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Date: 25 October 2017

By e-mail

DfE reply to letter dated 1 August 2017 from Jen Persson of DefendDigitalMe regarding statutory instrument - (SI) 808/2016

Dear Members of the Secondary Legislation Scrutiny Committee,

1. Thank you for providing the Department for Education (DfE) with the opportunity to respond to the letter dated 1 August 2017 from Jen Persson of DefendDigitalMe regarding statutory instrument (SI) 808/2016 - The Education (Pupil Information) (England) (Miscellaneous Amendments) 2016¹.
2. The department strongly rejects accusations that we have misled parliament, and the public, about the purposes behind this SI. As we explain in detail below, the DfE's intent in collecting this data was always for the purposes of educational research to ensure that all children, wherever they are from, have the best possible education.
3. Although the original Memorandum of Understanding (MoU) between the DfE and Home Office did contain an option for DfE to share nationality data with Home Office, this agreement was put in place in 2015 (before we started collecting the data covered by this SI). During the process of finalising the requirements for the collection of this new data, both departments decided it would not be appropriate for DfE to share nationality data obtained via the school census. An agreement was reached in June 2016 (prior to the SI being laid before parliament a month later) and the MoU was formally updated a few months later. Nationality, country of birth and proficiency in English data has never been shared with the Home Office.

What does SI 808/2016 permit?

4. Statutory Instrument (SI) 808/2016 facilitated the collection of pupil nationality, country of birth and proficiency in English data via the school census. This SI also required these three data items to be transferred between schools via the common transfer file (CTF) process when pupils move between settings.

What was the policy reasoning for SI 808/2016?

5. The policy driver for the collection of the new data items permitted under this SI is that the information will support the DfE, and individual pupils, by helping us to understand a range of factors, allowing us to better plan to meet needs within the school system. For example, what extra support we may need to provide to schools with high numbers of children who do not speak or understand English sufficiently to access the curriculum, whether particular groups of pupils are making good progress with their education, or where there is evidence of good practice with children of different nationalities that could

¹ <http://www.legislation.gov.uk/uksi/2016/808/contents/made>

be shared. Understanding trends in migration and the associated needs in the school system helps us to ensure that all children, wherever they are from, have the best possible education.

6. The DfE has been clear that the reason for the collection of data permitted via SI 808/2016 has always been as outlined above. This has been confirmed by DfE officials and ministers via a variety of channels before, during and after the laying of these regulations in July 2016. This includes:

- discussions with the Star Chamber Scrutiny Board (SCSB) during their review of the proposal in October 2015 and November 2015²;
- as part of the explanatory memorandum³ which accompanied this SI in July 2016;
- each of the statements referred to on page 2 and 3 of the letter to the committee dated 1 August 2017 to which this response refers. This includes statements to both houses of parliament;
- the DfE in the media blog⁴ which was published in October 2016 to correct some media misconceptions about the collection of data enabled by this SI;
- following the first collection of these new data items in autumn 2016, the department wrote out to all head teachers on 10 January 2017 in advance of the second collection in spring 2017. This communication confirmed that the new data was being used for the purposes outlined above and asked for support from schools in improving local processes for the collection of pupil level data from parents.

7. Despite misleading suggestions to the contrary, the Home Office were not involved in the DfE proposal to collect nationality, country of birth and proficiency in English via the school census. Details of all discussions with third parties (including other government departments) regarding these changes to the school census were provided to DefendDigitalMe via a freedom of information response in August 2016⁵. As such, claims that changes to the school census permitted by this SI were for any purpose not related to education are unfounded.

Will the data collected under SI 808/2016 be shared with third parties (including other government departments)?

8. The DfE have consistently been clear that the return of nationality and country of birth data is completely optional and parents are under no obligation to provide this data if they do not want to. The new data items on nationality, country of birth, and English proficiency which were introduced as a result of this SI will not be passed to the Home Office, or anyone else. They are solely for DfE to use internally for educational research.

9. DfE officials and ministers have repeatedly publicly confirmed that data on nationality, country of birth and proficiency in English will not be shared with third parties (including other government departments). This has been confirmed in statements to parliament, in the media and also directly in communications with Jen Persson from DefendDigitalMe who has raised this issue with the committee. Examples of statements covering the period from June 2016 (prior to the SI being laid before parliament) through to October 2017, illustrating that the Departments position on the sharing of this data has not changed, are referenced below:

- written answer on 24 June 2016 from DfE official to Jen Persson, DefendDigitalMe: *“These data items will not be passed to the Home Office. They are solely for internal DfE use for analysis, statistics and research.”*
- Response from DfE to this committee in September 2016⁶: *“The information is solely for internal DfE use for analysis, statistics and research. It is important we assess the quality of these data and*

² http://defenddigitalme.com/wp-content/uploads/2017/10/Star-Chamber-Minutes-Extracts-from-Jan-2015-to-July-2016_Redacted.pdf

³ http://www.legislation.gov.uk/uksi/2016/808/pdfs/uksiem_20160808_en.pdf

⁴ <https://dfemedia.blog.gov.uk/2016/10/31/information-about-the-school-census-and-the-national-pupil-database/>

⁵ https://www.whatdotheyknow.com/request/pupil_data_decision_making_on_ad#incoming-860604

⁶ http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/DfE-Response-SI2016_808.pdf

understand what it is telling us. Our decisions are reviewed periodically but at this point in time there are no plans to release these data items externally (including to other government departments)."

- Statement from Lord Nash in House of Lords debate on 31 October 2016⁷: *"I repeat loud and clear that the data on nationality, country of birth and language proficiency are not and will not be shared with the Home Office or police"*
- Letter from DfE Head of Profession for statistics to the National Statistician, UK Statistics Authority on 28 November 2016⁸: *"I would like to assure you, the public and users that these new data items are solely for the use of the Department for Education for research, statistics and analysis and are not shared beyond this."*
- Written answer to House of Lords parliamentary question HL4566⁹ answered on 7 February 2017: *"These new data items on nationality, country of birth, and English proficiency will not be passed to the Home Office, or anyone else. They are solely for the Department for Education to use for research."*
- Written answer to House of Commons parliamentary question PQ106877¹⁰ answered on 18 October 2017: *"In addition to the provisions within the Education Act 1997, in line with the Data Protection Act 1998, where the police or Home Office have evidence that a child may be at risk or evidence of criminal activity, limited data including a pupil's address and school details may be requested from the NPD. This data does not include nationality or country of birth information."*

10. The majority of other data collected via the school census is held by the DfE in the National Pupil Database (NPD). Under the Education Act, organisations may request access to some of the school census data held in the NPD. This does not include the nationality, country of birth and proficiency in English data collected under this SI which, as mentioned above, is only available for internal use by the DfE. One of the key criteria associated with accessing data from the NPD is organisations demonstrating how this will improve pupil's education through evidence or research. We take privacy extremely seriously and access to sensitive data is strictly controlled and governed by legal experts and senior civil servants¹¹. Anyone requesting data from the NPD must comply with strict confidentiality and security rules and must be registered with the Information Commissioner's Office for their request to be approved.

11. In addition to the provisions within the Education Act 1997, in line with the Data Protection Act 1998, where the police or Home Office have evidence that a child may be at risk or evidence of criminal activity, limited data including a pupil's address and school details may be requested from the NPD. It is right that we share this data if it helps to keep a child safe from harm or to disrupt a crime. The Memorandum of Understanding (MoU) between the DfE and the Home Office sets out how this process works and the data which is shared. As stated previously this does not, and will not, include the new data on nationality, country of birth and proficiency in English.

12. It is true that the original MoU between DfE and Home Office, which was put in place in 2015 (before we started collecting the data covered by this SI), did contain an option allowing the sharing of nationality data with Home Office if collected by DfE. During the process of finalising the requirements for the collection of this new data, both departments decided it would not be appropriate for DfE to share nationality data obtained via the school census and an agreement was reached in June 2016 (before the SI was laid a month later) which confirmed that the new data to be collected under this SI would not be shared. This was formally reflected in a revised MoU in October 2016¹² which made it absolutely clear that these data items would not be shared with the Home Office. Whilst the decision not to share had been made prior to the SI being laid in July 2016, it was not deemed necessary for the MoU to be updated at that point as data from the first collection of this new information in autumn 2016 would not be available until early 2017. Consequently the communications between June and October 2016 referred to in this

⁷ <https://goo.gl/zr1xKL>

⁸ <https://www.statisticsauthority.gov.uk/wp-content/uploads/2016/11/Letter-from-Iain-Bell-to-Ed-Humpherson-281116-1.pdf>

⁹ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-01-11/HL4566/>

¹⁰ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-10/106877/>

¹¹ See Data Management Advisory Panel (DMAP) terms of reference: <https://www.gov.uk/government/publications/national-pupil-database-requests-received>

¹² <https://www.whatdotheyknow.com/request/377285/response/941438/attach/5/20161016%20DfE%20HO%20MoU%20redacted.pdf>

letter where the Department repeatedly confirmed that the data would not be shared with the Home Office or any other government departments accurately reflects the DfE's intentions for, and subsequent uses of, this data. As such, any historical data sharing arrangements between DfE and Home Office are irrelevant to the SI to which this letter refers.

13. The DfE is wholly transparent about the uses we make of the data and publish suggested privacy notices¹³ to help schools and local authorities fulfil their responsibilities of informing pupils and parents about data collection and usage. Additionally, we also publish a list of third party uses of the National Pupil Database¹⁴ that details which organisations have received NPD data, along with an outline of what the data is being used for.

What were the DfE's scrutiny group told about the reasons for the collection of the data enabled by this SI?

14. The DfE's discussions with the Star Chamber Scrutiny Board (SCSB) during their review of the proposal in November 2015¹⁵ confirm that the reasoning provided for the collection of this data is consistent with that outlined earlier in this letter.

15. The terms of reference of the SCSB are clear in that it is this group's responsibility to represent the sector and ensure that all departmental data collection proposals are necessary, provide value for money and are designed to add as small a burden to the frontline as possible. Decisions on whether the DfE releases personal data held in the NPD to third parties (including other government departments) are subject to a separately governed robust approval process¹⁶. For this reason there was no need for DfE to discuss with SCSB the sharing of data with Home Office as: a.) none of the data being considered by the SCSB as part of the proposal supporting this SI has been, or will be, shared with any third party (including other government departments); and b.) even if the data was to be shared externally, those decisions are outside the SCSB terms of reference.

16. Hopefully the above information provides you with the necessary assurances regarding the department's use of the data enabled by SI 808/2016. However, should you have any further questions or queries please do not hesitate to get back in touch.

Yours faithfully

Gary Connell

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¹³ <https://www.gov.uk/government/publications/data-protection-and-privacy-privacy-notice>

¹⁴ <https://www.gov.uk/government/publications/national-pupil-database-requests-received>

¹⁵ http://defenddigitalme.com/wp-content/uploads/2017/10/Star-Chamber-Minutes-Extracts-from-Jan-2015-to-July-2016_Redacted.pdf

¹⁶ See Data Management Advisory Panel (DMAP) terms of reference: <https://www.gov.uk/government/publications/national-pupil-database-requests-received>