



CONSULTATION RESPONSE
TO THE UK HOME OFFICE
ON THE EXTRACTION OF
INFORMATION CODE OF
PRACTICE: POLICE, CRIME,
SENTENCING, AND COURTS
ACT 2022



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1. Introduction

1.1. The office of Scottish Biometrics Commissioner was established by the Scottish Biometrics Commissioner Act 2020 (SBC Act). The Commissioner's general function is to support and promote the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes.

1.2. The Scottish Biometrics Commissioner (SBC) welcomes the opportunity to comment on the Home Office's proposals for the Draft Code of Practice which implements Part 2, Chapter 3 of the Police, Crime, Sentencing and Courts Act 2022. The SBC is responding to the consultation based on an analysis of the relevant law, including human rights case law and standards, in accordance with its legislative mandate to support and promote the adoption of lawful, effective and ethical practices in relation to biometric data for criminal justice purposes.

1.3 We have considered these issues primarily with regard to the existing law (section 2 covers the legal framework). We have also referenced and given consideration to non-binding, but guiding and evolving human rights and ethical principles and standards. This paper provides general and specific comments for the draft code.

2. Legal Framework

- Scottish Biometrics Commissioner Act 2020
- European Convention of Human Rights/UK Human Rights Act 1998
- UK General Data Protection Regulation

- Equality Act 2010
- United Nations Convention on the Rights of the Child
- United Nations Convention on the Rights of Persons with Disabilities

3. Comments

Scottish Biometrics Commissioner Act 2020

3.1. The Scottish Biometrics Commissioner's range of functions will include preparing, and monitoring compliance with, a **Code of Practice** which will provide information, guidance and rules regarding the standards and responsibilities of Police Scotland, the Scottish Police Authority (SPA) and the Police Investigations and Review Commissioner (PIRC) in relation to biometric data. The SBC Code of Practice will apply to Scottish legislation which permits the capture of biometric data in Scotland by Police Scotland, the SPA or PIRC, except where that data is collected under legislation reserved to the UK Parliament, and where it already falls within the independent oversight of another commissioner.¹ Therefore any biometric data extracted from an electronic device in Scotland will be subject to the SBC Code of Practice. As the geographical application of the code is UK-wide, we consider that it would be beneficial for the **introduction of the draft code** to mention or reference the Scottish legislation and the SBC Code of Practice.²

Effective remedy

¹ The definition of biometric data adopted in SBC Act is broader than elsewhere in the UK. Biometric data means information about an individual's physical, biological, physiological or behavioural characteristics which is capable of being used, on its own or in combination with other information (whether or not biometric data), to establish the identity of an individual (section 34 of the SBA 2020).

² The SBC has finalised a draft Code of Practice, and will be submitted this month to the Scottish Ministers for approval in accordance with section 12 of the SBA 2020. Scottish Ministers will then prepare a draft instrument for the Scottish Parliament with the day the Code will come into force.

3.3. The new statutory powers in the Police, Crime, Sentencing and Courts Act will govern the practice of extraction information from electronic devices. As the use of these powers engage Article 8 Article of the European Convention of Human Rights and UK Human Rights Act 1998 - Right to respect for private and family life - appropriate procedural safeguards that prioritise the privacy of the individual should guide the draft code. This include clarity of the law, necessity, proportionality **and effective remedy**.³ The draft is silent on the procedural remedies available. This could be covered by the written notice required in the draft code.

Non-discrimination

3.4. The principles of equality and **non-discrimination** are central to human rights law and are recognised as norms in both the domestic and international framework. **The draft code should have an explicit reference to this**, including both to the Equality Act 2010 and Article 14 of the European Convention on Human Rights - which enshrines the right not to be discriminated against in “the enjoyment of the rights and freedoms set out in the Convention”. It is important that enforcement agencies do not use broad profiles that reflect unexamined generalisations and/or stigmatisation. Public Authorities have a positive duty to take reasonable steps to satisfy their equality duty (section 149 Equality Act 2010).

Necessary in a democratic society

3.5. As criminal justice authorities enjoy a wide margin of discretion in relation of the new powers, it could be useful to expand the **guidance on necessity**. There should be sufficient clarity about both the necessity and proportionality when using increasingly sophisticated techniques allowing,

³ Bărbulescu v. Romania [GC], 2017 ECHR or X and Others v. Russia, 2020 ECHR.

among other things, the capture of biometric and personal information. In other words, establishing necessity should be supported, for example, by a **human rights impact assessment (HRIA) [Paras 18-19, 29 and 46 -48 of the draft code]**. A HRIA helps to establish the real impact and/or alternatives of operational policing in relation to an interference with a person's human rights and personal data. There is a risk that without a proper analysis of the human rights impact, e.g. where privacy is adversely affected, the seriousness may be understated, particularly where they do not relate to data processing or data protection. HRIA would also complement and support the authorised person's recording as to why the information extraction is necessary and proportionate in the particular circumstances **[Para 79 of the draft code]**.

Consent

3.6. Consent is the basis for the extraction of information. The three constituent elements of consent: **free, prior and informed** should be the starting point of any voluntary provision, agreement and undue pressure. This tripartite notion should be **added to the draft code [Para 87 -90 of the draft code]**. The written notice should be periodically reviewed to ensure is fit for purpose.

3.7. To enable consent the draft code should explicitly and clearly mention what will happen with personal data, including **access by third parties**, this could be place in the written notice **[Para 87 -90 of the draft code]**. In addition, as Article 8 of the ECHR covers personal information, individuals can legitimately expect that their biometric data or personal information will not be **published or shared** without their consent.⁴ This should also be explicitly covered in the written notice. **[Para 87 -90 of the draft code]**. Any data

⁴ See Axel Springer AG v. Germany [GC], 2012 ECHR 227.

sharing between police officers and other agencies should address both privacy and data protection concerns.⁵ The draft code could cover a clear **decision-making framework** to ensure human rights and ethical storage, management, as well as use of data, including retention⁶ [**Para 87 -90 of the draft code**]. We welcome Paras 95 - 97 of the draft code as it is important that the person concerned may freely withdraw consent at any time as the degree of understanding may change over time.

Children and vulnerable adults

3.8. The notion of vulnerability can influence issues of consent, therefore we welcome the specific guidance on the use of the powers with children⁷ and vulnerable adults - who may need more support to make decisions about issues that affect them. Where the new powers are used in a context involving **children** (defined as those under 18) and **vulnerable persons**, steps will have to be taken to ensure compliance with the UN Convention on the Rights of the Child and UN Convention on the Rights of Persons with Disabilities.⁸ The draft code should reference those legal instruments [**section 38 of the draft code**]. For example, the draft code only refers elusively to two of the four key principles of the rights of the child (which are contained in the UN CRC): 'best interest of the child' and 'views of the child'. However, there are four key principles, including the principle of non-discrimination, which the draft code is silent about.

Proportionality

3.9. The powers enable the authorised person to access a significant amount of personal information. Therefore, **Part 7 of the draft code** is crucial

⁵ Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], 2017, ECHR.

⁶ Gaughran v. the United Kingdom, 2020, ECHR 144 and Peruzzo and Martens v. Germany ECHR 4 2013.

⁷ N. Š. v. Croatia, 2020, ECHR 10.

⁸ Both UN Conventions are signed and ratified by the UK.

to ensure lawfulness and circumvent potential abuses of power and arbitrary interference. There should be clear and sufficient parameters to guide for the most **selective and less intrusive** extraction possible.⁹ It is essential then that the extraction method is both specific and ensure the least amount of information needed to support the purpose to be extracted. In this context is also critical to ensure that privileged information/data is protected from extraction and viewing.

End.

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⁹ Uzun v. Germany, 2010 IHRL 1838 and Bărbulescu v. Romania [GC], 2017 ECHR.