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Your ref: RAN/00023
Our ref: Z2006066/LJM/HOI7

15 July 2020

Dear Sirs,

RE: Open Rights Group and the NHS Test & Trace Programme

We are in receipt of your letter before claim dated 1 July 2020, seeking a response within seven days. We wrote to you to explain that we would not be in a position to respond in that abbreviated timescale, for which there was no sufficient justification, but that we would seek to respond within the standard period of 14 days. This response is provided in accordance with the requirements of a judicial review pre-action protocol.

Proposed Claimant

The Open Rights Group.

Proposed Defendant

The Secretary of State for Health and Social Care.

Reference Details

Our reference: as set out at the top of the letter.

Please cite the above reference number on all future pre-action correspondence. Louise Marriott is the GLD pre-action contact on behalf of the Defendant. She can be contacted by emailing Louise.Marriott@governmentlegal.gov.uk, quoting the reference above.

Due to COVID-19 and the current circumstances, any correspondence should be sent via email to the address above to limit the handling of materials by post.

Details of the Decision being Challenged

1. It is not entirely clear from your letter what decision of the Defendant is proposed to be challenged by a claim for judicial review. However, we interpret your letter as essentially challenging a decision of the Defendant not to carry out a data protection impact assessment ("DPIA") which covers the entirety of the NHS Test & Trace Programme ("the Programme") as a breach of Article 35 of Regulation (EU) 2016/679 ("the GDPR").

Head of Division
Deputy Director, Team Leader Constitutional & Social Care Public Law



The Legal and Factual Context

2. Article 35 GDPR relevantly provides that:

“1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks.

2. The controller shall seek the advice of the data protection officer, where designated, when carrying out a data protection impact assessment.

3. A data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of:

- (a) a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person;*
- (b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10; or*
- (c) a systematic monitoring of a publicly accessible area on a large scale.*

...

7. The assessment shall contain at least:

- (a) a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;*
- (b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes;*
- (c) an assessment of the risks to the rights and freedoms of data subjects referred to in paragraph 1; and*
- (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation taking into account the rights and legitimate interests of data subjects and other persons concerned.*

...

11. Where necessary, the controller shall carry out a review to assess if processing is performed in accordance with the data protection impact assessment at least when there is a change of the risk represented by processing operations.”

3. In *R (Bridges) v The Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin); [2020] 1 WLR 672, the Divisional Court at §§145-147 drew an analogy between the obligation to produce a DPIA and the obligation to have due regard to the public sector equality duty in section 149 of the Equality Act 2010.
4. Similar to the extensive case law applicable to section 149, nothing in Article 35 is prescriptive about precisely how the DPIA should be conducted. There is no reason, for example, in principle why the obligation could not be met by reference to more than one document (howsoever labelled), so long as they together address all the matters required by Article 35. Any other approach would prioritise form over substance, to the potential detriment of data subjects.
5. The purpose of Article 35, as with an equality impact assessment, is to require the controller to turn its mind to the risks posed by its intended processing of personal data – where that processing is *“likely to result in a high risk to the rights and freedoms of natural persons”* – and to consider measures envisaged to address such risks. The Defendant acknowledges the value of a structured analysis of the type envisaged by Article 35 in assisting controllers identify and address any potential issues of non-compliant processing of personal data.
6. However, the obligation to carry out a DPIA is a procedural one. The content or form of any DPIA does not and cannot answer whether the substantive processing on the part of the controller is or is not compliant with the GDPR in any given context.
7. The Claimant’s reliance on Article 35 GDPR is in relation to the Programme. The Programme is one aspect of the Government’s continuing and evolving response to the global COVID-19 public health pandemic which currently affects the entirety of the United Kingdom.

8. The extremely serious risk to life and health posed by COVID-19 has obliged the Government to take unprecedented, vital steps at high speed to limit the ability of the virus to be spread, to protect public health and the lives of the population, and to reduce the burden on the National Health Service. By way of summary, see: *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin) at §4 per Lewis J.
9. Although both a co-ordinated testing programme and a form of contact tracing have been in place for many months during the COVID-19 pandemic, the NHS Test & Trace Programme brings together the various testing strands (such as those in hospitals and in testing centres) with a significantly increased contact tracing scheme, the aim of which is to identify people who have come into close contact with those testing positive for COVID-19. To be effective, the Programme required a scale of contact tracing beyond existing public health procedures, building on existing structures such as those in place at earlier stages of the pandemic. That has inevitably included the use of third party organisations to supply additional resources on an urgent timescale, which are identified in the various privacy notices to which your letter refers.
10. Contact tracing is an immensely time and labour-intensive process. In most cases, people who have been tested for COVID-19 will access their results, and provide contact details for those with whom they have had contact, through the contact tracing website service. In some cases, where a person has been tested but does not use the website, the Programme seeks to make contact with them by a telephone number they have provided at the point of testing. Those identified as a contact by a person who has tested positive will be contacted by the Programme through the contact tracing website service or by telephone. For the avoidance of doubt, and to address a query raised specifically in your letter, the contact tracing aspect of the Programme does go beyond the functioning of the tracing website service.
11. The availability and functioning of the Programme contributes towards the lifting of other public health restrictions on the general population, and better enables more localised measures should they be required. The Programme was launched on 28 May 2020, having been announced just a month earlier by the Secretary of State on 23 April 2020 at the Government's daily briefing.
12. The NHS Test & Trace Programme is operated by the Department for Health and Social Care, under the leadership of Baroness Harding. It uses the experience and expertise of Public Health England (an executive agency of the Department), and co-ordinates closely with NHS England, various other NHS bodies and local authorities. The Department for Health and Social Care is the controller in respect of the data collected by, and further processed within, the constituent parts of the Programme.
13. It will be appreciated that the development of the Programme in response to the pandemic has meant that its scale and functions have increased exponentially and with enormous speed. The huge efforts required from all public authorities concerned to put in place a Programme capable of testing and tracing on the necessary scale have been unparalleled. Inevitably, the Programme continues to evolve as the pandemic, the understanding of COVID-19 and other aspects of the Government's response develops.
14. There is no dispute that the Programme involves the processing of personal data on a large scale and in – for the United Kingdom – a novel way. The full scope of the Programme encompasses the testing process, the contact tracing process and the use of data to guide scientific advice to Government and to monitor the development of COVID-19 across the United Kingdom.
15. Accordingly, and notwithstanding the extraordinary speed with which the Programme has had to be developed to meet the pandemic, there has never been any doubt or dispute that the Programme must process that personal data in accordance with the requirements of the data protection legislation (particularly the GDPR and the Data Protection Act 2018 (“DPA”)), that data protection compliance must be built into every aspect of the Programme, and that the views and support of the specialist expert regulator, the Information Commissioner, should be sought and engaged with as appropriate (recognising, of course, that the Commissioner retains her independence at all times, including in assessing the need for regulatory action). The Defendant is fully committed to meeting all of these aspects and is taking steps on a continuing basis to ensure it meets this aim.
16. It is neither necessary nor proportionate in this correspondence to set out every way in which the Government have sought to develop the Programme compliantly with data protection legislation. Those officials working on the Programme have appropriate experience in the requirements of data protection law in the context of public health challenges and the processing of medical data, including the data protection officer of the Department for Health and Social Care. Various aspects of the Programme have been the subject at earlier stages of their development of a bespoke DPIA, all of which remain

under review and which have informed internal decision-making. Various aspects of the Programme which involve members of the public providing their personal data are the subject of detailed privacy notices published online, to which your letter refers, to assist public understanding of how personal data is processed and which explain how data protection compliance is being achieved. The Defendant is involved in detailed and rigorous constructive engagement with the Information Commissioner about the Programme's processing of personal data, enabling constant reflection on the operation of the Programme. This is particularly welcome to the Defendant in a context where the Programme has had to be developed and implemented with the greatest possible speed, in the most challenging of circumstances.

Response

17. The Defendant recognises the aim of the Claimant in ensuring the Programme operates compliantly with data protection law. However, any claim for judicial review on the basis that the Defendant has failed, or is failing, to comply with Article 35 GDPR will be refused permission.
18. **First**, it is trite law that judicial review is a remedy of last resort. If a claimant has an adequate alternative remedy available to them, permission will be refused because that remedy should be used instead.
19. Where a person wishes to allege a breach of Article 35 GDPR, that is a matter for which there is a clear adequate alternative remedy: a complaint to the United Kingdom's supervisory authority, the Information Commissioner, under Article 77(1) GDPR. The Information Commissioner has an extensive array of investigative and enforcement powers, as set out in Article 58 GDPR. Those powers include ordering the controller to comply with Article 35 (Article 58(2)(d) GDPR and section 149(2)(c) of the Data Protection Act 2018 ("DPA")), imposing a monetary penalty (Articles 58(2)(i) and 83(4) GDPR and section 155 DPA), or imposing warnings or reprimands (Articles 58(2)(a)-(b) GDPR). The Information Commissioner is the specialist and expert regulator, and the bringing of the matter to the attention of the Commissioner was identified by the Supreme Court as a proper and preferable alternative to judicial review proceedings in *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9; [2015] AC 1065 at §§13 and 45 *per* Lord Sumption. (We acknowledge that compliance with DPIA requirements was raised in *Bridges*, but it was one, relatively minor, issue amongst a variety of claims – particularly compliance with Article 8 ECHR – which could not have been raised before the Information Commissioner.)
20. In the present specific context, the availability of the Information Commissioner's functions is all the more appropriate as an alternative remedy. First, because the only Order that a Court could make on a successful judicial review claim would be, at its highest, a mandatory order compelling completion of a DPIA. The Information Commissioner already has that power, and indeed can take regulatory action that the Courts would have no jurisdiction to impose such as the imposition of a fine. Second, because, as follows from the provisions of Article 36 GDPR, the Information Commissioner is already well aware of the Programme and the Defendant is in constructive engagement with the Information Commissioner in relation both to the impact assessment of the Programme and also in relation to elements of the substantive processing involved. In other words, the specialist regulator is already seised of the substance of any complaint that the Claimant might make. The involvement of the Administrative Court would simply duplicate a regulatory process already in train.
21. **Second**, it is similarly trite law that permission will not be granted to a claim for judicial review which is academic. A claim asserting that the Defendant did not comply with Article 35 GDPR by having in place a DPIA which covered all aspects of the Programme which involve the processing of personal data, prior to the commencement of the Programme, would be academic.
22. The Defendant accepts that:
 - (i) Article 35 applies to the Programme in its entirety;
 - (ii) at or prior to the commencement of the Programme on 28 May 2020, there was not already in place a DPIA or DPIAs which addressed the processing of personal data across all aspects of the Programme;
 - (iii) such a DPIA was and is required; but also that
 - (iv) such a DPIA is currently being finalised, drawing on the extensive data protection compliance work (including existing DPIAs on parts of the Programme) done on the substance of the Programme's processing of personal data, including through detailed engagement with the Information Commissioner; and that
 - (v) the finalised DPIA will be the subject of reviews and updates as the Programme itself evolves.

23. Accordingly, a claim for judicial review would achieve nothing in addition to the existing position of the Defendant.
24. The Defendant acknowledges that it would have been preferable for there to have been a single DPIA in place prior to the commencement of the Programme which covered all aspects of the processing of personal data under the auspices of that Programme, and that there should have been impact assessments in whatever form in place addressing all of those aspects. It will doubtless be appreciated that the creation, development and adjustment of the Programme has had to occur on an unparalleled scale with unparalleled urgency, to help to meet the most serious public health crisis in a century. The primary focus of all of those involved in the Programme has been to ensure it functions effectively to save lives and protect public health. The absence of a DPIA for every aspect of the Programme cannot be and should not be equated with a failure to ensure that the protection of personal data has been an important part of the Programme's design and implementation. As noted above, critical aspects of the Programme have been the subject of compliance work, DPIAs and privacy notices (which reflect that compliance work) throughout.
25. For the avoidance of any doubt, the Defendant is clear in its aim that the processing of personal data in all aspects of the Programme must be compliant with data protection law. All such processing continues to be kept under review, including by reference to the Defendant's detailed and constructive engagement with the Information Commissioner.

Action Requested/Remedies

26. Under heading six of your letter, you set out four 'requests' that the Claimant seeks from the Defendant.
27. Given the position of the Defendant as set out in this letter, it will be apparent that the Defendant accepts and agrees that: (i) a DPIA which addresses all aspects of the Programme (including as the Programme itself evolves over time) is a legal requirement of Article 35; (ii) is not yet fully in place; and (iii) is in the process of being finalised, including through detailed engagement with the Information Commissioner. We consider that this disposes of the first and second requests your letter makes.
28. As to the third request, it also follows from the position of the Defendant set out in this letter that the Defendant's aim is that the Programme should be designed and operated in a manner which removes or reduces the risks to personal data, co-ordinate with the need to protect lives and public health to serve the aim of the Programme. Risks identified in any DPIA process, including the over-arching DPIA for the Programme as a whole, are always subject to analysis and mitigation.
29. The fourth request made is that the Defendant pay the legal costs of the Claimant to date. This request is refused. The very purpose of pre-action correspondence is to resolve and/or narrow disputes without the parties being liable for the other's legal costs. Further, and in any event, the Defendant's position in relation to a DPIA (or DPIAs) for the Programme is one which has at all material times been the subject of engagement with the Information Commissioner; the involvement of your client has not resulted in any change of the Defendant's position. Whilst your client has always been entitled to correspond with the Defendant, and to do so using legal representatives, there is no basis for the Defendant to make an *ex gratia* payment of public money in respect of it.
30. However, for the avoidance of doubt and on the basis set out above, any claim for judicial review issued will be defended and permission opposed.

Alternative Dispute Resolution

31. Your letter does not suggest any alternative dispute resolution and in the circumstances of this response, the Defendant does not consider that any alternative dispute resolution is relevant.

Requests for Information and Documents

32. Your letter makes extensive requests for disclosure. In the circumstances of this response, such disclosure would be unjustified and unnecessary.

Address for Further Correspondence and Service of Court Documents

33. All future pre-action correspondence should be sent to, and in the event that proceedings are later issued, documents should be served on, the following address:
Louise.Marriott@governmentlegal.gov.uk

34. Please acknowledge receipt of this letter.

Yours faithfully,



For the Treasury Solicitor

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