

**James Cleverly**  
**Secretary of State for the Home Department**  
**The Home Office**  
Peel Building  
2 Marsham Street  
London SW1P 4DF

28 February 2024

Dear Secretary of State for the Home Department

**Re: Warning to the Home Office**

**Background**

1. The ICO has been engaging with the Home Office since 11 August 2022 in respect of the Satellite Tracking Services GPS Expansion Pilot (the "**Pilot**"). The Pilot involved electronic monitoring as an immigration bail condition of data subjects who arrived in the UK via unnecessary and dangerous routes who had claims suitable for consideration under the detained asylum casework (DAC) process ("**Electronic Monitoring**")
2. Following careful consideration of all the information provided during that engagement, the Information Commissioner (the "**Commissioner**") provisionally found that the Home Office had failed and was failing to comply with Articles 35 and 5(2) of the UK General Data Protection Regulation (UK GDPR) in relation to the Pilot (the "Infringements").
3. Accordingly, on 19 December 2023 the ICO issued to the Home Office:
  - a preliminary enforcement notice pursuant to Section 149(2)(a) and (c) of the Data Protection Act 2018 (DPA) in respect of the Alleged Infringements (the "**PEN**"); and
  - "A notification of intention to issue a Warning to the Home Office" regarding the Home Office's compliance with UK GDPR in relation to the Pilot.
4. On 31 January 2024 the Home Office provided the ICO with its representations on both the PEN and the Notice of Intent to issue a Warning (the "**Representations**").

5. The Commissioner has considered the Representations and has today issued an Enforcement Notice (the "**EN**") together with the warning pursuant to Article 58(2)(a) UK GDPR, set out in this letter.

## **Warning**

6. The Commissioner's view is that if in the future the Home Office processes personal data for Electronic Monitoring (the "**Future Processing**") using the same or similar documents to the Pilot DPIA and documentation, that Future Processing is likely to infringe provisions of the UK GDPR (the "**Warning**").
7. The "**Pilot DPIA and documentation**" are:
  - GPS Expansion Satellite Tracking Service (STS) Data Protection Impact Assessment Version Draft 2.3 (provided to the ICO on 13 October 2023);
  - "Immigration Bail Conditions: Electronic monitoring (EM) expansion pilot" version 1. This guidance was updated and published as version 2 on 23 June 2023. This document states that it must be read in conjunction with the Immigration Bail guidance, the most recent version of this document is Version 16.0 published on 8 August 2023;
  - STS Privacy Information Notice GPS Expansion Pilot Cases (provided to the Commissioner on 13 October 2023); and
  - Home Office EM Internal Data Request Form and the Data Access Request Guidance (provided to the Commissioner on 6 January 2023), the Process Control Document Process Data Requests v0.8SM and the Process data requests v0.10 (provided to the Commissioner on 1 September 2023).
8. The reasons for the Commissioner's view are set out below.
9. For the avoidance of doubt, please note that the Warning relates only to the application of data protection law to the Future Processing.

## **The Commissioner's Powers**

10. Article 58(2) UK GDPR sets out the Commissioner's corrective powers. Pursuant to Article 58(2)(a) UK GDPR the Commissioner has the power:

“to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation”.

11. There is no statutory requirement to give notice of intention to issue a Warning. However, the Commissioner elected to give notice on a discretionary basis on this occasion for the purposes of:
  - encouraging the Home Office to enter early and meaningful engagement with the ICO regarding the Future Processing; and
  - affording the Home Office the opportunity to make representations regarding the measures it has, or will, put in place to ensure that the Future Processing is fully compliant with the UK GDPR.

### **Conclusions regarding the nature, scope and purpose of the intended processing operations**

12. Based on his understanding of the Pilot, the Commissioner anticipates that:
  - the Future Processing would include processing of the following categories of personal data: name, date of birth, nationality, photograph, offending history, any vulnerabilities identified; a record of the data subject's latitudinal and longitudinal location taken at regular intervals whilst the electronic device is operational together with a corresponding time stamp for each location record (“**Trail Data**”); and a record of any notifications sent by the electronic monitoring device alerting that immigration bail conditions are breached;
  - the Future Processing may include processing of special category personal data such as: information concerning racial or ethnic origin and health; and information concerning health, political opinions, religious or philosophical beliefs, and sexual orientation, if Trail Data is processed alongside information about the places the data subject visits. For example, a map showing the use of buildings and/or the names and locations of organisations;
  - the nature and purpose of the Future Processing would include (but may not be limited to) some or all of the following: retrieval, consultation and disclosure of personal data for the purpose of making and recording a decision to grant immigration bail subject to an electronic monitoring condition; collection, recording, retrieval,

consultation, use and disclosure of personal data for the purpose of fitting or otherwise providing an electronic monitoring device and maintaining that device; automated collection, recording and storage of Trail Data; retrieval, consultation, use, and disclosure of Trail Data for the purpose of responding to access requests made by or on behalf of, the Home Office, the data subject, or a third party such as a law enforcement agency; and the retrieval and erasure of personal data including Trail Data on expiry of a standard 6 year retention period; and

- the Future Processing would include processing of personal data of the following categories of data subjects: individuals subject to Electronic Monitoring.

### **Indications of the Home Office's intent to proceed with the Future Processing**

13. In deciding to issue this Warning, the Commissioner has noted the views expressed by the Home Office regarding the desire to reduce the number of individuals subject to immigration detention whilst controlling the rates of absconding and the lack of available options identified to meet these objectives. The Home Office position is summarised in the Draft DPIA V2.3 which states:

"Ideally the Home Office would like to have very few in detention, but the current control method of regular reporting is proven not to work and absconding rates are high. The Home Office has a public duty to reduce these rates. To date no other options have been identified as available to control rates of absconding. The Home Office has evaluated options available to it to try and reduce the rates of absconding without the need for detention. GPS tagging is a solution already in use and is proposed as an alternative to deprivation of liberty. The specific use of tagging for those arriving by unnecessary and dangerous routes has not been tested before hence the need for a pilot with a relatively small (but representative) number of individuals to test its viability. The hypothesis is that tagging individuals will reduce the rate of absconding."

14. Engagement between the ICO and the Home Office has been ongoing since early in the Pilot. The Home Office has given no indication either during this engagement nor in its Representations that there has been any change to the policy objectives as expressed above, or that any new options have been identified to control rates of absconding. From its Representations, it is clear that whilst there are no immediate plans,

Home Office has not ruled out Electronic Monitoring and Future Processing.

## **Conclusions regarding potential infringements of UK GDPR**

15. In the EN the Commissioner has concluded that the Home Office has failed and is failing to comply with Articles 35 and 5(2) of the UK General Data Protection Regulation (UK GDPR) in relation to the Pilot DPIA and documentation.
16. The Commissioner considers that if the Home Office proceeds with the Future Processing, using the same or similar documents to the Pilot DPIA and documentation, then the processing of personal data (including special category personal data) involved is likely to infringe some or all of the UK GDPR provisions as detailed below.

## **Infringement of Article 5(1)(a) UK GDPR – lawful processing**

17. For processing undertaken in connection with the Pilot, the Home Office is relying on Article 6(1)(e) UK GDPR and, in respect of special category personal data, on Article 9(2)(g) UK GDPR together with schedule 1 paragraph 6 DPA (the “**Specified Grounds**”). The Commissioner anticipates that the Home Office will also seek to rely on the Specified Grounds in relation to the Future Processing, which the Commissioner anticipates will be substantially the same as that undertaken in connection with the Pilot.
18. To rely on the Specified Grounds the Home Office must establish that each processing activity undertaken for the purpose of the Future Processing is necessary and proportionate for the performance of its identified public task or function, being the exercise of its powers under Schedule 10 of the Immigration Act 2016. The Home Office will be unable to rely on the Specified Grounds in respect of any processing activities that do not meet the test of necessity and proportionality.
19. To the extent that neither the Specified Grounds nor any alternative lawful bases and conditions of processing apply, the Home Office would be infringing the requirement of lawful processing under Article 5(1)(a) UK GDPR. Personal data must only be processed where one of the lawful bases under Article 6 UK GDPR applies. If the processing includes special category personal data, a condition under Article 9 UK GDPR and, where applicable, under Schedule 1 DPA, must also apply.

20. The Home Office must also be able to demonstrate that its Future Processing activities meet the test of necessity and proportionality, as required by the accountability principle in Article 5(2) UK GDPR, which provides that a data controller “shall be responsible for and be able to demonstrate compliance with the requirements of Article 5(1) UK GDPR”. As noted in the EN, the Home Office has not sufficiently demonstrated compliance with the requirements of Article 5(1)(a) UK GDPR in respect of processing undertaken for the purposes of the Pilot. If this was not effectively demonstrated for any Future Processing the Home Office would be infringing Article 5(2) UK GDPR.
21. The ICO’s guidance<sup>1</sup> makes it clear that lawfulness under Article 5(1)(a) UK GDPR “also means that you don’t do anything with the personal data which is unlawful in a more general sense. This includes statute and common law obligations, whether criminal or civil”. The guidance provides examples of relevant legislation, including the Human Rights Act (“**HRA**”). Were a court to judge that the Home Office had imposed an electronic tagging condition on an individual in breach of the HRA, any processing of that individual’s personal data by the Home Office associated with the electronic tagging condition would also be in breach of the Article 5(1)(a) UK GDPR requirement of lawfulness.

### **Infringement of article 5(1)(a) UK GDPR – fair processing**

22. Article 5(1)(a) UK GDPR includes a broad requirement that processing of personal data must be fair. To the extent that the Home Office fails to meet the requirement to process personal data lawfully (as detailed at paragraphs 17 – 21 above) and transparently (as detailed at paragraphs 23-25 below), or the Future Processing otherwise has an unjustified adverse effect on a data subject due to their particular circumstances or vulnerabilities, the Commissioner anticipates that the Home Office would also infringe the fairness requirement set out at Article 5(1)(a) UK GDPR.

### **Infringement of article 5(1)(a) UK GDPR – transparent processing**

23. Article 5(1)(a) UK GDPR requires controllers to be transparent about their processing of personal data. A list of specific information that controllers must provide to data subjects at the time that their personal data is obtained is set out in Article 13 UK GDPR. Pursuant to

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<sup>1</sup> [Principle \(a\): Lawfulness, fairness and transparency | ICO](#)

Article 12(1) UK GDPR the information listed in Article 13 UK GDPR must be provided in a “concise, transparent, intelligible and easily accessible form, using clear and plain language...”.

24. The EN details the Commissioner’s concerns regarding the privacy information provided to data subjects whose personal data was processed for the purpose of the Pilot.
25. If the privacy information provided by the Home Office to data subjects whose personal data is processed for the purpose of the Future Processing is the same or substantially the same as that provided for the purpose of the Pilot, the Commissioner anticipates that the Home Office would be failing to meet the transparency requirement as set out in Article 5(1)(a) and as more specifically detailed in Articles 12 and 13 UK GDPR.

### **Infringement of article 5(1)(c) UK GDPR – data minimisation**

26. Article 5(1)(c) UK GDPR sets out the requirement of data minimisation which specifically includes a requirement that personal data be “limited to what is necessary in relation to the purposes for which they are processed”.
27. The EN sets out the Commissioner’s concerns regarding access to potentially excessive and irrelevant trail data collected during the Pilot without proper regard to the principle of data minimisation.
28. If Trail Data generated from Future Processing is retained and accessed for the same purposes, and in accordance with the same processes and guidance, as applied to trail data generated during the Pilot, the Commissioner anticipates that Article 5(1)(c) UK GDPR would be infringed.

### **Infringement of Article 25 UK GDPR – data protection by design and by default**

29. Article 25 UK GDPR sets out the requirement for data protection by design and by default.
30. The requirement for data protection by design is set out in Article 25(1) UK GDPR:

“Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as

the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects”.

31. The requirement for data protection by default is set out in Article 25(2) UK GDPR:

“The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons”.

32. The Home Office should complete a data protection impact assessment to identify and reduce the data protection risks posed by the Future Processing and to assist it in meeting the requirement of data protection by design and by default.
33. The Commissioner has identified numerous concerns regarding the Home Office’s approach to processing for the purpose of the Pilot, including in relation to the DPIA and guidance documentation, which are detailed throughout the EN. If the Home Office fails to properly consider and address those concerns raised the Commissioner anticipates that the Home Office would be likely to infringe Article 25 UK GDPR in relation to the Future Processing.

### **Infringement of Article 5(2) UK GDPR – accountability**

34. Article 5(2) UK GDPR sets out the accountability principle, which provides that a data controller “shall be responsible for and be able to demonstrate compliance with “the requirements of Article 5(1) UK GDPR”. This imposes a dual requirement: firstly, to be responsible for compliance; and secondly, to be able to demonstrate compliance.



35. Paragraphs 16-33 above detail specific provisions of the UK GDPR that the Commissioner considers likely to be infringed in connection with the Future Processing. The Home Office must ensure that it takes appropriate steps to both comply with those provisions along with its other obligations as a controller under the UK GDPR and to demonstrate how it has achieved compliance.
36. Completing a full and detailed data protection impact assessment in accordance with the requirements of Article 35 UK GDPR, creating appropriate privacy information notices, and developing and documenting appropriate procedures and associated guidance will all assist the Home Office in meeting the accountability requirement.
37. The Home Office should carefully review the EN. The Commissioner anticipates that the Future Processing will be the same, or substantially the same, as the processing undertaken for the Pilot. If the Home Office fails to take appropriate steps to address the findings in the EN, it would be likely to infringe Article 5(2) when undertaking the same, or substantially the same, processing activities as part of the Future Processing.

**Action requested:**

38. Please bring this Warning to the attention of relevant colleagues at the Home Office.
39. Please be aware that a data controller's failure to take into account a relevant Warning is a potential aggravating factor which may be taken into account when the Commissioner is considering exercising his other corrective powers in relation to an infringement of the UK GDPR.<sup>2</sup> If the Home Office decides to undertake the Future Processing without having appropriately addressed the issues raised in this Warning, its failure to take account of the Warning could increase the likelihood of formal enforcement action being taken in relation to any infringements of the UK GDPR arising from those processing operations.

Yours sincerely,

John Edwards

Information Commissioner

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<sup>2</sup> 3 ICO Regulatory Action Policy, p. 11.

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