Upholding information rights

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Ms L Ten Caten
Solicitor
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By email to: LaratC@libertyhumanrights.org.uk

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Case reference number INF0808529

Dear Ms Persson

In the first instance, please accept my sincere apologies for the delay in this final response. There has been a good deal of staff absence to contend with here and we have needed to seek further clarification from DfE on a number of occasions. In addition to this, further related concerns have been raised regarding DfE's processing of pupil personal data which meant that there have been changes in our approach to ensure that we are tackling these issues most effectively and with best use of our resources.

We now have enough information in order to reach conclusions regarding the 2 areas of complaint that you raised, and most importantly, to take the necessary next steps in this area of DfE personal data processing.

This letter represents the ICO's decision on the compliance of the processing undertaken by the DfE in line with section 42 of the Data Protection Act 1998 (DPA98), and section 165 of the Data Protection Act 2018 (DPA18). These require the Commissioner to conduct an investigation, to an appropriate extent, into the likelihood of a controller's compliance with the data protection legislation in a given situation and to provide the complainant with the outcome of that investigation.

An assessment notice was not necessary in this case as we have been able to assess the DfE's compliance with the DPA98 and the DPA18 in this case without the recourse to such formal powers to obtain information from the DfE.

Complaint 1 – The systematic retention of nationality and country of birth data collected through the school census.

The question here is whether the collection and continued retention of the nationality and country of birth data through the school census was and is compliant with the data protection legislation.

You have referred to the nationality and country of birth data as sensitive personal data. The DPA98 defined sensitive personal data and set out specific additional conditions for processing such data. The DPA18 defines special category data, and again, sets out specific additional bases for processing such data. In both legislation, nationality and country of birth data could be argued to fall within the definition of the racial or ethnic origin of the data subject.

The DfE has confirmed that in terms of the DPA18 and GDPR, it relies on article 6(1)(e) as its basis for processing and retaining the data. This requires that the processing is necessary for a task carried out in the public interest or in the exercise of official authority vested in the controller. In terms of the basis for processing special category data, it relies on article 9(2)(j) which requires that the processing is necessary for archive purposes in the public interest, scientific or historical research purposes or statistical purposes.

As you are aware, every school in England and Wales has a statutory duty to complete the school census each term under section 537A of the Education Act 1996. The DfE relies on the Education (Pupil Information)(England)(Miscellaneous Amendments) Regulations 2016 for the collection of the nationality data. It highlighted that the regulations do not mandate that any particular data must be collected, but rather empower the DfE to request such information from schools.

During the first collection of the nationality data, the DfE recognised that there was some confusion over whether collection of the data was compulsory or optional. The DfE worked closely with sector representatives and internal policy specialists to update the data collection guidance to make it clear that the nationality data was optional. It also wrote to all head teachers ahead of the January 2017 census collection to highlight the updated guidance.

In addition the guidance included an offer to parents that, if they had not previously been aware of their right to decline the

nationality data and wished to retract any such data returned on a previous census, they should inform their school, which in turn would transfer this request to the DfE and the DfE would remove it from their systems. The retraction offer ended when the collection of the nationality data ceased as it was no longer part of the census.

However the offer of retraction did not then, and does not now replace or alter an individual's right to object under the GDPR, which can still be exercised. The DfE has confirmed that to date, it has not received any requests from individuals exercising their rights under the GDPR to erase the data or object to its processing.

The DfE has provided more detailed information about the processing it undertakes with the data. In the first instance, it is important to recognise that the nationality and country of birth data was never included in the school census feed into the National Pupil Database (NPD). It was fed into the Pupil Data Repository (PDR), access to which is restricted to a subset of DfE analysts for the purposes of internal analysis and modelling. As the data is held in the restricted PDR, it is not available externally for research purposes.

In addition to this the nationality data within the PDR is pseudo-anonymised with the data held and is access controlled separately from the rest of the data within the PDR that has been collected via the school census. The DfE is therefore able to use the data to analyse and identify whether pupils with particular backgrounds, or the schools they attend face additional educational needs that can be addressed through extra support or policy interventions.

With regard to the ongoing retention of the data, in data protection terms, this is governed by the storage limitation principle. This requires that personal data is kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed. It also states that personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.

The DfE has explained that in general terms, the retention schedules for NPD data are shaped by the requirement to conduct longitudinal research into the longitudinal educational outcomes of individuals. As such, the data is retained until the individual reaches

the age of 30, and reviewed every 3 years thereafter to determine if the purpose of holding the data can be maintained through deleted or de-identified data. However, the longitudinal educational outcomes project intends to match earnings and benefit data to educational records and experiences into the LEO dataset to inform policy, analysis, and modelling. Therefore the intention is to retain the data in identified form until the individual reaches retirement or the age of 67, reviewing ever 3 years.

However, in terms of the retentions of nationality and country of birth data, the DfE has confirmed that following publication of the high level summary in 2018, it intends to undertake further research that will make reference to these fields and other DfE databases in order to identify whether children with particular backgrounds, or the schools they attend face additional educational challenges that require extra support or policy intervention.

Once such additional research is completed and a high level summary is published, the DfE intends to maintain the nationality source data for a minimum of 12 months to allow for challenges to the high level summary to be addressed. Following this, a review panel will meet to consider whether there is a business need for the continued retention of the data, or whether the data can be delete or anonymised.

On review of the retention policies at the DfE in respect of the NPD data and more specifically, the nationality and country of birth data the ICO view is that this approach to retention is in line with the requirements of the storage limitation principle. It is reasonable to retain the data at this point as it is continuing to use it in a pseudo-anonymised form for internal analysis with a view to informing policy, and to continue to be able to justify and address any challenges to the high level summary. The retention schedule to frequently and continually review the need to retain the information is a proportionate approach to ensure compliance with the storage limitation principle. Particularly when considering that the primary purpose for the collection and use of the information is for statistical and research purposes.

Outcome

The ICO considers that the DfE can satisfy article 6(1)(e) and Article 9(2)(j) for the collection and retention of the nationality and birth data, and as such, consent, explicit or otherwise, is not required. However, the issues that the DfE experienced with the collection of

the nationality data in terms of parent and pupil awareness of the optional nature of the collection of that data has highlighted concerns regarding compliance with articles 12, 13 and 14 of the GDPR.

Our view therefore is that the DfE is failing to comply fully with the GDPR in respect of these articles.

This investigation has demonstrated that many parents and pupils are either entirely unaware of the school census and the inclusion of that information in the NPD, or are not aware of the nuances within the data collection, such as which data is compulsory and which is optional. This has raised concerns about the adequacy DfE's privacy notices and their accountability for the provision of such information to individuals regarding the processing of personal data for which they are ultimately data controllers.

Complaint 2 – data sharing with the Home Office

You have explained that you are concerned that the DfE has been sharing nationality and country of birth data with the Home Office, and that this has been done in a way that does not comply with the data protection principles.

In order to understand what personal data has been shared between the DfE and the Home Office, we have made enquiries regarding the Memorandum of Understanding (MoU) between the DfE and the Home Office for the sharing of personal data for immigration enforcement purposes. In order to understand the timeline and the nuances of what information has been shared, and when, we have had regard to the first 3 versions of the MoU and Procedural.

The first two versions, signed off on 5 June 2015 and 18 December 2015 respectively, do include a reference to nationality data in the lists of data to be shared by both the Home Office and the DfE. However, it is important to note that the DfE list referred to "*nationality (once collected)*". The reference to nationality data is removed in version 2.1 which was signed off on 7 October 2016. The date of this is important as the date of the first census to collect nationality data was 6 October 2016. The deadline for returns was 2 November 2016.

This timeline demonstrates that nationality data could never have been shared by DfE with Home Office as part of the MoU for the

exchange of information as it was not collected or held by the DfE when it was listed in the MoU, and once the DfE did hold nationality data, the requirement to share it was removed from the MoU. However, I recognised that you are concerned not solely with the sharing of nationality data of children, but more generally with the sharing of children's data for immigration enforcement purposes.

In terms of the legal basis under the data protection legislation for the sharing of children's data between the DfE and the Home Office, the MoU initially stated that it relied on article 6(1)(e) as its basis for this processing. It must be noted that as nationality data has not been shared, there is no special category data consideration to make here. The MoU specifically stated that the processing is necessary for a task carried out in the exercise of official authority vested in the controller. We raised concerns about this basis for processing as it was not clear that the task of disclosing matched data was carried out by the DfE in accordance with official authority vested in it, rather than the Home Office.

The DfE has therefore reviewed the MoU and confirmed that the correct clause of the legal basis at 6(e) is the processing is necessary for the performance of a task carried out in the public interest. The DfE has confirmed that it is taking steps to ensure the correct wording is now included to ensure that the DfE and the Home Office are clear and transparent about the purposes for which data is shared.

In order to rely on article 6(e) for the performance of a task carried out in the public interest, the DfE has explained that in this specific case, the public interest is met in responding to a request for data made under section 20 if the Immigration and Asylum Act 1999 as amended by Section 55 of the Immigration Act 2016. This gives a public authority the power to supply information to the Secretary of State for immigration purposes. The purposes the Home Office requests data from the DfE is for use in accordance with the immigration purposes as set out in that Act:

- the administration of immigration control under the Immigration Acts;
- the prevention, detection, investigation or prosecution of criminal offences under those Acts;
- the imposition of penalties or charges under Part II;
- the provision of support for asylum-seekers and their dependants under Part VI;

- anything else that is done in connection with the exercise of a function under any of the Immigration Acts;
- such other purposes as may be specified.

As you know, the ICO can only have regard to whether any processing of personal data is carried out in compliance with the data protection legislation. This means that where there is a legal gateway for the sharing of personal data, this will likely create compliance with the data protection legislation providing the data in question is shared for those purposes and in the manner set out in the MoU.

However, again, this matter has highlighted a lack of transparency by the DfE in relation to this processing. The ICO therefore has concerns regarding DfE's compliance with articles 12, 13 and 14 of the GDPR in respect of informing data subjects about the possible sharing of their data with the Home Office. As such, our view is that the DfE is failing to comply fully with the GDPR in respect of these articles, and the requirement for accountability in the processing of personal data.

Conclusion and next steps

We have reached a decision on the DfE's compliance with the data protection legislation in relation to the specific concerns raised in this case, and as such, the matter is closed.

However, the concerns you have raised have highlighted clear deficiencies in the processing of pupil personal data by the DfE, and as outlined above, our view is that the DfE is failing to comply fully with its data protection obligations. Primarily in the areas of transparency and accountability, where there are far reaching issues, impacting a huge number of individuals in a variety of ways.

During the course of this investigation, further concerns have been raised from a number of sources regarding related processing of pupil personal data by the DfE. I have therefore referred my decision and views in this case to my Investigations colleagues to support their ongoing work in this area.

This means that the wide ranging and serious concerns raised about the DfE in recent months, including this one, will be formally considered for further action in line with our Regulatory Action Policy and Information Rights Strategic Plan (both available on our website www.ico.org.uk/about-the-ico/our-information/).

Thank you for taking the time for bringing this matter to our attention, and for your patience in waiting for this outcome.

Yours sincerely

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Monday to Thursday