13 December 2019

Response to review of the immigration control exemption in the Data Protection Act 2018

The Immigration Law Practitioners' Association (ILPA) is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Longstanding opposition to the exemption

ILPA opposed the introduction of the immigration control exemption in paragraph 4 of schedule 2 to the Data Protection Act 2018 at every stage of the Act's passage through Parliament. In our Parliamentary briefings at the time, we stated:

> "*In light of the seemingly unfettered ability for decision makers to invoke the immigration control exception, ILPA is particularly concerned about the impact on individuals' and legal representatives' ability to reliably access data held by the Home Office. Information obtained through SARs is vital to protecting the rights of individuals in immigration cases. The curtailment of the right to subject access therefore goes to the very heart of access to justice and the preservation of the rule of law.*"

We continue to hold these concerns. These concerns have been confirmed by how the exemption has been used in practice, which has been coloured by a lack of transparency and clarity. At present, practitioners and applicants cannot be sure whether or not information has been withheld in reliance on this exemption in a subject access request response. This is because they do not appear to be notified when it is relied on. The existence of the exemption means individual applicants cannot necessarily rely on the data they have been provided.

ILPA continues to believe the exemption should be repealed or, at the very least, more significantly restrained.

Structure and timing of the review into the exemption

We are concerned that the review into the exemption is fundamentally inadequate to provide proper scrutiny of the operation of the exemption.

1. Timing

It was promised that the review into the exemption would take place 12 months after the exemption came into force.[1] The exemption came into force on 23 May 2018. We have been told

[1] Baroness Williams of Trafford in Data Protection Bill Ping Pong Stage in the House of Lords, 14 May 2018 – Hansard, vol. 791, col.494.

the review commenced on 1 July 2019. However, ILPA was only contacted about the review on 8 November 2019 and was told the review "should be completed by December 2019". We are concerned that third parties have been given very little time to engage in the review process. This is evidenced by the difficulties we have faced in securing a meeting to provide further feedback to the review.

2. Publicity

The review does not appear to have been made public anywhere on the Home Office website or emailed to those subscribed to the Home Office or UK Visas and Immigration mailing lists. It is concerning that between July and November a review was taking place without those affected by the exemption being made aware. While ILPA's members represent a significant number of migrants in the UK, there will be a large number of individuals who make a subject access request who are not in contact with ILPA at all. These individuals may not know about the review into the exemption. A proper review would be widely publicised to ensure that all those affected by the exemption have the opportunity to provide feedback.

3. Scope

We were asked to provide specific feedback on the following areas:

- Any specific cases that might demonstrate that an individual has been adversely affected by the use of the exemption;
- If so, the reasons why you believe this to be the case;
- Examples of where you believe the exemption may have been wrongly used;
- Any specific areas you feel that the exemption is not complying with the GDPR?

However, because practitioners are not informed when the exemption is being invoked, it is simply not possible for them to be able to provide feedback of this nature. The review is structured in a way to mean that there will simply be no feedback from practitioners because they cannot answer the questions being put to them.

We believe the review must be changed to ensure there is full independent oversight of the use of the exemption. An independent expert panel must be given access to a randomly selected sample of cases where the exemption has been used to be able to assess the legality and proportionality of its use. The review must be lengthened and publicised on the Home Office website so there is a proper opportunity for individuals to feed into it. It must be made clear who is managing the review. It must be made clear what the Home Office's plan is for responding to the review and what scope there is for significant changes to be made as a result of the review.

At present, because of these issues, we do not believe practitioners and the public more widely will have confidence in any of the conclusions drawn by the review.

Use of the exemption

During the passage of the Data Protection Bill in Parliament, a Home Office minister stated *"the restrictions would only bite where there is a real likelihood of prejudice to immigration controls in disclosing the information concerned"*.[2] She further stated *"paragraph 4 does not give the Home Office carte blanche to invoke the permitted exceptions as a matter of routine"*.[3]

By contrast, the evidence of what has happened in practice suggests the opposite. The exemption does appear to be being invoked as a matter of routine. It was recently disclosed as part of legal

[2] Baroness Williams of Trafford in Data Protection Bill Committee Stage in the House of Lords, 13th November 2017 – Hansard, vol. 785, col.1913.
[3] Ibid.

proceedings that, in the first year of operation, the Home Office relied on the exemption in about 59% of responses to subject access requests.[4]

We sent out several calls for evidence to our members on the use of the exemption in their clients' cases. These emails went to over 3500 individual contacts, the vast majority of whom will make subject access requests on a regular basis on behalf of their clients. We received no feedback at all on the use of the exemption itself. We do not believe this is because practitioners do not have concerns with how the subject access request process is operating; on the contrary, we received a significant amount of feedback on the subject access request process as a whole. Given the statistics as to the use of the exemption, it is simply inconceivable that the exemption is not being used in our members' cases. As a result, the absence of any direct experience of the exemption indicates that practitioners are kept in the dark about when the exemption is being invoked.

The picture is made more complicated by the fact that there remains a huge backlog of subject access requests at the Subject Access Request Unit. This has resulted in most subject access requests being responded to with only a short extract of the applicant's Home Office (usually IT records only). As a result, practitioners cannot work out whether data has been withheld because the exemption has been invoked or whether the data was simply not disclosed because of lack of resources in complying with the request.

Further, ILPA recently visited the Subject Access Request Unit and observed the process by which a subject access request response is produced by a caseworker. We are concerned that caseworkers appear to apply redactions in a manner that does not give sufficient scope to assess whether the legal requirements of the exemption have been met. This is made more severe by the absence of any statutory guidance to ensure there are adequate safeguards behind the use of the exemption. Statutory guidance on the exemption would go some way to assist in providing accountability of those invoking the exemption and allows those making subject access requests to understand the policy behind its use. Without this guidance, we believe caseworkers may apply the exemption in a disproportionate way without the data subject knowing.

This lack of transparency presents a huge barrier to access to justice as individuals cannot assess the legality and proportionality of the use of the exemption if they are not aware it has been used. Applicants must be told exactly what has been redacted from a subject access request response in reliance on this exemption.

[4] *R (Open Rights Group & Anor) v Secretary of State for the Home Department & Anor* [2019] EWHC 2562 (Admin) at [22].