

Andrew Hendry
Chief Digital Information Officer
Police Scotland
Digital Evidence Sharing Capability PS SRO

07 June 2023

Dear Andrew,

Police Scotland Response to Information Notice under section 16 of Scottish Biometrics Commissioner Act 2020

Thank you for your letter of 7 June providing a detailed response to the four questions contained in my Information Notice of 22 April 2023. The provision of this information discharges the legal obligations on Police Scotland arising from section 16 (1) of the Act, and I am grateful for your comprehensive response.

As you are aware, the central question giving rise to my information notice about DESC was whether the use of hyperscale cloud infrastructure provided by U.S. companies which involves biometric or genetic data is compliant with law enforcement-specific data protection rules, and specifically section 73 relating to international transfers, having regard to the potential implications of the U.S. Clarifying Lawful Overseas Use of Data Act 2018 (Cloud Act).

Although assessing compliance with UK Data Protection Law is solely and properly a matter for the UK Information Commissioner (ICO), protecting biometric data from unauthorised access and unauthorised disclosure is also a feature of my statutory Code of Practice which took legal effect in Scotland on 16 November 2022. However, the Scottish Code of Practice is about more than data protection, it is also about protecting human rights. I simply mention this as it does not necessarily follow that achieving compliance with UK data protection law also means achieving compliance with the Scottish Code of Practice.

Although I note the assurance that data is encrypted by the DESC solution prior to being hosted on a Microsoft Azure UK Data Centre. The U.S. Cloud Act allows access to electronic data stored overseas by 'US headquartered' electronic communication service providers and 'remote computing service providers.' Such electronic data was previously beyond the jurisdiction of U.S. law enforcement and investigatory authorities unless the providers used the traditional mutual legal assistance treaty (MLAT) mechanism.

It is equally the case however that U.S. headquartered service providers based in the UK are subject to GDPR because they are established in the UK. Accordingly, if they receive requests to access or preserve data, they will need to ensure that that no Scottish UK data, or onward transferred EU data, is accessed by U.S. authorities without valid authorisation and implementation of GDPR rules.

My understanding is that it was for these reasons that the Scottish Police Authority decided not to upload fingerprint and DNA evidence to the DESC Pilot, taking the view that such

processing may breach the controls that apply to international transfers as defined in section 73 of the UK Data Protection Act 2018. Therefore, and as required by section 65 of DPA, the controller must consult the UK Information Commissioner prior to commencing any processing that would result in a high risk to the rights and freedoms of individuals (in the absence of measures to mitigate the risks).

I also welcome that you are currently undertaking a due diligence review and have consulted with the Information Commissioner's Office (ICO), in the absence of any formal guidance relative to the storage of law enforcement data within the cloud infrastructure. I also note that there will be an evaluative review at the conclusion of the DESC pilot, and this may also provide the opportunity for a strategic pause pending the anticipated ICO advice.

More broadly, I shall be conducting an annual compliance assessment (based on validated self-assessment) on the Scottish Code of Practice with Police Scotland, the SPA, and PIRC over the winter months of 2023/24. In addition, we will also be conducting an assurance review on the use of images in the autumn and winter and will be laying a report on our findings before the Parliament in February or March 2024. I will potentially revisit progress with DESC as part of one or both programmed activities.

Many thanks again for your detailed response, and I look forward to further engagement on this and other matters.

Yours sincerely,

Brian Plastow

Dr Brian Plastow
Scottish Biometrics Commissioner