate" – must be compliant with Article 8(2) ECHR. Does retention serve a legitimate aim properly evidenced and is retention necessary and proportionate in light of the interference it poses with the rights of the individual to respect for private life? This three stage test must be the guideline for all of the Commissioner's work outlined in the Consultation Paper.	Acknowledged.
	Welcomes the conclusion that the same standard of review should be applied to applications under s.63G(2) and (3).	Acknowledged.
	Welcomes the proposal that the standard of review must be something more than the reasonableness standard.	Acknowledged.
	The interpretation that under s.63G(3) 'necessity' must mean more than 'mere	Acknowledged.

	convenience' is also welcomed.	
	The conclusion that compelling reasons for retention must be shown and supported by cogent evidence is in keeping with the HRA 1998.	Acknowledged.
	Disclosure of evidence supporting an application to the Biometrics Commissioner to (a) the Commissioner and (b) the data subject in at least summarised form is unavoidable. The procedural standards to be applied must provide for some form of substantive challenge to the basis for the application, without which the statutory right to make representations will be rendered nugatory.	Acknowledged.
	Welcomes the suggestion that the procedures adopted be published and transparent.	Acknowledged.
	Welcomes the recommendation that constructive guidance be given by the NDNAD Strategy Board.	Acknowledged.
	The 63G Tests: compelling reasons, proportionality and necessity: Welcomes the clarification of the duty of the applying officer to consider necessity based on compelling reasons and supported by cogent evidence. Remain sceptical about how a cogent link between the retention of DNA and the future resolution of as yet uncommitted crimes may be evidenced.	Acknowledged.
	Welcome the language used in the consultation paper which indicates that the decision making exercise is grounded in a balancing experience familiar to those frequently using a proportionality analysis.	Acknowledged.
	While the 'compelling reasons' test establishes that the gateway to retention is set at a high bar, concerned that some inconsistency in the language used may fail to reflect the analysis required by article 8 ECHR. For example, early in the paper, the Commissioner explains that applicant officers must reasonably consider that there are "compelling reasons to believe that the public interest will be served by the retention". Later in the document, the Commissioner specifies that in considering whether retention is appropriate: <i>'such retention will only be proportionate where there are compelling reasons to believe that the public interest will be served by its retention.'</i> JUSTICE is concerned that the "compelling reasons" test should not only focus on the	Acknowledged. The Commissioner is conscious that any retention must be proportionate.

	<p>public interest in retention, but must apply in the context of a broader proportionality exercise which considers both the public interest in retention and the impact on the individual right to respect for private life. That weighing exercise could be lost in the language of the test and could be articulated more clearly.</p>	
	<p>Compelling Reasons Test:</p> <p><i>‘There are compelling reasons to believe that the retention of the material may assist in the prevention and detection of crime and would be proportionate (emphasis added); and</i></p> <p><i>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.’</i></p> <p>This should read</p> <p><i>‘There are compelling reasons to believe that the retention of the material will assist in the prevention and detection of crime and would be proportionate (emphasis added); and</i></p> <p><i>The reasons for so believing are significantly 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.’</i></p>	<p>Rejected.</p> <p>In the Commissioner’s view the narrow test proposed would be unrealistic and unworkable. There are few if any circumstances in which one could sensibly conclude that retention of an individual’s biometric material <i>will</i>, rather than <i>may</i>, assist in the prevention or detection of some as-yet-uncommitted crime.</p> <p>It is not considered that the addition of “<i>significantly</i>” would be helpful/meaningful.</p>
	<p>Factors Considered on Application:</p> <p>Broadly consider each of the factors identified to be relevant.</p> <p>Remain sceptical as to whether the quasi-judicial assessment of the risk posed by an individual who has never been charged with an offence will in itself undermine that individual’s right to respect for private life.</p> <p>Only one factor identified refers to the circumstances of the individual and appears designed to allow the Commissioner to consider the seriousness of the implications of the decision to retain for the right to private life.</p> <p>It is important that these factors ensure that the Commissioner considers the question of proportionality with both the interference with the individual rights concerned and the proposed public interest in retention, squarely, without either side inappropriately weighted.</p>	<p>Acknowledged.</p> <p>Acknowledged.</p> <p>As set out in the consultation paper, the intention is to apportion appropriate weight to the representations and the specific circumstances of the individual concerned. Proportionality will be a key</p>

		issue for consideration in every case and will be assessed in the light of all the factors listed.
	<p>Stigmatisation:</p> <p>The fact of being subject to an application for retention of biometric material made to the Biometrics Commissioner may in itself lead to stigmatisation.</p>	Acknowledged. This possibility will be borne in mind.
	<p>The Commissioner and applying forces will need to be alert in their work to the risk that the exceptional retention of DNA may disproportionately affect particular groups of people with shared characteristics. If such a pattern or any profiling is allowed to develop, it will be open to challenge on article 14 ECHR grounds. It is therefore important to highlight the public sector equality duties in section 149 of the Equality Act 2010.</p>	Acknowledged. This will be borne in mind.
	<p>Procedural Fairness:</p> <p>Supports the assessment of the Commissioner that for a person subject to an application must be able to make representations to be “fair and worthwhile” there must be some requirement for the reasons and basis for the application to be disclosed to him or her.</p> <p>Concerned that this should include, in so far as necessary, an opportunity to rebut any supporting evidence.</p> <p>Welcomes the Commissioner’s recognition that even when an applicant force seeks confidentiality for intelligence material, no application can be made without the person subject to the application being provided with at least a “gist” of that material.</p> <p>Considers that the approach to the provision of a summary or a gist should be a broad one. The information provided must at a minimum be sufficient to allow the person concerned to properly understand the case he has to meet and should be automatically provided.</p>	Acknowledged.
	<p>Publications, Guidance and Information:</p> <p>Welcomes the decision of the Commissioner that he must adopt clear principles to govern his work and that those principles must be publicly available and transparent.</p>	Acknowledged.
	<p>Encourages the Biometrics Commissioner to take a transparent approach to his reporting duties – to provide as full a report as possible on the numbers of application</p>	Accepted.

	received, granted or refused on an annual basis.	
National DNA Ethics Group	<p>Applications:</p> <p>There will need to be a widely shared understanding as to the “exceptional circumstances” that should give rise to any application under 63G PACE. The position of “compelling reasons” and “more compelling” is a helpful statement.</p>	Accepted/Acknowledged.
	<p>Appropriateness:</p> <p>There should be no distinction of substance between the criteria to be applied to applications under 63G (2) and (3). Beyond the formal criteria under 63(2), regard should always be given to grounds of ‘proportionality’ and ‘necessity’.</p>	Accepted. It is anticipated that in cases where the criteria under s.63G(2) are satisfied, chief officers will be particularly alert to the possibility that an application should be made (subject to a consideration of issues of proportionality/necessity).
	<p>Relevant Factors:</p> <p>The factors for consideration are comprehensive. The Commissioner should also have regard to:</p> <ul style="list-style-type: none"> i. the representations made on or on behalf of the arrestee; and ii. the likely consequences for the arrestee in the event of retention. 	Accepted. Those matters are intended to be encompassed by factors (vii) and (viii). Paragraph 20 of the paper also refers to the particular circumstances and characteristics of the individual, which may have a significant bearing on the proportionality of extended retention.
	<p>Information:</p> <p>It is clearly appropriate that the Police should provide the information the Commissioner requests.</p>	Acknowledged.
	<p>Disclosure:</p> <p>Where possible the disclosure of the reasons for an application should be expressed in the same terms as the application itself, with reference to the documents considered. Reasons should be made available to the arrestee even where the source and nature of</p>	Largely Accepted.

	<p>the intelligence cannot be disclosed.</p> <p>For intelligence material deemed too sensitive to disclose to an arrestee, the Commissioner should determine the extent of the disclosure. It will be for the Commissioner to apportion relevant weight to the material.</p>	
	<p>An information leaflet should be provided to the arrestee notifying them of the Commissioner's role and procedures and informing them of their right to make representations. This should use an appropriately adapted tone for the intended audience.</p>	Accepted.
	<p>The leaflet should include examples of relevant representations so as to give guidance.</p>	Rejected. Representations should be specific to the subject's circumstances.
	<p>Decisions:</p> <ul style="list-style-type: none"> i. The Commissioner should give a written decision with reasons. ii. The decision notification should give information on the Early Deletion Process where applicable. 	<p>Accepted. It is anticipated that short form reasons will be given.</p> <p>Rejected. After agreeing to an extended retention period, it would not be appropriate for the Commissioner to suggest that the subject apply for early deletion.</p>
	<p>Retention during the 3 year period:</p> <p>The decision notice should make reference to the Police's duty as data controllers to review retention and to delete when it no longer falls within the data principle.</p>	Rejected (due to limited time period for extended retention).
	<p>Research:</p> <p>Welcomes that the Commissioner is to consult with the Home Office, Strategy Board and others with regards to research.</p> <p>Research/recording should be published in the Commissioner's Annual Report.</p>	<p>Acknowledged.</p> <p>Accepted.</p>
<p>National DNA Database Strategy Board</p>	<p>Agrees with the proposition that 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</p>	Acknowledged.

	of that material.	
	Supports the view 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. Such retention will only be proportionate where there are compelling reasons to believe that the public interest will be served by its retention.	Acknowledged.
	Does not believe that a wide interpretation of s.63G(2) was intended by the PoFA Act – particularly in light of the current economic situation.	Acknowledged.
	Proposal 1: Agrees with the proposal.	Acknowledged.
	Proposal 2: Agrees with the wording that “appropriate” should mean there should be compelling / more compelling reasons for believing that retention may assist in the prevention / detection of crime. Suggests that the wording could be strengthened further to be “ <i>significantly more compelling</i> ” or similar if this is felt necessary.	Acknowledged. Acknowledged. It is not considered that the addition of “significantly” would be helpful/meaningful.
	Proposal 4: Agrees with the relevant factors identified.	Acknowledged.
	Under factor (iv) it may be worth specifically considering the difficulty (or otherwise) in identifying offenders in the specific types of crimes feared in the future. Some offences (e.g. where the offender is unseen) may rely very heavily on DNA or fingerprint evidence to identify a suspect.	Accepted. This is the intended approach under factors (iv) to (vi).
	Proposal 5: Considers this proposal to be ‘entirely reasonable’.	Acknowledged.
	It is a sensible approach that applications to the Commissioner are made as soon as practicable.	Accepted.
	Proposal 6 :	Rejected. The Commissioner considers that the subject

	<p>Inclined towards the view that when the subject receives the notification from a Chief Officer they should be informed only in general terms of the reason for the application (e.g. whether it's under s.63G(2) or (3), and that it is believed necessary for the prevention and detection of crime.</p> <p>Disclosure of any further details should be 'on request', and on a case by case basis, with the chief officer being mindful of the risk (to other persons) involved in disclosing additional details to the subject. Disclosing certain details to the subject, such as sensitive intelligence, could result in making the vulnerable even more vulnerable.</p>	<p>should be informed of the reasons for the application (at least in summary form) as a matter of course. It will be a matter for the applying Chief Officer to decide on whether to proceed with an application if even the gist of some or all of the information relied on cannot be disclosed.</p>
	<p>Raised the possibility of developing an appeal process to be outlined in the published guidance / principles for both chief officers and suspects to challenge retention decisions.</p>	<p>Rejected. An appeal process was not envisaged by PoFA and both an applying police force and the subject of the application will have an avenue for redress through the Judicial Review process.</p>
<p>Dr Carole McCartney</p>	<p>Asks as to whether more people are charged with a qualifying offence and highlights the potential for the police to 'up-charge' in order to retain biometrics. Dr McCartney notes that the regime places a heavy emphasis on the charging decision and that there may be a risk that the CPS/Police will "negotiate" charging decisions in order to ensure retention.</p>	<p>Acknowledged. This is beyond the scope of the present consultation but the Commissioner will be alert to these risks.</p>
	<p>The success of the retention regime relies on the accuracy of police record keeping (especially dates).</p>	<p>Acknowledged. This matter will be kept under review.</p>
	<p>What is the Home Office guidance on 'fair' retention in National Security cases? Why and how does this differ from normal arrestees?</p>	<p>See 'Home Office Guidance on the Making or Renewing of National Security Determinations Allowing the Retention of Biometric Data.' June 2013.</p>
	<p>'Appropriate' retention – It may be considered in addition to the criteria listed whether DNA is actually relevant in that offence and whether future identification is likely to be dependent on DNA.</p>	<p>Accepted. These points may well prove relevant to any consideration of factors (iv) to</p>

	Also relevant may be the possibility that the individual may not be available at a later date for re-testing (likely to abscond).	(vii).
	There is a danger that including intimations of ‘terrorism’ in a police application may wrongly suggest that retention is ‘appropriate’.	Acknowledged. The Commissioner will be alert to that risk both when dealing with applications under section 63G and when reviewing National Security Determinations.
	There should be only one set of Guidance. If there are to be two and there is a conflict, which guidance should prevail? It would seem pointless to have guidelines for applications that are not in strict harmony with those for decision making.	Acknowledged. The Commissioner recognises that it would be unfortunate if he and the Strategy Board were to issue conflicting guidance and will seek to work with the Strategy Board to avoid such a situation arising. Although each is independent he does not think it likely that such a situation will in fact arise. It is envisaged that the ‘principles’ identified by the Biometrics Commissioner will feed into the Strategy Board Guidance.
	<p>One of the critical decisions will be deciding what are the ‘reasonable grounds’ upon which a police officer can base his belief that the criteria are made out.</p> <p>Poses the question whether the following will be relied upon:</p> <ul style="list-style-type: none"> - Informant evidence - Experience of the officer, or - Concrete facts / testable evidence. 	Acknowledged. The Commissioner will attempt to give appropriate weight to different types of evidence and will determine each case on its own merits.
	Suggests that a plain English version / translation of the guidance is included with the information for the individual concerned.	Accepted. Efforts will be made to provide accessible and

		understandable guidance to individuals.
	Questions whether there will be an appeal process for decisions made by the Commissioner.	PoFA makes no provision for an appeals process. It is envisaged that any challenges to decisions made by the Commissioner will be by way of the Judicial Review process.
	Dr McCartney raises a number of other important questions concerning the PoFA regime.	Acknowledged.
Professor Clive Walker University of Leeds	Comments that the potential numbers of qualifying cases sounds very alarming. Suggests a guideline which warns that retention should not be considered routine and the expectation is that most cases will not require retention.	Acknowledged. Acknowledged. It is hoped that this will be apparent to Chief Officers.
	Suggests the 'sanction' might be that statistics will be collected about retention rates per police force and those forces which seem to be wasting resources and whose practices threaten privacy will be investigated.	Accepted. Statistics will be recorded in any event.
	Agrees with the 8 factors identified (proposal 4).	Acknowledged.
	The only query concerns <i>'(iii) the strength of, and grounds for, suspicion of the arrestee'</i> . There is no problem with the 'grounds' but the notion of 'strength' might run the danger of involving rather subjective claims - most arrests are arrests without warrant and therefore have not involved proof of the standard of evidence to a third party. There are some variations in the formulation of arrest powers which relate to standard of evidence - reasonable belief compared to reasonable suspicion. But otherwise, this criterion encourages extravagant or unfounded claims by the police, the investigation of which will take a lot of time. A better explanation of 'strength' can be made in the context of <i>'(iv) the reasons why the arrestee has not been charged;'</i>	Accepted. The words " <i>strength of</i> " will be removed.
Wilmer Hale	Broadly supportive of the role and responsibilities of the Biometrics Commissioner.	Acknowledged.
	Proposal 1: Agrees that "reasonable grounds" is the appropriate threshold.	Acknowledged.

	Offers a comparison with the American model.	
	<p>Proposal 2: Raised a number of queries:</p> <ul style="list-style-type: none"> i. Would there be a limit on the number of extensions? – Presumed not but would benefit from clarification. ii. What would constitute a public interest to retain where an individual is not charged or convicted of a qualifying offence – presumed this would include the nature of the offence and the characteristics of the offender (i.e. repeat) <p>Offers comparison with the American, Scottish and Northern Ireland models.</p>	Acknowledged. See PoFA.
	<p>Proposal 3: Questioned whether being “particularly alert” translates to a lower threshold for an application under s.63G(2) to meet than under s.63G(3).</p>	<p>Acknowledged. There will not be a lower threshold. It is considered that the correct approach is as set out in proposal 3 and it is anticipated that, in cases where the criteria under s.63G(2) are satisfied, chief officers will be particularly alert to the possibility that an application should be made (subject to a consideration of issues of proportionality/necessity). It is noted, moreover, that in such cases the manner in which those victim criteria are met may have a bearing on other relevant factors.</p>
	<p>Proposal 4: Overall these appear to be strong factors for predicting re-offending and in turn,</p>	Acknowledged.

	appropriate for the determination of the continued retention of material.	
	<p>Comments with regards to the following factors:</p> <p><i>(iii) the strength of, and grounds for, suspicion of the arrestee;</i> presumably if a decision to arrest is made, there would be a sufficient degree of suspicion at the outset as well as adequate grounds to arrest the suspected person. If not this is of critical importance as if an individual has been arrested on flimsy grounds then this should weigh heavily against retention of their DNA.</p> <p><i>(vii) the age and other characteristics of the arrestee;</i> it would be helpful to distinguish that first time offenders under 18 are less likely to re-offend than first time offenders over 18.</p>	<p>Acknowledged. The words “strength of” will be removed.</p> <p>Acknowledged. PoFA does provide for a different regime for minors charged and/ or convicted of an offence.</p>
	<p>Proposal 5: Believes this to be a very important proposal. Suggests that it be enhanced so that the undertaking also requires an officer, in a manner similar to the disclosure test, to confirm that they have provided everything that supports and undermines their application. An undertaking could provide an adequate safeguard in place for those concerned about the possible abuse of applications.</p>	<p>Acknowledged. Rejected. An undertaking to provide the Commissioner with whatever information he may reasonably request is for now considered sufficient.</p>
	<p>Proposal 6: Informing an arrestee is appropriate when there has been a request made. Doing so strikes a balance between the interests of society and the rights of the individual. In line with EU Directives and the Data Protection Act individuals should be made aware when their data is being used and generally how it is being used.</p>	<p>Accepted. Acknowledged.</p>
	<p>Proposal 7: Publishing principles will add transparency to the decision making process and is highly recommended.</p>	<p>Acknowledged.</p>
	<p>Proposal 8: Consultation with the DNA Database Strategy Board is recommended as the Strategy Board is a major stakeholder in how the National DNA Database is utilised.</p>	<p>Acknowledged.</p>
Professor Michael Zander	No comments to add. Agrees with the proposals in the consultation paper.	Acknowledged.

Public Response (1)

Agreed with the proposed approach.
A literal interpretation of Section 63(2) would be too broad.

Acknowledged.