

## The Biometrics Commissioner's Response to the National DNA Database Strategy Board's Consultation on Guidance on Early Deletion of DNA and Fingerprint Records

### Introduction:

This paper sets out the response of the Commissioner for the Retention and Use of Biometric Material ('the Commissioner') to the consultation on "Early Deletion Process: Guidance to Chief Officers on the Destruction of DNA Samples, DNA Profiles and fingerprint records under section 63AB(2) of the Police and Criminal Evidence Act 1984". In it the Protection of Freedoms Act 2012 is referred to as 'POFA'.

### General Observations: The Availability of Early Deletion

1. The Commissioner notes that, in its final form, the Guidance issued by the Strategy Board will be binding on all Chief Officers and will therefore be determinative of the circumstances in which 'early deletion' of DNA profiles will be available.<sup>1</sup> It seems reasonable to assume that it will also be treated as binding – and thus determinative – as regards the early deletion of fingerprints.
2. If the Guidance remains in the form of the current draft it seems:
  - (i) that an application for early deletion will be considered only if it is made by an applicant without previous convictions who has been given a PND or who has been charged with, but not convicted of, a qualifying offence; and
  - (ii) that such an application will be successful only if the applicant both satisfies those criteria and has been eliminated as a suspect for the offence for which he or she was arrested.<sup>2</sup>

In the Commissioner's view these conditions are much too restrictive and early deletion should be available in a much wider range of situations.

3. At Paragraph 3 of the draft Guidance it is observed that the power of retention under the legislation in force in the period leading up to the enactment of POFA was permissive and not mandatory. The powers of retention which are provided for in POFA are likewise permissive rather than mandatory. The proposition that the relevant legislation allowed – but did not require – the police to retain indefinitely arrestees' DNA samples, DNA profiles and fingerprints was central to the reasoning in the majority judgments in *R (GC) v The Commissioner etc*<sup>3</sup>, a case in which the Supreme Court declared unlawful the ACPO Guidelines in respect of the 'Exceptional Case Procedure' which is to be replaced by the Early Deletion Process.

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<sup>1</sup> See Section 63AB(2) of PACE. In this context 'early deletion' means discretionary deletion within the retention periods which are provided for by POFA and does not include situations (such as those which are referred to at Paragraphs 10, 11 and 12 iv. of the draft Guidance) in which POFA expressly requires immediate deletion and/or in which continued retention would be unlawful.

<sup>2</sup> It is noted that at Paragraph 12 viii. of the draft Guidance it is suggested that a Chief Officer may order early deletion if he or she "determines that there is a wider public interest to do so". It is also noted, however, that at Paragraph 9 iv. of the draft Guidance, and in the first sentence of Paragraph 12, it is made clear that elimination as a suspect is a *sine qua non* of (discretionary) early deletion. [See also Paragraph 28 (third bullet) below.]

<sup>3</sup> [2011] UKSC 21, especially at Paragraphs 24, 25, 27, 30, 33 and 35.

4. The maximum retention period which is provided for in respect of an individual without previous convictions who has been given a PND is 2 years from the taking of the relevant DNA sample or fingerprints. The maximum retention period which is provided for in respect of an individual without previous convictions who has been charged with, but not convicted of, a qualifying offence is (absent a successful application to a District Judge for an extension) 3 years from the taking of the relevant sample or fingerprints. By proposing that early deletion should be available only in the very restricted circumstances which are summarised at Paragraph 2 above the Strategy Board is in effect proposing:
  - (i) that every other maximum retention period which is provided for by POFA should be treated not as a maximum retention period but rather as a minimum retention period; and
  - (ii) that early deletion should be available only in circumstances where an individual's DNA profile or fingerprints may be retained for a relatively short period and not where they may be retained for a much longer period or even indefinitely.
5. Furthermore, notwithstanding the genesis of the 'biometric' provisions of POFA no reference is made in the draft Guidance to issues of privacy or proportionality and no provision is made for Chief Officers to carry out of any kind of balancing exercise as regards the retention of the material at issue. Decisions on early deletion are, it seems, to turn primarily (and perhaps solely) on the existence or otherwise of substantial evidence that the individual in question is no longer a suspect for the offence for which they were arrested. In the absence of such evidence those decisions are, it seems, to be made entirely without reference to factors such as the age, nature and seriousness of the alleged offence at issue, the age and subsequent history of the individual applicant, or the cogency of any reasons for believing that the public interest will be served by continued retention.
6. It is not difficult to conceive of circumstances which would fall outwith the ambit of the proposed Early Deletion Process but in which the continued retention of an individual's DNA profile or fingerprints might well be considered unnecessary and disproportionate. Such circumstances might well arise, for example, where that continued – and, indeed, indefinite – retention could be 'justified' only by reference to the fact that many years previously the individual in question had accepted a caution for a minor offence.
7. Against that background there must, in the Commissioner's view, be scope for real doubt as to whether an Early Deletion Process which is available only in the very restricted circumstances which are proposed by the Strategy Board takes proper account of the principles laid down in S and Marper v UK<sup>4</sup> or adequately reflects the spirit or policy underlying the 'biometric' provisions of POFA. There must likewise be scope for doubt as to whether a 'blanket and indiscriminate' refusal to consider applications for early deletion from, for example, any individual whose DNA profile or fingerprints are subject to indefinite retention (e.g. any adult who has been convicted of, or cautioned for, a recordable offence) would be consistent with a Chief Officer's duty as a Data Controller under the Data Protection Act 1998 to ensure that the retention of sensitive data is at all times proportionate and not excessive<sup>5</sup>.

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<sup>4</sup> [2008] ECHR 1581.

<sup>5</sup> See Paragraph 8 of the draft Guidance and DPA 1998, Schedule 1 Part 1 (3) and (5). See also Schedule 2, at 6(1).

8. In the Commissioner's view an Early Deletion Process which is significantly less restrictive than that which is proposed in the draft Guidance would allow for the striking of a more proportionate balance between the public interest in the prevention and detection of crime and the individual's right to privacy. In his view, moreover, such a Process would not only allow for more appropriate decisions in a much wider range of individual cases but might also be more likely to command broad public support and to assist in maintaining public confidence in those who are authorised to take and retain DNA and fingerprints.<sup>6</sup>
9. The Commissioner recognises that there might well be concerns that a less restrictive Early Deletion Process than that which is currently proposed would have considerable financial and other resource implications for police forces. Such a Process would not, however, have to be one under which Chief Officers would inevitably be required to make complex individual judgments in huge numbers of cases. In that connection – and quite apart from the fact that a specific application would continue to be necessary before the Early Deletion Process was triggered – 'brightline' rules<sup>7</sup> could be introduced which, for example, excluded applications within (say) 3 years of a conviction or caution or where (say) the offence at issue is a 'qualifying' offence as defined at section 65A(2) of PACE.
10. It is suggested that the scope of the proposed Early Deletion Process should be significantly broadened so as to allow for early deletion in a much wider range of circumstances in which the continued retention of an individual's biometric material might reasonably be considered unnecessary and disproportionate.

### **Specific Comments on the Draft Guidance**

11. The following specific comments on the draft Guidance should be read in the light of the above observations as regards the proposed scope of the Early Deletion Process. They follow the side-headings of that draft Guidance.

#### 'Introduction'

12. At Paragraph 2 of the draft Guidance it is stated that "in the interests of expediency and consistency the guidance and the accompanying process applies to fingerprints and DNA Samples as well as DNA profiles". Similar indications are given at Paragraphs 9 i. and 18. Although there are obvious advantages in taking such an approach as regards DNA profiles and fingerprints, the Commissioner doubts that it is appropriate to do so as regards DNA samples.
13. The POFA retention regime for DNA samples is very different from, and much more restrictive than, those for DNA profiles and fingerprints and different factors will be relevant to any application for early deletion/destruction. Notwithstanding the qualified way in which section 14 of POFA is to take effect<sup>8</sup> – and in stark contrast to the position as regards DNA profiles and fingerprints – the default position as regards DNA samples will be that they will be subject to mandatory destruction within 6 months and any retention beyond that period will be lawful only in very limited circumstances.
14. The draft Guidance makes no express reference to this different retention regime as regards DNA samples or to the special practical and other difficulties which might

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<sup>6</sup> Note in this regard the first sentence of Paragraph 9 of the draft Guidance.

<sup>7</sup> cf e.g. *R (on the application of RMC and FJ) v MPC* [2012] EWHC 1681 (Admin) at Paragraphs 51 and 54.

<sup>8</sup> See Article 2(c) of the Commencement Order at SI 2013/1814 - and see also the amendments to POFA which are proposed in the Anti-Social Behaviour, Crime and Policing Bill which is currently before Parliament.

arise in connection with their early destruction. It is perhaps unlikely that that there will often be scope for discretionary early deletion of DNA samples and it is suggested that the issues which arise in that connection merit separate consideration and guidance.

#### 'Background'

15. The Commissioner has commented above on the matters referred to in Paragraphs 3 – 6 of the draft Guidance. He notes that, as is made clear in Paragraph 6, the draft Guidance is primarily intended to cater for discretionary early deletion rather than for situations in which material falls to be destroyed 'automatically' because there is no power to retain it.
16. Although in that paragraph it is stated that the "automated [deletion] process where no application is necessary ... is ... not part of this guidance", that process is in fact addressed in detail at Paragraphs 7 ii. 7 iii. 10 and 11 of the draft Guidance. The Commissioner welcomes this and suggests that the Guidance might usefully include further provisions which will assist in ensuring that 'automatic deletion' in fact takes place in appropriate cases. He further suggests that the proposed Early Deletion Unit could fulfil a valuable supervisory and/or monitoring role in that connection.

#### Who can apply for "Early Deletion"?

17. The Commissioner's views as regards the broad thrust of Paragraph 7 of the draft Guidance are set out at Paragraphs 1-10 above. He proposes that, contrary to the suggestion at Paragraph 7 i., the Early Deletion Process *should* cover "the lawful retention of material from convicted persons" and that an applicant who has been convicted should *not* always "have to appeal the conviction itself" in order to obtain early deletion. This is particularly so since, as is noted in that paragraph, "under PACE 'conviction' includes cautions, reprimands and warnings".
18. Paragraphs 7 ii. and 7iii. summarise the 'automatic' deletion' provisions in respect of the DNA profiles and fingerprints of individuals who are arrested for or charged with, but who are not convicted of, an offence. Those provisions will, where appropriate, take effect at "*the conclusion of the investigation of the offence or, where the investigation gives rise to proceedings against the person for the offence, ...[at]... the conclusion of those proceedings*"<sup>9</sup> and the actual deletion of relevant profiles and fingerprints will, it seems, be triggered by entries on the PNC. It is clearly desirable that police forces should adopt a consistent approach to the question of when an investigation or proceedings are 'concluded' and that they should ensure that appropriate entries are promptly made on the PNC when that stage is reached. To that end it is suggested that appropriate definitions be included in the Guidance and that express reference to be made to the importance of promptly updating the PNC.

#### 'Core Principles of Early Deletion'

19. The Commissioner's general views as regards the 'Core Principles' set out at Paragraphs 8 and 9 of the draft Guidance have been set out above. Subject to those general views he comments on Paragraphs 9 i. to 9 viii. as follows.
20. As to Paragraph 9 i. the Commissioner again questions the appropriateness of any reference to a 'DNA sample' – see Paragraphs 12 to 14 above. He observes, moreover, that it would seem desirable for a more 'holistic' approach to be taken to

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<sup>9</sup> See Section 2 of POFA and Section 63E(2) of PACE

the deletion issues which arise as regards “accompanying PNC records” and “accompanying footwear impressions, custody photographs and any other material held...”.

21. At Paragraph 9 ii. of the draft Guidance specific reference is made to the importance of identifying when “the investigation and any proceedings have concluded”. In that connection the Commissioner repeats his comments at Paragraph 18 above.

22. Paragraphs 9 iii. and 9 iv. provide:

*“iii. It is for Chief Officers to exercise professional judgment in deciding whether early deletion is reasonable, based on all the information available.*

*iv. However, the basis for early deletion will include the fact that there is substantial evidence that an individual is no longer a suspect ... i.e. they have been eliminated from enquiries.”*

The implication of those provisions appears to be that there will be circumstances in which, even though the individual has been eliminated as a suspect, a Chief Officer may nonetheless properly reject an application for early deletion on the grounds that such deletion would be ‘unreasonable’. On the face of things, however – and save possibly in the first sentence of Paragraph 12 and/or in sub-paragraph 12 viii. – the draft Guidance nowhere identifies the sort of factors which might properly lead a Chief Officer to reach such a conclusion.

If the intended implication of these provisions is as indicated above, then those factors should, in the Commissioner’s view, be clearly identified in the draft Guidance.

23. Subject as aforesaid the Commissioner agrees that the principles set out at Paragraphs 9 v. to 9 vii. of the draft Guidance are appropriate ones and welcomes the provision at Paragraph 9 viii. to the effect that for these purposes a ‘Chief Officer’ should be an officer of substantive ACPO rank.

#### ‘Grounds for Early Deletion’

24. Paragraphs 10 and 11 of the draft Guidance address the criteria for ‘automatic deletion’ under Section 63D of PACE and the Commissioner refers in this connection to his observations at Paragraph 16 above. It is clearly desirable that mechanisms should be in place to ensure that material which falls within the ambit of that Section is quickly identified and destroyed/deleted. To that end it is suggested that the Guidance provide that, in any case in which material may have been obtained unlawfully or as a result of an arrest which was either unlawful or based on mistaken identity, that possibility should forthwith be brought to the attention of the responsible Chief Officer and also to that of the Early Deletion Unit. It is also suggested that the Guidance should further provide that that Unit should have a supervisory and/or monitoring role in connection with such cases.

25. The Commissioner notes – and questions – the narrowness of the definition of an “arrest ... based on mistaken identity” which is given at Paragraph 10 of the draft Guidance. Such a definition would apparently exclude a case where, for example, an individual is arrested on the basis of an identification made by a witness but that witness later retracts the identification as mistaken and convincingly explains how that mistake came about. It is suggested that the definition should either be widened or deleted.

26. The first sentence of Paragraph 12 of the draft Guidance states that in all cases of (discretionary) early deletion “the key considerations ... will be the nature of the incident that led to [the] arrest and the nature of the evidence that has led [to] an

individual being eliminated as a suspect.” It is unclear, however, quite what is meant in this context by “the nature of the incident” or in what circumstances, if any, the “nature of the incident” might lead a Chief Officer to reject an application for early deletion from an individual who has been “eliminated as a suspect”. In the Commissioner’s view it would be helpful if the thinking behind this reference to “the nature of the incident” were made clearer in the draft Guidance.

27. The rest of Paragraph 12 gives “examples of circumstances or situations in which early deletion should be considered by a Chief Officer following an application”. Those examples reflect the restrictive approach to early deletion which is set out elsewhere in the draft Guidance and which is summarised at Paragraph 2 above. As has been made clear, the Commissioner disagrees with that approach and considers that a less restrictive Early Deletion Process would be appropriate. He accepts, however, that the examples which are given in this paragraph – and, indeed, the observations which are made at Paragraph 13 – provide vivid and useful guidance as to the very high ‘bar’ which applicants would have to surmount if the Process remains as proposed in the draft Guidance.<sup>10</sup>

28. Of the examples given in Paragraph 12, the Commissioner specifically comments only on those at 12 iv., 12.vi. and 12 viii.

- As to the first of those examples (‘Unlawful Disposal’) it is noted that that example appears to deal with circumstances which fall outside the strict ambit of the proposed Early Deletion Process in that continued retention of the material would be unlawful. It might perhaps be useful to make that point clear.
- As to the second of those examples (“Judicial Recommendation”) it is noted that whereas it is stated in each of sub-paragraphs 12 i. – 12 v. that material “should be deleted” in the circumstances which are there set out, it is stated in sub-paragraph 12 vi. that material should only “usually” be deleted if deletion is recommended by a Court. If that distinction is deliberate it would be helpful to identify the factors which might lead a Chief Officer not to comply with such a recommendation.
- As to the third of those examples (“Public Interest”) it is noted that the wide discretion which appears to be implied by this sub-paragraph is in fact strictly constrained by the narrow scope of the proposed Early Deletion Process and, in particular, by what appears to be the absolute rule that early deletion will be available to an applicant only if he or she has been eliminated as a suspect. If this ‘Public Policy’ provision is intended to allow for early deletion otherwise than in the circumstances summarised at Paragraph 2 above then this should be made clear and some indication should be given of what those circumstances might be. If that is not the intention of this provision its true purpose and scope should be explained or it should be deleted altogether.

#### ‘The Early Deletion Process’

29. Subject as aforesaid (and save only for the reference to DNA samples at Paragraph 18) the Commissioner has no objection to the procedural and other provisions which are suggested at Paragraphs 14 to 20 of the draft Guidance. As is indicated above, moreover, the Commissioner agrees that the Early Deletion Unit could usefully play an important part in the Early Deletion Process and, indeed, in supervising and/or monitoring the ‘automatic deletion’ of material in appropriate cases.

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<sup>10</sup> It is noted, moreover, that the example given at paragraph 12 i. is very similar to the example given in the ACPO Guidelines for the Exceptional Case Procedure.

30. It is likely that the Commissioner will want to be in a position to review the operation of the Early Deletion Process and to carry out at least some 'dip sampling' of applications which are decided under it. He would ask that the Guidance make clear that Chief Officers and the Early Deletion Unit should grant him access to any records held by them which he may reasonably require for those purposes.

### **An Appeals Process**

31. The only remedy available to an individual whose application for early deletion is rejected will presumably be by way of Judicial Review. Although the consultation documents make no reference to any alternative possibility, the Commissioner understands that it has been suggested that it might be appropriate to make provision for an 'appeals process' under which the Commissioner or some other tribunal would hear and determine appeals against Chief Officers' decisions to reject applications for early deletion.
32. The introduction of an appeals process, though no doubt welcome to applicants, would clearly have resource implications for both the police and the tribunal concerned, particularly if it was available to all disappointed applicants. It is, moreover, hard to see that such a process would serve any very useful function if the circumstances in which early deletion can be granted are to be as narrow and limited as is provided for in the current draft Guidance (i.e. where the central issue for determination will be that of whether or not the applicant can conclusively be eliminated as a suspect for the offence for which he or she was arrested).
33. In the Commissioner's view, however, the arguments in favour of an appeals process would be significantly stronger if early deletion were more widely available. In such circumstances a 'balancing exercise' would often be required and there would be a greater risk of inconsistent approaches being taken by different Chief Officers. If the Strategy Board elects to widen the scope for early deletion beyond that contemplated in the current draft Guidance, it is suggested that it should also give thought to the possible development and terms of an appropriate appeals process.

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Biometrics Commissioner

29 July 2013