



Home Office

# **Protection of Freedoms Act 2012: Application to magistrates' court and Crown Court for the extended retention of biometric data**

1. The Protection of Freedoms Act 2012 (PoFA) amends the Police and Criminal Evidence Act 1984 (PACE) to limit the periods for which the police can retain biometrics (DNA and other samples, DNA profiles and fingerprints). There are however two provisions allowing the normal retention period to be extended by means of a court order (which are shown in Annex A). This paper describes the processes and forms to be used to apply for the orders. These are new processes and may need to be adapted over time to reflect interpretation of the legislation by the courts. The paper covers communication between the police and the courts rather than issues such as updates to PNC.

## SECTION 63F ORDER

### Introduction

2. This relates to extending the retention period for DNA profiles (i.e. numerical sequences representing a small part of a person's DNA) and fingerprints taken from persons arrested for or charged with qualifying offences (QOs - i.e. specified more serious offences) but not convicted. In the case of those charged, retention for three years is permitted. In the case of those arrested but not charged, retention for three years is permitted with the consent of the Biometrics Commissioner.

3. Under section 63F of PACE added by section 3 of PoFA, this can be extended for a further two years by a court order. A chief officer of police may apply to a District Judge for an order extending retention. The application must be made within the three month period ending on the last day of the normal three year retention period. The order may extend retention for a further two years from the end of the normal retention period. An appeal against the court's decision to grant or not grant an order may be made by the chief officer or the person from whom the material was taken. The legislation makes no provision about the grounds on which an order may be granted. (Section 63F is shown at Annex A).

4. The Order making transitional provisions for bringing section 63F into effect states that in respect of material taken before 31 October 2013, the provisions of section 63F governing applications for retention apply only where the retention period expires on or after 31 January 2014. Therefore forces may make applications to the courts from 31 October 2013 but only in relation to material where retention ends on or after 31 January 2014. (Because of the initial three year retention period, this is material taken on or after 31 January 2011). (Relevant parts of the Order are also shown at Annex A).

### Volumes

5. The number of applications for Section 63F Orders is uncertain. A tentative estimate is that the number of applications for Section 63F Orders is unlikely to exceed double figures per year, but this must await practical experience for confirmation.

## Court rules

6. Revised court rules have been agreed with the Ministry of Justice; the relevant rules are shown at Annex B.

7. Key points are that an application for a Section 63F Order must:

- identify the material
- state when the retention period expires
- give details of any previous such application relating to the material
- outline the circumstances in which the material was acquired
- provide a case specific reason why retention will be relevant during the next two years
- explain any change of circumstance during the previous three years
- be served on the court officer
- be served on the person from whom the material was taken
- explain why the retention period should be extended

## Force process

8. It is expected that applications for retention beyond the initial three years will be exceptional and that neither PNC nor forces will maintain a list of all persons where the law would allow an application for further retention, rather that forces would be aware of individuals of particular concern and apply in those cases, in particular where circumstances have changed during the course of the initial three year retention to give greater weight to extended retention.

9. The force should begin to consider whether it wishes to make an application four months before the end of the initial period (i.e. 32 months after the person's DNA sample/fingerprints were taken). This allows the force a month to decide and produce the application.

10. If the force wishes to apply for retention to be extended, it should submit the form at Annex C1 to the court office of the relevant magistrates' court (it will be a District Judge (DJ) who determines the application). The legislation requires that this be done no earlier than three months before the end of the initial retention period. In order to allow time for the court procedures and any appeal, the application should be made as soon as possible after this date. The force must also submit the form to the person whose profile/fingerprints it wishes to retain ('the person concerned'). After receipt of the form the court will notify the police of a date for a hearing and the police must notify the person concerned of that date. If the police have not received a date for a hearing from the court two weeks after the application has been made, they should contact the court again (the period of two weeks may be varied depending on the urgency of the situation). The **minimum** period between receipt of the application and the hearing date is expected to be two to three weeks (and the possibility of a longer interval cannot be ruled out), so the importance of making an application as soon as possible is emphasised.

11. The issue will be determined at a hearing to which the police will send an officer. The person concerned has a right to attend. The outcome of the hearing will be recorded on the form by the DJ or a court official. If the person concerned did not attend the hearing, under Court Rule 6.35(5) the police must serve notice of the decision on him/her. If lengthy or complex legal argument is raised, it may be necessary to adjourn the hearing; this is a matter for the discretion of the DJ.

12. Either the police or the person concerned may appeal to the Crown Court against the DJ's decision, using the form at Annex C2. Under Court Rule 6.36(2), the appellant must serve an appeal notice on the Crown Court officer and the other party no more than 21 days after the magistrates' court decision or (if the appellant had not been present at the magistrates' court hearing) notice on the appellant of that decision.

13. If no appeal notice against the DJ's decision is received within 21 days, it will be assumed that decision is final and the force will then update PNC to amend the retention period as necessary.

14. It may not be possible to complete consideration by the DJ and Crown Court during the three month window between application to the DJ for retention and the end of the three year retention period. This may be because of adjournment of the DJ hearing or because it is not possible to hold both DJ and Crown Court hearings within this period. The legislation does not explicitly state that DNA profiles and fingerprints can be lawfully be retained if the three year retention period runs out pending a decision from a DJ following an adjournment in the magistrates' courts or a decision on appeal in the Crown Court. In the event that the DJ decides that the biometrics may be retained and the person concerned then appeals to the Crown Court, it is expected that the biometrics could be retained until the outcome of the Crown Court hearing, even if this falls after the end of the three year retention period, as in these circumstances a ruling in favour of retention by the lower court would be in place. However, if the DJ decides that the biometrics may not be retained and the police wish to appeal to the Crown Court for retention, it is considered less likely that the biometrics could be retained until the Crown Court has decided the issue, if that decision falls after the end of the three year retention period. Ultimately the issue is subject to judicial interpretation of the legislation in due course.

## SECTION 63R ORDER

### Introduction & volumes

15. This relates to extending the retention period for DNA or other samples. An amendment to PACE is being sought under the Anti-Social Behaviour, Crime and Policing (ASBC&P) Bill which would exempt samples from destruction as long as they are subject to the Criminal Procedure and Investigations Act 1996 (CPIA) and its associated Code (i.e. may be needed as evidence in court). This amendment passed Commons Committee stage on 16 July 2013. The Commencement Order for PoFA (<http://www.legislation.gov.uk/uksi/2013/1814/made>) states that in general its provisions relating to biometrics will come into effect on 31 October 2013, except that the requirement to destroy samples which are or may become disclosable under the CPIA and its Code will not then be brought into effect – rather legislation on this will be brought into effect after the ASBC&P Bill has received Royal Assent, which is expected to be in spring 2014. If the legislation proceeds as planned, Section 63R Orders will not be necessary and are therefore not discussed further here.

Police Transparency Unit  
Home Office  
31 October 2013

## **ANNEX A – Relevant amendments to PACE made by PoFA**

### **PoFA Section 3 - Persons arrested for or charged with a qualifying offenceE+W**

After section 63E of the Police and Criminal Evidence Act 1984 (for which see section 2) insert—

“63F Retention of section 63D material: persons arrested for or charged with a qualifying offence

(1) This section applies to section 63D material which—

(a) relates to a person who is arrested for, or charged with, a qualifying offence but is not convicted of that offence, and

(b) was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of the offence....

(6) The retention period is—

(a) in the case of fingerprints, the period of 3 years beginning with the date on which the fingerprints were taken, and

(b) in the case of a DNA profile, the period of 3 years beginning with the date on which the DNA sample from which the profile was derived was taken (or, if the profile was derived from more than one DNA sample, the date on which the first of those samples was taken).

(7) The responsible chief officer of police or a specified chief officer of police may apply to a District Judge (Magistrates' Courts) for an order extending the retention period.

(8) An application for an order under subsection (7) must be made within the period of 3 months ending on the last day of the retention period.

(9) An order under subsection (7) may extend the retention period by a period which—

(a) begins with the end of the retention period, and

(b) ends with the end of the period of 2 years beginning with the end of the retention period.

(10) The following persons may appeal to the Crown Court against an order under subsection (7), or a refusal to make such an order—

(a) the responsible chief officer of police;

(b) a specified chief officer of police;

(c) the person from whom the material was taken.

#### **POFA Section 14 - Destruction of samples**

After section 63Q of the Police and Criminal Evidence Act 1984 (for which see section 13) insert—

“63R Destruction of samples

(1) This section applies to samples—

(a) taken from a person under any power conferred by this Part of this Act, or

(b) taken by the police, with the consent of the person from whom they were taken, in connection with the investigation of an offence by the police.

(2) Samples to which this section applies must be destroyed if it appears to the responsible chief officer of police that—

(a) the taking of the samples was unlawful, or

(b) the samples were taken from a person in connection with that person's arrest and the arrest was unlawful or based on mistaken identity.

(3) Subject to this, the rule in subsection (4) or (as the case may be) (5) applies.

(4) A DNA sample to which this section applies must be destroyed—

(a) as soon as a DNA profile has been derived from the sample, or

(b) if sooner, before the end of the period of 6 months beginning with the date on which the sample was taken.

(5) Any other sample to which this section applies must be destroyed before the end of the period of 6 months beginning with the date on which it was taken.

- (6) The responsible chief officer of police may apply to a District Judge (Magistrates' Courts) for an order to retain a sample to which this section applies beyond the date on which the sample would otherwise be required to be destroyed by virtue of subsection (4) or (5) if—
- (a) the sample was taken from a person in connection with the investigation of a qualifying offence, and
  - (b) the responsible chief officer of police considers that the condition in subsection (7) is met.
- (7) The condition is that, having regard to the nature and complexity of other material that is evidence in relation to the offence, the sample is likely to be needed in any proceedings for the offence for the purposes of—
- (a) disclosure to, or use by, a defendant, or
  - (b) responding to any challenge by a defendant in respect of the admissibility of material that is evidence on which the prosecution proposes to rely.
- (8) An application under subsection (6) must be made before the date on which the sample would otherwise be required to be destroyed by virtue of subsection (4) or (5).
- (9) If, on an application made by the responsible chief officer of police under subsection (6), the District Judge (Magistrates' Courts) is satisfied that the condition in subsection (7) is met, the District Judge may make an order under this subsection which—
- (a) allows the sample to be retained for a period of 12 months beginning with the date on which the sample would otherwise be required to be destroyed by virtue of subsection (4) or (5), and
  - (b) may be renewed (on one or more occasions) for a further period of not more than 12 months from the end of the period when the order would otherwise cease to have effect.
- (10) An application for an order under subsection (9) (other than an application for renewal)—
- (a) may be made without notice of the application having been given to the person from whom the sample was taken, and
  - (b) may be heard and determined in private in the absence of that person.
- (11) A sample retained by virtue of an order under subsection (9) must not be used other than for the purposes of any proceedings for the offence in connection with which the sample was taken.
- (12) A sample that ceases to be retained by virtue of an order under subsection (9) must be destroyed

### **The Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) Order 2013**

4. In its application to PACE material taken, or (in the case of a DNA profile) derived from a sample taken, before 31st October 2013, section 3 of the Act has effect as if—
- (a) the words “or (5)” in section 63F(3), and sections 63F(5) and 63G of the Police and Criminal Evidence Act 1984 were omitted, and
  - (b) section 63F(7) to (10) applied only in a case where the retention period expired on or after 31st January 2014.



## ANNEX B

### SECTION 8: ORDERS FOR THE RETENTION OF FINGERPRINTS, ETC.

*[Note. Rule 6.4 (Court's power to vary requirements under this Part) and rule 6.5 (Documents served on the court officer) also apply.]*

#### Exercise of court's powers

**6.34.**—(1) The court must determine an application under rule 6.35, and an appeal under rule 6.36—

- (a) at a hearing, which must be in private unless the court otherwise directs; and
  - (b) in the presence of the applicant or appellant.
- (2) The court must not determine such an application or appeal unless any respondent—
- (a) is present; or
  - (b) has had an opportunity—
    - (i) to attend, or
    - (ii) to make representations.

#### Application to extend retention period

**6.35.**—(1) This rule applies where a magistrates' court can make an order extending the period for which there may be retained material consisting of—

- (a) fingerprints taken from a person—
    - (i) under a power conferred by Part V of the Police and Criminal Evidence Act 1984<sup>(1)</sup>,
    - (ii) with that person's consent, in connection with the investigation of an offence by the police, or
    - (iii) under a power conferred by Schedule 8 to the Terrorism Act 2000<sup>(2)</sup> in relation to a person detained under section 41 of that Act;
  - (b) a DNA profile derived from a DNA sample so taken; or
  - (c) a sample so taken.
- (2) A chief officer of police who wants the court to make such an order must—
- (a) apply in writing—
    - (i) within the period of 3 months ending on the last day of the retention period, where the application relates to fingerprints or a DNA profile, or
    - (ii) before the expiry of the retention period, where the application relates to a sample;
  - (b) in the application—
    - (i) identify the material,
    - (ii) state when the retention period expires,
    - (iii) give details of any previous such application relating to the material, and
    - (iv) outline the circumstances in which the material was acquired;
  - (c) serve the application on the court officer, in every case; and
  - (d) serve the application on the person from whom the material was taken, where—
    - (i) the application relates to fingerprints or a DNA profile, or
    - (ii) the application is for the renewal of an order extending the retention period for a sample.

(3) An application to extend the retention period for fingerprints or a DNA profile must explain why that period should be extended.

(4) An application to extend the retention period for a sample must explain why, having regard to the nature and complexity of other material that is evidence in relation to the offence, the sample is likely to be needed in any proceedings for the offence for the purposes of—

- (a) disclosure to, or use by, a defendant; or

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<sup>(1)</sup> 1984 c. 60.

<sup>(2)</sup> 2000 c. 11.

- (b) responding to any challenge by a defendant in respect of the admissibility of material that is evidence on which the prosecution proposes to rely.

(5) If in a respondent's absence the court makes an order extending the retention period, the applicant must serve notice of the decision on that respondent.

*[Note. See rule 6.1(6)(a). The powers to which rule 6.35 applies may be exercised only by a District Judge (Magistrates' Courts).]*

*The time limits for making an application under this rule are prescribed by sections 63F(8) and 63R(8) of the Police and Criminal Evidence Act 1984(3), and by paragraphs 20B(6) and 20G(8) of Schedule 8 to the Terrorism Act 2000(4). They may be neither extended nor shortened.*

*Sections 63D and 63R of the 1984 Act(5), and paragraphs 20A and 20G of Schedule 8 to the 2000 Act(6), provide for the circumstances in which there must be destroyed the material to which this rule applies.*

*Section 63F of the 1984 Act, and paragraph 20B of Schedule 8 to the 2000 Act, provide for the circumstances in which fingerprints and DNA profiles may be retained instead of being destroyed. Under section 63F(7) and paragraph 20B(5), a chief officer of police to whom those provisions apply may apply for an order extending the statutory retention period of 3 years by up to another 2 years.*

*Section 63R of the 1984 Act and paragraph 20G of Schedule 8 to the 2000 Act provide for the circumstances in which samples taken from a person may be retained instead of being destroyed. Under section 63R(6) of the 1984 Act and paragraph 20G(6) of Schedule 8 to the 2000 Act, a chief officer of police to whom those provisions apply may apply for an order to retain a sample for up to 12 months after the date on which it would otherwise have to be destroyed. Under section 63R(9) and paragraph 20G(9), such an order may be renewed, on one or more occasions, for a further period of not more than 12 months from the end of the period when the order would otherwise cease to have effect.]*

## Appeal

**6.36.**—(1) This rule applies where, under rule 6.35, a magistrates' court determines an application relating to fingerprints or a DNA profile and—

- (a) the person from whom the material was taken wants to appeal to the Crown Court against an order extending the retention period; or
- (b) a chief officer of police wants to appeal to the Crown Court against a refusal to make such an order.

(2) The appellant must—

- (a) serve an appeal notice—
  - (i) on the Crown Court officer and on the other party, and
  - (ii) not more than 21 days after the magistrates' court's decision, or, if applicable, service of notice under rule 6.35(5); and
- (b) in the appeal notice, explain, as appropriate, why the retention period should, or should not, be extended.

(3) Rule 63.10 (Constitution of the Crown Court) applies on such an appeal.

*[Note. Under section 63F(10) of the Police and Criminal Evidence Act 1984, and under paragraph 20B(8) of Schedule 8 to the Terrorism Act 2000, the person from whom fingerprints were taken, or from whom a DNA profile derives, may appeal to the Crown Court against an order extending the retention period; and a chief officer of police may appeal to the Crown Court against the refusal of such an order.]*

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<sup>(3)</sup> 1984 c. 60; section 63F is inserted by section 3, and section 63R by section 14, of the Protection of Freedoms Act 2012 (c. 9), with effect from a date to be appointed.

<sup>(4)</sup> 2000 c. 11; paragraphs 20B and 20G of Schedule 8 are inserted by section 19 of, and paragraph 1 of Schedule 1 to, the Protection of Freedoms Act 2012 (c. 9), with effect from a date to be appointed.

<sup>(5)</sup> 1984 c. 60; section 63D is inserted by section 1 of the Protection of Freedoms Act 2012 (c. 9), with effect from a date to be appointed.

<sup>(6)</sup> 2000 c. 11; paragraph 20A of Schedule 8 is inserted by section 19 of, and paragraph 1 of Schedule 1 to, the Protection of Freedoms Act 2012 (c. 9), with effect from a date to be appointed.