



Office of the Biometrics Commissioner

Response to Protection of Freedoms Act 2012: Draft statutory guidance on the making or renewing of national security determinations allowing the retention of biometric data

Thank you for the opportunity to give my views on the draft guidance on the making and renewing of national security determinations (NSDs). Those views, which I have already discussed with your officials, are set out below.

General Observations

According to Paragraph 10 of the draft Guidance, three key aspects of its purpose are:

- **[To] Set out the threshold for making or renewing a NSD and the way in which those powers may be exercised.**
- **To promote the fundamental principles to be observed by those authorised to make or renew a NSD under provisions mentioned in section 20(2)(a) of the 2012 Act and to ensure the effectiveness of the use of those powers to retain biometric data for national security purposes.**
- **To ensure that any interference with the right to respect for private and family life (Article 8 of the European Convention on Human Rights (ECHR)) of persons to whom the data belongs is necessary, proportionate and in accordance with the law.**

There are a number of ways in which the draft Guidance might more effectively achieve those stated objectives. To do so it should, in my view, provide more detailed guidance to those who are authorised to make or renew NSDs as to the principles upon which they should work – and as to the factors which they should take into account – when deciding whether or not to make or renew them. I also take the view that such Guidance should, if possible, include illustrative examples of situations in which the making of NSDs would – or would not – be appropriate.

The Relevant Test

At several points in the draft Guidance reference is made to the fact that those who make or renew NSDs must satisfy themselves that retention of the biometric material at issue is both ‘necessary in the interests of national security’ and ‘proportionate’. The key passages in this regard are at paragraphs 38 - 42 and 60 - 65 and the issues of ‘necessity’ and ‘proportionality’ are most fully dealt with in those paragraphs as follows.

The Test to Apply

Necessity

38. In order to make a NSD under any of the statutory provisions listed in section 20(2)(a) of the 2012 Act the responsible Chief Officer or Chief Constable must believe and have reasonable grounds for believing that a NSD is **necessary** in the circumstances of the particular case for the purposes of national security.

39. A NSD should only be made where the responsible Chief Officer or Chief Constable has considered information from which he can reasonably form the belief that retention of the material is 'necessary' for the purposes of national security. This may involve an assessment of any or all of the following categories of information:

- a) Police intelligence
- b) Arrest history
- c) Information provided by others concerned in the safeguarding of national security
- d) International intelligence
- e) Any other information considered potentially relevant by the responsible Chief Officer or Chief Constable

Proportionality

40. A decision to make a national security determination must be **proportionate**. The responsible Chief Officer or Chief Constable must have regard to that individual's right to privacy, as provided for by Article 8 of the ECHR. If retention is considered necessary, the responsible Chief Officer or Chief Constable making the NSD must also believe that such retention is proportionate to the goal sought – i.e. for the purposes of national security. This will involve balancing any interference with an individual's ECHR Article 8 rights against the need to retain such material for national security purposes.

Helpful though those paragraphs are, they are nowhere expanded upon in a way which would, in my view, provide real assistance to those who will actually have to apply the tests there summarised. No practical guidance is provided as to how they are to assess the issue of 'necessity' in any given set of circumstances, nor as to the factors which they should take into account – or as to the approach they should adopt - when carrying out the balancing exercise which will be required of them. As a result, the risk of inconsistency would seem to be a high one.

In this connection I note the following passage which appeared in a memorandum dated 16 May 2011 from the Minister, James Brokenshire MP, to the Human Rights Joint Committee:¹

The Government considers that it is appropriate for mandatory guidance to be issued to persons responsible for making national security determinations to ensure that decisions concerning such determinations are taken on a consistent basis. Although the decision will be that of the chief officer or responsible officer, the availability of guidance will ensure a national approach. The decision to use guidance rather than legislation for this purpose reflects the likelihood that decisions about the retention of material for the purposes of national security will be fact-specific and will more readily be informed by general principles and illustrative examples rather than rigid rules. The Secretary of State will also have the power to make revisions to the guidance which will allow it more flexibly to respond both to changing circumstances and to the observations of the Commissioner [emphasis added].

¹ The passage is quoted at paragraph 30 of the Eighteenth Report of that Committee published on 7 October 2011.

I respectfully agree with the suggestion that ‘general principles and illustrative examples’ would be valuable components of guidance about the making or renewing of NSDs. In the absence of such components the current draft Guidance will, in my view, provide little practical assistance to those responsible for making NSDs and do little to inform or reassure the public as to the basis upon which biometric material is being retained.

Expanding the Draft Guidance

Although it is my understanding that concerns have been expressed about the possible risk to national security of including in any Guidance illustrative examples such as are referred to above, I am as yet uncertain as to the detailed reasoning that underlies those concerns. This is a matter which I hoped to pursue at a meeting with representatives of the Metropolitan Police Service to discuss specific factual situations which might give rise to NSDs. Regrettably, that meeting had to be postponed albeit it will, I hope, be possible to re-arrange it for a date within the next two or three weeks. Whatever comes of that meeting, however, I recognise that in view of the relevant timetable it may well be impossible to incorporate any illustrative examples into the draft Guidance before it has to be submitted for Parliamentary scrutiny and approval.

The same may not, however, be true of the incorporation into that draft Guidance of at least some informative general principles as regards the making or renewal of NSDs. Some clearer indication could, for example, presumably be given of what is meant by ‘necessary’ in this context (such as that it denotes something less than ‘essential’ but more than merely ‘desirable’ or ‘useful’) and it would presumably be possible to identify in general terms at least some of the factors which should be taken into account when considering the issues of ‘necessity’ and ‘proportionality’ (e.g. the nature, scale and immediacy of the relevant risk to national security, the cogency of the reasons for believing that retention may serve some useful purpose, the lapse of time since the material was obtained, the age of the individual from whom it was obtained, etc).

Other Matters

I deal below with other aspects of the draft Guidance in the order in which those matters are referred to in it. I have omitted reference to minor typographical and other errors which I have already drawn to the attention of your officials.

Definitions and Glossary

‘Law enforcement authority’

At Paragraph 5 of the draft Guidance it is said that NSDs may only be made by ‘a law enforcement authority listed under section 18E(1) of the Counter-Terrorism Act 2008 or specified in any order made by the Secretary of State under that section’ and the relevant wording of section 18E(1) is reproduced in the ‘Glossary’ at Chapter 5. That wording, however, makes reference to non-UK bodies (such as foreign police forces etc) which can, of course, have no power to make NSDs.

‘Chief Officer or Chief Constable’

The draft Guidance makes clear that NSDs must be made by a ‘Chief Officer or Chief Constable’ and that term is helpfully defined in the Glossary. In conversations with your officials and others it has been indicated to me that Chief Constables may well wish to delegate their power to make NSDs and I have made clear that, in my view, such delegation would be acceptable provided that the officers in question

are of at least ACPO rank. It would be helpful if this ‘delegation’ issue were expressly addressed in the draft Guidance.

The Extent to which the Guidance is Binding

Paragraphs 12 and 13 helpfully set out the extent to which the guidance must be followed by those making NSDs. Paragraph 13 is, I think, particularly helpful.

Retention Periods

Paragraphs 21 to 30 summarise the new legislative regime as regards the retention of biometric material. Amendments to that summary - and in particular to paragraphs 23 to 25 - will of course be necessary if (as seems possible) changes are made to the rules governing the applicability to DNA samples of the provisions of the Criminal Procedure and Investigations Act 1996. In my view, however, it would in any event be both helpful and appropriate to set out in this section – and in Annex D (which is referred to at paragraph 30) – the various retention periods which, in the absence of a NSD, apply to biometric material which has been collected pursuant to counter-terrorist legislation.

Paragraphs 41 - 66

Subject only to my above ‘General Observations’, Paragraphs 41 - 66 of the draft Guidance are both useful and helpful, particularly as regards procedures, timescales and the provision of information. Those paragraphs fall under the headings:

- ‘Making a national security determination’;
- ‘Independent Oversight by the Biometrics Commissioner’;
- ‘Cancelling a National Security Determination’;
- ‘Renewing a National Security Determination’; and
- ‘Notification of Renewal to the Commissioner’.

Some minor points arise as regards the wording of those paragraphs (which I have already drawn to the attention of your officials) but the only one of any substance relates to the definitions in the Glossary of ‘NSD submission’ and ‘NSD notification’ which could, in my view, usefully be revisited.

Paragraphs 56 – 57 of the draft Guidance indicate that the responsible Chief Officer or Chief Constable must ‘keep under review the continued necessity of retaining biometric material pursuant to a NSD’ and must notify the Biometrics Commissioner if he or she comes to the view that ‘it is no longer necessary to retain that material’. It would in my view be helpful if it were also made clear that any information that is produced by or for a Chief Officer or Chief Constable for the purposes of that ‘review’ function should be shared with the Biometrics Commissioner.

Keeping of Records

Since part my of role will be to keep under general review the retention of biometric material pursuant to NSDs and the uses to which such material is put I am, of course, concerned that proper records be kept of such matters. In those circumstances paragraphs 67 – 74 of the draft Guidance are, in my view, particularly helpful. As regards those paragraphs, however, the following improvements might usefully be made.

The first sentence of paragraph 67 is not complete. That sentence should make clear who will establish and maintain the ‘centrally retrievable record’ to which reference is made. It would also seem sensible:

- for provision to be made as regards the obligations which Chief Officers and Chief Constables will owe to provide information to that person; and

- for that person to be named in paragraph 74 as being obliged to ensure that access to that record is granted to the Biometrics Commissioner.

Paragraphs 70 and 71 of the draft Guidance provide for the supply to the Home Office of specified 'statistical information'. In my view provision should also be made for that information to be supplied to the Biometrics Commissioner.

To assist me in my general 'reviewing' role it would be helpful if, in addition to information about the matters listed in paragraph 70, information were retained and made available to me about the use to which retained material is put and about any benefits which result from that use. I assume that such material will repeatedly be 'searched against' and I would not require information about every such search; I am, however, concerned that statistical and other information should be retained and made available to me about any 'hits' on material which is covered by a NSD and about the practical benefits (if any) which flow from the retention of that material. I am also concerned that statistical and other information should be retained and made available to me about:

- biometric material which is currently held for purposes associated with national security but in respect of which no application is made for a NSD (and which should therefore be destroyed unless otherwise capable of being lawfully retained); and
- biometric material which is taken for such purposes (e.g. pursuant to Schedule 8 of the Terrorism Act 2000) but is not retained.

The draft Guidance would, in my view, be improved if it provided for the retention of such information and for its being made available to the Biometrics Commissioner.

I would of course be happy to provide any further assistance I can to you or your officials in relation to this draft Guidance.

Yours sincerely

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Biometrics Commissioner