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November/08 **IMMIGRATION** **DIRECTORATES'** **INSTRUCTIONS****CHAPTER 24**
SECTION 11**SUBJECT ACCESS REQUESTS****1. INTRODUCTION**

Individuals have a right of access to personal data held on them by organisations processing personal data such as Government departments under section 7 of the Data Protection Act 1998 (DPA). The right of access is subject to certain limited exemptions set out in the DPA. A request by an individual for access to his personal data is known as a “**subject access request**” (SAR).

The right of subject access only applies to data (information), which amounts to “personal data” within the meaning of the DPA. The meaning of “personal data” is considered at paragraph 6 of section 1 of this chapter. Essentially, data relating to a living individual who can be identified from that data and other information will be “personal data” and therefore covered by the Act (and the subject access provisions) if:

- The data is processed on our **computer systems** (including personal and shared drives, email and any UKBA databases); or
- The information is manually recorded¹ and this particularly means that it is contained in **any paper record** (including paper files, note books, work diaries).

Any request by individuals to access personal data held about them must be considered under the DPA. Routine enquiries from the applicant or their representative (including MPs) about the state of play of a case or for copies of correspondence should be dealt with in a straightforward fashion by the casework groups and Immigration Service officers. Staff should remember that we are under a legal obligation to respond to such requests. The UK Border Agency will treat as a subject access request all non routine requests, such as for:

- (a) all personal data on file,
- (b) a complete Immigration Officer’s report,
- (c) minute sheets,
- (d) a copy of a landing card, etc

2. HOW SUBJECT ACCESS REQUESTS ARE MADE

Individuals must submit subject access requests **in writing** and must also pay a **fee of £10**. There is no obligation to process any request for subject access until these two requirements have been met. Individuals seeking information about their immigration records should make their request by writing to:

The Data Protection Unit
Lunar House
40 Wellesley Rd
Croydon

¹ Some manually recorded data is subject to special rules on subject access requests – see point 9.4 below

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They should enclose a cheque or postal order for £10 made payable to “The Accounting Officer – Home Office”.

Where an individual has made a SAR but has specifically requested personal information on themselves making reference to FOIA, the query should be forwarded on immediately by fax (on 0208 760 3394/3541) to the DPU, who will respond appropriately to the applicant.

Occasionally, individuals may write directly to the Departmental Records Officer (DRO) at Queen Anne’s Gate if they wish to see both immigration and other Home Office records. In these cases, the DRO will forward the request directly to the Subject Access Bureau and will co-ordinate a final reply on behalf of the Home Office as a whole.

Individuals do not need to specify any particular reason why they wish to see their personal records. Furthermore, there are no nationality or residence requirements which people must meet before making a request.

Individuals do not need to complete an application form and their request does not need to mention the DPA (or FOIA) in their request. If it is not possible to satisfactorily identify the individual from the details supplied, a letter should be sent to the individual or their representative asking for additional information to enable their identity to be confirmed, this might include date of birth, nationality and any file reference numbers. It is open to individuals to make a request for individual pieces of information (such as details of a particular report or interview) or for all the information held on them. If we (reasonably) require further information to locate the information which the applicant requires then we must write to the applicant informing them of this. In both these cases, if no further information is forthcoming (either proof of identity, further information to enable location of their personal data or both) we need not proceed with the request. [FOIA has amended the DPA in a number of ways – see part 9 below].

UK Border Agency staff should ensure that it is not inadvertently disclosing confidential information to third parties. Particular care should be taken to verify the identity of the requestor in cases involving asylum seeker or any other case where inadvertent disclosure to a third party may cause loss, damage or harm.

3. SUBJECT ACCESS REQUESTS MADE ON BEHALF OF PARTICULAR INDIVIDUALS BY SOLICITORS OR OTHER REPRESENTATIVES

It is vital to ensure that information about individuals is not disclosed to people who have not been authorised to act on behalf of a particular individual. So, any request made by a person purporting to act on behalf of someone **must** be accompanied by a signed authorisation by the individual concerned. The representatives should be advised that this is to make sure unlawful disclosure is not made. There are separate provisions in place for where an MP makes a subject access request on behalf of an applicant [*see sections 1 & 3 of this IDI*].

Requests to access personal information about third parties (where the requestor is not the subject of the personal information being requested), made without the consent of the data subject, are not subject access requests. These requests should be dealt with under FOIA, and in particular section 40 of that Act [*see section 12 for more guidance on handling such requests*].

Where a request for information is received and it requests a mixture of personal and non-personal information and falls to be dealt with under FOIA and as a subject access request, a copy of the request should be faxed immediately to Data Protection Unit (DPU). DPU will respond to the subject access part of the request. Staff should deal with the non-personal part of the request in the appropriate Directorate [*see chapter 25 for further guidance on handling FOI requests*].

4. PROCESSING OF SUBJECT ACCESS REQUESTS

Upon making a request and paying the fee to the Home Office, an individual is entitled to:

- (a) be told whether we process (i.e. have) that individual's personal data.
- (b) be provided with a description of the personal data, the purposes for which that personal data are processed, and the recipients or classes of recipients to whom those data are or may be disclosed.
- (c) have communicated in an intelligible form:
 - (i) the information that constitutes those personal data.
 - (ii) any information available to us about the source of those data.
- (d) be informed of the logic involved in any automated decision taking (there is no automated decision making in the UK Border Agency therefore this is unlikely to be an issue).

Although most individuals who have lodged an application of some kind with the UK Border Agency or have been apprehended by the Immigration Service will already be aware that we hold information on them, this should still be confirmed to them.

The information should generally be provided by supplying a copy in permanent form, i.e. hard copy, unless this is not possible or would involve disproportionate effort, or the data subject agrees otherwise. If any of the information is not intelligible without explanation, the data subject should be given an explanation of that information. For example if the data we hold includes various acronyms, it may be necessary on occasions to provide a guide to the abbreviations. A glossary of common abbreviations is held in the DPU.

5. HOW WE SHOULD PROVIDE INFORMATION

Individuals are entitled to **information** that we hold on them, they are not entitled to any particular documents or to the file itself. This means that we do not necessarily have to provide photocopies of all the contents of a manual file or printouts of all computer records. An assessment needs to be made of the most efficient way of supplying information. In practice it should not be necessary to routinely supply copies of information already held by the individual/their representatives, for example correspondence between the individual/representative and the UK Border Agency, information from appeals bundles etc. However, where such information is specifically requested by an individual/representative we will need to provide it.

5.1. Photocopies

It will normally be quicker to simply photocopy the relevant files and supply these copies to the individual who has made the request. In most cases this will be the method used. It has the advantage of ensuring that no information is missed and avoids the need for producing a written summary which is both time-consuming and more likely to lead to relevant information being withheld from the requestor even when they have a right to see it.

But it is essential that the contents be scrutinised to make sure that information is not being supplied which the department does not wish to disclose and to which one of the exemptions should properly apply (see part 7 below). In case of doubt, the matter should be referred to a senior caseworker.

Removing the names of individuals from information supplied to the data subject. Individuals' names can be removed by placing a strip of blank paper over the name before photocopying.

The names of staff contained in minute sheets, interview reports, memos should not normally be disclosed. The names of officers do not in themselves have any bearing on the decisions made in individual cases and there should be no expectation on the part of the individual making the request that these names will be divulged. The only time where the name need not be blanked out is where copies of letters, which contain the name of an official (e.g. a refusal notice), are already in the possession of the data subject.

5.2. Summaries

Producing a written summary will be more appropriate where the sequence of events in a file would not be easily understood by the requestor even with an explanation of abbreviations or other matters. It may also usefully be used where a file contains minutes or interview reports which refer to third parties or contain other information which we would not wish to disclose and to which an exemption applies (see part 7 below). Care should be taken to include every piece of information which constitutes personal data – including, for example, dates on letters relating to decisions about the individual or the fact that the individual's details are repeated in a letter sent from one part of the Home Office to another.

There is no requirement to comply with a request where we have already complied with an identical or similar request by the same individual, unless a reasonable time has passed between compliance with the previous request and the making of the current request. When considering what amounts to a reasonable interval, the nature of the data, the purpose for which the data are processed and the frequency with which those data are altered should be considered. Where the caseworker believes that a reasonable time has not passed since complying with a previous request the matter should be referred to a senior caseworker.

5.3. UKBA's Policy

On receipt of a subject access request, you should ensure that all records in which the individual's personal data are or may be contained are checked, including:

- any paper records (case files, correspondence)

- all computer records (including personal and shared drives and email)
- microfilm records.
- CCTV and audio recordings

As we provide the subject making the request with copies of **all** correspondence present on his/her file if it contains an element of personal data, there is the potential for non-personal data to be disclosed. Technically, this goes beyond the requirements of Section 7 of the Data Protection Act 1998. Given the amount of documentation contained in the average UK Border Agency applicant's file, however, this is the only practical solution if we are to comply with the 40-day deadline laid down by the DPA. Any document which is not correspondence between the applicant/representative and the UK Border Agency or which has not been before the appellate authorities should be checked against the exemptions in the DPA and where necessary omitted altogether or redacted or dealt with in summary form.

6. TIME PERIOD FOR ANSWERING REQUESTS

Subject access requests must be answered "promptly" and in any event within 40 calendar days of the date on which the UK Border Agency has received the request in writing, the fee, and any further information which has been sought to enable identification of the person making the request and location of the information sought. The 40-day period is a maximum target and we should therefore aim to respond sooner if possible.

7. WHEN INFORMATION SHOULD NOT BE DISCLOSED

In some cases it may be considered that it would not be desirable or appropriate to disclose certain information when responding to a subject access request. If the information falls within one of the subject access exemptions set out in the DPA there will be no obligation under the DPA to disclose it, and the information may be withheld.

7.1. National Security

Section 28 of the Data Protection Act provides an exemption from the subject access provisions if exemption from those provisions "is required for the purposes of safeguarding national security".

If a Minister certifies that exemption from the subject access provisions is required for this purpose in relation to particular personal data, the certificate will be conclusive evidence of this fact, subject to an appeal to the Information Tribunal (National Security Appeals Panel). The Tribunal may quash such a certificate if it finds that the Minister did not have reasonable grounds for issuing it.



7.2. Crime

Section 29 of the Data Protection Act provides an exemption from the subject access provisions for personal data which are processed for the purposes of:

- the prevention or detection of crime, or
- the apprehension or prosecution of offenders

in any case to the extent that the application of those provisions would be likely to prejudice any of these matters.

“Offenders” in this context would include persons who have committed offences under the Immigration Acts. The most likely use of these exemptions will be in connection with Immigration Service reports and investigations. Particular care should be taken not to disclose information that will prejudice existing or future operations by revealing intelligence sources. If for example such an investigation has been carried out in the past, particular care should be taken not to disclose information which may provide details of immigration procedures that through disclosure would be compromised for future use. Staff should also take care not to disclose the sources of intelligence or details about other individuals involved in such a case. If in doubt about disclosing such information staff should consult with the investigating unit/department.

7.3. Legal professional privilege

There is an exemption from the subject access provisions if the personal data consist of information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings. LPP can apply to the request for legal advice as well as the advice. UK Border Agency files may contain advice obtained from various legal advisors e.g. in house lawyers (HOLAB) or lawyers employed by the Home Office (Treasury Solicitors or Counsel) or information in relation to litigation, which is covered by LPP.

This exemption will only apply if the communications between lawyer and client are confidential i.e. the information is not in the public domain (generally both client and lawyer expect that communications between them will remain confidential). It is unlikely the communications will have been put into the public domain and you should never assume that this is the case.

LPP is a complex exemption and you should always take further advice if data which may be disclosed under a subject access request:

- is between a lawyer and his client (e.g. between UKBA, and HOLAB, Treasury Solicitors or Counsel acting for UKBA); or
- relates to litigation and is about the conduct of the litigation by the Home Office; or
- concerns the preparation of evidence by the Home Office for use in litigation (for example communications about witness statements or drafts of statements).

It is important to note that if LPP can be applied to information then the exemption will apply as long as that information is in existence. Information subject to LPP will not become disclosable simply because litigation is completed or the advice is very old. As with all DPA exemptions, it may be possible to release parts of a document while the rest of it is covered by LPP. [More detailed LPP guidance can be found at **Annex A** to this section and at <http://www.foi.gov.uk/guidance/exguide/sec42/index.htm>]

Legal advice should never be disclosed without consultation with the IAPT or HOLAB. If it is clear that from the UK Border Agency'S records that there is litigation pending DPU staff must always inform the (UKBA) litigation team of the request prior to disclosure. There are special procedures in place where Treasury Solicitors are involved in a case, DPU staff should consult their line manager for details.

7.4. Third parties

A potential difficulty arises where compliance with a subject access request would lead to the disclosure of information relating to another individual who can be identified from that information. There are only two circumstances where we are obliged to comply with the request by revealing such information:

- (a) Where the other individual has consented to the disclosure of the information; or
- (b) Where it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

In deciding whether (b) applies, the following factors should be considered:

- Any duty of confidentiality owed to the other individual
- Any steps taken by UKBA with a view to seeking the consent of the other individual
- Whether the other individual is capable of giving consent
- Any express refusal of consent by the other individual

Each case, however, will need to be considered on its own merits and it may be necessary to refer the matter to a senior caseworker.

It should be noted that this does not excuse us from communicating as much of the information sought by the subject access request as can be communicated without disclosing the identity of the other individual, for example by omitting their name or other identifying particulars.

There are a number of cases where some general principles can be followed:

Where allegations have been received from estranged spouses/former civil partners or other third parties, the guiding principle will be that the allegations will not be disclosed to the individual making the subject access request **provided** we are satisfied that disclosure would either in itself or in conjunction with any other information lead to the data subject identifying the person making the allegation.

Immigration officer reports may refer to third parties that are the subject of separate investigations. We would normally assume that the duty of confidentiality applied to such individuals and that disclosure would not be lawful.

MPs are no longer considered to be “third parties” and therefore there is no need to redact their details from any letters on an applicant’s file. The exception to this will

be where an MP has written to the UK Border Agency on behalf of another third party e.g. an estranged spouse.

7.5. **Information from other Government Departments**

There will be instances when staff come across information on a file which relates to the data subject but is from another Government Department (e.g. DWP). That information may relate to an investigation undertaken by the other Department and disclosure of that data, in response to a subject access request, could prejudice that investigation. Staff should not release this information to the data subject until receipt of confirmation from the relevant Department that it is ok to do so. There are procedures in place for contacting other Departments, DPU staff should speak to a line manager if in doubt.

7.6. **Responding to requests where one of the DPA exemptions applies**

There is no requirement to inform someone that we are withholding information in reliance on one of the exemptions. When responding to a request, our reply should merely state that we are satisfied that we have complied with our obligations under the DPA.

Dealing with sensitive or high-profile cases

Subject access requests may be received from “celebrities” or from applicants who have had a very public immigration history. Furthermore, there may be cases where we are obliged to disclose information which may disclose the nature of any consideration of the case by Ministers. Consideration should therefore be given to informing Ministers and Press Office in advance of any disclosure. Cases of this nature should be referred to the senior officer in the subject access bureau who will liaise with IAPT and LAB as appropriate. Cases, which may affect other Government Departments, should be flagged accordingly. LAB will liaise with appropriate contact points where this is necessary.

8. THE RIGHT TO TAKE ACTION AGAINST UKBA

A person who has made a subject access request to the UK Border Agency under Section 7 of the DPA and who is dissatisfied with the response may apply to a court who will consider whether the UK Border Agency has failed to comply with the request in contravention of the subject access provisions. If the court is satisfied that the UK Border Agency has failed to comply, it may order the UK Border Agency to comply with the request.

In addition, individuals can make a request to the Information Commissioner (who has enforcement powers under the DPA) for an assessment of whether we are complying with our duties under the Act. Individuals may take this action if, for example, they think we have not provided them with the information they are entitled to, that we have not provided the information in an understandable form or if we have failed to meet the 40-day deadline for dealing with requests.

On receipt of any such request, the Information Commissioner must make an assessment. This will include an examination of the substance of the request, whether the person is entitled to make an application to the court in respect of the personal data in question, and any delay in making the request for assessment.

The Information Commissioner may decide to seek information from the UK Border Agency to help him in this assessment. He can do this by serving an **information notice** specifying both the information sought and a time limit for responding. The notice must be brought to the attention of the senior officer in the DPU. IAPT must also be informed each time that an information notice is received.

If the Information Commissioner is satisfied that the UK Border Agency is in breach of the data protection principles, he can serve an **enforcement notice** requiring particular action to be taken to cease or remedy the breach. Again, such a notice must be brought to the attention of the senior officer in the DPU and IAPT should be alerted.

There is a right of appeal to the Information Tribunal against information and enforcement notices. The senior officer in the subject access bureau and IAPT will consider whether such an action is justified in each individual case.

9. AMENDMENTS TO THE SUBJECT ACCESS PROVISIONS BY THE FREEDOM OF INFORMATION ACT (FOIA)

9.1. Section 40(1) of FOIA

FOIA contains an exemption for personal data where an individual requests their own personal information held by a public authority (i.e. UKBA). Such a request, which is actually a subject access request can be exempt by virtue of section 40(1) of FOIA. Section 40(1) is absolute. The standard template letter below can be used by staff to exempt any subject access request where the requestor incorrectly cites FOIA as the information access regime under which they require the information. This letter should only be sent when it is clear that the requestor requires an “FOI” response and does not need to be sent where the data subject has made their request without mentioning FOIA.

9.2. Standard template letter for refusing to provide personal data to the data subject under FOIA:

“Thank you for your correspondence dated [*insert date*] in which you requested personal information about yourself under the Freedom of Information Act 2000.

The information you have requested amounts to personal data as defined by the Data Protection Act 1998. Your request is actually a subject access request and should be handled under section 7 of the Data Protection Act. Therefore the information you have requested exempt from disclosure under the Freedom of Information Act. Section 40(1) of the Freedom of Information Act is absolute and allows us to exempt any information if it constitutes personal data of which the requestor is the data subject.

However, we will process your request under the Data Protection Act. In order that we may begin processing your subject access request you must supply the following in accordance with section 7(3) of the Data Protection Act:

- Proof of your identity e.g. full English driving licence, passport etc
- £10 fee made payable to “The Accounting Officer – Home Office”

If you are dissatisfied with this response you may request an independent internal review of our handling of your request. An internal review can be requested by submitting your complaint to:

The UK Border Agency
Complaints Unit
12th floor West Block C
Whitgift Centre
Croydon
CR9 1AT

During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely

[name of member of staff]

9.3. **Extension of information to be disclosed under DPA**

FOIA also extended the application of the DPA by including all recorded information within the scope of information potentially to be provided in a subject access request **[see chapter 25 Section 12 for further details]**. Prior to this the DPA applied only to information recorded on computer systems and certain manual files known as “relevant filing systems”.

This means that from 1 January 2005 all recorded personal data may fall within the scope of subject access requests, although certain data has to be specifically requested (see part 9.1. below). Therefore, from 1 January 2005 DPU will consider the release of both computer records and paper (manual) case files in response to a subject access request. An explanation for this change is outlined in detail below. Staff should contact the IAPT if they are unsure what records should be considered in handling a subject access request.

Subject access requests will now potentially apply to:

- Data held on computer systems;
- Data held on relevant filing systems;
- All other recorded information held by the UKBA which is not held on a computer system or a relevant filing system. This new class of data was inserted by a new paragraph (e) in the definition of “data” in section 1 of the DPA. For this reason it is referred to as “Category 1(e) data”.

9.4. **Category 1(e) data**

Category 1(e) data is further sub-divided into:

- data which is “structured personal data” (i.e. our manual personal case files); and

- data which is “unstructured personal data”

Structured personal data is category (e) data which is recorded as part of (or with the intention that it should form part of) any set of information relating to individuals to the extent that the set is structured by reference to individuals or by reference to criteria relating to individuals.

Unstructured data is category (e) data which is not part of a set of information relating to individuals to the extent that the set is structured by reference to individuals or criteria relating to individuals.

There are therefore three “levels” of manually recorded data under the Data Protection Act:

- Data on relevant filing systems – this is the data most structured by reference to individuals;
- Structured Personal Data (which has a lesser degree of structure by reference to individuals); and
- Unstructured Personal Data, which is not at all structured by reference to individuals.

All of these classes of data are potentially subject to a subject access request. But because of the differing levels of structure it would be unworkable for them all to be subject to the same access regime. The DPA (as amended by FOIA) therefore provides that unstructured personal data will be subject to a less stringent regime – this regime is laid down by section 9A of the DPA.

Structured personal data and data on relevant filing systems are subject to the usual regime set down by Section 7 of the DPA – see above.

The unstructured personal data regime

Where a subject access request attaches to unstructured personal data:

- (a) There is no obligation to comply with the request unless the request contains a description of the data (i.e. a request for “all the information you have on me” would not attach to unstructured personal data);
- (b) Even if a description of the unstructured personal data is given there is no obligation to comply with a request if it is estimated that the cost of complying with the request (so far as relating to the unstructured personal data) would exceed the appropriate (fees) limit. For more information on fees and for the appropriate limit see 9.4 onwards below.

Even if you are not obliged to comply with the request because to do so would exceed the appropriate fees limit, you must still tell the applicant whether unstructured personal data of which they are the subject is processed, unless the cost of that exercise alone would exceed the appropriate limit.

9.5. **Examples of unstructured personal data**

Unstructured personal data would cover personal information contained within:

- Loose sheets of paper in an in-tray or un-marked folder
- Policy files (which are structured by reference to the subject matter)
- Other files which aren't structured by reference to individuals / criteria relating to individuals

This is not a comprehensive list of data which may come within the meaning of unstructured personal data. If in doubt please consult your Line Manager who may refer your question to the IAPT.

9.6. **The effect of the Freedom of Information Act fee ceiling on subject access requests relating to unstructured personal data**

Gathering together information which is unstructured personal data under category 1e as part of a SAR will probably be time consuming and expensive because it will be held on unstructured files. For this reason, as referred to above, the Freedom of Information Act allows us to use a fee ceiling beyond which it would be disproportionate for us to provide unstructured personal data in response to a SAR. This fee ceiling, beyond which the UK Border Agency will not have to provide all other manual data, is currently set at £600 which is calculated at a rate of £25 per hour or 3.5 working days. The fee ceiling only applies to the cost of:

- Determining whether the unstructured personal data is held;
- Locating and retrieving the unstructured personal data;
- Extracting the unstructured personal data from other information, including the first time an individual working in a particular UKBA Directorate reads information for this purpose. However, the cost of any subsequent readings by any other member of staff should not be counted; and
- Communicating the unstructured personal data. This includes only the actual staff time taken to write a response to the request, or to summarise, edit or redact information into the response.

9.7. **Refusing to provide unstructured personal data which will exceed the fee ceiling.**

If the cost of gathering all the unstructured personal data requested in a subject access request will exceed the fee ceiling it is the policy of the UK Border Agency to refuse to provide that information. In cases where the fee ceiling will be exceeded, DPU staff should contact the IAPT prior to any refusal to provide this information. A full record of how the calculation of cost was reached should be provided to the IAPT in support of any refusal **[for more guidance on calculating fees refer to Chapter 25 Section 4]**.

There may be extreme circumstances where there are compelling compassionate grounds for providing all recorded information to a requestor even when doing so would involve provision of unstructured personal data which would exceed the fee ceiling. The IAPT should be consulted in all such cases.

This does not affect:

- Any personal data other than unstructured personal data (i.e. data on computer systems, data held on relevant filing systems and data which is structured

personal data)

The fee ceiling is not relevant to the actual charge that can be levied for processing a SAR. It is only used as a notional comparator to decide whether it would be too costly to comply with a request for unstructured personal data. The charge for handling all subject access requests will remain at £10 and DPU staff should continue to provide this information when a SAR is made.

9.8. **Standard letter for refusing to provide unstructured personal data which will cost in excess of the fee ceiling.**

This letter is for use when an individual specifically requests unstructured personal data held by the UK Border Agency. Staff must always confirm whether we are processing their personal data, if we are not then we should confirm this:

“Thank you for your correspondence dated [INSERT DATE] and received here on [INSERT DATE] in which you ask [INSERT BRIEF DETAILS].

Your request is for personal data within the meaning of the Data Protection Act 1998 (DPA) and we have therefore processed your request as a subject access request under section 7 of the DPA.

Firstly, I can confirm that personal data about you is being processed by the UK Border Agency.

[NB: this statement is subject to the application of exemptions under the DPA to the extent they are relevant].

However, I regret that I am not in a position to supply you with further information as to do so would be excessively costly and in these circumstances we are not obliged to comply with your request further. This letter sets out the reasons why we are not obliged to provide further information to you.

Section 9A of the Data Protection Act says that we are not obliged to comply with a subject access request where it requests “unstructured personal data” and we estimate that the cost of complying with the request so far as it relates to that unstructured personal data exceeds an amount laid down by regulations.

Unstructured personal data is defined in section 9A(1) but is basically data about you which is held on records that are not structured by reference to individuals or criteria relating to individuals. The fact that the data is held in this way means that processing requests about it is potentially very time consuming and costly and so the section 9A provides an exemption from complying where this would be the case.

I regret that in this case we estimate that to comply with your request would exceed the cost limit. The Home Office is not obliged to comply with any request where the prescribed costs involved in supplying you with the unstructured personal data exceed £600. This limit applies to all central government departments and is based on work being carried out at a rate of £25 per hour, which equates to 3½ days work per request. Prescribed costs include those which cover the cost of locating and retrieving information, and preparing our response to you. They do not include considering whether any information is exempt from disclosure, overheads such as heating or lighting, or disbursements such as photocopying or postage.

Despite the fact that we are not able to process your request as it currently stands, we would like to assist you. Although your request would at present be too costly to answer, if you refine it so that it falls under the cost limit we will be pleased to consider it further.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request. An internal review can be requested by submitting your complaint to:

the UK Border Agency
Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

I realise that this reply will be a disappointment to you, but I look forward to hearing from you again shortly should you wish to refine your request.

Yours sincerely

[name of member of staff]"

Annex A

Legal Professional Privilege (LPP) guidance²

1. This sets out in more detail what LPP is and when a claim to LPP can be maintained. It should however be noted that this is a complex area of law and legal advice will need to be taken in any specific case where it appears the exemption in section 42 might apply.
2. There are two main heads of LPP: advice privilege and litigation privilege.

Advice privilege

Relates to communications and other documents such as draft statements and reports passing between a person and his lawyer provided they are confidential and are part of the continuum of giving and getting advice and assistance in relation to legal rights and obligations. It covers direct communications and communications through someone acting as an agent for the lawyer or the client, but not communications with third parties. Documents such as reports produced by agents or employees for their principal or employer are not privileged under this head, even where the report is subsequently used to enable the principal or employer to seek legal advice. The extent of this head of LPP is subject to the judgment of the House of Lords in the Three Rivers case.

Litigation privilege

Attaches to confidential communications or other documents that come into existence after litigation is in reasonable prospect or is pending, if they come into existence for the sole or dominant purpose of giving or getting advice in regard to the litigation or collecting evidence for use in the litigation. It applies to communications between the client and his lawyer, whether direct or through an agent, or between any one of them and a third party. This head of LPP does not apply to communications in investigative and non-adversarial proceedings, such as wardship proceedings (although again advice should be taken to ascertain the extent to which this is the case following the outcome of the Three Rivers appeal).

3. The Three Rivers litigation has also raised an issue as to the extent of the availability of LPP for corporations as opposed to for individuals. It is not clear however how this may have implications for government departments. Where this is likely to be an issue legal advice will need to be taken to ascertain the up-to-date legal position.
4. The basic rule is that if material attracts LPP it will always attract LPP. This means that if a claim for LPP can be made in respect of a document in one case, it can be made in respect of the document in any subsequent case in which the document is relevant, whether by the person who was originally entitled to claim LPP or by his successor in title.
5. For a claim for LPP to be maintained, the information in question must be confidential. Confidential information may lose its confidential quality where the information in question is so generally accessible that in all the circumstances it can no longer be regarded as confidential. In the normal course, communications between solicitor and client will be presumed to be confidential. Correspondence between lawyers acting for the same client will also attract LPP. However although correspondence between opposing parties to litigation may be confidential it will not be so in the normal course and will not usually attract LPP.

² Taken from the Department of Constitutional Affairs website – FOI exemptions guidance, section 42 annex A

6. Information which is protected by LPP may be disclosed to one person on terms that it is to be treated as confidential so that the quality of confidentiality is not lost as against another person. Where this is the case, LPP can still be claimed against that other person.
7. This means that disclosure of legal advice in one set of proceedings does not necessarily constitute waiver of LPP for the purposes of subsequent proceedings, so long as the advice retains its quality of confidentiality between the parties to the subsequent proceedings at the time of those proceedings.
8. Part of a document may contain or refer to privileged material whilst the remainder of the document does not. Where this is so, careful consideration will need to be given to the extent to which part of or the whole document attracts LPP. Where only part of a document attracts LPP it might be possible to redact the privileged material and disclose the remainder of the document. It might also be possible to disclose the non-privileged information in another form as the right under section 1(1)(b) of the Act is to information, not to the document in which the information is contained. Care will need to be taken where disclosing part of a document to ensure that LPP is not inadvertently being waived.