

DATE: 23 December 2015
Your Ref:
Our Ref: LSW15739L/DC/CD

Peter McGrath
Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
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Chief Constable

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Dear Mr McGrath

**JUSTICE COMMITTEE OF THE SCOTTISH PARLIAMENT
'INTERCEPTION OF COMMUNICATIONS BY POLICE SCOTLAND'**

I refer to the above. I am instructed for the office of the Chief Constable of the Police Service of Scotland.

I refer to the proceedings of the Justice Committee ('the Committee') at its meeting on the morning of 15 December 2015. The Agenda indicated it to have been the 36th Meeting (of the Committee), 2015 (Session 4). The particular matter in question was the second Item on the Agenda.

I also refer to the Minutes of that meeting, issued in your name. Paragraph number 4 of those Minutes records the Committee as having agreed to do certain things. Firstly, it agreed to write to Police Scotland to seek further information on (what is described as) "the interception of communications by Police Scotland". In addition to recording an intention to publish an item of correspondence, the Minute goes on to record the Committee as having agreed to write to four persons, who are named, all police officers, inviting them to (as it is described) "give evidence on the interception of communications by Police Scotland".



Those instructing me remain committed to assisting the Committee in the discharge of its remit and wish to make clear their intention to be as helpful as they can. There are concerns, however, about the matter – referred to above – set out in the Minutes. More particularly, there are concerns the Committee may be acting beyond its powers or otherwise in a way which contravenes or might contravene relevant legal provisions.

I am, accordingly, asked to write to you to set out those concerns more fully in order that they might be considered, and to invite your response thereon. I am asked to respectfully request that the invitations to the four police officers are withdrawn. I reserve our position on the request for further information set out in the letter dated 16 December and sent by the Committee Convener to DCC Richardson. I am also asked to explore with you whether there might yet be steps open to us which would enable Police Scotland to try and assist the Committee with its work but to do so in a way which does not bring the concerns referred to above into play.

In summary, the concerns we have may be said to comprise the following:-

- That the Committee is acting beyond its powers (*'ultra vires'*).
- That there may be improper disclosure of information and/or material; and
- The risk to certain named individuals.

By way of expansion on the foregoing summary the following is offered for your further consideration.

1. *That the Committee may be acting ultra vires*

The Scottish Parliament's powers are, principally, as set out in the Scotland Act 1998 ('the 1998 Act'). The establishment of its committees and their conduct is as more particularly regulated in its standing orders (which are made under Section 22 of the 1998 Act).

Rule 12.4 of the standing orders makes specific provision regarding 'Witnesses and documents' in connection with Committee proceedings. Provision for the despatch of invitations to anyone to attend proceedings to give evidence or otherwise to produce documents is set out at Rule 12.4.1. That provision, however, clearly states that such powers may only be exercised: "... in connection with any competent matter ...".

Without prejudice to any other ground of challenge we may advance there is, and with respect, reason to question the competence of the Committee to invite the attendance of the said persons or, otherwise, the production of documentation.

Interception of communications is specifically reserved to the Parliament at Westminster, and all as more particularly set out at paragraph B8 (under '*Head B-Home Affairs*') in Part II of Schedule 5 to the 1998 Act. The exceptions set out in paragraph B8 do not appear to be engaged in the present matter.

Furthermore, the present matter concerns activities by officers of Police Scotland carried out in terms of Chapter II of Part I to the Regulation of Investigatory Powers Act 2000 ('RIPA') and to the subsequent investigation into those activities conducted by the Interception of Communications Commissioner ('the Commissioner'). The Commissioner's powers derive under RIPA – more particularly set out at Part IV. Analysis of those provisions as they relate to the matter under consideration currently by the Committee tends to the conclusion that that matter is not within the competence generally of the Scottish Parliament nor otherwise and more specifically the Committee.

The extent to which the Commissioner has a particular review role in the exercise and performance by the Scottish Ministers of powers and duties conferred or imposed on them appears at Section 57(2)(aa) of RIPA (with consideration also given to Sections 5, 9 and 10 of RIPA). None of those provisions is engaged here.

The Code of Practice on the 'Acquisition and Disclosure of Communications Data', approved on 25 March 2015, is made in terms of Section 71 of RIPA. It was approved by the House of Commons. The Code, among other things, directs that in the event the Commissioner establishes any individual to have been adversely affected by a 'wilful or reckless failure' by anyone within a relevant public authority exercising or complying with the powers and duties under RIPA in relation to the acquisition of communications data then that individual is to be informed of the existence of the Investigatory Powers Tribunal ('the Tribunal') and its role. Certain information is also to be disclosed to such individuals. The Tribunal is established in terms of Part IV of RIPA. Having regard to Section 65 of RIPA, and to what is said about the Tribunal's jurisdiction, it might be argued that that is exclusive jurisdiction for the matters under current consideration (although I express no concluded view about that).

2. Improper Disclosure of Information and/or Material

As the Committee is aware, the Commissioner has written to four individuals and informed each of them of certain matters. Each has also been informed of the existence and role of the Tribunal. As set out above, RIPA makes more particular provision for the constitution of the Tribunal and for its powers. The Investigatory Powers Tribunal Rules 2000 (SI No. 2665) ('the Rules') provide specifically for the way in which the Tribunal is to operate and, among other things, place constraints on the disclosure of information or material. The Rules also make provision for the way in which proceedings at the Tribunal are to be conducted.

We are already in receipt of correspondence from solicitors intimating interest for two of the individuals to whom the Commissioner has written. That correspondence leads us to conclude that the institution of Tribunal proceedings following complaints from them, or either of them, is more than a lively possibility. The time limits set out in Section 67(5) of RIPA for the bringing of any such complaint to the Tribunal have not yet lapsed. Accordingly, it is our view that regard should be had now to the aforementioned Rules and to what is said therein about the disclosure of information and/or material; that is so even although proceedings have not actually been instituted as far as we are aware.



There is a concern that if the Committee pursues its interest in this matter, as suggested by the issues which were raised by members in the course of the proceedings on 15 December and as alluded to in the Minute, that information and/or material may be disclosed which would have the practical effect of rendering Rule 6 of the Rules. Rule 9 of the Rules also makes it clear that hearings at the Tribunal take place in private.

Additionally, I am aware of exchanges of communication between you and Ms Jo Cavan of the Commissioner's Office, in which the latter made clear that the Commissioner could see little point in accepting an invitation to attend any meeting of the Committee if he could not properly enlarge on what he had already publicly stated. The Committee has before it a copy of the Commissioner's public statement of 25 November 2015.

Furthermore, and in any event, as was made clear by Deputy Chief Constable (Designate) Neil Richardson in the course of his evidence to the Committee on 15 December 2015, the actions in question which led to the IOCCO investigation arise from an ongoing police investigation. That is the investigation into the murder of Emma Caldwell. Nothing should be done, by way of proceedings at any Committee of the Scottish Parliament or otherwise, which prejudices that investigation or any criminal proceedings instituted by the Lord Advocate arising from it.

3. Risk to Named Witnesses

The individual police officers named in the Minutes are engaged or have recently been engaged, to varying extends, in sensitive enquiries. Some of those enquiries touch on matters which might be properly characterised as investigations into serious and organised crime or into terrorism. There is an attendant risk to any police officer and/or member of police staff engaged in such work. Police Scotland have various measures in place to mitigate such risks.

Inviting those named officers to attend the meeting of the Committee scheduled for 12 January to give evidence is assessed by those instructing me to present a compromise to our mitigation of those risks. It is not immediately clear to those instructing me that full regard has been had to any of that in presenting the said invitations.

I am aware that the President of the Association of Police Superintendents of Scotland ('ASPS') has already written to the Presiding Officer to express his concerns on behalf of the Association's members who have already been named and who have been invited to attend the Committee. I am given to understand that the Scottish Police Federation has similar concerns in respect of the other named officer.

Conclusion

I am instructed to seek your views, or otherwise the views of the Committee or members of the Committee, on the foregoing. I am instructed to respectfully request the withdrawal of the said invitations to the named officers. Those instructing me wish to emphasise that the unusual step of my writing to you in these terms is taken only after due consideration and in light of the seriousness of the concerns which are expressed herein. We do so with the intention generally of endeavouring to identify areas where

we might properly assist the Committee in the discharge of its remit. There is no intention to be obstructive.

Without prejudice to the foregoing matters I am also asked to explore with you in what other ways in which Police Scotland might try to assist the Committee with its work. In that connection, it might be more helpful if we were and in advance to get a fuller exposition of specific matters into which the Committee might wish to make further enquiry.

I submit the foregoing for your consideration. I await hearing from you at your earliest convenience.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Duncan Campbell". The signature is written in black ink on a white background.

Duncan Campbell
Solicitor
Interim Head of Legal Services