

Date: 18 February 2019

Your Ref:

Our Ref:



The Convener
Justice Sub-Committee on Policing
Scottish Parliament
Edinburgh
EH99 1SP

Steve Johnson
ACC Specialist Crime & Intelligence

Specialist Crime Division
Scottish Crime Campus
Craignethan Drive
Gartcosh
G69 8AE

ACCSpecialistCrimeandIntel@scotland.pn
n.police.uk
Tel: 01236 818 961

Dear Convener,

In response to your letter dated 13th February 2019, I am writing to provide the additional information you have requested.

It may be helpful to describe the structures which support the proposed introduction and use of digital triage devices. The use of this technology is being considered as part of transformation work by the Service under the 2026 Programme. The Cybercrime Capability Programme (CCP) has formal programme status and requires the identification of a Senior Responsible Officer (SRO) or 'programme lead'. I am the SRO for CCP and the dedicated Programme Team is led by DSU Nicola Burnett. The programme is conducted under the supervision of DCS Gerry McLean, who has departmental responsibility for Cybercrime within Police Scotland.

Previous written submissions have been provided in DSU Burnett's name. Please be assured that all written submissions have been provided with full oversight from myself and DCS Gerry McLean. Police Scotland wish to provide the Committee with a level of assurance around the governance of this programme of work and if agreeable, all future communication will be sent from myself.

Minutes of the meetings held on 30th October 2018, were presented to the Stakeholder and Reference Groups at the subsequent meeting in January 2019. As these are public facing documents it gives group members the opportunity to agree the accuracy of the minutes, prior to them being published. The content has now been agreed for both the October and January meetings and I am advised are now ready to be published this week.

We recognise that in our letter to the Committee on 15 October 2018 we indicated a position, which was our understanding at the time, that any guidance provided by COPFS may have been informed by Crown Counsel. The response from COPFS clearly states that this is not the case and Police Scotland apologise for any misunderstanding. Whilst COPFS were represented at subsequent Stakeholder Groups the matter of who would be providing the Crown Office position was not detailed.

Police Scotland only became aware of the misunderstanding on receipt of the response provided by Crown Office dated 30 January 2019. To assist in clarification of the Police Scotland statement made I have included the letter sent to COPFS for your reference.

Police Scotland has continued to retain a high level of confidence on the legal basis to support the proposed use of digital triage devices as part of our overall suite of cyber forensic capabilities. We do not believe the position described by Crown necessarily contradicts our understanding of the legal basis. As SRO I have referred this updated position to our internal legal advisors for further consideration, which may include a proposal to seek further independent legal advice on this important matter. It would be our intention to provide a further update to the Committee at the earliest opportunity. A date for the next Stakeholder and Reference Group is still to be agreed but should be in early April 2019.

Whilst we welcome the views of Crown Office we recognise the importance of the consultation process in providing a confidence and assurance to the Committee and the communities of Scotland. Matters pertaining to public confidence will be key in any determination in the proposed use of digital triage devices.

Yours sincerely

Steve Johnson
Assistant Chief Constable

Date: 15 October 2018

Your Ref:

Our Ref:

Andrew Laing
Deputy Procurator Fiscal
Specialist Casework
COPFS
Scottish Crime Campus
Gartcosh, G69 8AE



Steve Johnson
Assistant Chief Constable
Specilaist Crime & Intelligence
Craignethan Drive
Gartcosh
G69 8AE

Tele: 01236 818 961

ACCSpecialistCrimeandIntel@Scotland.pnn.police.uk

Dear

Police Scotland Digital Device Triage System (Cyber Kiosks)

A key element of the Cyber Capability Programme is to establish consistent digital forensic service provision within Police Scotland. Digital Triage Devices or 'kiosks' were identified as a key deliverable in supporting the aspiration to digitally enable frontline officers and provide greater access and improved delivery of cyber digital forensic capabilities. As a consequence the procurement of cyber kiosks was included in the 3 year implementation plan as a way of maximising efficiency, improve service delivery and thus provide capacity to modernise as part of the 2026 vision.

The technology behind Cyber Kiosks has been available to United Kingdom Law Enforcement since the late 1990's and the software is routinely used by Police Scotland Cybercrime Digital Forensic Teams within the existing Hubs. While the technology is not new to Police Scotland, the proposal to make some of the capability available to suitably trained frontline officers, in a triage format, forms a key deliverable within the digital strategy aimed at driving efficiency and improving service delivery.

Kiosk Functionality

The Kiosk is a desktop personal computer which has a single function – to examine mobile devices using built-in software. It provides the trained officer to submit search parameters and the device to provide responses derived from the 'stored' data on the device. The examination is conducted while the SIM card has been removed, thereby negating any possibility of the device connecting to a network or returning 'live' data. It is a forensic read only tool and will not add, amend, export or delete data from any device.

Legality

As alluded to in the attached case law, before undertaking any examination of a digital device, Police have always relied upon the following position; *where evidence seized by a public authority acting under a power of search conferred by common law or by statute or by order of*

the court (warrant) then that is sufficient justification to render lawful what might otherwise be unlawful acts. (JL & EI v HMA)

Where that power of search requires officers to retain evidence from a digital device then we have looked to case law; HM Advocate v Rollo 1997 JC 23 to describe the legal basis under which we retrieve information which is stored digitally.

The planned introduction of 'kiosks' has been of significant public interest both to the media and a range of interested parties. As a consequence, we have been invited to give evidence in front of the Justice Committee sub group on three separate occasions. While providing assurances on a number of issues the one area which the committee are keen to examine is the legal basis by which Police undertake digital forensic examinations. This has been questioned by a number of groups including the Scottish Human Rights Commission and it is my understanding that SHRC are seeking independent legal advice on this matter.

Our understanding of the existing legal framework is attached to this letter in Appendix 1. In order to provide some independent assurance of the legal basis in which we rely upon our police powers to take, seize and examine digital devices guidance is sought from Crown Office (Crown Counsel) in relation to the following;

- *What is the legal framework and considered common law view to allow Police Scotland to take, seize and examine a digital device?*

European Convention on Human Rights

Whilst PSoS believe the legal framework exists to support current processes, engagement with SHRC has identified an opinion that, with due regard to the current and future advancements in the storage capability of digital devices in terms of both volume and detail of personal information, they are of the opinion that the current position and legal framework may not be lawful with regards to Articles 5, 6 and 8 of ECHR.

- *In relation to identified legal framework what considerations should be given to the ECHR?*

The above comments and questions are submitted for your consideration. It is our expectation that prior to any planned roll out of this technology, we will be invited back to the Justice Committee and it would be helpful to confirm our understanding of the powers conferred on officers, supported but existing case law is consistent with that of Crown Office

I would be extremely grateful for any guidance or comment you may have on this matter,

Yours sincerely

Steve Johnson
Assistant Chief Constable
Specialist Crime and Intel

Appendix 1

HM Advocate v Rollo 1997 JC 23

William Rollo was charged with contraventions of the Misuse of Drugs Act 1971 and was tried and convicted in Glasgow on 8 January 1996 before a judge and jury. Part of the evidence against Rollo was contained in a Memomaster electronic notepad to which access was controlled by a password. That part contained highly incriminating information including names, telephone numbers and details relating to apparent drugs supplies. On appeal it was argued that the contents of the Memomaster did not constitute a document in terms of the statutory provision.

It was held that terminological emphasis in description in cases such as information stored on machines or tapes on the means or surface for recording information did not deprive such stores of information from qualifying as 'documents' as the essential essence of a document was that it was something containing recorded information of some sort and it did not matter if, to be meaningful, the information required to be processed in some way such as translation, decoding or electronic retrieval; so that the Memomaster qualified as a 'document' for the purposes of the statutory provision.

Amid various observations It was noted) a store of recorded information was not deprived of qualifying as a 'document' because it was protected in some way against unwarranted access, any such electronic security mechanisms being no different to a lock on a locked diary, which clearly did not deprive the latter of qualifying as a 'document';

J.L + E.I v Her Majesty's Advocate



J.L.+E.I. v. HER
MAJESTY'S ADVOCA'