

The Information Commissioner's response to the Home Office's consultation on the Draft Statutory Guidance on the Making or Renewing of National Security Determinations Allowing the Retention of Biometric Data

Introduction

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA). He is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Information Commissioner's Office (ICO) welcomes the opportunity to respond to this consultation.

DNA related information is capable of being 'sensitive' personal data within the terms of the DPA. In the context of policing this is particularly so as not only is it information as to physical health or condition, it can be information about racial or ethnic origin and be related to an individual involved in the commission or alleged commission of an offence. This requires additional stringent safeguards and it is welcome the process for making or renewing National Security Determinations is being approached on a case by case basis factoring in important elements such as necessity and proportionality and the potential impact on individuals' privacy when retaining personal data of this type. Further, independent oversight by the Biometrics Commissioner provides an important additional safeguard and is welcomed.

It is particularly important that these safeguards are in place as there are specific exemptions laid out in Section 28 of the DPA where exemptions from its provisions are necessary for safeguarding national security. This means, in practice, that data controllers are exempt from many of the requirements of the Data Protection Principles and individuals' rights (such as subject access requests).

Our specific comments on the draft Statutory Guidance are as follows.

Making a National Security Determination

It is reassuring that a specific timescale is being applied in terms of the length of time an NSD is valid. This imposes an important requirement to review the case and determine whether it is appropriate to continue to retain the information based on necessity and proportionality tests.

Independent oversight by the Biometrics Commissioner

As mentioned, it is welcome that there is independent oversight of the process including retention and deletion of the material. Consideration should be given to retention periods for the material which will be retained by the Biometrics Commissioner as, for example, if the Biometrics Commissioner orders deletion of DNA material the DNA will be deleted by the Law Enforcement Agency but the Biometrics Commissioner will still retain information about the case including the personal data of the individual who is no longer on police systems.

We again welcome that there is a duty on Chief Officers and Chief Constables to keep under review the continued necessity of retaining biometric material and that there is facility to cancel the NSD should it be decided that the material no longer needs to be retained.

Notification of Renewal to the Commissioner

There is reference to the notification of a renewal of a NSD to be in writing, be appropriately protectively marked and transmitted in accordance with 'applicable security procedures'. If these 'applicable security procedures' are laid out elsewhere then that should be made clear or, alternatively, what those applicable security procedures are should be included in the guidance. As mentioned above, DNA is particularly sensitive and so it needs to be clear what security should be in place in terms of the transmission of the information.

Recording requirements

Under paragraph 67 the first sentence states 'A centrally retrievable record of every NSD made or renewed (including a copy of the NSD notification submitted to the Commissioner)'. It should say here who will maintain the centrally retrievable record. Paragraph 69 does not make clear who the Senior National Counter Terrorism Co-ordinator is.

Information Management

Under paragraph 72 the DPA is referred to as 1984 when it should be 1998. However, as mentioned above, certain exemptions apply in the DPA in terms of national security and it may be that information being

processed in connection with national security purposes will be exempt from some of the requirements to comply with the Data Protection Principles.

Further Contact

We have already established contact with the Biometrics Commissioner and we look forward to working with him to ensure effective cooperation in the discharge of our respective statutory responsibilities. We are happy to provide further advice on the interrelationship between the draft statutory guidance and the DPA as this guidance is developed.

Information Commissioner
20 May 2013