

Call It Off

Are police searching mobile phones illegally?



SECTION 1:

Call it off: are police searching mobile phones illegally?

DO POLICE SEARCH AND SEIZE PHONES DURING STOP AND SEARCH?

THE EVIDENCE

Media reports and examples collected by advocacy groups suggest there are instances of police searching and seizing mobile phones during stop and searches. These accounts in themselves are concerning; further research is necessary to understand the extent to which this practice occurs.

A growing number of reports have catalogued instances of police searching or seizing mobile phones during stop and search encounters:

- BBC reporter, Noel Phillips, has his phone seized during a search (initially suggested to be for a knife, later for drugs): “I had my mobile phone in my hand throughout. When I said to the officers I intended to record what was happening, the detective sergeant grabbed my phone and stopped the recording” (Phillips, 2017).
- Advocacy group, Liberty, note that they often receive reports of members of the public experiencing this treatment (Welch, 2009).
- Following a search of her boyfriend which she filmed, Gemma Atkinson’s phone was seized. During the encounter, she was detained for 25 minutes, handcuffed, and threatened with arrest. Atkinson claims the officer she filmed stated: “I don’t want to see myself all over the internet,” (Lewis, 2009).
- An article following the activities of police officers within Hammersmith and Fulham’s robbery squad documented a search of a mobile phone’s contents during a stop: “A search turned up a small bag of cannabis, which the youth mumbled had cost him about £10... The police checked his mobile phone, which had a picture of a gun for a screensaver. But he had no real weapons secreted about his person.” (The Independent, 2008).

Despite these numerous reported examples, it is unclear how prevalent this practice is. The Independent Office for Police Conduct have not published details of any complaints made in relation to this issue (Independent Office for Police Conduct, n.d.). The next section will demonstrate that in many of the examples presented, the action taken may have been illegal or, at best, legally ambiguous.

SECTION 2:

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ARE THESE SEARCHES LEGAL?

There appears to be very limited circumstances under which police could legally search for a mobile phone during a stop and search, much less search within it. While police have powers to seize phones under terrorism legislation, these do not apply in everyday policing. In light of the examples already discussed, it seems unlikely this practice would usually be legal.

Police powers to stop and search are drawn from a range of legislation, but the majority of stops fall under Section 1 of the Police and Criminal Evidence Act 1984, and associated legislation including Section 23 of the Misuse of Drugs Act 1971 (Home Office, 2018a). Code of Practice A regulates these powers (Home Office, 2015, 24-26). Other search powers not covered by this exist, relating to specific settings and scenarios, such as those under the Terrorism Act 2000 (Home Office, 2015, 24-26).

When could police legally search for – and within – a phone during a stop and search? There are only a few scenarios around which there is little legal ambiguity that police are permitted to search for, or within, a phone during a stop and search.

Searches performed under Schedule 7 of the Terrorism Act 2000 permit police to search, copy and keep data from digital devices such as laptops and phones – however, this power can only be invoked at international railway stations, ports and airports, not in everyday policing duties. Section 1 of the Police and Criminal Evidence Act 1984 gives legal justification for searches for stolen property. In terms of everyday policing, this may be the only clear-cut legal basis for searching for a phone – it would be legal to search for a phone under this power if the phone was considered stolen and the search was performed expressly to search for said stolen phone (Home Office, 2015, 25), and the search passed the requirement of reasonable grounds for suspicion the code outlines (Home Office, 2015, 6).

However, the legal clarity ends here. There are many more scenarios in which the legality of searching for or within phones is unclear. For example, while the legal justification for searching for a stolen phone under Section 1 of the Police and Criminal Evidence Act 1984 seems clear, it is less clear whether police would be justified in searching the phone itself. While the act allows police to search phones belonging to those arrested (Home Office, 2013, 15), no such provision is mentioned regarding stop and search. As the legality of the stop itself is based on the suspicion of finding a stolen phone, it could be

claimed that phones found suspected to be stolen would need to be searched to confirm this. Indeed, in discussing this, advocacy group Liberty note, “in this scenario inspecting the phone and the information on it long enough to establish the facts might be justified” (Welch, 2009). Police can check whether a phone is stolen by checking a phone’s unique IMEI number (Metropolitan Police, n.d.a.), however, there is no official guidance governing such situations.

Similar ambiguity surrounds other stop and search legislation. Under Section 43 of the Terrorism Act 2000, police are permitted to search those they suspect of terrorist activity and seize anything they feel is evidence of this. Some have suggested this would extend to searches of phones, but this is not explicit (Welch, 2009).

The Metropolitan Police appear to agree, stating in their guidance that they have the power “to view digital images contained in mobile telephones or cameras carried by a person searched under S43 of the Terrorism Act 2000 to discover whether the images constitute evidence that the person is involved in terrorism” and that phones may be seized as evidence if police “reasonably suspects [the phone] may constitute evidence that the person is a terrorist” (Metropolitan Police, n.d.b.). This act also prevents individuals filming police activity on a mobile phone if this is “designed to provide practical assistance to a person committing or preparing an act of terrorism” – however, this power does not ordinarily apply in everyday policing activities (Metropolitan Police, n.d.b.).

Further confusion surrounds the Misuse of Drugs Act 1971. This allows police to search individuals they suspect to be in possession of illegal drugs, and “seize and detain, for the purposes of proceedings under this Act, anything found in the course of the search which appears to the constable to be evidence of an offence under this Act.” (Misuse of Drugs Act 1971, c. 38, Section 23). While some could suggest this may include a phone, without guidance on this, it remains ambiguous. Indeed, a forum discussion on UK Police Online (2011) prompted a range of contradictory opinions from members, including:

“Are you suggesting that you stop search under s23 and go through someone’s phone? I am fairly certain this would be outside of powers, although I would love it if it were ok.”

“I was always told that if you are conducting a stop search in the street under s23 for example, you can have a look through the mobile phone.”

“If someone has enough drugs to (or has drugs in a way that would) implicate dealing then as a matter of course surely everyone seizes any mobile phones as evidence?”

SECTION 3:

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THE NEED FOR GUIDANCE

Guidance on this activity is needed for three primary reasons. Firstly, those stopped need legal clarity on whether they are required to hand over their phones. Failing to provide this will only serve to fuel tension in the stop and search interaction. Secondly, the volume of information police have access to in the search of a phone changes the nature of a stop and search; a similar search in other circumstances may require a warrant. Government need to decide if this is, or even should be, legal. Finally, access to these volumes of information without adequate training raises practical concerns around data protection.

No formal guidance appears to be offered by government, any police force in England and Wales, or any third sector policing organisation on this issue:

- Code A, the code of practice covering stop and search procedure under the Police and Criminal Evidence Act 1984, was last updated in 2015 (Home Office, 2018b) and contains no reference to this issue.
- The issue is also not covered within the Best Use of Stop and Search scheme (Home Office, 2014; HMIC, 2016).
- The National Police Chiefs' Council appear to offer no guidance relating to the seizure of mobile phones during searches (National Police Chiefs' Council, n.d.), and the College of Policing do not cover this issue in their guidance on stop and search practice (College of Policing, 2018).
- Her Majesty's Inspectorate of Constabulary (HMIC) do not raise this issue in their original 2013 report into the effective and fair use of stop and search powers or the follow up report to this in 2015 (HMIC, 2013; HMIC 2015a).
- HMIC's recent work on digital crime and police response to this also did not discuss this topic (HMIC, 2015b).
- This issue was also not raised within the most recent PEEL police legitimacy reports for any force (HMICFRS, 2017).
- The topic is also not covered by the government guidance on stop and search published online for citizens (Gov.uk, n.d.).

Guidance on police powers relating to viewing, searching and seizing phones under the Terrorism Act 2000 is equally mixed – the Met stipulates that officers have powers to seize phones only if “the officer reasonably suspects [the phone] may constitute evidence that the person is a terrorist” and that when they do, that images may only be viewed, not deleted (Metropolitan Police, n.d.b.) – but this guidance is not endorsed by the Home Office (Lewis, 2009).

As the examples presented have demonstrated, searches and seizures of mobile phones appear to be taking place, despite the legal ambiguity around this practice. This is highly concerning, for three reasons:

1. *Currently, those stopped have no legal clarity as to whether they are required to hand over their phones – this will only create tension in stop and search encounters.*

Without guidance on if and when those stopped would be compelled to hand over a mobile phone to police, there is the potential for disagreement and tension over this in each stop. While a cautious reader might struggle to find a legal basis for searching and seizing phones in the majority of stops, in the presence of the power imbalance between police and those who they stop, this ambiguity will likely serve to allow mobile phone searches where these should not take place.

Not only have the examples presented shown the potential for psychological and physical harm such unjust encounters can create for those stopped, but stop and search practices viewed as discriminatory and unjust have been repeatedly demonstrated to damage the legitimacy of the police (e.g. Scarman, 1986; Lewis et al, 2011). Definitive guidance is needed to remove the ambiguity that allows this to persist.

2. *A search of a mobile phone gives police access to a substantial volume of highly personal information, changing the nature of a stop and search; a similar search in other circumstances may require a warrant.*

Technology has changed drastically. Mobile phones today carry a wealth of personal information, and police may be able to learn a great deal about a person from what might be considered only a relatively cursory search of their phone:

- **Movements:** many apps contain data on where a person has been. For example, by examining the photos a person has taken and the time and location stamps on these, records of searches for locations via maps or internet browser apps, records of their

journeys on apps such as Uber, or check-ins via social media, police may quickly be able to piece together a person's recent movements. Not only this, but during a search, police may take unique ID information from a person's phone and SIM card which will allow their future movements to be tracked (Freedom of the Press Foundation, 2018).

- **Friends and networks:** police could quickly gain understanding of a person's social circle. Who is saved in a person's phone book, who a person recently or regularly contacts, and who they are connected with via social media, all give a comprehensive picture of this. In some cases, this could lead to these people becoming targets for police action themselves (Freedom of the Press Foundation, 2018).
- **Communications:** a huge volume of contact is recorded on phones and it would be easy for police to access this quickly. Chat logs on social media, email accounts, text message exchanges, and call logs could all be searched and read easily (Freedom of the Press Foundation, 2018).
- **Other sensitive information:** the way many people use their smartphones today means that if something is important to them, there will likely be information relating to this on their phone. From a person's address, their employment, their financial records saved in banking apps, even their name - it will likely be found on their phone.

Legal understanding must be updated to reflect this. Millie Graham Wood of privacy rights charity, Privacy International captures this:

“...searching a mobile phone cannot accurately be compared to a search of the home, let alone a physical search. It is far more exhaustive. They have immense storage capacity, can hold thousands of pictures, videos and apps, all of which can reveal so much about your, and potentially your contacts', political, sexual and religious identity.” (Bowcott, 2017b).

Privacy International, have repeatedly suggested such searches should require a warrant (Bowcott, 2017b; Nye and Sands, 2018).

Similar concerns have been raised relating to the Schedule 7 powers of the Terrorism Act 2000. Under Schedule 7, refusal to comply with police requests for access to devices like mobile phones is a criminal offence; this was tested when Muhammad Rabbani, International Director of Cage, was charged with and found guilty of this offence in 2017 (Bowcott, 2017a).

The legality of these powers have been questioned by both the Joint Committee on Human Rights (Grierson, 2013) and the independent reviewer of terrorism legislation, David Anderson QC (Anderson, 2013).

These concerns become all the more pressing when evidence is considered that suggests police might have access to technology that allows them to search and store data from phones, sometimes without the individual's awareness. Research published in 2018 from Privacy International shows that more than half of police forces in England and Wales currently use mobile phone extraction technology, while another 8 have or intend to trial such tools (Privacy International, 2018, 11, 13). This is highly concerning. Indeed, as noted in the report, one company supplying such technology noted, "If you've got access to a sim card, you've got access to the whole of a person's life" (MSAB cited in Privacy International, 2018, 7).

3. Guidance is needed to inform how data generated from these searches is handled by police; if they are performed legally, police must have the capacity and training to perform these searches in a way that does not raise data protection concerns.

Privacy International have raised further practical concerns over these searches, suggesting that present police training and resources mean that no guarantees of data security could be made, and as such, these searches raise data protection concerns (Bowcott, 2017b). Indeed, North Yorkshire's Police and Crime Commissioner revealed in a report, discovered by Bristol Cable magazine, that "sensitive data may have been lost or misappropriated" during searches of phones (Aviram, 2017).



RECOMMENDATIONS

1. Police searches of mobile phones and the data contained within them should be halted until their legality can be clarified and until appropriate data protection guarantees are in place;
2. The Government should review the legality of the searches for and of mobile phones under the acts covered by the Police and Criminal Evidence Act 1984 Code of Practice A;
3. The Government should issue guidance on mobile phone searches for police and public;
4. The Government should revisit the legality of search powers regarding phones under the Terrorism Act 2000. Up to date guidance should be produced for police and public on the powers under this Act regarding public photography;
5. The Government should commission research on the police and public experiences of, and attitudes towards, mobile phone searches.

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