

**EXPLANATORY MEMORANDUM TO
THE PROTECTION OF FREEDOMS ACT 2012 (DESTRUCTION, RETENTION
AND USE OF BIOMETRIC DATA) (TRANSITIONAL, TRANSITORY AND
SAVING PROVISIONS) ORDER 2013**

2013 No. 1813

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 This instrument provides for the destruction or retention of DNA, fingerprints, and other forensic material taken before commencement of the relevant sections of the Protection of Freedoms Act 2012 (“the Act”). With a few exceptions, the instrument requires material taken before commencement to be destroyed or retained in the same way as material taken after commencement. The instrument also makes a saving provision to allow an interim technique for speculatively searching material taken from arrested individuals against crimes on the databases before it is deleted.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 This instrument is made to implement the biometric retention and destruction provisions of Chapter 1 of Part 1 of the Act in relation to material taken before commencement and transitional provisions. It makes such transitional arrangements considered appropriate and as permitted under section 25 of the Act. The Government has committed to commencement of the key biometric retention provisions in the Act by October 2013. Material taken before commencement which does not meet the retention requirements of the Act or will not be held in accordance with the provisions of this Order is being destroyed and progress of the destruction programme has been communicated to Parliament.
5. **Territorial Extent and Application**
 - 5.1 This instrument applies to England and Wales in respect of material taken under the Police and Criminal Evidence Act 1984 (“PACE”). It applies UK wide for material taken under National Security legislation.
6. **European Convention on Human Rights**
 - 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.
7. **Policy background**

- *What is being done and why*

7.1 Chapter 1 of Part 1 of the Protection of Freedoms Act 2012, which amends PACE, sets out new rules for the retention and destruction of DNA, fingerprints and other forensic samples taken from individuals in the course of an investigation. Retention periods are based on the individual's conviction history, age and seriousness of offence. The Act was introduced following a ruling by the European Court of Human Rights in *S and Marper v United Kingdom* (2008) 48 EHRR 1169 against blanket retention of the DNA and fingerprints of innocent individuals.

7.2 Material taken from individuals in the past has been stored indefinitely, either in forensic laboratories or on the National DNA Database or the national fingerprint database. It has always been this Government's intention that material taken in the past would be retained or destroyed in accordance with the retention periods in the Act. This requires the destruction of a large volume of existing material. The majority of this material has already been destroyed, with the remainder to be completed before Chapter 1 of Part 1 of the Act is commenced in October. This instrument puts that policy on a statutory basis, with a few exceptions detailed below.

7.3 The Act allows the police to make an application to the Commissioner for the Retention and Use of Biometric Material to retain material taken from individuals arrested but not charged with a serious offence for three years. Applications may not be made in respect of material taken before commencement. This material has already been deleted; allowing such applications would have caused significant delay to commencement of the Act.

7.4 The Act allows material taken from an individual arrested *and* charged with a serious offence to be retained for three years. The police may apply to a magistrates' court to extend this retention period for a further two years. Such applications will only be possible for material where the original three year retention period expires on or after 31 January 2014. This will ensure there is enough time between the power to make such an application coming into effect on 31 October, and the expiry date, for the application to be made and an outcome received from the court.

7.5 Samples taken before commencement which may be needed as evidence in court will not be destroyed. These have been defined as samples which may become disclosable under the Criminal Procedure and Investigations Act 1996 and its associated Code. The intention is that the defendant should have access to forensic samples so that they may challenge test results submitted by the prosecution, ensuring a fair trial. A proposed amendment to PACE, to give the same effect in relation to material taken after commencement, was tabled on 28 June for inclusion in the Anti-Social Behaviour, Crime and Policing Bill which is currently before Parliament.

7.6 Samples taken with consent in relation to identification of missing persons before commencement will not be destroyed. This covers a small number of cases where relatives have provided samples to enable identification of a family member as part of a police investigation, but because the investigation is too old, or has been discontinued, the sample cannot be protected using the provision at 7.5.

7.7 Section 9 of the Act provides that material may be retained for as long as a national security determination (NSD) has effect in relation to it. A NSD will be made where it is determined that it is necessary to retain that material for the purposes of national security. A NSD will have effect for a period of up to 2 years and is renewable. The Biometrics Commissioner is required by the Act to keep under review every NSD made or renewed. All material taken prior to the relevant commencement date under national security legislation or under the Police and Criminal Evidence Act 1984 where it has been identified that section 9 may apply, will be reviewed by the police on a case by case basis to determine whether it is necessary to make a NSD in relation to it. This Order therefore provides for a 2 year transitional period in respect of such material to provide sufficient time for the completion of this review.

7.8 This instrument also makes a transitional provision, to allow the use of an interim method for speculatively searching newly arrested individuals against crimes on the national DNA and fingerprint databases before their records are deleted (where there is no power under the Act to retain them). Such individuals' material may be loaded to the DNA and fingerprint databases and kept there for up to 63 days after the material was taken. This allows time for the DNA sample to be processed to produce a DNA profile which can be loaded to the DNA database, and for the database search and quality checks (which verify the accuracy of records on the database) to be completed. New technology being developed by September 2014 will provide a fully automated speculative search process, allowing the search and quality checks to be completed within 2 days, although time will still be needed to process the DNA sample. Fingerprints are always deleted at the same time as the DNA profile, as they allow identification of the individual should quality checks show any discrepancies with the DNA profile. This transitional measure ensures commencement of the Act is not delayed and matches to crimes are not missed while the new technology is developed.

- ***Consolidation***

7.9 Consolidation is not necessary.

8. Consultation outcome

8.1 No public consultation has been considered necessary.

9. Guidance

9.1 Police forces and forensic laboratories will be made aware of this instrument by means of existing mechanisms used to communicate with them on implementation of the Protection of Freedoms Act: a letter from the national lead on forensics to Chief Officers and other relevant post holders; information posted on the Police Online Knowledge Area (POLKA) website which provides the police with guidance; and email and phone enquiry lines.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is the cost in destroying a large volume of material taken before commencement. This majority of this work has already been completed and the cost has been covered from existing Home Office and police resources.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 DNA samples, DNA profiles and fingerprints taken before commencement which do not meet the retention requirements of the Act will be destroyed before commencement, and the numbers recorded. There will be no further monitoring or review of this instrument.

13. Contact

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