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Dear ACC Johnson

Police Scotland Digital Device Triage System (Cyber Kiosks)

Thank you for your letter of 12 October 2018 addressed to Andrew Laing which asked for guidance on two points;

- (1) What is the legal framework and considered common law view to allow Police Scotland to take, seize and examine a digital device?
- (2) In relation to identified legal framework what considerations should be given to the ECHR?"

In terms of the Data Protection and Human Rights implications of processing information whilst seizing and investigating digital devices that is a matter on which Police Scotland as a public authority must satisfy themselves. The Crown Office and Procurator Fiscal Service (COPFS) involvement relates to the admissibility in Court of evidence secured in that manner.

I am aware that Police Scotland has sought advice from its own Legal Services on the legal basis of the proposed facility and the powers available in terms of search and seizure.

As the powers being discussed are Police powers it is appropriate that where Counsel's opinion is being sought it is facilitated through Police Scotland's Legal Services. I am aware that Counsel's opinion has been sought on legal issues relating to Police powers in the recent past, including in relation to the implementation of the Criminal Justice (Scotland) Act 2016.

There seems to be a misunderstanding expressed in evidence given to the Justice Sub Committee on policing that your letter has been passed to Crown Counsel for consideration. The letter has not been passed to Crown Counsel for consideration as it is not appropriate for COPFS to do that in relation to a request for broad guidance on Police powers.

I would highlight the following points in relation to the questions that you have raised in your letter of 12 October 2018;

There are legal provisions which set out where authority is required for the Police to overcome the physical security either of an individual or their property in order to secure evidence which is admissible. There are also legal principles which allow the Police to overcome the physical security of an individual or their property without recourse to those legal provisions, again to secure evidence which is admissible. It should be noted that the legal provisions and principles apply irrespective of the technique deployed to secure the information.

The legal provisions and principles which allow Police Officers to seize an item can broadly be categorised as follows;

- where an individual has been arrested (under sections 47 and 49 of the Criminal Justice (Scotland) Act 2016 and *JL and EI v HMA (2014 SCCR 253)*),
- where there is a statutory power of search of an individual or their property without the need for a search warrant (for example section 23 of the Misuse of Drugs Act 1971),
- where a search warrant has been granted either under legislative powers or the common law,
- where the owner has given consent,
- where there is a common law power or
- where there is urgency.

The extent of any examination of an item will be dictated by the power or authorisation under which the police officer is acting;

- Where an individual has been arrested the extent of the examination of any item seized will depend on the nature of the item itself and of the information sought (as per *JL and EI v HMA (above)*).
- In the case of an article being seized with consent, the examination should be consistent with the consent given.
- Where seizure has been authorised by statutory power of search or a search warrant then the courts would expect police officers to use such powers as have been specified within the terms of the statute or the warrant.
- Where acting under common law powers or in a situation of urgency, a court would expect the examination of such an item to be proportionate and necessary in the particular circumstances.

Where evidence is recovered from a digital device which has been seized by the Police and that evidence is revealed to COPFS, Prosecutors will assess whether the evidence is admissible. Where the evidence has been recovered as a result of actions for which there was legal authority then the evidence will be admissible, subject to any other legal rules which might apply to that evidence.

Where the information has been taken outside the terms of, or in the absence of, legal authority then the evidence will not necessarily be inadmissible. In that instance the fairness of the approach taken by the Police will be considered in assessing whether the evidence will be admissible. Each case will be determined on its facts and circumstances.

The terms of the European Convention on Human Rights is a consideration which underpins any decision made by COPFS or by the Court in establishing whether evidence which is to be led in Court is admissible. To this end it should always be a consideration when establishing what approach to take to the seizure of evidence.

I hope this information is of assistance to you.

Yours sincerely



LINDSEY MILLER
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