JUSTICE SUB-COMMITTEE ON POLICING

REPORT ON POLICE SCOTLAND’S PROPOSAL TO INTRODUCE THE USE OF DIGITAL DEVICE TRIAGE SYSTEMS (CYBER KIOSKS)

RESPONSE FROM THE INFORMATION COMMISSIONER’S OFFICE

In our letter of 12 March 2019 we referred to the fact that we were awaiting Police Scotland’s final position and welcomed the opportunity to review the lawful basis in Scotland in respect of the use of digital device triage systems.

We have now reviewed the legal advice from Senior Counsel\(^1\) to the Chief Constable. We were disappointed that the focus of the advice was on warrantless searches of arrested persons. The ICO has consistently asked Police Scotland for a full assessment of the legal position in respect of each category of data subject, including victims, witnesses and third parties. The legal advice only considers this in brief terms at paragraph 30.

We understand that the examination of digital devices is often a necessary intrusion for suspects, victims or third parties in order to conduct relevant investigative lines of enquiry, and can be a justified interference with right to privacy under article 8 of the European Convention on Human Rights (ECHR). As such the ‘in accordance with law’ requirement must be sufficiently circumscribed and provide adequate safeguards against abuse.

We question whether common law powers, or any other existing provisions, are sufficient to give members of the public an adequate indication of when and how their data will be processed by the police, and satisfy the ‘in accordance with law’ requirement under article 8 of the ECHR.

The police may ask for permission to seize and interrogate a person’s mobile device. However, under data protection law, the legal basis for the subsequent processing of personal data held on the device, and any retention of personal data of evidential value, needs to be considered. That will include whether consent is a valid legal basis in this context.

Next steps

We would welcome a commitment from the Scottish Government to make the necessary arrangements for ensuring that digital forensic investigations are conducted “in accordance with the law”, be that through a code as Counsel indicates or other measure. This would ideally be based on clear principles which can keep pace with technological advancements. From a data protection perspective, this requires careful consideration given the ongoing assessment of these issues in England and Wales and for there to be alignment where possible.

\(^1\) Opinion of Senior Counsel (cyber-kiosks), The Scottish Parliament, 30 April 2019
https://www.parliament.scot/S5_JusticeSubCommitteeOnPolicing/Inquiries/20190430SeniorCounselOpinion.pdf
We also believe that the Government should make arrangements for a wider review of the legislative framework for criminal justice in the digital age. This could underpin the use of other digital tools by law enforcement bodies such as automated facial recognition technology, which is also currently subject to a legal challenge.

The Government has recently introduced the Scottish Biometrics Commissioner Bill in Parliament. The Commissioner and the code of practice they will be required to produce will assist with some aspects of digital policing. However there may be more that can be done to protect the privacy of members of the public while facilitating reasonable and proportionate criminal investigations for the benefit of Scottish society that are firmly and clearly based in law.

Ken Macdonald
Head of ICO Regions