

GeneWatch UK response to Protection of Freedoms Act 2012 - Consultation on: Guidance on early deletion of DNA and fingerprint records

July 2013

GeneWatch UK welcomes the opportunity to comment on the draft Guidance.

We note that the Early Deletion process as outlined in this guidance will replace the “exceptional case” procedure, allowing Chief Constables the discretion to delete an individual’s DNA and fingerprints before the legal retention period has expired. We further note that the implementation of the Protection of Freedoms Act 2012 will make deletions routine and automatic for innocent persons in most cases, significantly improving the previous situation.

1. Which of the following best describes you or the organisation or sector that you represent?

Civil liberties charity / organisation / pressure group

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):

b) Tend to agree. Because the Protection of Freedoms Act now includes a procedure for automatic removals of innocent persons’ records, GeneWatch UK tends to agree that substantial evidence is needed for early deletion. However, we have spoken to many people who have applied under the “exceptional cases” procedure whose cases were clear-cut but nevertheless involved years of delay and sometimes legal action. We therefore urge that the bar is not set so high that the procedure becomes meaningless to the people using it. Further, we believe the Guidance should be extended to cover persons with convictions or cautions, as detailed under “other comments” (below). In these cases, the test is not whether the individual is no longer a suspect, but whether retention of material in relation to old, minor offences continues to satisfy the tests of necessity and proportionality.

3. The guidance gives a number of scenarios where Chief Constables should consider early deletion. See paragraph 12 for more information on the scenarios.

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

- No crime
- Malicious/false allegation
- Proven alibi
- Unlawful disposal
- Suspect status not clear at the time of arrest
- Judicial recommendation
- Conviction of another person for the offence
- Public interest

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

All of these scenarios merit early deletion, since they all indicate that it has become clear that the individual was not involved in the alleged offence. We would add proven misconduct by the officer(s) involved in the arrest (e.g. discrimination against, or harassment of, the arrested person), even if the arrest itself was not unlawful. We would also add official recognition (by police officer(s) or the court) that the individual was actually trying to prevent an offence. We are aware of a number of cases where a group of people have been

arrested during a public disturbance and, after taking statements, the police have become aware that one of them had actively intervened to try to stop a crime e.g. a fight or criminal damage. These individuals' arrests do not necessarily result from false allegations or unlawful arrests, but simply the confusion of the moment and the need for the police to bring the situation under control before investigating all the facts. Often, the individual's actions have been praised by the police (or later, by the court, if the situation is not resolved until then) but their biometrics have nevertheless been retained.

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:

- b) Tend to agree

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**

Please give reasons for your answer:

- b) Tend to agree. Having a central unit can help to avoid the significant discrepancies between different forces' decisions experienced in the past.

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**

- b) tend to agree. This is the responsibility of Chief Constables, who manage the data and oversee the arrest process and conduct of their police force. It is in any case a requirement of the Act. However, we strongly urge that access to a straightforward appeals process is considered, for example to Biometrics Commissioner or ICO. Many people have concerns about relying on a process managed by the police force which arrested them.

Any other comments

Police National Computer Records

On a successful application by an individual, the current Exceptional Case procedure usually results in the deletion of an individual's Police National Computer (PNC) record at the same time as their records on the National DNA Database and fingerprint database (IDENT1). In many cases, other materials such as photographs have also been destroyed. However, the early deletion process as described in this guidance includes deletion of an individual's DNA sample (if still held), DNA profile and fingerprints – but not Police National Computer (PNC) records, photographs or other material which is subject to different retention rules.

Until legislation allowing the retention of innocent people's DNA profiles and fingerprints was introduced in 2001, ACPO policy was to delete PNC records routinely at the same time as other records and, under the Exceptional Cases procedure, most forces have continued to delete PNC records as well as DNA and fingerprint records when granting a request. Failure to delete PNC records can lead to circumstances where innocent individuals are repeatedly required to reveal details of the arrest to employers or embassies (e.g. when travelling to the USA, as the US Visa Waiver Scheme does not apply to any person who has been arrested). This can have serious negative consequences for the individual. For example, a person with a job requiring frequent travel to the USA may be unable to fulfil their job's requirements if they have to apply for a visa on every occasion (a slow and expensive process even if it does not lead to a refusal) merely because they have been arrested. We are aware of innocent UK citizens employed by US companies having particular problems following an arrest. Routine access to PNC records of arrest by police officers on the street can also lead to discrimination against individuals who have been arrested but not convicted or cautioned for any offence. Further, the practical value of retaining PNC records and other material such as photographs is reduced once fingerprints have been deleted, since it may no longer be possible to distinguish between multiple individuals with the same name. GeneWatch UK therefore strongly urges that PNC records are deleted at the same time as DNA and fingerprints. Policy on deletion of accompanying footwear impressions, custody photographs and any other material held should also be consistent.

The Supreme Court's decision in the case of R (on the application of GC & C) v the Commissioner of Police of The Metropolis (2011) UKSC 21 indicated that PNC records should not be treated any differently than other retained material. Therefore, GeneWatch UK believes that PNC records should always be deleted at the same time as DNA database and fingerprint records (including when automatic deletions from the DNA and fingerprint databases take place under the Act). However, there is an even stronger case for doing so under the early deletions procedure. The grounds for deletion include cases where an individual has had DNA and fingerprint samples taken as a result of an unlawful arrest or a malicious accusation. In such circumstances, it is particularly hard to justify why such individuals should be penalised indefinitely by retention of their PNC record.

Persons with convictions, cautions and final warnings

GeneWatch UK does not agree with the statement under "Who can apply" that "*individuals with a conviction cannot apply, as this would put Chief Constables in a position where they would be overruling standing convictions*". Nor do we agree that the only option should be for individuals to appeal against the conviction itself. It is clear that:

- Retention of material from "convicted" persons (including people with convictions, cautions and final warnings) is not mandated by the Act, but remains a matter for the discretion of Chief Constables ("the material may be retained indefinitely");

- An appeal against retention of material is not the same as an appeal against conviction. Retention of material may be unnecessary and disproportionate even if the conviction is sound e.g. in the case of old minor offences. See, for example, the Equality and Human Rights Commission's legal advice from Michael Beloff QC (7th August 2009), on: http://www.equalityhumanrights.com/uploaded_files/counsels_advice_dna_database.pdf ;
- There is in any case no mechanism for appeal against cautions (which are treated as admissions of guilt), although we are aware of many cases in which individuals were unaware of the implications of accepting a caution and subsequently dispute their role in the offence and the necessity of retaining material. Often these concerns arise in the case of groups arrested for a single offence where the responsible individual has not been identified (e.g. fights or criminal damage at a pub or bus stop) and everyone in the group has been offered (and accepted) a caution to save police time;
- Some vulnerable individuals may be particularly concerned about retention of biometric material in circumstances in which it may cause them significant alarm and distress whilst making no contribution to solving crimes. For example, we are aware of several instances in which people suffering mental illness have been arrested and cautioned for public order offences but remain deeply distressed (even suicidal) about the retention of their DNA profile on the database.

The judgement of the European Court of Human Rights in the Case of M.M. v The United Kingdom (13th November 2012) involved a woman who had her Police National Computer (PNC) records retained indefinitely following a caution. The Court ruled that this was a breach of her right to privacy because there are no detailed rules regarding when such records can be retained or should be removed. This would seem to indicate that the Guidance should also cover requests for removal from persons with convictions or cautions, so that consistent decisions can be made by Chief Constables taking account of the extent to which the retention of DNA profiles and fingerprints, as well as PNC records, is necessary and proportionate to the need to tackle crime. In these cases, the test is not whether the individual is no longer a suspect for an alleged crime, but whether retention of material in relation to old, minor offences continues to satisfy the tests of necessity and proportionality. Relevant considerations would be: time since last offence, number of offences, relative seriousness of the offence, potential relevance of biometric material to any known offences.

Transparency

We recommend that an annual breakdown of decisions is published, by police force and scenario, including numbers of successful and rejected applications.