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Mr Francis Davey
request-14702-470adc1c@whatdotheyknow.com
By e-mail only

2 February 2010

Dear Mr Davey

Freedom of Information request (our ref. 12754): Internal Review

Following Ian Lister's e-mail of 7 January 2010, I am writing to give you an update on the progress of the internal review. I understand Mr Lister wrote that he aimed to supply you with a response by 29 January 2010.

Please accept my apologies however I require more time to consider your internal review request and my investigation is still ongoing.

I aim to complete this investigation by 26 February 2010. Please accept my apologies again for the delay in response to your request for internal review.

Yours sincerely

Lawrence CW Lui
Information Access Team

Internal review of response to request under the Freedom of Information (Fol) Act 2000 by Mr Francis Davey (reference 12754)

Responding Unit: Information Access Team

Chronology

Original Fol request: 13 July 2009
Acknowledgement: 26 August 2009
Direct Communications Unit response: 18 September 2009
Request for internal review: 24 September 2009

Subject of request

1. Mr Davey requested the release of the list of dates and addressees of notices served under Regulation 10 of the Data Retention (EC Directive) Regulations since 6 April 2009.

The response by the Direct Communications Unit

2. The Direct Communications Unit (DCU) acknowledged that the Home Office held the information Mr Davy requested. The DCU, however, informed Mr Davey that the information will not be released and relied on the exemptions under sections 31 (law enforcement) and 43 (commercial interest) of the Freedom of Information Act (Fol).

Mr Davey's request for an internal review

3. Mr Davey requested the decision to be internally reviewed by e-mail where he wrote:
 - i) On the question of s.31 (law enforcement), the information that I have requested would not reveal the nature of any particular criminal investigation or law enforcement activity. Nor do I seek to know the details of the data retention carried out by public communications providers - their legal obligations are already a matter of public record.

The only way in which s.31 could be engaged is if the secretary of state had failed in his duty to send notices under s.10 to public communications providers who could then be targeted by criminals in the knowledge that there would be no general data retention.

That seems to me unlikely, unless there were a serious failure to comply by the secretary of state. If that were the case, there would be a very strong public interest in his failure being made known.

I suggest that the public interest outweighs any prejudice to s.31 interests.

If you do not accept this argument, I invite you to explain clearly how you think s.31 interests might be engaged and the nature of the balancing exercise you have carried out. Unless I understand the reasons for your decision I will have to refer the matter to the Information Commissioner's Office.

ii) Disclosing redacted information

A second ground of review is that you have not disclosed to me redacted information. I would find it useful to know the dates on which notices were sent, even without knowing the names of the addressees. It is inconceivable that knowledge as to when notices were sent (but not to whom) could prejudice law enforcement or any commercial interests.

Such redaction would only require the removal of a column from a spreadsheet which should be technically straightforward.

Failing that, disclosure of the *number* of notices sent to date would be of some use and would be a further alternative if you are not prepared to give me the redacted information.

iii) Commercial interests (s.41)

I suggest that it is very unlikely that the commercial interests of any public communications provider could be prejudiced in any materially significant way. All public communications providers may be required to carry out data retention, many already do even without having been notified by the secretary of state. There is unlikely to be a significant move of customers to unnotified providers given that notification may occur at any time.

Procedural issues

4. Under Section 10(1) of the FoI Act, the DCU should have responded to Mr Davey's within twenty days of receipt Mr Davey's FoI request.

5. Mr Davey made his FoI request on the 13 of July 2009 and sent a chaser letter on 13 August 2009 after he did not receive a response from the Home Office.
6. The DCU wrote to Mr Davey on 26 August 2009 and explain that there will be a delay in responding to his request and set a target date of 16 September 2009 for the DCU response.
7. The DCU response to Mr Davey's FoI request was sent on 18 September 2009 with an apology that the deadline set on 16 September 2009 was not met.
8. The internal review has found that DCU did not respond to Mr Davey within twenty days of receipt of Mr Davey's request, thus there has been a procedural breach.
9. Under Section 17 (b) and (c) of the FoI Act, UKBA has to cite the exemptions they relied on and state why the exemption applies to Mr Davey's request.
10. UKBA wrote that they relied on the exemption allowed under Sections 31 and 43 of the FoI Act in their decision to refuse to release the information to Mr Davey.
11. UKBA did not explain how the exemption applied to Mr Davey's request.
12. The internal review has found that although s17(b) was met, S17(c) was not.

Consideration of the response

13. As part of the internal review the correspondence exchange between Mr Davey and the DCU was reviewed.
14. As mentioned in paragraphs 9 to 12 of this internal review, the DCU response did not comply with s17(c) of the FoI Act.
15. Considering Mr Davey's internal review request, paragraphs 3 (i), (ii) and (iii), and the DCU's obligations under s17(c), DCU was asked to explain how the exemptions applied to Mr Davey's request.
16. The DCU explained:
 - i) I would like to provide you with additional clarity about the implementation in the United Kingdom of Directive 2006/24/EC concerning "the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public

communications networks”; commonly known as the EU Communications Data Retention Directive or EUDRD for short. The lead Government department for the EUDRD is the Home Office.

- ii) As you will be aware, the EUDRD became European Law in March 2006. This required all EU Member States to transpose the Directive through legislation within three years. The UK, in common with many other Member States, implemented the legislation in two stages. The first set of Regulations “2007 No. 2199 ELECTRONIC COMMUNICATIONS” related to the retention of fixed and mobile communications and was implemented by UK Government in September 2007. The final Regulations “2009 No. 85 Electronic Communications The Data Retention (EC Directive) Regulations 2009” implemented the directive in relation to internet or “IP” communications data, and subsumed. The 2009 regulations became law in April 2009.
- iii) As concluded in the consultation document preceding the final Regulations “Government Response to the Public Consultation on the Transposition of Directive 2006/24/EC,” the Home Office is concerned to ensure recital 13 of the EUDRD was fully included in plans for implementing the EUDRD into the UK. Recital 13 directs each Member State to implement communications data retention in a way that avoids duplication of stored data. There are a number of good reasons for this.
 - a) Firstly, avoiding the storage of communications data by one company already held by another company, helps to minimise the number of people who can access the data to no more than necessary to implement the Directive.
 - b) Secondly, minimising the number of companies falling under the EUDRD Regulations minimises the impact on businesses. The Government takes seriously the impact of all Regulations and information requirements on the private sector, seeks, where possible, to minimise such impact, and;
 - c) Thirdly, the costs of communications data retention are more than justified by the benefits to society through a better ability to prevent, investigate and prosecute those involved in criminality and to safeguard public safety. However, the Government is keen to avoid unnecessary expenditure.

- iv) This approach does take some coordination and following a suggestion from the communications industry the Home Office introduced a Notice system. The aim of the Notice system was to provide clarity to specific companies that they had a responsibility for retaining communications data and what specifically that retained data should be. This Notice system means that a company is only obligated to retain data under the EUDRD if they are presented with a Notice from the Home Office to that effect.
- v) Following individual discussions with a number of companies, the first Notices have been issued. Those discussions are necessary to help ensure that any difficulties faced by the communications companies in complying with the Regulations are communicated to the Home Office. It is also important to ensure the regulations are effective in meeting public safety requirements. In the event that two or more companies are involved in the provision of a service those discussions also establish the approach to be taken to comply with the regulations.
- vi) In some cases Notices will be issued to companies which are not the main provider of the communications service; this might be done for a variety of reasons. Therefore, it does not necessarily follow, that the absence of Notice for a particular company means that company's data is not being retained.
- vii) After consultation with national security and law enforcement agencies, we have determined that releasing the requested information would be damaging to their current capabilities to acquire communications data to protect the public. It would make it more likely that a subject of investigation could determine which service providers are currently inside the scope of the retention regime and which are not. This might change the behaviour of significant number of individuals, who are subject of investigations, in a way that will make it more difficult for the national security and law enforcement agencies to acquire communications data when necessary and proportionate in accordance with law.
- viii) Moreover releasing the information would explicitly identify those service providers currently subject to notices to retain communications data. During the development of the legislation we received representations from service providers arguing that they should not be publicly identified because of a risk that customers would transfer their business to services (or companies) not named on a retention Notice even though data generated by companies not named in that way would still be retain by virtue of arrangements in place in accordance with Recital 13. We

consider that releasing this information could have a damaging commercial effect.

Advice and assistance

17.No advice or assistance was given to Mr Davey in the DCU response and this was not applicable in this case.

Conclusion

18.DCU fully complied with S17(b) in their response to Mr Davey, they have however did not comply with S17(c) in their response in the first instance.

19.DCU cited the exemptions they relied on in their response to Mr Davey's request; however DCU did not explain how the exemptions applied in this case.

20.The DCU addressed this by their answer in paragraph 16 of this internal review.

21.The answered supplied by the DCU satisfied the obligation the DCU has to fulfill under S17(c) of the FoI Act and it also answers the questions raised by Mr Davey in his internal request.

22.Mr Davey's complaint is therefore partially upheld.

Information Access Team
Home Office
29 January 2010