

Early Deletion Response – Specific Questions

1. Which of the following best describes you or the organisation or sector that you represent? Please give details in the box below.

- Police force;
- Police and crime commissioner;
- Legal profession;
- Regulatory body, standards body or inspectorate;
- Civil liberties charity / organisation / pressure group;
- Representative body;
- Member of the public
- Other (please specify)
- Prefer not to say

Response:

Regulatory body, standards body or inspectorate.

The functions and responsibilities of the Biometrics Commissioner include:

- the determination of applications by chief officers under Section 63G of PACE for consent to the retention of DNA profiles and/or fingerprints;
- keeping under review national security determinations which have been made by chief officers in connection with the retention of such material;
- keeping under review the retention and use of DNA samples, DNA profiles and fingerprints in accordance with PACE and other legislation; and
- reporting to the Home Secretary about the carrying out of his functions and, if he considers it appropriate to do so, about any matter relating thereto.

2. The guidance says at paragraph 9(iv) that the basis for an early deletion decision will include '**substantial evidence that an individual is no longer a suspect**'. To what extent do you agree that this standard of evidence should be required? (Select one option a to e):

- a) Strongly agree
- b) Tend to agree
- c) Tend to disagree
- d) Strongly disagree
- e) Not sure

Response:

d) Strongly disagree.

The Commissioner's reasons for taking this view are set out in detail in the accompanying document ("the General Response"). Put shortly, the Commissioner suggests that the scope of the Early Deletion Process should be significantly broader than is contemplated in the draft Guidance and, in particular:

- that the absence of "substantial [or any] evidence that an individual is no longer a suspect" should not be an absolute bar to early deletion of that individual's biometric material; and
- that early deletion should be available in a much wider range of circumstances in which the continued retention of the relevant material might reasonably be considered unnecessary or disproportionate.

A more comprehensive Early Deletion Process than that which is currently proposed would, in the Commissioner's view:

- take better account of the principles laid down in *S and Marper v UK* and would better reflect the 'spirit' or policy underlying the biometric provisions of the Protection of Freedoms Act 2012;
- be more consistent with the principles laid down in the Data Protection Act 1998;
- 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; and
- allow for more appropriate decisions in a much wider range of individual cases.

3. The guidance gives a number of scenarios where Chief Constables should consider early deletion.

A - For each of the scenarios listed below, please state whether you think they do, or do not, merit early deletion:

[NB: The following answers should be read in the light of the Commissioner's General Response and the Response to Question 2 above. They assume that, contrary to the views which are there expressed, the scope of the Early Deletion Process remains as narrow as is proposed in the current draft Guidance.]

- No crime – Yes
- Malicious/false allegation – Yes
- Proven alibi – Yes
- Unlawful disposal – Yes (albeit deletion would in those circumstances presumably be 'automatic' in that continued retention would be unlawful)
- Suspect status not clear at the time of arrest – Yes
- Judicial recommendation – Yes
- Conviction of another person for the offence – Yes (if it can reasonably be concluded from that conviction that the applicant can be eliminated as a suspect)
- Public interest – Not understood – see Paragraph 28 of the Response (third bullet point).

B - Please explain your answers, and specify any further scenarios where you think early deletion should be considered.

Response:

See the Commissioner's General Response and the Response to Question 2 above. As is indicated at Paragraph 27 of that General Response:

Paragraph 12 [of the draft Guidance] 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 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.

4. The guidance gives a definition of **arrest based on mistaken identity** at paragraph 10 (DNA and fingerprints taken as a result MUST be deleted):

"Arrest based on mistaken identity refers to circumstances where there was an error such as arresting the wrong "John Smith", notwithstanding that the arrest may still be lawful. Situations where the evidence against a suspect is ultimately inconclusive will not be seen as arrests based on mistaken identity."

To what extent do you agree or disagree with this definition? (select one option a to e)

- a) Strongly agree
- b) Tend to agree
- c) Tend to disagree
- d) Strongly disagree
- e) Not sure

Please give reasons for your answer and any alternative definitions:

Response:

- c) Tend to disagree

As is indicated at Paragraph 25 of the General Response:

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 that definition should either be widened or deleted.

The simplest course may be to substitute “includes” for “refers to” at Paragraph 10 of the draft Guidance.

5. The guidance sets out a process whereby applications are administered by a central national early deletion unit, run by the police Criminal Records Office, which will process applications on behalf of all forces. The unit will not make or recommend decisions on applications.

A - To what extent do you agree or disagree that a central early deletion unit is needed? (select one option a to e)

- a) Strongly agree
- b) Tend to agree
- c) Tend to disagree
- d) Strongly disagree
- e) Not sure

Response:

- a) Strongly agree

As is indicated in the General Response (especially at Paragraphs 16 and 29) the establishment of a national Early Deletion Unit as a means of maintaining records, collating statistics and ensuring consistency across the different police forces is welcomed. It is clearly desirable that applications for early deletion should be decided in a consistent manner and that regional variations such as those which appear to have been seen under the former Exceptional Case Procedure are not replicated under the Early Deletion Process. It is suggested that an Early Deletion Unit might also play a valuable role in supervising and/or monitoring the ‘automatic deletion’ of material in appropriate cases.

B - To what extent do you agree or disagree that the decision making role on applications should be with Chief Constables? (select one option a to e)

- a) Strongly agree
- b) Tend to agree
- c) Tend to disagree
- d) Strongly disagree
- e) Not sure

Response:

- a) Strongly agree

The Biometrics Commissioner welcomes the provision at Paragraph 9 viii. of the Guidance prescribing that Chief Officer should mean an officer of substantive ACPO rank. The limiting of relevant decision making powers to officers of this rank reflects the importance of the decision making process.

6. If you have any other comments you would like us to take into consideration, on any element of the draft guidance that you have not already mentioned, please outline them below:

Response:

Please see attached 'General Response' document.

Alastair R MacGregor QC

Biometrics Commissioner

29 July 2013