

The National DNA Database

A Big Brother Watch Report

June 2012

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Key Findings¹

- Only **North Wales, Staffordshire and West Mercia Police** are able to distinguish the DNA profiles of those convicted from those neither charged nor found guilty.²
- The **up-front cost** of implementing the Protection of Freedoms Act, requiring tracing and deleting legacy DNA profiles, will be **£8 million³ - double the Home Office's estimate.**
- At least **900,000** samples of DNA were gathered by police forces between January 2009 and November 2011.
- **13 out of 51** police forces **refused to release or do not hold detailed information regarding DNA profiles**, suggesting that the figure will in fact be far higher than 900,000.
- **Suffolk Constabulary** collected **17,465** samples and has deleted **4**.⁴
- **10 police forces** have gathered **more than 30,000 samples** in three years (see Table 1)
- **1 in 22** people in **Staffordshire** have had a sample placed on the police database in the past three years.⁵
- **67,946** (1 per cent of the National DNA Database (NDNAD)) of profiles are for **10-15 year olds⁶**

Table 1 - Police Forces collecting over 30,000 samples of DNA between January 2009 – November 2011

	Police Force	Number of DNA Samples Collected
1	Metropolitan Police	120,000
2	West Midlands Police	68,954
3	Merseyside Police	53,413
4	Lancashire Constabulary	44,698
5	Essex Police	42,425
6	Kent Police	39,755
7	Avon and Somerset Police	38,884
8	Staffordshire Police	37,599
9	Northumbria Police	37,486
10	Nottinghamshire Police	32,525

¹ Figures for police forces in England and Wales. Period covers 1st January 2009- 30th November 2011.

² See Appendix One

³ See Appendix Four

⁴ See Appendix One

⁵ Population estimated at 828,700 in Staffordshire. 828,700/37,599 results in 1/22

⁶ See Appendix Six

Executive Summary

Despite the Protection of Freedoms Act, the retention of DNA in England and Wales remains an uncertain and illiberal regime.

The overwhelming majority of police forces are unable to distinguish the profiles of those convicted to those not charged, let alone found innocent. There is little to no standardisation between forces. Because of this, our research suggests the cost of implementing the Protection of Freedoms Act will be double the Government's own estimate, also casting serious doubt on the accuracy of the on-going costs of implementation.

Whilst making good progress, the Protection of Freedoms Act does not fulfil the Coalition agreement's pledge to implement the Scottish model, with a broad discretionary power to retain DNA for 'national security' purposes that was highlighted by the Joint Committee on Human Rights as a serious concern. Retention under this header will not be authorised by judges.

As recognised by the Information Commissioners Office, there remains no provision for individuals to request the deletion of their DNA and fingerprints. There is similarly no independent appeal process for those individuals whose DNA and fingerprints the Chief Officer have refused to destroy.

As the data sharing agenda continues apace, Britain continues to put its citizens at a disadvantage internationally by allowing these databases to remain substantially broader than other countries.

Despite the Protection of Freedoms Act becoming law, there remains no timetable for enacting the provisions relating to the DNA Database and ensuring those records that should no longer be held are deleted.

We are also concerned that the long term implementation of the Act could be diminished or left incomplete once a large proportion of legacy cases are dealt with in light of the resource implications and logistical challenge. Such a climbdown has already been seen with physical DNA samples being partially anonymised rather than destroyed.

The Protection of Freedoms Act was a good first step, but the DNA Database remains in need of fundamental overhaul, with proper judicial safeguards and a re-architecting to enable rapid separation of those never convicted or charged of a crime from those convicted. Only at this point will England and Wales be in a position to say it is able to protect its citizens from the long arm of overzealous European law enforcement agencies based upon data that they would not hold on their own citizens.

Introduction

Before the 2010 General Election, both the Conservative and Liberal Democrat parties recognised the need to restore the balance of civil liberties. The Conservatives spoke of a Government with “fewer databases, greater protection of personal privacy”⁷ while the Liberal Democrat manifesto pledged the removal of “innocent people from the DNA database”⁸;

More than 8 per cent of the British population (6 million people) have their details contained within the largest DNA database in the world. There is little evidence to suggest DNA profiling results in a higher sense of public safety⁹, while innocent people continue to be tarnished as guilty because they have a profile retained on the DNA Database.

The Joint Committee on Human Rights recognised this, calling on the Government to collect better records to demonstrate the contribution made to the prevention and detection of crime by the retention and use of biometric material in the future.¹⁰

The Coalition Agreement brought together these concerns and explicitly states that the Coalition Government would implement the ‘Scottish model’¹¹ for the retention of DNA.

While the Protection of Freedoms Act does introduce new safeguards on the retention of innocent people’s DNA, it did not introduce the Scottish model, but a watered down version that lacks the same judicial oversight in every case that is central to the system in Scotland.

In this report, Big Brother Watch highlights the lack of awareness of many police forces regarding the number of DNA samples on the database and the lack of clarity in profile deletion. For instance, only three police forces (North Wales, Staffordshire and West Mercia) have stated that they are able to distinguish the DNA profiles of those neither charged nor convicted. This report raises concerns about the Protection of Freedoms Act as well as highlighting the lack of clarity and regulation governing the use of the DNA database by police forces.

⁷ Conservative Party, The Rise of the Surveillance State, September 2009

⁸ Liberal Democrat Party, Manifesto 2010,

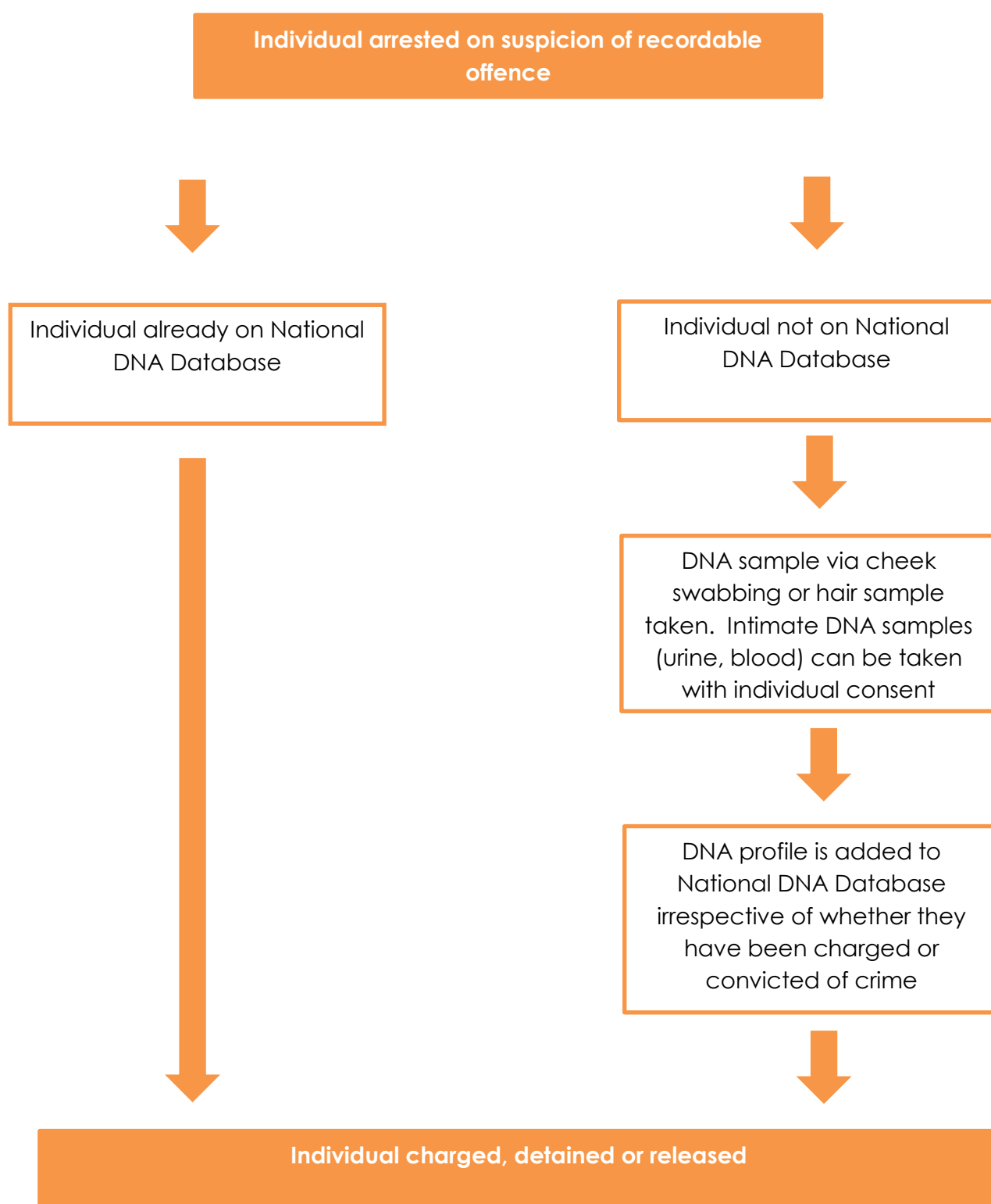
http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf

⁹ National Policing Improvements Agency (NIPA) <http://www.npia.police.uk/en/13338.htm>

¹⁰ Joint Committee on Human Rights, Eighteenth Report, Legislative Scrutiny: Protection of Freedoms Bill, September 2011, <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/195/19505.htm#note5>

¹¹ HM Government, The Coalition: our programme for government, May 2010, http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

Current DNA Profiling in England and Wales



Who is on the National DNA Database?¹²

Who is on the NDNAD?¹³

- There are currently **6.4 million** profiles on the NDNAD, **41,600** of those were gathered from volunteers
- There are **390,200** crime scene sample profiles on the NDNAD
- **78 per cent** of profiles are **male**, **21 per cent** are **female**
- **79 per cent** of profiles have a **White** ethnic appearance, **8 per cent** have a **Black** ethnic appearance and **6 per cent** have an **Asian** ethnic appearance
- **32 per cent** of profiles are from **25-34 year olds**, **22 per cent** from **35-44** year olds
- 1 per cent (**67,946**) are from **10-15 years olds**

Whose DNA is taken?

- DNA samples are currently taken from those arrested on suspicion of a recordable offence. In practice, this means any offence punishable with imprisonment and various additional offences.
- People may be asked to provide DNA samples for elimination purposes or whilst helping an investigation. These profiles will not be added to the NDNAD unless explicitly requested by the person providing the sample.

What is contained in a National DNA Database profile?

- Name
- Date of Birth
- Sex
- Ethnic group
- Arrest Summons Number
- Collecting police force details
- Laboratory number and details
- The DNA profile (a string of numbers)

¹² National Policing Improvement Agency <http://www.npia.police.uk>

¹³ See Appendix Six

Glossary*

DNA Sample: A DNA sample is the cellular matter taken from an individual, usually from a person's mouth using a swab. After a DNA profile has been obtained from the sample, all remaining sample material is stored in freezers by the laboratory that profiled the sample

DNA Profile: DNA profiling targets areas of DNA that are known to differ widely between individuals. The current system of DNA profiling used in the UK is known as SGM Plus. It examines ten sequence areas of DNA plus a gender test and produces a numeric DNA 'profile' that can be loaded electronically onto the NDNAD. This contains two numerical representations of the DNA at each area examined: one inherited from the mother and the other from the father.

The DNA profile on the NDNAD is a list of numbers, along with two letters (XX or XY) that shows the result of the gender test.

The Exceptional Case Procedure

The Metropolitan Police Authority published a report¹⁴ in 2011 outlining the current provision (pre-Protection of Freedoms Act) for individuals who wish to have their DNA profile deleted under the Exceptional Case procedure. This echoed the National Policing Improvement Agency's own guidance on the issue.¹⁵

It summarised the system as follows:

"As the name suggests, removal only occurs in exceptional circumstances and has to be approved by a chief officer who is the 'data controller' for the force.

Guidelines on retention issued by the Association of Chief Police Officers recommend that when such a request is made, applicants should be sent a letter informing them that the DNA sample and profile, PNC record and fingerprints are lawfully held. Their request for deletion / destruction is refused unless the applicant believes the application should be regarded as exceptional. The applicant is then invited to state the grounds upon which they believe their case to be exceptional.

Applications are considered against set criteria and an individual's record (DNA, fingerprints, PNC record and photographs) will only be removed in the following instances:

- *a recordable offence no longer exists or;*
- *any part of the process from arrest through to detention was found to be unlawful.*

Therefore those wishing to apply must write to the force concerned detailing why they believe their request to be exceptional.

It is important to note that under current legislation and guidelines it is immaterial whether a person is absolved of any involvement in a recordable offence, or acquitted at court. Providing a recordable offence occurred and the whole process was correctly conducted, records may be retained.

The final decision always rests with a chief officer for the owning force, who has ultimate authority to exercise her/his, discretion on removal or retention."

Even after the Protection of Freedoms Act, the regulatory framework fails to include judicial oversight in every case, while we still await a timetable for profile deletion.

Despite making a firm commitment to resolving this problem, the Coalition Government has failed to carry to fruition the promises of its early rhetoric and much more remains to be done.

¹⁴ <http://www.mpa.gov.uk/downloads/scrutinities/dna.pdf>

¹⁵ <http://www.npia.police.uk/en/13881.htm>

The Coalition Government and the NDNAD

Under the last Labour Government the NDNAD grew to more than five million samples, the largest in the world per head of population. The cost of the NDNAD has more than doubled since 2002, when the law was changed to allow for the permanent retention of the DNA of people neither charged nor convicted of an offence.¹⁶ In 2008, in a landmark judgement in the case of *S and Marper vs. UK*, the European Court of Human Rights found that the indefinite retention of DNA samples and profiles taken from innocent people, including children, is in violation of Article 8 of the ECHR (the right to a private life).¹⁷

In response to the approach taken by the Labour Government and the ECHR judgement both the Conservative and Liberal Democrat parties included clear measures within their 2010 manifestos that outlined their plans for the future retention of DNA samples.

The Conservative Party stated¹⁸:

"Fewer Databases, Greater Protection of Personal Privacy –

- *DNA should be retained only whilst a person remains subject to investigation or until criminal proceedings have concluded and should only be used for the purposes of investigating and detecting crime;*
- *... no DNA samples or profiles should be retained on children under the age of 10 (the age of criminal responsibility)*
- *... the operation of DNA Databases should be subject to independent oversight."*

The Liberal Democrats laid out their plans to¹⁹:

- *"remove innocent people from the police DNA database and stop storing DNA from innocent people and children in the future too."* Liberal Democrat Manifesto, 2010

The Coalition Agreement stated²⁰:

"We will adopt the protections of the Scottish model for the DNA database"
Coalition Agreement, May 2010

¹⁶ National DNA Database Annual Report 2006/7

¹⁷ Human Rights Joint Committee, Eighteenth Report, Legislative Scrutiny: Protection of Freedoms Bill, September 2011, <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/195/19505.htm#note5>

¹⁸ Conservative Party, *The Rise of the Surveillance State*, September 2009

¹⁹ Liberal Democrat Party, *Manifesto 2010*,

²⁰ HM Government, *The Coalition: our programme for government*, May 2010

However, despite these commitments and previous assurances from the Coalition Government that the DNA profiles of millions of innocent people would be deleted, the Home Office has now decided that those profiles will now be retained but anonymised.

Speaking in May 2011 the Home Office minister James Brokenshire stated:

"Our aim is to remove the vast majority of non-convicted people from the NDNAD as soon as is practicable, following enactment of the relevant provisions."²¹

However, just two months later the Home Office abandoned their commitment, stating that DNA profiles would "be considered to have been deleted even though the DNA profile record, minus the identification information, will still exist."²²

James Brokenshire MP stated to MP's that:

"Most DNA records ... will include the original barcode, which is used by both the police and the Forensic Science Service to track the sample and resulting profile through the system.

"It is therefore theoretically possible that a laboratory could identify an individual's profile from the barcode, but only in conjunction with the force that took the original sample, by giving details of the barcode of the force and asking for the individual's name."

Both the Conservatives and Liberal Democrats whilst in opposition and subsequently together as a Coalition made explicit assurances that the Protection of Freedoms Act would create a NDNAD resembling the Scottish model and put the privacy of innocent individuals first.

The model implemented by the Protection of Freedoms Act does not fulfil the Coalition agreement to implement the Scottish model and is arguably open to further legal challenge for indefinitely retaining the DNA of people never convicted of a crime without any opportunity for judicial oversight or individual challenge.

²¹ <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110509/text/110509w0003.htm>

²² The Telegraph, <http://www.telegraph.co.uk/news/uknews/law-and-order/8660821/Innocent-peoples-DNA-profiles-wont-be-deleted-after-all-minister-admits.html>

The 'Scottish Model'

In May 2006, the Scottish Parliament voted to reject a proposal to allow the police to store all DNA taken on arrest indefinitely. Instead, they agreed to expand police powers to retain some DNA from innocent people, but only in specific circumstances and upon the approval of a Sheriff. The DNA of some adults charged but not convicted of violent or sexual offences can be retained for 3 years, after which the Chief Constable of the relevant force can apply to a Sheriff if they wish to extend retention for a further 2 years. The law also gives individuals the right to appeal against any decision made by a Sheriff. The DNA privacy campaign group GeneWatch argues that the 'Scottish model' is by no means perfect, but it is vastly fairer than the current UK system.²³

The 'Scottish Model' of DNA retention stipulates that:

- If an individual is convicted of an offence there is no limit on the period their DNA may be retained, although in Scotland (unlike England and Wales) records relating to old or minor convictions are periodically weeded and destroyed.
- A limited power of retention applies to DNA samples.
- There is power to retain DNA samples taken from persons who were arrested or detained on suspicion of having committed an offence, provided criminal proceedings were instituted against them for a relevant sexual or violent offence even though such proceedings did not result in a conviction, for a period of 3 years after the proceedings concluded.²⁴
- The relevant Chief Constable would then have discretion to apply to a Sheriff for extensions of up to 2 years at the end of each period.

²³ GeneWatch: <http://www.genewatch.org/sub-539489>

²⁴ Fraser Report on Retention of DNA and fingerprint data, Governments response, 2008, <http://www.scotland.gov.uk/Resource/Doc/239066/0065846.pdf>

The Protection of Freedoms Act and DNA

In a letter to Chief Police Officer's, the Association of Chief Police Officers (ACPO) recognised that their own retention guidelines were found to be in violation of Article 8 of the ECHR that ACPO itself stated was "no surprise" and have accepted that the system requires changes.²⁵

The Protection of Freedoms Act originally aimed to "create a new framework for police retention of fingerprints and DNA data", proposing the:

- modelling of the database on the Scottish model;
- banning of the retention of DNA from individuals arrested on suspicion, but not convicted of, minor offences
- the indefinite retention of DNA taken from those convicted of most criminal offences.

The Protection of Freedoms Act, that became law on the 1st May 2012, has failed to fully introduce the Scottish model and fails to ensure that people who have never been charged or convicted will have their DNA profiles and samples destroyed.

The Joint Committee on Human Rights raised concerns in 2011 about the proposals in the Act, that *"we consider may undermine some of the significant safeguards for individual privacy which the Government intends to introduce."*²⁶ These 'safeguards' include discretionary powers for the Secretary of State to designate some circumstances when biometric material can be taken from innocent people and retained, as well as broad discretionary powers for Chief Constables to retain biometric material when it is deemed to be in the interests of 'national security.'²⁷ This allows for the retention of DNA profiles for an initial period of three years, followed by two year extensions.

Unlike the Scottish model, this will not be a judicial process, and it is unclear how individuals will be able to challenge the decision, aside from an expensive and lengthy judicial review. In cases where these special criteria are not applied, magistrates will oversee the retention of DNA material beyond the initial time period.

The precise circumstances where DNA profiles might be categorised as a threat to 'national security' remain opaque and unclear. This urgently needs to be clarified to avoid the invasive retention of DNA belonging to innocent citizens.

²⁵ See appendix three

²⁶ Joint Committee on Human Rights, Eighteenth Report, Legislative Scrutiny: Protection of Freedoms Bill, September 2011, <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/195/19502.htm>

²⁷ *ibid*

Such safeguards will inevitably over complicate the retention system and it is unclear whether the Home Office understand the full ramifications of this policy, particularly given the inability to distinguish between the records of those never convicted and those convicted without individually reviewing each record every few years.

Implementing the Protection of Freedoms Act

The Home Office compiled an impact assessment on the Protection of Freedoms Act that estimates the costs of implementing the proposals.²⁸ They estimate the cost of implementing automatic deletion of profiles after the proposed retention period as a £4.5m one off payment and subsequently £2.8m per year.

Table 3 – Home Office Impact Assessment

Cost of reprogramming all relevant IT systems	£300,000 (one off)
Cost of tracing and deleting legacy DNA profiles	£4.5m (one off)
Cost of re-profiling in re-arrest cases	£2.3m (per year)
Cost to the Independent Commissioner	£500,000 (per year)
Cost of reviewing profile on grounds of national security for those arrested but not convicted, every 2 years after initial retention period	Negligible (per year)
Cost of reviewing to retain profiles for a further 2 years	Negligible (per year)
Total	£4.5m (one off) + £2.8m (per year)

However, our own research suggests this is a significant under-estimate.

Based on our FOI request, the following forces provided cost figures for assessing records and separating those belonging to people not charged or convicted of any offence from those who were convicted.

Table 4 – Police force cost estimates of complying with the Big Brother Watch FOI

Force	Estimate	Explanation
Lancashire	£37,250.00	Estimated at 1,490 hours – at £25 p/h
Warwickshire	£12,797.50	3 min per record – 10,238 records - £25 p/h
City of London	£9,375.00	375 hours - £25 p/h
Devon and Cornwall	£12,873.75	3 min per record - 10,299 records - £25 p/h
Gwent	£6,475.00	259 hours - £25 p/h

²⁸ See Appendix Six

Leicestershire	£25,858.75	3 min per record – 20,687 records - £25 p/h
Norfolk	£43,750.00	21,000 records, 5 min per record - £25 p/h
Northamptonshire	£16,650.00	666 hours - £25 p/h
Northumbria	£46,850.00	1,874 hours - £25 p/h
Average	£1.25 per record	

Extrapolated to the wider DNA database, the estimated cost of compliance would be some £8 million.²⁹

These figures are based on estimates of complying with the demands of the Big Brother Watch FOI supplied to us by some individual police forces. We have included in the table an explanation of the precise figures involved. For the figure of £8 million above, we have used the figure of 3 minutes to check each record suggested by several police forces and the labour cost of £25, which is the standard figure used by public authorities when calculating the cost of responding to Freedom of Information requests.

²⁹ 6.4 million DNA profiles / 20 [60 minutes/3 minutes per profile] = 320,000 hours x £25 [standard hourly charge] = £8 million

The Information Commissioner's Office's Position

The Information Commissioner's Office is responsible in the United Kingdom for promoting and enforcing the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA). The Commissioner has welcomed the clarity, greater transparency and protection for privacy that many of the provisions in the Protection of Freedoms Act aim to establish. The Commissioner has nonetheless raised concerns over several provisions contained within the Protection of Freedoms Act that relate to DNA retention:

- Although there is provision to delete fingerprints and DNA profiles there is **no provision to delete the allied biographical information**, i.e. the arrest record, contained on either the Police National Computer (PNC) or the Police National Database (PND).
- There should be clear provisions **requiring the deletion of all associated records** when fingerprints and DNA are deleted. This engages concerns about compliance with the fifth principle of the Data Protection Act in that personal data should not be kept for longer than necessary.
- There is no provision **for individuals to request the deletion of their DNA and fingerprints**. Also, there is **no independent appeal process** for those individuals whose DNA and fingerprints the Chief Officer may have refused to destroy.
- The creation of a **National DNA Database Strategy Board** would be welcomed but further information and discussion is required as to the appropriate composition of the Board and its functions.³⁰

The Information Commissioner has raised important shortcomings in the Protection of Freedoms Act. Most of these problems stem both from the failure of the Act to adhere to the Scottish standard of DNA retention and from the lack of any assurance that individuals will be able to appeal against the inclusion of their profile on the DNA database.

³⁰ Information Commissioner's Office, The Information Commissioner's view on the provisions of the Protection of Freedoms Bill - As at Committee Stage (House of Lords), November 2011, www.ico.view_on_provisions_of_protection_of_freedoms_bill_committee_stage_nov2011.pdf

The Prüm Convention – what will it mean for the UK?³¹

The Prüm Treaty of 27 May 2005, on the stepping up of cross-border cooperation, particularly on combating terrorism, cross-border crime and illegal migration, signed between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria, lays down procedures for more efficient exchanges of information in the framework of criminal investigations.

The **United Kingdom** has opted into the Prüm Treaty although we have yet to bring the Decisions into force. In a letter from James Brokenshire MP to other Members of Parliament he explains that the delay in the implementation of Prüm is due to the cost, the Protection of Freedoms Act and the complexity of the DNA database (See Appendix Seven).

According to the European Union, the Prüm Treaty (also known as the Prüm Convention/Decision) aims to improve the exchanges of information between the authorities responsible for the prevention and investigation of criminal offences. The convention sets out the following provisions:

- the automated access to DNA profiles, dactyloscopic data³² and certain national vehicle registration data;
- supply of data in relation to major events;
- supply of information in order to prevent terrorist offences;
- other measures for stepping up cross-border police cooperation.

Prüm and DNA

The Prüm Convention stipulates that “EU countries are to establish national DNA analysis files for the purpose of investigating criminal offences”. How it works:

- Reference data, consisting of the non-coding part of the DNA and of a reference number that does not enable an individual to be identified, **must be made available to other EU countries to carry out automated searches.**
- These searches are performed via national ‘contact points’ by comparing DNA profiles, but only on the basis of individual cases and in a hit/no-hit manner.
- If the search provides a match, the national contact point carrying out the search receives the reference data in an automated manner. If no profile is

³¹European Union, Summary of Prüm Convention,
http://europa.eu/legislation_summaries/justice_freedom_security/police_customs_cooperation/jl0005_en.htm#KeyTerms

³² Dactyloscopic data: fingerprint images, images of fingerprint latents, palm prints, palm print latents and templates of such images that are stored and dealt with in an automated database.

found for a particular individual who is under investigation or against whom criminal proceedings have been brought, the requested EU country may be obliged to establish a DNA profile for that individual.³³

EU countries are also obliged to make available reference data from the national automated fingerprint identification systems (AFIS) and national vehicle registration data via automated online searches.

Supply of data in relation to major events

If an event has a cross-border dimension, EU countries are obliged to provide each other with non-personal data via their national contact points, as required for the purpose of preventing criminal offences and maintaining public order and security. This data may only be used in relation to the event it was provided for and must be deleted once it has served its purpose, but no later than a year after it was supplied.

Supply of information to fight terrorism

EU countries may provide the following data to each other via the national contact points, but only in individual cases and to the extent required by the conditions leading to the supposition that criminal offences will be committed:

- surname and first names;
- date and place of birth;
- description of the conditions leading to the supposition that criminal offences will be committed.

³³ European Union, Summary of Prüm Convention

Big Brother Watch's Position

- **The retention of innocent individuals' DNA profiles should be banned**

There is no justification for innocent people to have their DNA held on a central database without their consent. Membership of the Prüm Treaty means that this measure should be a priority for police forces as no DNA should be shared with other European states if that profile is of an innocent individual. As the Protection of Freedoms Act stands, individuals who were never charged may still see their DNA profile stored under 'prescribed circumstances' with the consent of the Biometrics Commissioner.

Aside from three police forces, no police force was able to distinguish the DNA of those not charged from those who were.³⁴ The Home Office should begin measures for every police force to review the DNA profiles they hold in order to decipher the innocent profiles from the guilty.

- **The Protection of Freedoms Act**

The Protection of Freedoms Act does a great deal to begin to move away from the authoritarian excesses of recent years. It does not, however, represent the end of indefinite retention of innocent people's DNA.

Big Brother Watch would welcome a time limit of five years for the retention of DNA profiles of individuals that have committed a one off, non-serious offence, even if mandated by the Biometrics Commissioner or a Chief Constable

- **The Scottish model should be adopted for the DNA database**

The Government should re-think the watered down version of the Scottish model that has been proposed. Both the Conservative and Liberal Democrat parties have committed themselves to the implementation of the Scottish model, as was highlighted in the Coalition agreement.

- **Biometric data should fall under the same guidelines as the DNA database**

Just as worrying as the DNA database, there is currently the ability to retain biometric data based upon 'national security determinations' for an initial two years, but with potential for indefinite renewal. This is grossly excessive and judging from past cases of how anti-terrorism legislation has been

³⁴ Some police forces refused under Section 12 (time and cost)

applied it is far from certain that it will be limited to cases of credible threat to national security.

- **The Home Office should not commit the UK to membership of the Prüm Treaty**

The data in this report clearly highlights the enormous strain that membership to the Prüm Treaty would have on police forces. For example, 9 forces were unable to provide us with the total number of DNA profiles taken due to time and cost implications (Refused under Section 12 of the 2000 FOI Act). Appendix Four highlights that the estimated cost for police forces to review every profile on the database would be approximately £8 million.

Appendix One: Police Force Use of DNA

Police force	Total DNA Profiles Taken	Total Charged with offence	Total non-charged profiles deleted
Avon and Somerset Police	38,884	Refused ³⁵	41
Bedfordshire Police	11,858	Refused	2,352
Cambridgeshire Constabulary	13,425	Refused	1,687
Central Scotland Police	Information not held ³⁶		
Cheshire Constabulary	19,000	Refused	Refused
City of London Police	Refused	Refused	Refused
Cleveland Police	16,562	Refused	12
Cumbria Constabulary	11,839	Refused	Refused
Derbyshire Constabulary	26,017	Refused	48
Devon and Cornwall Constabulary	10,299	Refused	Refused
Dorset Police	16,151	Refused	1,941
Dumfries & Galloway Constabulary	Info not held	Refused	Refused
Durham Constabulary	11,313	Refused	Refused
Dyfed Powys Police	Refused	Refused	Refused
Essex Police	42,425	Refused	Refused
Fife Constabulary	10,371	10,371	Held by SPSA
Gloucestershire Constabulary	15,035	Refused	Refused
Grampian Police	19,124	Refused	Refused
Greater Manchester Police	Refused	Refused	Refused
Gwent Constabulary	Refused	Refused	Refused
Hampshire Constabulary³⁷	25	12	13
Hertfordshire Constabulary	Info not held	Info not held	DNA not routinely destroyed
Humberside Police	20,582	Refused	1,903
Kent Police	39,755	47,573	63
Lancashire Constabulary	44,698	Refused	Refused
Leicestershire Constabulary	20,687	Refused	Refused
Lincolnshire Police³⁸	17,710	3,617	2,180

³⁵ 'Refused' = refusal to respond under Section 12 (time and cost)

³⁶ Refusal under Section 17 of the Freedom of Information Act

³⁷ Hampshire Constabulary provided us with an analysis based on a random sample of 25 case files; the information here should be taken as indicative of general trends on the retention of DNA by police forces.

³⁸ Lincolnshire police are not able to distinguish DNA samples taken before the 24 March 2010

Lothian & Borders Police	22,542	Info not held	Info not held
Merseyside Police	53,413	Refused	29
Metropolitan Police³⁹	120,000	Refused	Refused
Norfolk Constabulary	21,000	Refused	Refused
North Wales Police	15,777	9,444	2,804
North Yorkshire Police	14,315	3699	Unstated
Northamptonshire Police	8,834	Refused	Refused
Northern Constabulary	Refused	Refused	Refused
Northumbria Police	37,486	Refused	Refused
Nottinghamshire Police⁴⁰	32,525	I.N.H	0
South Wales Constabulary	7,264	Refused	Refused
South Yorkshire Police	26,781	Refused	Refused
Staffordshire Police	37,599	11,934	29
Strathclyde Police	Information not held		
Suffolk Constabulary	17,465	Refused	4
Surrey Police	15,157	Refused	Refused
Sussex Police	28,181	Refused	0
Tayside Police	6,108	Refused	640
Thames Valley Police	Refused	Refused	Refused
Warwickshire Police	10,238	Refused	2,213
West Mercia Constabulary	21,393	6,994	7
West Midlands Police	68,954	Refused	Refused
West Yorkshire Police	Refused	Refused	Refused
Wiltshire Constabulary	15,975	Refused	Refused
Total	986,767		15,966

Central Scotland Police, Dumfries & Galloway Constabulary, Lothian & Borders Police, Strathclyde Police and West Yorkshire Police stated in their response that this information was not held. These forces consequently may have the ability to distinguish DNA of those not charged or convicted

³⁹ Figures for 2009 only

⁴⁰ Figures for 2011 only

Appendix Two – Freedom of Information Request⁴¹

Dear Sir/Madam,

I am writing to obtain information about the number of DNA profiles obtained by this Police Force from people who were not charged or convicted of an offence in the period 1st January 2009- 30th November 2011.

To outline my query as clearly as possible, I am requesting:

1. The total number of people that had their DNA taken by this Police Force in the last three years.
2. Of the total number of people above whose DNA was taken by the Police in the same time period, the number of those who were subsequently charged with an offence.
3. The number of a DNA profiles subsequently destroyed for those individuals in question 2 not charged with an offence in this time period.

My preferred format to receive this information is electronically, but if that is not possible I can accept hard copies.

Some parts of this request may be easier to answer than others. In such case, I would ask that you release the available data as soon as possible rather than delay or refuse the entire request.

Again, for clarity, our definition of the "past three years" is the period up from 1st January 2009- 30th November 2011.

I understand that under the Freedom of Information Act, I am entitled to a response within 20 working days. I would be grateful if you could confirm in writing that you have received this request.

⁴¹ This Freedom of Information request was sent out to police forces from the 8th December 2011

Appendix Three: DNA Database Timeline⁴²

May 2001	<i>The Police and Criminal Evidence Act (PACE) is amended so that the DNA taken after arrest no longer needs to be destroyed on acquittal or where proceedings are discounted</i>
April 2004	<i>PACE is amended to enable police to take DNA or fingerprints of anyone aged 10 or over who is arrested for a recordable offence</i>
2005	<i>Under the Serious Organised Crime and Police Act (SOCPA) allows for wider DNA sampling from individuals arrested</i>
4 December 2008	<i>The European Court of Human Rights judges that in the case of S and Marper vs UK the UK's policy on indefinite retention of DNA is in breach of the European Convention on Human</i>
July 2009	<i>The Home Office launches a consultation on the future of DNA retention post S and Marper vs UK ruling. The Government proposes, among other things, that the DNA of individuals arrested but not convicted is retained for periods of 6 to 12 years</i>
19 October 2009	<i>Home Office announced that the clauses in the Policing and Crime Bill that would allow for regulations on DNA retention are to be dropped from the Bill</i>
11 November 2009	<i>Home Office announces plans to treat innocent 16 and 17 year olds arrested for serious crimes the same as adults. All other children arrested but not convicted of any offence will have their profiles held for 3 years</i>
May 2010	<i>The Coalition Government pledge to adopt the Scottish model, which is based on allowing the retention of DNA for those convicted or cautioned for serious offences such as sexual assault or violence</i>
1 May 2012	<i>Protection of Freedoms Act becomes law but falls short of introducing the Scottish model of database</i>

⁴² Liberty, <http://www.liberty-human-rights.org.uk/human-rights/privacy/dna-retention/index.php>

Appendix Three: Letter from ACPO



**ASSOCIATION OF
CHIEF POLICE OFFICERS**

**CRIME
BUSINESS AREA**

**Security
classification:**
Not Protectively Marked

**Disclosable under
FOIA 2000:**
Yes

Author:
CC Chris Sims

Force/organisation:
West Midlands Police

Date created:
16 June 2011

Telephone:
0121 626 5482

TO: ALL CHIEF CONSTABLES AND COMMISSIONERS

Dear Colleagues

**RE: RETENTION OF BIOMETRIC DATA IN THE LIGHT OF GC & C v COMMISSIONER OF
POLICE OF THE METROPOLIS – 18th MAY 2011**

As many of you will be aware, the Supreme Court recently adjudicated on the retention of DNA and fingerprints in its judgement of *GC & C vs. Commissioner of Police of the Metropolis*. The case is related to the decision made by the European Court of Human Rights (ECHR) in the *S&Marper* case in 2009.

In brief, the Supreme Court determined that our current arrangements for the retention of biometric data under Section 64(1a) of PACE 1984 and the ACPO Retention Guidelines are a violation of Article 8 of the ECHR. This was no surprise, as a concession to that effect was made by both the Commissioner and the Secretary of State Home Department (SSHD) in their Printed Cases. Each accepted that the system required to be changed in order to conform to Article 8. This was the intended effect of the Crime and Security Act 2010 but which, due to the change in Government, was not brought into force. The Protection of Freedoms Bill is the means by which the current Government intends to legislate in line with and to give effect to the decision of the ECHR in *Marper*¹.

Whilst the present ACPO guidelines (as amended) are unlawful, the court noted that "since Parliament is already seized of the matter" and there is an intention to legislate "later this year", "it is neither just nor appropriate to make an order requiring a change in the legislative scheme within a specified period".

¹ The Protection of Freedoms Bill concluded the Committee Debate stage of its progress in the House of Commons on 17th May 2011, and is next due to proceed to the Report stage.

If Parliament does not produce legislation within a reasonable time, which is currently interpreted as being within the timeframe set for delivery within the Freedom Bill, then the Secretary of State will have to introduce new Guidelines with the support of ACPO.

The Law Lords acknowledged how important it was for the Police Service to act corporately with regard to the taking, retention and disposal of DNA, fingerprints and associated matters. With this in mind, ACPO have sought Counsel Opinion concerning the ramifications of the judgement and he has advised as follows:

(1) It is presently lawful for the Police Service to continue to process applications under the current scheme (viz s64(1A) of PACE, and existing ACPO guidelines);

(2) Claims against the Police Service by persons seeking the destruction and deletion of biometric data may be robustly defended on the basis of the judgment of the Supreme Court. There will, of course, continue to be cases which are "exceptional" – these should be processed in the same manner as they were being processed before the judgment in *GC & C*;

(3) ACPO is not required to amend its current exceptional case procedure. In his view, it is for Parliament to be left to consider, debated and perhaps even alter the Government's proposed legislation; neither ACPO, still less individual forces, should seek to operate any policy other than that currently in place.

In practice, the current exceptional case procedure remains extant and records held on national systems can be deleted where no offence exists or where due process was unlawfully or inappropriately conducted. However, in cases that result in an acquittal, no further action or discontinuance, relevant records may be retained. In considering exceptional case applications, Chief Officers as Data Controllers, have the discretion in law to authorise the removal of records owned by their force and which are held on any national criminal records database (PNC, IDENT1 or NDNAD).

In this regard the Commissioner accepted before the Supreme Court that the retention or deletion of an arrest history was inextricably linked with the need to retain or the need to delete biometric data. This was because the arrest history simply provides a link between the details and circumstances of the person arrested and the record of their biometric data: if the biometric data is deleted or destroyed, then there is no need – and therefore no justification – for the retention of the arrest record on the PNC. Therefore, if the biometric data is to be deleted or destroyed, then so must be the arrest record on the PNC.

It is important to recognise, however, that this does not require deletion of *all* records of the person's arrest – that was never the Appellants' submission: they accepted that there would be good policing reasons (including the need to be able accurately to answer CRB and other safeguarding enquiries) to retain a record of their arrest on other police computer systems (e.g. CRMINT, CRIS, CAD etc.) and indeed in hard copy.

I hope that this assists colleagues in what I recognise is a difficult area in decision making. I will continue to keep you advised as the Freedom Bill progresses its route through Parliament. If you require further information please contact my Staff Officer, Chief Inspector Phil Healy on 0121-626 5482 or p.healy@west-midlands.pnn.police.uk.

Yours faithfully

Chris Sims
Chief Constable, West Midlands Police
ACPO Lead for the Forensic Portfolio

Appendix Four: Estimated Cost of deciphering innocent DNA profiles⁴³

Force	Estimate	Explanation
Lancashire	£37,250.00	Estimated at 1,490 hours – at £25 p/h
Warwickshire	£12,797.50	3 min per record – 10,238 records - £25 p/h
City of London	£9,375.00	375 hours - £25 p/h
Devon and Cornwall	£12,873.75	3 min per record - 10,299 records - £25 p/h
Gwent	£6,475.00	259 hours - £25 p/h
Leicestershire	£25,858.75	3 min per record – 20,687 records - £25 p/h
Norfolk	£43,750.00	21,000 records, 5 min per record - £25 p/h
Northamptonshire	£16,650.00	666 hours - £25 p/h
Northumbria	£46,850.00	1,874 hours - £25 p/h
Average	£1.25 per record	

This table shows the estimated cost of performing a one off review of DNA profiles to separate the profiles belonging to those never charged from those charged with an offence.

Extrapolated to the wider DNA database, the estimated cost of compliance would be some £8 million.⁴⁴

These figures are based on estimates of complying with the demands of the Big Brother Watch FOI supplied to us by some individual police forces. We have included in the table an explanation of the precise figures involved. For the figure of £8 million above, we have used the figure of 3 minutes to check each record suggested by several police forces and the labour cost of £25, which is the standard figure used by public authorities when calculating the cost of responding to Freedom of Information request.

⁴³ These figures have calculated on the basis of figures provided by the police forces in question

⁴⁴ 6.4 million DNA profiles / 20 [60 minutes/3minutes per profile] = 320,000 hours * £25 [standard hourly charge] = £8 million

Appendix Five: Home Office Impact Assessment⁴⁵

- It is assumed that for the automatic deletion of DNA profiles, there would be a one-off programming cost of around £300,000⁴ to re-programme and test the NDNAD, IDENT/1 and the Police National Computer (PNC)
- It is estimated that just over 1 million⁵ people with no recorded conviction are recorded on the NDNAD, around half of whom do not have a PNC record (known as 'orphans')⁶.
- Available data suggests that it would take 1 worker to locate 2.4⁷ profiles per hour, which equates to around 4000 profiles located per year per worker (7.12 hours in a working day and 220 working days in a year). Therefore we estimate that it would take around 140 staff to remove the orphaned profiles (530,000/4,000).
- Data provided by NPIA suggests that a police staff member's salary, including non-wage costs such as accommodation, would be around £30,000.
- We assume that the staff would require half-a-day training at a one-off cost of less than £10,000 for all 140 staff.

Option 2 – Automatic deletion of profiles after proposed retention period

Costs

Under this option, we estimate that there would be a one-off cost to the public sector of around £300,000 for re-programming and testing the PNC, NDNAD and IDENT/1 software.

To remove the legacy orphaned profiles, we anticipate a one-off cost of around £4.2 million. This is based on approximately 140 workers at a total cost (salary plus on-costs) of around £30,000 searching and deleting the orphaned profiles. This cost also includes the associated £10,000 training cost.

There is a cost of re-sampling and deriving profiles that have been deleted in accordance with the timescales set out above. Analysis of the available data estimates that there are some 150,000 re-arrests per annum, 75% of which would need DNA to be re-profiled. At a unit cost of a DNA sample from taking to destruction of around £23 (of which around £3 is the sampling cost, which is carried out in all cases to simplify custody procedures), this would give an annual cost directly attributable to the adoption of the protections of the Scottish model of approximately £2.3 million.

The policy to retain the profiles of those that are arrested on the grounds of national security but not convicted would mean that the total cost would be lower. However, due to the small number of national security related profiles (hundreds) the overall impact on the costs would be negligible. In addition, there would be potential costs to the police and the courts if it was decided that the profile of certain individuals should be kept on the database for a further two years. Given insufficient data on the likely numbers of these individuals we are unable to monetise the costs. Nevertheless, the quantity is expected to be small and the cost would therefore be negligible.

Furthermore, there would be a cost of around £500,000 per annum in relation to the Independent Commissioner for the Retention and Use of Biometric Material, to cover the salaries and office costs of the Commissioner and a small supporting staff. This is based on the costs of other similar independent reviewer roles, with an uplift to reflect the additional level of work which the Commissioner is expected to have.

Therefore the total monetised cost of this option is estimated to be around £4.5 million (one-off) plus £2.8 million per annum (ongoing).

⁴⁵ Home Office, Retention of DNA & Fingerprints by Police, 10/01/2011, <http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/dna-fingerprints-ia?view=Binary>

Appendix Six: National DNA Database Statistics⁴⁶

England and Wales as at 04/01/2012

Estimated total number of individuals retained on NDNAD	5,508,170
Total number of subject sample profiles retained on NDNAD	6,441,313
Total number of sample profiles retained on NDNA from volunteers	41,687
Total number of crime scene sample profiles retained on NDNAD	390,275

England and Wales plus Transport Police as at 04/01/2012

Gender	Subject Profiles	%
Male	5,398,020	78.35
Female	1,447,715	21.01
Unassigned	43,650	0.63
Total	6,889,385	100

England and Wales plus Transport Police as at 04/01/2012

Ethnic Appearance ⁴⁷	Subject Profiles	%
Unknown	294,839	4.58
Asian	393,016	6.10
Black	518,285	8.05
Chinese, Japanese other SE Asian	49,246	0.76
Middle Eastern	60,088	0.93
White – North European	4,985,855	77.40
White – South European	139,984	2.17
Total	6,441,313	100

⁴⁶ National Policing Improvement Agency - <http://www.npia.police.uk/en/13338.htm> "The figures ... include the Criminal Justice (CJ), Police and Criminal Evidence (PACE) volunteer and reference samples. The figures are a profile count not individuals. The number of subject profiles on the NDNA is higher than the number of individuals because in some cases the NDNAD may hold more than one profile from a given individual. Such replicate profiles arise from samples being taken from the same individual on more than one occasion. This may happen as a result of a person giving difference names, or different versions of their name, on separate arrests. There may also be situations where a police force chooses to resample an individual. **It is currently estimated that as at 31st September 2011 14.6% of the subject profiles held on the entire NDNAD are replicates.**"

⁴⁷ Ibid. "The Ethnic appearance data is based on the judgement of the police officers taking the samples as to which of seven broad ethnic appearance categories they consider the individuals belong."

England and Wales plus British Transport Police as at 04/01/2012

Current Age	Subject Profiles	%
Under 10	0	0
10 – 15	67,946	1.05
16 – 17	140,004	2.17
18 – 20	411,411	6.39
21 – 24	812,285	12.61
25 – 34	2,067,297	32.09
35 - 44	1,429,884	22.20
45 - 54	947,791	14.71
55 - 64	386,088	5.99
65+	178,367	2.77
Age Unknown	240	0
Total	6,441,313	100

Appendix Seven: Prüm Letter to Lord Roper

The following letter was sent by James Brokenshire MP on 7th February 2011 in response to a letter written by Lord Roper, Chair of the Lords European Union Committee.

UNITED KINGDOM IMPLEMENTATION OF THE PRÜM COUNCIL DECISIONS.

I am writing to update you on the Government's plans for implementing the Prüm Council Decisions and that we will not be able to implement Prüm in full before August 2011.

Full implementation of Prüm is inevitably complex, covering as it does DNA, fingerprints and Vehicle Registration Data, and implementation will inevitably take a significant period of time. We will also need to make sure that the way in which we implement Prüm is compatible with this Government's focus on civil liberties. For example, we need to bring our fingerprint and DNA retention policy in line with the Coalition Commitment to adopt the protections of the Scottish model. We will be bringing forward detailed proposals for the retention of DNA and fingerprints in a Protection of Freedoms Bill very soon. We think it important to carry out this preparatory work before looking towards exchange with other EU Member States.

Secondly, like all of Government, the Home Office has a very tight Spending Review settlement for 2011-2015. Because of this, we have had to consider very carefully how we prioritise our resources across the department's business. Early work to identify the cost of meeting our Treaty obligations suggests that we will not be able to afford full implementation of all the Prüm requirements within this Spending Review period. Within this, we expect work to concentrate on the Vehicle Registration Data and DNA elements of Prüm later in the 2011-2015 period which we hope will go some way towards meeting our implementation obligations. Our intention is to apply for EU funding to assist with this. I will keep the Committee informed of any future developments on this matter.

The Prüm Council Decisions fall within those subject to the transitional arrangements in Protocol no.36 to the Treaty on the European Union and the Treaty on the Functioning of the European Union, where the UK must decide in 2014 whether to accept the extension of ECJ jurisdiction to all acts of the Union in the field of police and judicial co-operation in criminal matters adopted before entry into force of the Lisbon Treaty. That decision will be some time away and I hope to be able to update you in due course.

About Big Brother Watch

Big Brother Watch was set up to challenge policies that threaten our privacy, our freedoms and our civil liberties, and to expose the true scale of the surveillance state.

Founded in 2009, we have produced unique research exposing the erosion of civil liberties in the UK, looking at the dramatic expansion of surveillance powers, the growth of the database state and the misuse of personal information.

We campaign to give individuals more control over their personal data, and hold to account those who fail to respect our privacy, whether private companies, government departments or local authorities.

Protecting individual privacy and defending civil liberties, Big Brother Watch is a campaign group for the digital age.

If you are a journalist and you would like to contact Big Brother Watch, including outside office hours, please call +44 (0) 7505 448925 (24hrs). You can also email press@bigbrotherwatch.org.uk for written enquiries.

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