



Dr Brian Plastow
Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh
EH7 4NL

By email to:

15th December 2021

Dear Dr Plastow

Scottish Biometrics Commissioner Act 2020 – Draft Code of Practice

Thank you for your invitation to comment on your proposed Code of Practice. GeneWatch UK recognises the important role that you play in providing independent oversight of the acquisition, use, retention, and destruction of biometric data for criminal justice and police purposes in Scotland, and is broadly supportive of the approach outlined in the Draft Code of Practice. However, there are a few matters we wish to draw to your attention regarding the twelve General Guiding Principles and Ethical Considerations.

Principle 4: Enhancing Public Safety and Public Good

This section would benefit from an additional paragraph to highlight the importance of transparency, including publishing the various assessments that are required. Similar references to the importance of transparency in underpinning justice and accountability could be made in relation to Principle 7.

Principle 5: Ethical behaviour

After stating that data should not be shared for non-policing or non-criminal justice purposes, at the end of the last sentence, you state, “*Otherwise, data sharing between Scotland and other UK and International policing and criminal justice jurisdictions is encouraged*”. This statement is problematic because it requires a caveat that such international sharing should only take place in the context of important human rights safeguards, of which the purpose limitation is only one. Such safeguards should be referred to in more detail under Principle 5 or under Principle 6 (Respect for the Human Rights of Individuals and Groups).

Best practice requires the provisions of relevant safeguards in both countries involved. For example, Council of Europe Recommendation No. R(92)1 on the use of analysis of DNA within the criminal justice system states: “*Transborder communication of the conclusions of DNA analysis should only be carried out between states complying with the provisions of this recommendation and in particular in accordance with the relevant international treaties on exchange of information in criminal matters and with Article 12 of the Data Protection Convention*”.¹ In particular, data should be transferred overseas only when it is necessary and proportionate to do so, for the purpose for which it was originally collected, and best

53 Milton Road ♦ Cambridge ♦ CB4 1XA ♦ UK
Phone: +44 (0)330 0010507 ♦ E-mail: mail@genewatch.org
Website: www.genewatch.org

GeneWatch UK is a company limited by guarantee. Registered in England (No. 03556885).

practice standards must apply in both countries.² For example, if a person's DNA profile is required to be deleted in the country of origin if they are acquitted, or after a certain period of time, this must also be required in the receiving one.

Attention also needs to be given to reports citing international legal experts regarding countries using Interpol for political gain or revenge by targeting nationals abroad such as political rivals, critics, activists and refugees.³ Preventing such abuses requires a 'human rights check' to take place in Scotland before any biometrics or other data are shared in the context of any international investigation. Serious human rights abuses – including assassination, kidnap and torture of dissidents and/or their family members – could occur if such safeguards are not implemented.

Principle 12: Retention authorised by law

GeneWatch UK recognises the important steps that Scotland has taken to limit the unnecessary and disproportionate retention of biometric data. However, this section would benefit from more detailed attention to the cited ruling (by the European Court of Human Rights, not the EU) in the case of *Gaughran v UK* on 13th February 2020, in which the Court ruled that the current policy and practice of the indefinite retention of DNA profiles, fingerprints and photographs of individuals convicted of a criminal offence in Northern Ireland violates Article 8 of the European Convention on Human Rights (ECHR).¹

In this judgment, the European Court of Human Rights found that, "*the indiscriminate nature of the powers of retention of DNA profiles, fingerprints and photograph of the applicant as a person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention, and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests*". In response to the judgement, the Department of Justice in Northern Ireland has proposed replacing the indefinite retention of biometric data of convicted persons with maximum retention periods based on age and the seriousness of the offence and setting out a review mechanism that will require police to carry out a periodic review of the continued need for biometric data to be retained under these maximum retention periods.⁴ Scotland will need to take similar steps if it is to avoid a breach of the European Convention on Human Rights, as will all member states of the Council of Europe. GeneWatch UK responded to the relevant consultation in Northern Ireland and our position is outlined in our consultation response, which recommends that, for all offences where a rehabilitation period is specified, DNA profiles are deleted at the time at which the offence becomes spent.⁵

If the issues we have highlighted are addressed, your Code of Practice provides an important opportunity to follow best practice in the areas we have highlighted and for Scotland to set an important precedent for other countries in the world.

Thank you for the opportunity to input to this consultation.

Yours sincerely,



Dr Helen Wallace
Director
GeneWatch UK
Email:

¹ CASE OF GAUGHRAN v. THE UNITED KINGDOM (Application no. 45245/15). JUDGMENT. STRASBOURG. 13 February 2020. <http://hudoc.echr.coe.int/eng?i=001-200817>

¹ COUNCIL OF EUROPE COMMITTEE OF MINISTERS (1992) RECOMMENDATION No. R (92) 1 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE USE OF ANALYSIS OF DEOXYRIBONUCLEIC ACID (DNA) WITHIN THE FRAMEWORK OF THE CRIMINAL JUSTICE SYSTEM (Adopted by the Committee of Ministers on 10 February 1992 at the 470th meeting of the Ministers' Deputies).

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1518265&SecMode=1&DocId=601410&Usage=2>

² Forensic Genetics Policy Initiative (2017). Establishing Best Practice for Forensic DNA Databases. Available on: <http://dnapolicyinitiative.org/wp-content/uploads/2017/08/BestPractice-Report-plus-cover-final.pdf>

³ Has Interpol become the long arm of oppressive regimes? The Guardian. 17th October 2021.

<https://www.theguardian.com/global-development/2021/oct/17/has-interpol-become-the-long-arm-of-oppressive-regimes>

⁴ Proposals to amend the legislation governing the retention of DNA and fingerprints in NI. Available on:

<https://www.justice-ni.gov.uk/consultations/proposals-amend-legislation-governing-retention-dna-and-fingerprints-ni>

⁵ GeneWatch UK response to the Department of Justice's consultation on proposals to amend the legislation governing the retention of DNA and fingerprints in Northern Ireland.

<http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/niconsul2020-gw-fin.pdf>