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Dear Sir/Madam

## Complaint against the Department for Education

We act for Against Borders for Children ("ABC"), a coalition of parents, teachers, NGOs and campaigners which aims to remove borders and immigration controls from education and children's lives.

This letter concerns two separate complaints:

- (i) a complaint against the Department for Education ("DfE")'s systematic retention of nationality and country of birth data previously collected through the school census; and
- (ii) a complaint against the data sharing between the DfE and the Secretary of State for the Home Department ("SSHd") for immigration enforcement purposes.

We enclose the following documents, and ask that the ICO takes them into account when investigating ABC's complaints:

1. Order by Mrs Justice Lang DBE of 12 February 2018;
2. Claimant's skeleton argument by Shu Shin Luh and Emma Fitzsimons of 19 March 2018;
3. Defendant's skeleton argument by Holly Stout of 20 March 2018;
4. Order by Mr Justice Supperstone of 23 March 2018;
5. Appeal Grounds of 29 March 2018;
6. Extract from School census 2018 to 2019: guide for schools and LAs, V1.1 of 28 June 2018;
7. Email to DfE of 28 June 2018;
8. Letter from DfE of 28 June 2018;
9. Open letter to DfE of 19 September 2018; and
10. DfE reply of 12 October 2018.

## Privacy notices and draft MOU

11. Draft MOU between Home Office and DfE (version 0.2);
12. October 2016;
13. October 2017; and
14. October 2018.

We also enclose copies of the following bundles:

15. Judicial review bundles x 2 ("Permission bundle 1" and "Permission bundle 2" respectively); and
16. Bundle of authorities for judicial review.

The DfE's work is the responsibility of the Secretary of State for Education ("SSE") and the Home Office's business is the responsibility of the SSHD so on occasions DfE/SSE and Home Office/SSHD have been used interchangeably.

ABC is bringing this complaint on behalf of all the parents, teachers and students that follow its campaign, several of whom provided statements to support ABC's judicial review proceedings against the Secretary of State for Education ("SSE").<sup>1</sup> We contend that it is not appropriate for each individual parent or child to make an individual complaint first.

In any event Complaint 1 has already been considered by the DfE in the course of ABC's litigation against the SSE and also in their enclosed letter of 12 October 2018.

The bundles used by ABC in their challenge against the SSE's collection of nationality and country of birth data through the school census contain particulars of their concerns raised in Complaint 1 as well as statements from an additional 21 witnesses. ABC's witnesses include:

- 2 headteachers (Alex Crossman, Christian Hicks);
- the Deputy General Secretary of the National Education Union (Amanda Brown);
- 2 educational psychologists (Charlie Matthews and Maria Galan);
- 5 education professionals (Ben Gidley, Yesim Deveci, Arun Mistri, Gargi Bhattachaya, Dermot Bryers);
- 6 parents (Shiri Shalmi, Sonali Bhattacharyya, Luciana Liardet, Sylvia Turner, Charlotte Brooks, Sonali Naik);
- a data expert (Camilla Graham Wood);
- 3 professionals working with migrants (Lisa Matthews, Solange Valdez-Symonds, Celia Sands); and
- a child whose data was collected (Swadhin Bhattacharyya).

Some of the above witnesses fall into more than one category, but we refer above to the dominant one in their statement. All witnesses provide details of their concerns as to the unlawfulness of the DfE's collection of nationality and country of birth in their statements. Some references to the witness statements are provided below but the ICO is invited to read all the evidence and pleadings in the enclosed bundles in full.

Complaint 2 has been considered by the SSE in the pre-action correspondence on behalf of Marisol Urbano, which can be found in permission bundle 1 at E1 to E52.

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<sup>1</sup> ABC's claimant statement setting out who they are and the background to the proceedings is in permission bundle 1 at pages B1- B30. The witness statements can be found in that same bundle, under tab C.

## **Systematic retention of nationality and country of birth data collected through the school census – (“Complaint 1”).**

This complaint concerns 8.67 million school-aged pupils aged 5 to 19 in schools in England and the way in which their data was collected and is stored and used by DfE. The data of many more pupils who were at school when the census collection of nationality and country of birth started in September 2017, but who have left school since, is also retained by the DfE. The total number of students potentially affected by the retention of data is therefore unknown.

On 28 June 2018 the DfE published new census guidance for schools stating that they should no longer collect or retain nationality and country of birth information “from autumn 2019 onwards”. However, the DfE has refused to erase the data collected so far on the basis that 1) it was lawfully obtained and 2) it is still needed to support internal research and policy development. The DfE has also refused to revoke the Education (Pupil Information) (England) (Miscellaneous Amendments) Regulations 2016 (“the 2016 Regulations”), which enable schools to collect nationality and country of birth information.

### Background

On 2 January 2018 ABC issued proceedings against the DfE’s collection and retention of pupils’ nationality and country of birth data through the school census. Maintained schools had been required to submit such information through the school census for children 5 to 19 since 6 October 2016.<sup>2</sup>

On 12 February 2018 ABC was refused permission to proceed with judicial review on the papers. ABC renewed its application orally.

On 22 and 23 March 2018, Mr Justice Supperstone heard the renewed application for permission. He dismissed it on the basis that, amongst other things, he agreed with the DfE’s argument that “there is an adequate alternative remedy available to [ABC] under ss.40 and 42 of the Data Protection Act 1998 (“DPA 1998”),<sup>3</sup> namely the Information Commissioner’s powers to (i) serve enforcement notices and (ii) make an assessment of whether the DfE’s collection, processing and storage of nationality and country of birth data) is likely to be DPA 1998-compliant.<sup>4</sup>

On 23 May 2018, the DPA 1998 was replaced by the Data Protection Act 2018 (“DPA 2018”).<sup>5</sup> The most recent and final summer 2018 collection of nationality and country of birth therefore went ahead under the DPA 2018.<sup>6</sup>

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<sup>2</sup> The pleadings to the proceedings are in permission bundle 1 at tab A.

<sup>3</sup> The ICO’s current powers to serve enforcements notices are at ss. 149-153 DPA 2018; the provisions relating to assessment notices are at ss. 146-7. S.165 DPA 2018 also places an obligation on the information commissioner to investigate complaints by data subjects as to breaches.

<sup>4</sup> See Defendant’s Skeleton Argument, paras 10-17. Now the question is whether the actions taken by the DfE are GDPR/DPA 2018 compliant.

<sup>6</sup>The ICO’s current powers to serve enforcements notices are at ss. 149-153 DPA 2018; the provisions relating to assessment notices are at ss. 146-7.S. 165 DPA 2018 also places an obligation on the information commissioner to investigate complaints by data subjects as to breaches.

ABC had appealed against the refusal of permission to the Court of Appeal. However, in light of the publication of the amended census guidance on 28 June 2018 the appeal has been discontinued.

On 19 September 2018 ABC and 26 other organisations wrote to the DfE asking it to:

1. delete the nationality and country of birth data it collected through the school census by end of February 2019;
2. safeguard all pupil personal data collected through schools from the Home Office's requests for immigration enforcement purposes; and
3. revoke the 2016 Regulations.

On 12 October 2018 ("the 12 October letter") the DfE replied refusing to take any of the requested action.

For the reasons set out in the 12 October letter and its skeleton argument, the DfE argued that the collection was lawful and that the permanent retention of such data is necessary. In summary, they stated that:

- the collection, storage and use of nationality and country of birth data by the SSE involves minimal interference with rights of privacy;
- the collection of the data pursued the legitimate aim of informing the development of education policy and in particular for the purposes of internal educational research;
- it was a proportionate way of pursuing that aim; and
- nationality and country of birth data was not 'sensitive personal data' within the meaning of s.2 DPA 1998 but 'ordinary' personal data within the meaning of s.1 DPA 1998.<sup>7</sup>

The DfE therefore refused to take any of the requested action, stating, in the 20 October letter, that:

1. The information collected through the school census from autumn 2016 and summer 2018 (inclusive) is necessary for the purposes of internal educational research. Once enough data was obtained the collection was stopped;
2. The DfE has a nominated Information Asset Owner and a robust approvals panel. The data collected is therefore safe;
3. The DfE said it would publish a high-level summary in December 2018 that would then be supplemented by more detailed internal analysis.<sup>8</sup> The data collected could not therefore be deleted by the end of February 2019; and
4. The 2016 Regulations simply empower schools to collect data. The power only crystallises into a duty once the requirements in the School Census are published. The census guidance has now been amended and the government updates and direct messages to schools and local authorities ("LAs") have ensured schools and LAs aware

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<sup>7</sup> Sensitive processing is now defined in s. 35(8) DPA 2018. Specific safeguards for the same are also set out at s.42 DPA 2018. Conditions for sensitive processing are at schedule 8 DPA 2018.

<sup>8</sup> It is unclear what the government means by this. No "high level report" has been published but data sharing statistics were published on 13 December 2018 and are available at this address: <https://www.gov.uk/government/publications/dfE-external-data-shares>. If these statistics are what the government means by a "high level report", the retained data can now be deleted.

that there is no further need to collect data on nationality and country of birth. The 2016 Regulations will not therefore be revoked.

### Complaint

ABC's concerns as to the lawfulness of DfE's collection and permanent retention of nationality and country of birth data are set out in the enclosed skeleton argument by Ms Luh and Ms Fitzsimons.<sup>9</sup> In summary, ABC contends that the collection and permanent retention of such data are unlawful because:

- it was **not necessary** to collect children's nationality and country of birth data to achieve the aim of understanding and monitoring the scale and impact of migration on schools. Its collection is in breach of the Data Protection Principles and ultra vires the implied limits to the power under s.537A of the Education Act 1996;<sup>10</sup>
- there is a **disproportionate and unjustified interference** with children's fundamental right to privacy in the collection and permanent retention of children's country of birth and nationality. The DfE has not shown that a less intrusive measure cannot be used to meet the stated aim or that the information collected and retained is attended by sufficient safeguards to prevent arbitrary interferences with children's rights to privacy and/or to ensure the interferences are proportionate;<sup>11</sup>
- the collection was unlawful for **want of explicit consent** from the children and parents of children and the absence of sufficient safeguards in breach of the Data Protection Principles, particularly the strict restrictions relating to the processing of sensitive personal data; and<sup>12</sup>

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<sup>9</sup> For the initial judicial review grounds, see permission bundle 1, pages A7-A32.

<sup>10</sup> The collection of nationality and country of birth data was always optional. Therefore it was clearly not necessary to assess educational need. See for example the statement of Camilla Graham Wood at paragraph 36 (at permission bundle 1, page C402). The point as to necessity or otherwise of the nationality and country of birth data is also made in the statement of Wasi Daniju at paragraphs 21 and 73 (pages B9 and B27-B28 respectively in permission bundle 1), and in several other witness statements such as those of Charlie Matthews at paragraphs 8 to 12 (pages C2-C4 in permission bundle 1), Christian Hicks at paragraphs 12-13 (pages C190-C191 in permission bundle 1) and Dermot Bryers at paragraph 15 (Page C345 in permission bundle 1).

<sup>11</sup> Virtually all witness statements provide examples that show why the collection of nationality and country of birth data is disproportionate - see for example the statement of Amanda Brown at paragraphs 18- 20 (pages C352-C354 in permission bundle 1). As to less intrusive methods of determining migrant children with additional educational needs, see in particular the statements of Sonali Bhattacharyya at paragraphs 22 and 25 (pages C28-C29 in permission bundle 1), Ben Gidley at paragraph 7 (permission bundle 1, page C63) and Alex Crossman at paragraph 7 (permission bundle 1, page C184) (all the aforementioned comparing the collection of nationality and country of birth with that of English as an Additional Language).

<sup>12</sup> Some children were asked for the information at school without parental consent or without informed consent. See for example the statement of Shiri Shalmy at paragraphs 15 and 33, Sonali Bhattacharyya at paragraphs 4 to 6, Lisa Matthews at paragraphs 18-19 and Charlotte Brooks at paragraphs 10 -15, 18 and 21. Many parents (and teachers) were not told about parents and children's right not to reply to the nationality and country of birth questions: the information was buried deep into the guidance - see paragraph 8 of Arun Mistry's statement and also paragraph 14 and exhibit GN3 of Gargi Bhattacharyya' statement and paragraphs 4 to 12 of Sonali Naik's statement.

- it is not sufficient for the DfE to state that there are robust safeguards in place when it is unable to show that the collection of nationality and country of birth data was lawful and that the permanent retention of this data is proportionate.

ABC also has concerns as to the quality of the nationality and country of birth data that has been collected through the school census.<sup>13</sup> These concerns have been echoed by several other education professionals<sup>14</sup> as well as by DfE staff in a meeting with ABC in November 2016 where DfE staff stated that, the more parents who refused to give the data, the more likely it was that the DfE would have cause to look again at the integrity of the data to see whether it was of sufficient quality to meet their aims.<sup>15</sup>

To this effect, ABC notes that the DfE's acknowledged in January 2018 that they did not obtain nationality and country of birth information for 23.5% of pupils (almost a quarter). 1.9% refused to provide this data and in 20.6% of cases it was recorded as "not yet obtained".<sup>16</sup> The "not yet obtained" category seems to be at least in part (if not all) due to schools and pupils who also actively refused to provide this information. Maria Paula Galan explains in her statement that in her children's schools no one was asked to provide nationality or country of birth, the school replied "not yet obtained" for all pupils.<sup>17</sup> For this reason too, any "research" carried out based on the nationality and country of birth data obtained through the school census is likely to be flawed.

Finally, ABC is concerned that even if nationality and country of birth data are not currently being shared, the DfE has confirmed to them and others orally that it is still used to assess the confidence of a match in the address-sharing scheme.<sup>18</sup>

### Remedies

We contend that for the reasons fully particularised in the Claimant's skeleton argument and summarised above, the ICO should find that Complaint 1 is upheld because the DfE's collection and retention of nationality and country of birth data was not compliant with the DPA 1998 and remains non-compliant with the DPA 2018.

ABC therefore asks that the ICO exercise its power to take regulatory action, namely, to **serve an assessment notice on the DfE** to carry out an assessment of the DfE's retention

<sup>13</sup> See Wasi Daniju's statement at para 78 (permission bundle 1, B29).

<sup>14</sup> For example: the statement of Charlie Matthews at paragraphs 13 to 15 (pages C4-C5 in permission bundle 1). Some schools did not collect the data at all - for an example of this see the statement of Maria Paula Galan at paragraph 6 (page C10 in permission bundle 1). For children's lack of knowledge of their own nationality and parents' anxiety as to providing the data, see, *inter alia*, the statement of Ben Gidley at paragraphs 10 and 13 (pages C54-C55 permission bundle 1). For the difficulties in understanding and ascertaining someone's nationality see, *inter alia*, the statement of Solange Valdez-Symonds (in particular paras. 10-19 and 22-25 at pages C138-C142 and C143-C144 in permission bundle 1).

<sup>15</sup> See para 38, page B16 of Wasi Daniju's statement, permission bundle1.

<sup>16</sup> Department for Education, Collection of data on pupil nationality, country of birth and proficiency in English: summary report, December 2017, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/665127/Data\\_on\\_pupil\\_nationality\\_country\\_of\\_birth\\_and\\_proficiency.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665127/Data_on_pupil_nationality_country_of_birth_and_proficiency.pdf), accessed on 6 December 2018.

<sup>17</sup> Para 6, page C2, permission bundle 1.

<sup>18</sup> See para 39, page B16 of Wasi Daniju's statement, permission bundle1.

of nationality and country of birth data, and thereby assess its (non-)compliance with the DPA 1998 and the DPA 2018.

The DfE itself agrees, and, indeed, suggests by way of remedy that ABC should ask the ICO to carry out the above step.<sup>19</sup>

In addition, ABC asks the ICO to:

- (i) **Issue undertakings** committing the DfE to take steps to destroy the existing data that it holds in relation to nationality and country of birth, and requiring the DfE to work with schools to ensure that they do the same; and
- (ii) **Report to Parliament** under s.139 DPA 2018 that the retention of nationality and country of birth data collected through the school census is an issue of concern, and in breach of the DPA 2018.

### **Data sharing between the DfE and other government departments – (“Complaint 2”)**

In addition to the systematic collection of nationality and country of birth data, ABC is concerned that the DfE shares information obtained through the school census, which is stored in the National Pupil Database (“NPD”), with the SSHD for immigration purposes. Indeed, ABC is concerned about the use of such data for any reason unrelated to the stated goals of collection on which parents and schools relied, that is, the education and welfare of children.<sup>20</sup> ABC asks the ICO to investigate Complaint 2.

Some of ABC concerns as to the data sharing agreement between the DfE and the SSHD for immigration purposes, as well as to how that agreement became public are set out in the first statement of Wasi Daniju, which can be found at tab B in permission bundle 1.

In addition, ABC endorses the concerns expressed in the pre-action letter sent by Liberty on behalf of Marisol Urbano, which are at pages E1 to E35 of permission bundle 1.

A summary of those concerns is provided below.

#### Background

The Education (Individual Pupil Information) (Prescribed Persons) (England) Regulations 2009 (SI 2009/1563) (“the 2009 Regulations”) prescribe which persons may be provided with individual pupil information. These are organisations which have educational functions (see regulation 3(5) and (6)) or organisations who, for the purpose of promoting the education and well-being of children in England are conducting research or analysis, producing statistics or providing information, advice or guidance. The list of prescribed persons does not include the SSHD.

However, through a Memorandum of Understanding (“MOU”) dated 18 December 2015, and updated in October 2016, the SSE has agreed to share information from the NPD with the

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<sup>19</sup> See in particular, para 11, Defendant’s Skeleton Argument (page 4).

<sup>20</sup> See Guidance for Schools and LAs 2017-2018 version 1.8 at paragraph 2.6 which purports to set out the uses of census data. At no point does the document mention immigration control. This file is accessible at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/708550/2017\\_to\\_2018\\_School\\_Census\\_Guide\\_V1\\_8.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708550/2017_to_2018_School_Census_Guide_V1_8.pdf) and was accessed on 5 December 2018.

SSHD for immigration enforcement purposes. This MOU only became public knowledge almost exactly one year later, on 15 December 2016, when the Guardian reported that the DfE had made an agreement with the Home Office to share the personal details of 1,500 school children a month.

The MOU enables the data of British children to be shared with the SSHD if the parents of the child are suspected immigration offenders without the consent of the children or of their parents. Such information sharing can lead to the removal of parents and/or their British offspring from the UK.

The transfer of information under the MOU involves nominal consideration of the “benefit (to both parties) of the exchange”<sup>21</sup> but no consideration of the best interests of the children involved. The agreement runs indefinitely. Parents and children are not informed that the addresses they are obliged to provide to schools on registration or later through the school census can be shared with the SSHD for immigration enforcement purposes.

On 22 June 2017 Liberty sent a pre-action letter on behalf of Marisol Urbano to the DfE expressing concerns, *inter alia*, as to the agreement between the SSE and the SSHD regarding the MOU and the consequent sharing of information contained in the NPD for immigration enforcement purposes (the “pre-action letter”).<sup>22</sup>

On 6 July 2017 the DfE replied to the pre-action letter.<sup>23</sup>

In summary, the DfE contends that:

1. The sharing of NPD information for immigration enforcement purposes does not breach any data protection legislation since it is covered by section 29 DPA 1998;
2. The privacy notice template issued by the DfE that states data is shared with “other government departments and agencies” is sufficiently transparent;
4. The SSHE “would not *normally* request information about British nationals” from the DfE. However, it is “*of course possible* that the SSHD may request information about EEA nationals” from the DfE<sup>24, 25</sup>;
5. The MOU does not, in and of itself, provide any power to share data with the SSHD;
6. It is not overly broad; and
7. It was not appropriate for a full equality impact assessment to be carried out in respect of the MOU.

On 13 March 2018, Victoria Atkins MP confirmed that innocent children’s data might be used to track their parents if the Home Office believed them to be absconders. She stated that:

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<sup>21</sup> Paragraph 1.8 MOU version 2.1.

<sup>22</sup> Pages E1-E10 in permission bundle 1.

<sup>23</sup> Pages E45-E52 in permission bundle 1.

<sup>24</sup> Paras 37 and 38 at page E51, permission bundle 1, emphasis added.

<sup>25</sup> For information as to when British and EEA children might be shared see note 20 below regarding the statement of Victoria Atkins, which confirms that data relating to blameless children would be shared in order to catch their parents.



“There may be occasions when there is a person we have lost track of whose status is irregular. If we know they have a child, we will seek from the Department for Education assistance to find the whereabouts of the child. **That child has not committed a criminal offence**, so I would be very concerned to ensure that the Home Office, Border Force or whoever else acted lawfully when seeking that data in order to enable them to find the parent or whoever is the responsible adult, as part of the immigration system” (emphasis added).<sup>26</sup>

### Complaint

ABC echoes the concerns expressed in Liberty's letter of 22 June 2017 regarding the sharing of information between SSE and the SSHD, namely, ABC complains that:<sup>27</sup>

1. The SSE has no statutory power to share individual pupil's information with the SSHD. The SSHD is not a prescribed person for the purposes of the 2009 Regulations;
2. The data has not been processed fairly, contrary to the first Data Protection Principle and s. 35 DPA 2018.<sup>28</sup> It is apparent from the Census Guidance and the template privacy notices that have been used by the DfE since the beginning of the data sharing SSE-SSHD that the governing body and proprietor of schools are not explaining to parents: (i) that the individual pupil information may be shared with the SSHD, and (ii) that the SSHD may process individual pupil's information in pursuance of her immigration enforcement functions;
3. The data has not been processed fairly, contrary to the first Data Protection Principle and s. 35 DPA 2018 as none of the conditions in Schedule 8 are met;<sup>29</sup>
4. The sharing by the SSE of the individual pupil information with the SSHD constitutes an interference with the individual pupil's rights under Article 8 of the European Convention on Human Rights (“the ECHR”). The interference is not justified or proportionate; and
5. If, contrary to ABC's primary contention that the sharing of individual pupil information by the SSE with the SSHD has a lawful basis, the MOU is in any event unlawful,

In particular:

- a. It is overbroad: it permits information to be shared in respect of pupils who are British citizens, or pupils who are EU citizens. Such children are

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<sup>26</sup> Hansard, Col 72, available at: [https://hansard.parliament.uk/Commons/2018-03-13/debates/0714412b-9b1d-4c1c-b0c5-c6aee4c48612/DataProtectionBill\(Lords\)\(SecondSitting\)#contribution-8D39BA9F-68A6-4F4E-BBA7-B526CDE1FACF](https://hansard.parliament.uk/Commons/2018-03-13/debates/0714412b-9b1d-4c1c-b0c5-c6aee4c48612/DataProtectionBill(Lords)(SecondSitting)#contribution-8D39BA9F-68A6-4F4E-BBA7-B526CDE1FACF)

<sup>27</sup> See also the statement of Wasi Daniju at permission bundle 1, tab B, at paragraphs 59 to 60 that also develop some of ABC's concerns with the data sharing SSE-SSHD for immigration enforcement purposes.

<sup>28</sup> Previously s. 4 (4) DPA 1998.

<sup>29</sup> Previously schedule 2 DPA 1998.

not subject to the immigration enforcement powers of the SSHD (whatever the position of their parents); and

- b. Neither the SSE, nor the SSHD, appear to have had due regard to the matters contained in section 149(1) of the Equality Act 2010.

ABC is also concerned that the data provided by the SSE to the SSHD in order to catch alleged immigration offenders is being matched with Home Office records that might be incorrect. On 30 November 2018, the National Audit Office (“NAO”) published a report on the Windrush generation that highlighted serious concerns as to the quality of data held by the Home Office. It stated that:

***“Issues with the Department’s data management increased the risk of action being taken against people who had a legal right to be in the UK. When the Department identifies someone it believes should not be in the UK, for example because it refuses that person’s visa application, it places them automatically in a ‘migration refusal pool’. Immigration Enforcement uses these data to target its work on removals and detention. The Department also shares these data with other public bodies, which may then apply other sanctions. Both we and the Inspectorate have raised concerns several times since 2014 about the quality of the data and controls underpinning this system. The Department declined to cleanse its database as recommended by the Inspectorate in its review of compliant environment measures on driving licences and bank accounts in 2016 [...]”***<sup>30</sup>

The NAO also outlined all the previous times that concerns as to the quality of the data on which enforcement action was taken had been raised with the Home Office and highlighted that: “Of 14 recommendations made in this report, the only one the Department rejected was that it cleanse its database of any individuals listed as disqualified who should not be there.”<sup>31</sup>

#### *Privacy notices*

ABC refers the ICO to the enclosed privacy notices that the DfE suggests schools should use. None of them clearly sets out or explains that some of the data collected may be shared with the SSHD for immigration enforcement purposes under the terms of the MOU. Such lack of transparency is in breach of principles 1 and 2 under the DPA 1998 and articles 12 and 13 GDPR for lack of: 1) fairness of processing; 2) transparency and 3) lack of purpose limitation.

ABC notes in particular that:

1. None of the privacy notices enclosed explain that pupil data may be shared between the SSE and the SSHD for immigration enforcement purposes;
2. An earlier draft of the current MOU obtained through a Freedom of Information Act request shows that the drafter(s) advised the government that sharing of information with the SSHD was likely to be unlawful if it was not for the purpose for which it was collected, that is, for an educational purpose under s. 537A Education Act 1996,<sup>32</sup>

<sup>30</sup> National Audit Report, “Handling of the Windrush Generation”, paragraph 15, page 10, available at: <https://www.nao.org.uk/wp-content/uploads/2018/12/Handling-of-the-Windrush-situation-1.pdf>

<sup>31</sup> Ibid, paragraph 3.21, page 15.

<sup>32</sup> Para 5.1, page 5 of version 0.2 of the MOU. The comments in the document are by officers of the Home Office or Department for Education.

3. The notices are not in a concise, transparent<sup>33</sup> and easily accessible form. This is particularly important where, like here, the information provided should be in language that could be easily understood by a child whose data might be shared;<sup>34</sup>
4. ABC witnesses to the judicial review proceedings against the SSE have clearly stated that they were not informed of the purpose of the collection of nationality and country of birth at the time their children's data (or their data) was collected, in breach of recitals 60 and 61 GDPR. It is therefore clear that most schools (if not all) are not using the privacy notices. It is unclear whether the government has done anything to monitor the use of privacy notices by schools.

#### October 2016 privacy notice

5. This notice is just over 1 page long and does not refer under "How we use pupil information" to data sharing as one of the purposes for which pupil information might be used; and
6. It refers to the DfE sharing pupil level personal data "with third parties" but does not state that the SSE may share data with the SSHD for immigration enforcement purposes.

#### October 2017 privacy notice

7. This is the privacy notice that was in force when ABC started its judicial review proceedings against the SSE.<sup>35</sup> It is just over 3 pages long, so twice as long as the October 2016 notice. It mentions that pupil data is used "to comply with the law regarding data sharing" but does not even attempt to set out or explain this law;
8. In particular, it does not state anywhere that data collected by schools may be shared between the SSE and the SSHD for immigration enforcement purposes; and
9. At page 3, the guidance lists the purposes for which the DfE may share information with third parties. This list does not include immigration enforcement.

#### October 2018 privacy notice

10. This notice is five and a half pages long so about four times the length of the October 2016 notice;
11. This privacy notice has a new section called "How Government uses your data" but it only refers to educational purposes; it does not refer to immigration enforcement at all; and
12. This is the first notice that we have obtained which has any mention of the Home Office in the penultimate paragraph of the document. Even then it only refers to "fighting crime". Whilst an immigration offence is a crime under English law; most (if not all) parents would not know that what this actually means is that their child's data could be used to deport someone in the family if they were overstaying their visa. Neither would, of course, children who are asked for the data directly understand that this means their addresses could be used to entrap their parents if these were (or were perceived as being) absconders.

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<sup>33</sup> The concept of transparency underpins the whole GDPR. For example, see recitals 58 and 60 as well as article 12 (1).

<sup>34</sup> See article 12 (1) GDPR and also recital 58. For the special protection of children's data see also recital 38 of the GDPR and the Information Commissioner's Office: "Consultation: Children and the GDPR guidance" available at <https://ico.org.uk/media/about-the-ico/consultations/2172913/children-and-the-gdpr-consultation-guidance-20171221.pdf>, accessed 6 December 2018.

<sup>35</sup> See pages E75-76 permission bundle 1.

## Remedies

We contend that for the reasons above the ICO should find that Complaint 2 is also upheld because the sharing of information stored in the NPD between the DfE and SSHD for immigration enforcement purpose is not compliant with the DPA 1998 or the DPA 2018.

ABC therefore asks that the ICO exercise its power to take regulatory action and to:

**(i) Serve an assessment notice** on the DfE to carry out an assessment of the DfE's sharing of NPD information with the SSHD for non-educational purposes and thereby assess its (non-)compliance with the DPA 2018;

**(ii) Serve an enforcement notice** requiring the DfE to refrain from sharing NPD information with the SSHD for immigration enforcement purposes;

**(iii) Issue undertakings** committing the SSHD to take steps to destroy the existing data that it has obtained from the DfE without consent that it be used for immigration enforcement purposes; and

**(iv) Report to Parliament** that the sharing of NPD information for immigration purposes is an issue of concern, and request that they amend the 2009 Regulations to make it clear that the data sharing described above is not authorised.

We also ask that pending the outcome of Complaint 2 the ICO requests that the DfE and the SSHD stop sharing data contained in the NPD for immigration enforcement purposes under the terms of the MOU immediately and until such time as there is a resolution to Complaint 2.

### **Scope of the ICO's powers**

If the ICO disagrees that it has the power to require the DfE and SSHD to take the above actions, either at the end of the investigation of the complaint or in the interim, we would be grateful if it could confirm the same to us as soon as possible and clarify:

(i) the extent of the ICO's powers in requesting that the DfE stops retaining data which has been unlawfully collected; and

(ii) which criteria the ICO take into account when deciding whether to undertake an assessment of an organisation.

If the ICO also considers that it does not have the power to ask the DfE and SSHD to stop sharing information contained in the NPD for immigration enforcement purposes, we ask that it please confirm whether the investigation of Complaints 1 and 2 can be expedited and, if so, the timeframe for the expedited investigation.

### **Conclusion**

ABC asks that the ICO investigates Complaints 1 and 2 and that:

1. the ICO should expedite the investigation of both complaints as they affect at least 8.67 million children ;

2. the ICO should stop the DfE and the SSHD from sharing NPD data for immigration enforcement purposes immediately and until there is a resolution to Complaint 2; and
3. the ICO, in any event, taking into account its resources, confirm whether it will be able to investigate Complaints 1+ 2 and recommend the above final and interim actions and, if so, the timeframe for such investigations.

If the ICO cannot do so or does not consider that it has the powers we are asking it to exercise, we ask that it outline the basis for this decision.

Please let us know if there is any further information we could provide that would be of assistance to the ICO in carrying out such an investigation.

We look forward to hearing from you soon.

Yours faithfully

PP. 

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