

EXPLANATORY MEMORANDUM TO
THE CORONAVIRUS (RETENTION OF FINGERPRINTS AND DNA PROFILES IN
THE INTERESTS OF NATIONAL SECURITY) REGULATIONS 2020

2020 No. 391

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 In accordance with section 24 of the Coronavirus Act 2020 and the power conferred on the Secretary of State under subsection (2), this instrument extends the deadline for retention of fingerprints and DNA profiles by six months where they are retained:
 - (a) in accordance with a national security determination;
 - (b) under section 63F of the Police and Criminal Evidence Act 1984 (retention of section 63D material); paragraph 20B or 20C of Schedule 8 to the Terrorism Act 2000 (retention of paragraph 20A material); section 18A of the Counter-Terrorism Act 2008 (retention of section 18 material); and paragraph 8(2) of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011 (retention of paragraph 6 material) (other than fingerprints and DNA profiles that may be retained indefinitely under the provision in question);
 - (c) in advance of a requirement to destroy under: section 18(3) of the Criminal Procedure (Scotland) Act 1995 (destruction of relevant physical data); and Article 64(3), 64ZB(2), 64ZC(3), 64ZD(3), 64ZE(3), 64ZF(3), 64ZG(3) or 64ZH(3) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989/ 1341 (N.I. 12)) (destruction of fingerprints and samples).
- 2.2 This instrument extends the retention deadlines of fingerprints and DNA profiles held by Counter-Terrorism Policing Command, Police Service of Northern Ireland (PSNI), and Police Scotland that would otherwise fall to be destroyed during the period of 6 months starting with the date on which the Regulations come into force.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Joint Committee on Statutory Instruments will want to note that these Regulations have been laid in Parliament under the negative procedure and breach the 21 day rule, by coming in to effect the day after they are made. Any delay between the laying and coming into force of this instrument would result in the loss of biometrics (fingerprints and DNA profiles) from police databases which may have otherwise been retained on national security grounds by the making of a national security determination. Because of the effects of coronavirus on the police, including limitations on staff travel (and the implications this has in terms of accessing sensitive material on high classification systems) and reallocation of staff to critical policing

functions, Counter-Terrorism Policing Command is unable to make and renew national security determinations at this time. The Regulations have been laid at the earliest opportunity after the passage of the Coronavirus Act 2020. In these exceptional circumstances, it is considered justified to breach the important 21 day rule.

- 3.2 There are no new duties imposed by the Regulations on the police.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Home Secretary Priti Patel has made the following statement regarding Human Rights:

“In my view the provisions of the Coronavirus (Retention of fingerprints and DNA profiles in the interests of national security) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 24 of the Coronavirus Act 2020 confers a regulation-making power – under subsection (2) – on the Secretary of State so that she may vary the statutory retention deadlines for biometrics (fingerprints and DNA profiles) taken under relevant specified counter-terrorism and law enforcement legislation. The power enables the Secretary of State to make regulations extending, for up to six months, the period for which biometrics (fingerprints and DNA profiles) may be retained. The power may be exercised on more than one occasion but not so as to extend the period for which any fingerprints or DNA profiles may be retained by more than 12 months in total.
- 6.2 Regulations may only be made in response to the effects that coronavirus is having, or is likely to have, on the capacity of chief officers of police to consider whether biometrics need to be retained in the interests of national security. The regulations may only provide for the retention of biometrics which would otherwise fall to be destroyed in the period of 12 months starting with the date of Royal Assent (25 March) of the Coronavirus Act 2020 and only after consulting the Biometrics Commissioner.
- 6.3 The power is limited so that it ceases to have effect unless it is exercised within three months of Royal Assent.
- 6.4 This is the first instrument to be laid under section 24, subsection (2) of the Coronavirus Act 2020.
- 6.5 The retention deadlines for material within scope of the instrument are to be extended by six months as soon as the instrument comes into force.

7. Policy background

What is being done and why?

- 7.1 Biometrics taken or received in the UK can be retained for initial specified periods. The statutory retention periods for biometrics taken under terrorism legislation vary from 6 months to 3 years depending on the power by which the biometrics were taken. Biometrics taken under Police and Criminal Evidence Act (PACE) 1984 powers, or similar legislation applicable in Scotland and Northern Ireland, may also be retained depending on the alleged offence and conviction status of the individual.
- 7.2 Under powers established in the Protection of Freedom Act 2012, a chief officer of police may order that biometrics be retained on grounds of national security by making a national security determination if it is necessary and proportionate to do so. A national security determination must be in writing and lasts for a maximum of two years beginning with the date on which it is made. A national security determination may be renewed for a further period of up to two years on any number of occasions.
- 7.3 The Counter-Terrorism Policing Command has confirmed that – due to the impact of coronavirus on its resourcing – it is unable to maintain business-as-usual in relation to the reviews of intelligence required to process and submit national security determinations to chief officers of police for their consideration. As statutory retention periods end biometrics will automatically be deleted. This could result in the loss of the biometrics of up to 150 individuals per month (many of these could be subjects of national security interest).
- 7.4 Biometric material held using national security determinations is known in the past year to have led to the identification of individuals thought to have travelled to take part in the conflict in Syria/Iraq; linked individuals to other intelligence provided by overseas partners; linked individuals to unidentified crime stains; provided evidence of potential terrorist offences; and matched to potential visa and asylum applications, resulting in individuals being refused entry to the UK.
- 7.5 It is vitally important that where the effects of coronavirus restrict the capacity of chief officers of police to consider the case for making or remaking a national security determination that biometrics are not automatically deleted. The Secretary of State has therefore decided to exercise the power in section 24, subsection (2), of the Coronavirus Act 2020.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 The Government does not assess that there is any need for consolidation measures.

10. Consultation outcome

- 10.1 The statutorily independent Biometrics Commissioner has been consulted in the process of making these Regulations and has confirmed that the extension they permit is reasonable and proportionate.

11. Guidance

11.1 No guidance is necessary in connection with this instrument.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

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

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Office of the Biometrics Commissioner will prepare, on behalf of the Commissioner, a report for Parliament detailing the impact of the regulations once the situation has returned to normal.

15. Contact

15.1 The CT Pursue Unit at the Home Office can answer any queries regarding the instrument and can be contacted at the Home Office, 5th Floor, Peel Building, 2 Marsham Street, London, SW1P 4DF, Telephone: 020 7035 4848.

15.2 The Deputy Director for CT Pursue Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt. Hon. James Brokenshire MP at the Home Office can confirm that this Explanatory Memorandum meets the required standard.