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Dear Emily Keaney

Satellite Tracking Services GPS Expansion Pilot

We write in response to your letter of 19 December 2023 and accompanying Preliminary Enforcement Notice and Notice of Intent Warning.

The Home Office has carefully considered these documents and feels it would not be proportionate to issue the enforcement notice in this case and makes the following representations.

Processing position

The pilot came to an end in December 2023 and data is no longer being collected. There are no current plans to operationalise the use of satellite tracking for this cohort of data subjects following conclusion of the pilot.

Alleged Infringement – Article 35 (1)

This infringement, outlined in paragraphs 52 to 68 of the Enforcement Notice, is not phrased as an alternative allegation of non-compliance but as an additional allegation on top of the allegation of breaching Art 35 (7). The Home Office contends that a controller can only be held to account either of not conducting a DPIA before processing starts or of not having completed a DPIA that adequately meets the requirements of Art 35 (7). It cannot be guilty of both simultaneously. Paragraph 70 of the enforcement notice specifically states that there was a DPIA in place before the pilot started. The Home Office therefore requests that paragraphs 52-69 be disregarded.

Alleged Infringement – Article 35 (7)

The Home Office intent was to meet the requirements of Article 35 (7) in full and amendments were made to the DPIA and Privacy Notices following feedback/consultation with the ICO. In hindsight, the Home Office acknowledges that the contents of documentation could have been laid out more clearly and where relevant, included more detail/clearer reference to accompanying documents. There are a number of concerns raised in the enforcement notice however that the Home Office would like to challenge and these are listed below.

Paragraph 81 – '*The Commissioner's preliminary assessment is that the trail data is highly likely to constitute special category personal data. The trail data will include the dates, times and locations of the data subjects' movements. This data is highly likely to reveal information about an individual's health, religious or philosophical beliefs, political beliefs and sexual orientation.'*

The Home Office does not agree that trail data is *highly likely* to constitute special category data. The 'trail data' consisted of a list of chronologically stamped GPS co-ordinates/ geolocation references. This data in and of itself cannot alone reveal any of the kinds of data listed as special category data under Article 9. Paragraph 82 of the PEN acknowledges the HO specifically ruled out inferring anything from the location data. In any event, processing the numerical location data alone would almost never amount to special category processing because to be able to infer anything would require combining it with other data. Simply knowing that a particular set of co-ordinates was close to certain properties e.g. hospital, religious building etc would be insufficient to make valid inferences. For example, being recorded at a medical facility would not on its own reveal a medical condition.

Paragraph 83 – *'If a third party requests access to the trail data and the Home Office knows, or in the circumstances of the request ought reasonably to know, that person will be using the trail data to infer special category data, then the Home Office will be processing special category data when it makes the decision and then discloses that trail data. The DPIA does not take this into account.'*

The point at which any trail data was to be shared with a third party, no special category data would be known. Only where the recipient combined this data (in their capacity as controller) with other data (not collected by the Home Office) might it theoretically (but unlikely) be possible to infer special category.

Paragraphs 86 to 88 – *'The Draft DPIA V2.3 does not provide any basis for the conclusion that the trail data does not "mostly" concern vulnerable data subjects. The Draft DPIA V2.3 does not provide any evidence of consideration of what constitutes a material vulnerability or the factors in determining that an individual may be unduly affected as a consequence of electronic monitoring'*

Paragraph 10 of the screening section of the DPIA states:

Any material vulnerability will be considered as part of the assessment prior to tagging. Any individuals identified that may unduly be affected as a consequence of gathering data via the use of electronic tagging will not be included in the pilot.

Immigration Bail conditions documents provide guidance in relation to vulnerabilities.

Paragraph 91 – '*The Commissioner's preliminary assessment is that there is a significant risk that some data subjects, in particular those who are vulnerable, will not understand how their personal data is being processed and for what purposes'*

Whilst it may not have been made sufficiently clear in the DPIA, the Home Office would like to assure the ICO that care was taken to ensure data subjects understood how and why their data was being processed. Whilst privacy notices were available, the primary communication method was via direct engagement with data subjects (given the limitations of privacy notices in this context). The Immigration bail conditions guidance includes the following: *It is important that decision makers inform the bailed person of their responsibilities regarding electronic monitoring and how their data can be used'*

Paragraph 104 – *'In section 3.1 of the Draft DPIA V2.3 the Home Office also speculates that electronic monitoring may reduce the likelihood of absconding and so benefit the data subject by reducing the risk of deportation. More detail is needed on the evidence base for this, and in the absence of such evidence very little weight can be placed on this factor in the necessity and proportionality assessment.'*

No reference to reducing the risk of deportation is made in this document.

Paragraph 107 – *'Although data subjects will be invited to make representations, there is not enough detail as to the weight which can be placed on those representations (or lack thereof), and how the Home Office considers the power imbalance between the Home Office and the data subjects and their vulnerabilities.'*

The HO is under various legal duties to consider the rights position and welfare of data subjects and this standard of care won't change materially whether a person makes representations or not or makes lesser or limited representations because of the power balance. The representations mechanism is designed as an additional evidence gathering route to assist carrying out HO duties. If an individual didn't make representations or limited their representations due to power imbalance that wouldn't legally or practically allow the HO to provide them with a lower level of treatment. The HO still needs to take sufficient action to satisfy itself that any vulnerabilities are addressed as part of the suitability of them being part of a trial.

Paragraph 108 – '*The tenth paragraph of section 3.1 of the Draft DPIA V2.3 sets out that data subjects will be given a new notice. There is not enough detail to demonstrate how data subjects are informed about how their data is being processed, particularly taking into account their circumstances and potential vulnerabilities'.*

As noted above, against paragraph 91, whilst privacy notices were available, the primary communication method was via direct engagement with data subjects (given the limitations of privacy notices in this context).

Paragraph 109 – *'The eleventh and twelfth paragraphs of section 3.1 of the Draft DPIA V2.3 contain the assessment of the necessity and proportionality of extending the pilot. This assessment only considers the number of data subjects in the pilot. The Commissioner's preliminary view is that this is not sufficient, given the intrusiveness of electronic monitoring. Other factors which should be considered include any learnings from the pilot to date, and any positive or negative experiences of data subjects already in the pilot.'*

The DPIA was only able to record the number of data subjects in the trial as the reason for the extension of the pilot on the basis that no learning could legitimately be taken from the pilot because the sample size was too small to allow any meaningful analysis.

Paragraph 110 – '*The DPIA should contain an assessment of the necessity and proportionality of retaining the data and the safeguards in place for access to retained data. This should include justification for the retention periods and details of periodic reviews to erase data which is no longer needed. In light of the volume and sensitivity of the trail data collected this should include an assessment of whether all the trail data is required to be retained for the stated retention periods.'*

Section 2.14 of the DPIA outlines applicable retention rules. These retention rules apply to the records as a whole, since to undertake periodic reviews to erase data no longer needed would necessitate enabling access to records that would otherwise not be viewed i.e. would introduce greater and unnecessary access to data.

Paragraph 116 – '*The Commissioner's preliminary view is that more detail on risks and impact is needed here, beyond a high-level statement of the types of risk and impact. The DPIA should detail and consider:…*

• the risk and impact of at least some data subjects being unlikely to have a comprehensive understanding of the data processing activities associated with electronic monitoring and the associated risks to them, due to their circumstances;
…

• the risk and impact of a lack of transparency regarding the data processing activities associated with electronic monitoring, which may undermine, complicate or hinder the data subjects' exercise of their rights;…

The Home Office contends that these risks are more speculative, contingent and more remote in nature than the rest listed or than is usually considered in such circumstances.

Alleged Infringement – Article 5(2)

Paragraph 133 (and paras 142,144, 146 -149,161,164) - *The Commissioner's preliminary view is that the cited documents do not demonstrate compliance with the relevant principles and so the Home Office is processing personal data in breach of article 5(2).*

The Home Office contends that Art 5(2) doesn't require that the HO is able to demonstrate its compliance in any particular form.

Paragraph 139 – '*In deciding whether or not to issue an electronic monitoring bail condition to data subjects: the decision-making process laid out by the Pilot Guidance is that the presumption is that electronic monitoring should be used unless:*
• one of only four exceptions apply..'

These were not the only exemptions – they were merely the exemptions that definitely applied in every case. There was no presumption that EM should be used unless a limited set of exemptions applied. Decision makers were able to take a non-exhaustive list of practical reasons and representations into account.

Immigration bail conditions guidance:

There will be some cases that may not be suitable for an EM condition for practicality reasons or because there is a risk that their rights under ECHR could be breached. When reviewing the individual circumstances of the particular case and deciding whether it is appropriate to monitor a person, the following should be taken into consideration:

• whether there is strong independent medical evidence to suggest that an EM condition would cause serious harm to the person's mental or physical health
• whether a claim of torture been accepted by the Home Office or a Court
• whether there has been a positive conclusive grounds decision in respect of a claim to be a victim of modern slavery
• whether the person's mental capacity is deemed to be a bar to understanding the EM conditions and therefore their ability to comply for example, a person suffering with dementia
• whether the individual is suffering with phlebitis or similar conditions which cause swelling of the lower legs
• whether the individual is showing any signs of frailty or age-related conditions which may impact on the person's ability to wear and/or maintain the device

The above list is not exhaustive: decision makers must consider the individual circumstances of each case.

Paragraph 140 - . *The fact that this is the guidance provided (in other words, that the presumption for Home Office staff is to electronically tag a data subject) means that two further actions must be taken by the Home Office:*

• first, the DPIA must explain why adopting a default position of tagging the data subject unless one of a limited and explicit list of exceptions applies is necessary and proportionate for those public tasks/functions. This is not the case here (see paragraphs 97-109 above); and

• second, the Pilot Guidance must set out a detailed and (near) exhaustive set of situations in which the default presumption will be inapplicable. This is not the case here (see paragraph 143).

It was not the presumption for Home Office staff to electronically tag a data subject (see response to Para 139 above).

Paragraph 152 – '*For other more frequent instances of access, which fall within the main purpose of the pilot, there is insufficient assessment in the Draft DPIA V2.3 as to whether and to what extent access to trail data is necessary and proportionate for the purpose of the pilot.'*

Access to trail data was not frequent.

Paragraph 153 – '*Furthermore, there is no guidance in the Pilot Guidance, the Data Access Request Form, the Access Guidance or Access Information for Home Office staff as to how to make the decision to access the trail data.'*

This is covered in the Process Control Document.

N.B. There were 62 occasions in which trail data was accessed for the purposes of the pilot. 56 of these occasions related to alerts as a result of 'strap tamper' i.e. where the EM device was damaged and rendered inoperable. 6 related to less serious bail breaches e.g. battery depletion.

Additional points of note

Paragraph 73 – *'As a result of the (preliminary findings of) breaches of article 35, the Home Office is unable to be certain it is not processing personal data for the pilot in breach of UK GDPR and is unable to meet the requirements of article 5(2) to be able to demonstrate compliance with article 5(1).*

As a consequence of the assessment of risk and control measures put in place, the Home Office is confident that processing was compliant.

Paragraph 77 – *'The Commissioner's preliminary assessment is that the Home Office has not sufficiently explained in its Draft DPIA V2.3 the nature of the processing. In particular there is insufficient information and/or not enough detail of:*

• *The categories of personal data being processed at each stage, for each processing operation.*

Sections 2.1 and 2.8 of the DPIA, in combination with the Data Flow map (provided to ICO Sep 23) provide detail/information to clarify the categories of personal data being processed.

• *The circumstances when the Home Office staff could access the trail data, and the conditions and restrictions that must or could be placed upon that access (including where the trail data is being provided to a third party agency).*

Section 2.1 of the DPIA, risk mitigations, the data request process map and process control document outline these circumstances.

• *The safeguards in place for the access and ongoing retention of trail data to demonstrate that access and ongoing retention is necessary, proportionate and compatible with the purpose of the processing.*

DPIA 2.14 outlines the following:

Trail data will be retained as follows:

1) *Until individual leaves the UK – trail data is no longer likely to be of any use as the individual is no longer in the UK.*

2) *Until granted a form of leave – trail data isn't likely to be used as part of any immigration application – they've already been granted leave (and for the pilot likely to be refugee status or HP/DL);*

and

3) *Where not granted leave or removed/made a voluntary departure – retain for 6 years as data may be needed to inform future A8 claims or as part of criminal investigations/etc.*

Other Data Related to Application for leave to Remain in the UK:

Standard Home Office policy applies (in most cases, this will be six years after the closure of the claim). The six years retention period was determined over a period of years and allows for time for judicial reviews, complaints and legal reparation. Where information from the GPS trail data is used as part of a criminal investigation the standard law enforcement retention times will apply once the data is moved to the investigation service.

Paragraph 93 – '*The purpose is set out in paragraph 2 of the Draft DPIA V2.3 (and is set out in full in paragraph 29 above). However, there are additional purposes set out in the Pilot Guidance (as set out in paragraph 30 above). These should be included in the DPIA'.*

The Home Office would like to note that purpose is also covered in 3.1 of the DPIA.

Paragraph 94 – *'For clarity the Commissioner also recommends that the Home Office links its purposes to both its article 6(1)(e) public task and its article 9(2)(g) public interest condition.'*

The Home Office would like to note that the legal basis for processing is recorded in sections 3.2 and 3.4 of the DPIA.

Paragraph 95 – *'Where access to the trail data forms part of the pilot, the Commissioner's preliminary assessment is that the DPIA must set out whether this processing is also necessary and proportionate for the pilot and is in compliance with UK GDPR generally (such as the article 5(1)(c) principle of data minimisation). This is not in Draft DPIA V2.3.'*

The Home Office would like to note that section 3.1 of the DPIA includes the following:

Access and use of trail data, as outlined in 2.1 is made in line with the Home Office's obligation to uphold effective immigration control and to decide applications for leave to remain in the UK. The pilot is set up to tag a number of individuals who have arrived in the UK via unnecessary and dangerous routes and fail to have their claims considered under the detained asylum casework processes or are potentially inadmissible. The pilot is a mechanism for gathering the evidence to inform a future decision on wider roll out of GPS tagging, supported by the underpinning policy rationale of:

• Ensuring that the data subjects are in regular contact with the Home Office throughout their application process.
• The Home Office has a duty to prevent asylum seekers absconding without appropriate leave to remain.
• Detention is the only current option that prevents absconding

Paragraph 102 - *Section 3.1 of the Draft DPIA V2.3 explains that:*

"When [trail] data is requested, the requester must prove the need for the data and that they have considered the amount of data that is required. All applications are scrutinised by the Service Delivery Team who reject any requests where they determine that proportionality and/ or necessity are not adequately proven."

This sets out how the decision is made to allow access to trail data, but it is not a complete, reasoned analysis of the necessity and proportionality when access is given to the trail data.

The Home Office would like to note that section 2.1 of the DPIA includes the following:

Data collected is not accessed unless an exception alert is triggered. Authorised Home Office staff may request access to GPS trail data for a specified period and review that data in the event of any of the following occurrences: -

- *Breach of Immigration Bail Conditions …*
- *Individual Absconds…*
- *Allegations of Electronic Monitoring Breaches or Intelligence of Immigration Bail Condition Breaches Received….*

Terms of the proposed enforcement notice

The Home Office will await a review of the representations and notes made above but with regard to the current proposed terms of the enforcement notice, the Home Office has the following observations.

Annex 1. a) - Whilst an updated DPIA can be provided, the processing to which it relates is now complete. The Home Office is already taking learning from engagement on this matter and has changes planned to both the format of the HO DPIA and ways in which they are completed.

Annex 1. b) – The processing to which the expansion pilot guidance relates has now ceased and there would be no consequent value in updating this documentation.

Annex 1. c) – The processing to which the expansion pilot guidance relates has now ceased and there would be no consequent value in updating this documentation.

Annex 1. d) and e) – The data collection to which the privacy notice relates has ceased. The Home Office can provide data subjects, for whom trail data is still stored, in line with applicable retention periods, with a specific privacy notice.

Notice of Intent Warning

Any use of GPS tagging going forward would be subject to a separate DPIA in which necessity and proportionality would need to be reconsidered since the purpose would differ to that of the pilot. The Home Office has no plans however to undertake future processing in relation to the use of GPS satellite tagging for this category of data subject.

The pilot did not include processing of offending history, criminal convictions and offences data, political opinions, religious or philosophical beliefs and sexual orientation. (See response to paragraph 81 of the Preliminary Enforcement Notice above).

The Home Office would request that the issuing or content of any future warning take into account the representations made with regard to the Preliminary Enforcement Notice.

We await your considerations and would be happy to discuss any points raised if further clarity is required.

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