

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

2013 No. 2580

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 order allows DNA and fingerprints taken as part of the police ‘Operation Nutmeg’, where police took material from those convicted of serious offences but not on the DNA database, to be retained on the database, even if the consent given is vitiated because it was not properly sought. It also allows individuals subject to Operation Nutmeg to have their DNA sample retaken, should the record be deleted for any reason.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The Protection of Freedoms Act 2012 made amendments to the Police and Criminal Evidence Act 1984 in respect of the destruction, retention and use of fingerprints and DNA. This instrument amends the Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) Order 2013 (S.I. 2013/1813), which made general provision in respect of biometric material taken before commencement of the 2012 Act. The change is being made to ensure biometric material taken from certain individuals convicted of serious offences can be retained, following a court judgment that ruled the wording of the consent letter used to obtain the material to be unlawful.

5. Territorial Extent and Application

5.1 This instrument applies to material taken by police forces in England and Wales under the Police and Criminal Evidence Act 1984 (“PACE”).

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 The Crime and Security Act 2010 made changes to allow police to take a DNA sample and fingerprints from any individual convicted of a recordable offence who did not already have a record on the DNA and fingerprint databases, for example because the opportunity to take samples was missed at the time of arrest, or because the offence pre-dated the inception of the DNA database in 1995.

7.2 Using these powers, a police-led national operation (Operation Nutmeg) to take DNA samples from individuals convicted of murder, manslaughter and sexual offences was completed this year. More than 6,000 convicted offenders had their material added to the database. The vast majority of these individuals consented to having their material taken, rather than forcing the police to invoke the powers given to them by the Crime and Security Act.

7.3 In *R (on the application of R) –v– a Chief Constable [2013] EWHC 2864 (Admin)* the High Court held on 24 September 2013 that the police had used a standard consent letter which was unlawful, in that the wording constituted a demand rather than making a request, and the necessary authorisations had not been obtained. However the Court ruled that the police did have a power lawfully to take material from convicted serious offenders in the position of those targeted by Operation Nutmeg, and that this was a proportionate interference with their rights under ECHR Article 8, and on the facts of the particular case the claim was dismissed.

7.4 From 31st October 2013 the Protection of Freedoms Act will require the destruction of material which appears to have been taken unlawfully. This instrument disapplies that requirement in relation to individuals with a conviction for a recordable offence, who purported to give consent to their material being taken. In the event of a further court judgment ruling that the material taken under Operation Nutmeg (with the apparent consent of the individuals concerned) was in fact taken unlawfully, there will therefore be no legislative requirement to delete the records of more than 6,000 individuals convicted of murder and sexual offences from the database.

7.5 The second part of the instrument preserves the ability to re-take a DNA sample from an individual liable to be sampled under the powers in the Crime and Security Act, should the DNA profile have to be destroyed. Whilst unlikely, should any set of circumstances occur that require the DNA profiles taken under Operation Nutmeg to be destroyed, the police retain the power to re-sample. This power would otherwise be removed to some extent by the Protection of Freedoms Act.

7.6 This instrument preserves the principle of the Protection of Freedoms Act that individuals guilty of a criminal offence should have their records retained indefinitely on the databases. It safeguards against the possibility of the records of more than 6,000 serious offenders lawfully held on the DNA database having to be removed due to an unforeseen error in a letter sent to them by the police.

- ***Consolidation***

7.7 Consolidation is not considered necessary.

8. Consultation outcome

8.1 No public consultation has been considered necessary.

9. Guidance

9.1 Police forces will be made aware of this instrument by means of existing mechanisms used to communicate with them on Operation Nutmeg.

10. Impact

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

10.2 The impact on the public sector is a reduced likelihood of police forces having to defend further legal challenge to retention of the biometric material of individuals convicted of serious offences.

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 No monitoring or review is considered necessary.

13. Contact

13.1 Mick Carling (michael.carling@homeoffice.gsi.gov.uk) at the Police Transparency Unit, Home Office, can answer any queries regarding the instrument.