

Digital Device Seizure and Examination – Consent

Introduction

Police Scotland officers will only take and examine a digital device where there is reasonable belief that it may contain evidence or information relating to a police investigation or incident.

The use of consent to take a digital device relates only to victims and witnesses.

Section 1 - Capturing Consent

Essential Elements which must be established:

Voluntary – the decision to either consent or not must be freely made by the person and free of coercion, pressure or influence, and

Informed – the person must be given information about what the process of taking and examination involves and their rights in terms of providing, refusing and withdrawing consent, and

Capacity – the person must be capable of giving consent, which means they understand the information given to them and can use it to make an informed decision.

Capacity:

When requesting consent the investigating officer **must** consider the individual needs and any vulnerabilities of the victim or witness:

Factors to be considered include, but are not limited to:

- *Any thing effecting capacity - whether permanent or temporary - e.g. physical or mental health, learning disability, emotional state, trauma, intoxication.*
- *Any additional support needs e.g. responsible adult, appropriate adult, parent or guardian, interpreter, support.*

Informed:

On every occasion on which a digital device is taken under the authority of consent the investigating officer **must** provide the victim or witness with a copy of the Digital Device Consent Public Information Leaflet and this must be read over to / by the victim or witness and explanation provided where necessary to ensure understanding of the content.

Their decision regarding whether or not they wish to provide consent should be recorded in an official police statement or notebook using the consent declaration which must have its own dedicated signature.

Consent Declaration

I understand that I do not have to provide consent.

The Digital Device Consent Public Information Leaflet has been read to / by me and I confirm that I understand this information.

I do / do not give my consent for Police Scotland to take my device for the purpose of examination.

Examination Request Form

An Examination Request Form (ERF) must be submitted and authorised prior to any device examination. These are subject of audit and review and it is essential that they are completed accurately.

Where consent is the authority for taking a device the supervisor reviewing the ERF must be satisfied that the Digital Device Consent Public Information Leaflet has been provided and the Consent Declaration noted.

Section 2 - POWERS

Powers:

To Take – The Digital Device of a Victim or Witness

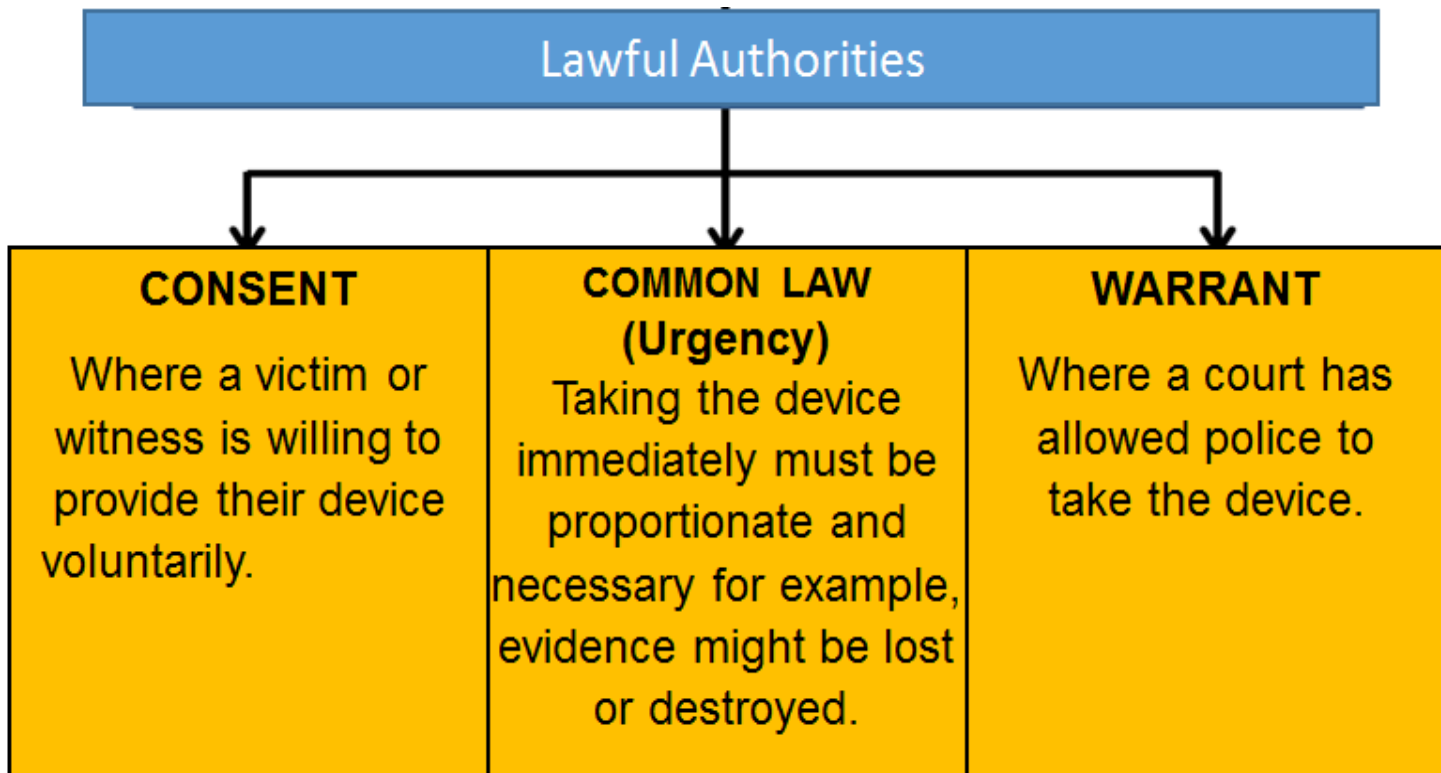
There are three lawful authorities for taking a device from a victim or witness for the purpose of examination.

The decision on which authority to use will be depend on the facts and circumstances of the particular investigation.

Taking a device, particularly a mobile phone can have a huge impact on the owner. Nothing in this briefing document prevents the need for compassionate and comprehensive engagement between the investigating officer and the victim or witness of crime.

A full explanation must always be given when taking a device for examination; irrespective of the lawful authority being used or the status of the individual.

By providing a detailed explanation of **why** a device is required, you empower the victim or witness of crime and provide a more transparent service.



When assessing the most appropriate lawful means by which to take a device, the investigating officer **must** consider all factors, including but not limited to:

- Victim / Witness rights (Article 8 ECHR right to respect for private and family life)
- **The status of the individual** (victim or witness)
- Seriousness of incident
- Potentially linked incidents

Powers:

To Examine – The Digital Device of a Victim or Witness

The Data Protection Act 2018 allows police to keep and use information taken from a device for the purpose of the investigation, even if the consent for police to keep the device itself is withdrawn.

More information can be found within the Digital Device Seizure and Examination – Legal Basis.

Example - Consent

An example where **consent** may be used as a lawful authority to take possession of a device for the purpose of examination would be when a victim of crime reports an incident, indicates their device contains evidence, and is willing to provide their device voluntarily to police.

If consent is refused or withdrawn, it **does not** change Police Scotland's duty to fully investigate.

Remember: Consent is only a consideration for victims and witnesses, not suspects or accused.

Example – Common Law (Urgency)

An example where **common law (urgency)** may be used as lawful authority to take and examine a device would be when there is a reasonable cause to suspect that a witness to an enquiry may delete evidential material relating to the investigation. For example, a video of a sexual assault.

In these circumstances, there is a pressing need to preserve evidence **immediately** and therefore the use of a warrant or consent are not appropriate due to the immediate risk to the investigation.

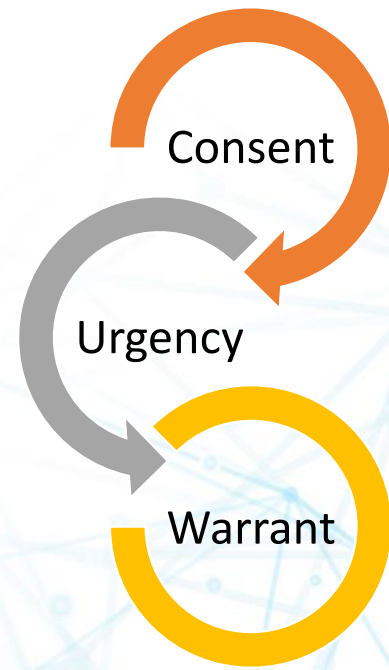
Example - Warrant

Consideration should be given to a **warrant** when evidence assessed to be within a device is so essential that the device is required, irrespective of the wishes of the individual. For example, the device belongs to a witness who is a close associate of a suspect.

In these circumstances, if urgency does not apply and asking for consent is not appropriate, a warrant should be craved.

The following slides are designed to highlight questions an investigating officer may consider when assessing the authorities available to take possession of a digital device for the purpose of digital forensic examination.

Remember; there must be **reasonable and justifiable grounds** for taking and examining a device.



Is the victim or witness willing to provide their informed consent for the device to be taken by Police Scotland for the purpose of examination for evidence?

NO

If the victim or witness is not willing to provide their consent (in the absence of urgency or a warrant) then there is no lawful basis to take or examine the device.

YES

The victim or witness must be provided with a copy of the Digital Device Consent Public Information Leaflet and this must be read over to / by them to ensure understanding of the content.

Their decision regarding whether or not they wish to provide consent should be recorded in the form of a signed statement.

This signature must be dedicated to the consent declaration

Is it assessed that the device is essential
(contains evidence) and is **required** to progress
the enquiry?
(However urgency is not a factor)

YES

Consent can be requested.

or

If consent is not appropriate in the circumstances, consult with COPFS regarding obtaining a warrant to seize and examine the device.

NO

Consider the opinion of the victim / witness and explore alternatives to taking the device.

Is there an **urgent** need to preserve the device to prevent the loss, or potential loss, of evidence relating to the investigation?

YES

Seize the device using common law powers.

NO

Consider Consent or Warrant

Section 3 – Consent Withdrawal

Consent can be withdrawn at any time via 101, a police officer or at any police station.

It should be noted that information extracted from the device is kept by police under a separate authority allowed by the data protection act, and as such any **withdrawal of consent relates only to the device itself.**

Where a device is taken by consent, there is a right to withdraw that consent at any time.

As with refusal of consent there may be times that Police Scotland need to keep the device despite withdrawal of consent; in these cases one of the other powers (warrant or common law) must be used.

If another power is not used to keep the device it must be returned as soon as possible after consent withdrawal is confirmed.

Guidance on that decision, the factors that may influence it and communication with COPFS are outlined in the 'Digital Device Consent Guidance'.

Digital Device Consent Withdrawal Form

Police Scotland and COPFS have collaborated to develop a process to facilitate withdrawal requests as quickly as possible.

On every occasion a withdrawal of consent is made the Police officer / staff member receiving the request must complete the Digital Device Consent Withdrawal Form and follow the directions within, informing the Cybercrime Digital Forensic Gateway who will stop any examination request if not already undertaken.

Further Guidance

Officers can find further information regarding consent in relation to digital devices and victims and witnesses of crime within the 'Digital Device Consent Guidance' document on the Police Scotland Intranet.