



Home Office

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

17 March 2010

Dear Mr Davey

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

Thank you for your e-mail of 24 September 2009, in which you asked for an internal review of our response to your Freedom of Information (Fol) where you requested a list of dates and addressees of notices served under Regulation 10 of the Data Retention (EC Directive) Regulations since 6 April 2009.

I have now completed the review. I have examined all the relevant papers and have consulted the policy unit which provided the original response. I have considered whether the correct procedures were followed and assessed the reasons why information was withheld from you. I confirm that I was not involved in the initial handling of your request.

My findings are set out in the attached report. My conclusion is that although more efforts should have been made to explain how each of the exemptions applied, the exemptions the Direct Communications Unit (DCU) cited in their response were correct.

This completes the internal review process by the Home Office. If you remain dissatisfied with the response to your Fol request, you have the right of complaint to the Information Commissioner at the following address:

The Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lawrence CW Lui', with a long horizontal flourish extending to the right.

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 Davey requested. DCU, however, informed Mr Davey that the information would 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 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.43)

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 of his request.
5. Mr Davey made his FoI request on 13 July 2009 and wrote to the Home Office on 13 August 2009 when he did not receive a response.

6. DCU wrote to Mr Davey on 26 August 2009 to explain that there would be a delay in responding to his request and set a target date of 16 September 2009 by which to send a 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. DCU did not respond to Mr Davey within twenty days of receipt of Mr Davey's request and were therefore in breach of section 10(1).
8. Under Section 17 (b) and (c) of the FoI Act, DCU is required to cite the exemptions they relied on and state why the exemption applies to Mr Davey's request.
9. DCU explained that they relied on the exemptions allowed under Sections 31 and 43 of the FoI Act, to refuse to release the information to Mr Davey. DCU did not explain how the exemption applied to Mr Davey's request.
10. The internal review has found that although s17(b) was met, S17(c) was not.

Consideration of the response

11. As part of the internal review the correspondence exchange between Mr Davey and DCU was reviewed.
12. DCU provided me with background information about the Data Retention (EC Directive) Regulations. This can be found at **Annex 1** at the back of this internal review.

Section 31(1)(a)

13. In response to points raised by Mr Davey in paragraph 3.i. DCU explained that section 31(1)(a) was engaged for the following reasons:

Public Interest considerations in favour of disclosure

- i. *It would be in the public interest to disclose which Internet Service Providers (ISP) were served notices under the Data Retention (EC Directive) Regulation as this would promote public transparency and accountability of how the Home Office promotes measures to safeguard national security, public protection and introduces measures to reduce crime.*

Public Interest considerations in favour of non-disclosure

- ii. *DCU can confirm the first notices were issued on 06 April 2009, however beyond this the DCU is unable to comment. 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.

14. In response to points raised by Mr Davey in paragraph 3 (ii), DCU confirmed that section 31(1)(a) was engaged in relation to 'redacted' information for the following reasons;

- i. *Disclosing the information even in the suggested redacted format will also reveal information that would harm Law Enforcement Capability. By disclosing the dates on which additional Notices have been issued it would be possible to determine whether new entrants into the UK communications market were covered under the scope of the retention regulations. Similarly disclosure of the number of notices sent could identify how much of the communications market had been covered to date.*

Section 43(2)

15. In response to points raised by Mr Davey in paragraph 3 (iii) DCU explained that section 43(2) was engaged for the following reasons;

- i. *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 publically 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

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

Conclusion

17. In the initial DCU response to Mr Davey FoI request, DCU cited the exemptions they relied on but did not explain how the exemptions applied to this case. This has been addressed in the internal review.
18. DCU specified which section and subsection of the FoI Act exemptions they relied on 31(1)(a) and 43(2) respectively.
19. The issues raised by Mr Davey in his Internal Review request were addressed by DCU and after careful consideration, I have found that the reasons and the exemptions that DCU relied on were correctly applied. I can also confirm that it is not possible to release the information in a redacted form.
20. For these reasons, the information that Mr Davey requested is therefore not to be released and his complaint is not upheld.

Information Access Team
Home Office
17 March 2010

Annex 1

DCU background information of the Data Retention (EC Directive) Regulations.

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.

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.

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.

- 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.
- 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;
- 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.

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.

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.

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.

Direct Communication Unit