

## The Information Commissioner's response to the Department of Justice's consultation on proposals to amend the legislation governing the retention of DNA and fingerprints in Northern Ireland

### About the ICO

1. The Information Commissioner has responsibility in the UK for promoting and enforcing the General Data Protection Regulation (GDPR), the Data Protection Act 2018 (DPA 2018), the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Privacy and Electronic Communications Regulations 2003, amongst others.
2. The Commissioner 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 and taking appropriate action where the law is broken.

### Introduction

3. The Information Commissioner's Office (ICO) welcomes the opportunity to respond to this Department of Justice (DoJ) consultation. We have provided comments on the consultation document below in accordance with each of the headings within the consultation document for ease of reference.

### **Retention of DNA and fingerprints of convicted persons**

4. We welcome the aim of the policy proposal to move away from indefinite retention of biometric data to a more nuanced retention regime. In relation to the 75/50/25 model proposed, we appreciate it is difficult to be specific about what is a reasonable retention period but we would expect the DoJ to be able to provide evidence to support the assertion that these are acceptable retention periods, particularly with respect to the proportionality and necessity of retaining the records for such lengths of time.

5. By way of example, retaining biometric data for the maximum 75 years of an individual who was convicted at the age of 20 of a serious violent offence would be a lifetime for the vast majority of people. Likewise, retaining the biometric data for the maximum 50 years of an individual who was convicted at the age of 15 of a non-serious offence involving a custodial sentence of just over 5 years would result in that individual's data being retained until they are 65 years old. The DoJ will need to be able to justify the retention period for such cases, for example, what evidence is available regarding that age group committing further offences.

### **Periodic review of biometric data of convicted persons**

6. It is critically important that a mechanism is built into the regime to ensure continued retention is necessary and proportionate and we appreciate the intentions to do so as highlighted within the consultation document. This will ensure compliance with the fifth data protection principle set out within section 29, Part 3 of the DPA 2018 which states that "*Appropriate time limits must be established for the periodic review of the need for the continued storage of personal data for any of the law enforcement purposes.*"
7. Periodic reviews of retained biometric data will also ensure that the data held is processed fairly (the first principle); adequate, relevant and not excessive (the third principle); accurate and kept up-to-date (the fourth principle); not kept for longer than is necessary for the purpose for which it is processed (the fifth principle); and securely kept, using appropriate technical and organisational measures (the sixth principle).
8. If biometric data is to be retained for set maximum periods of time, this brings along with it a responsibility to ensure the processing is compliant with the principles for its lifetime.
9. It should be made clear to individuals what the retention timeframes of their biometric data are to ensure full transparency, along with clarity that the timeframes are the *maximum* period of time that the DoJ may retain their data and the process followed to determine whether the biometric data can be destroyed or should be retained.

10. We note that a separate consultation will take place for Regulations regarding a detailed review mechanism that will apply to all material falling within the 75/50/25 maximum retention periods. Please note that the ICO must be consulted directly during the drafting of these Regulations as required under Article 36(4) of the GDPR.

### **Retention of material by virtue of a conviction outside the UK**

11. In relation to this policy intention, we would raise similar comments to that raised in paragraph 4 above, that the DoJ should be able to demonstrate why the 50 and 25 year proposed retention periods are deemed acceptable, necessary and proportionate. It is unclear why a "*simplified version*" of 50 years and 25 years has been adopted in comparison to the 75/50/25 years set out within the first policy proposals, as this is inconsistent with the longer retention period for offences committed within the UK (for example, the biometrics of a person convicted of a serious violent, sexual or terrorism offence outwith the UK could be held for up to 25 years less than a person convicted of such offences within the UK). Whilst recognising that there may be difficulties in mapping offences committed abroad to offences committed in the UK, consideration should be given to setting retention periods in these circumstances on a case-by-case basis guided by rigorous procedure.
12. It is also worth noting that such transfers will bring into play the international transfer considerations and requirements set out in Chapter 5, Part 3 of the Data Protection Act 2018 when data regarding criminal convictions is transferred to and from third countries or to an international organisation. We would direct you to our [guidance](#) for further information on the aforementioned considerations and requirements.

### **Retention of material – Left on Books**

13. In relation to this policy intention, we would reiterate the comments raised in paragraph 4 above, that the DoJ should be able to demonstrate why the 12 month proposed retention period is deemed acceptable, necessary and proportionate. Consideration could be given to a variable retention period according to the nature

of the allegation, reflecting the approach being taken for cases where a prosecution has been successful.

### **Extension of the scope of the Northern Ireland Commissioner for the Retention of Biometric Material**

14. Biometric data is regarded as special category and sensitive personal data under the GDPR and DPA 2018 respectively and, as such, warrants special protection as well as additional stringent safeguards. In the context of policing, this is particularly important as not only is it information as to the physical health or condition of an individual, it can be information about their racial or ethnic origin and be related to an individual involved in the commission or alleged commission of a criminal offence.
15. We note the policy intentions to widen the scope of the Northern Ireland Commissioner for the Retention of Biometric Material (the Biometric Commissioner) to provide independent statutory oversight of the acquisition, retention, use and disposal of biometric material. We would welcome an opportunity to meet with the DoJ to discuss this further and, in particular, consider potential overlap with the functions of the Information Commissioner. This can form part of the formal consultation with us as required under Article 36(4) of the GDPR.

### Conclusions

16. We hope the above comments are useful to the DoJ in taking forward the proposed policy changes. We await formal consultation under Article 36(4) of the GDPR in respect of the legislative proposals you have outlined and reiterate our offer of a meeting in relation to the statutory oversight of biometric material.