



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Peter ...

24 October 2008
Our reference: FOI/1000...

Dear Mr ...

Request for Information

Further to my letter of 30 September 2008, we are now in a position to respond to the part of your information request that asked for copies of *"All correspondence between ICO and BERR ... concerning Phorm since 14 February 2008."*

As I explained previously we have exchanged correspondence with BERR since 14 February 2008 in connection with Phorm. This correspondence arose from the need for BERR to consult with the ICO about the data protection issues relating to Phorm which, amongst other things, they were required to address. Specifically the ICO was consulted in connection with:

1. a standard letter BERR prepared in order to address enquiries about Phorm,
2. a response to a parliamentary question,
3. preparation of the response to Fabio Colasanti's letter to Downing Street of 30 June 2008, and
4. the press lines BERR wished to take when handling enquiries about Phorm by their Press Office.

Having collated the information in question we then considered it for disclosure in accordance with the requirements of the Freedom of Information Act 2000 (FOIA), and as part of that process consulted with BERR. Taking all factors into account we concluded that the information may be subject to the provisions contained within the exemption at section 36 of the FOIA, and as a result the matter was referred to Richard Thomas, the Information

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Commissioner, for consideration. As you know because of this it was necessary for us to extend our response time to your original request of 31 August 2008 by a further 20 working days, to 28 October 2008.

For information held by the ICO to be exempt under section 36 it must, in the reasonable opinion of a qualified person (in this case the Information Commissioner), be capable of either inhibiting the free and frank provision of advice or exchange of views (s36(2)(b)), or prejudicing the effective conduct of public affairs (s36(2)(c)).

The Commissioner has now reviewed your request and the requested information, and in doing so has also taken into consideration the representations made to us by BERR.

It is his opinion that disclosure of the requested information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, and therefore the exemption at section 36(2)(b)(ii) applies to all the categories of information listed on page 1. He has confirmed this conclusion is especially influenced by the following factors:

- BERR have specifically stated that, if disclosed by ICO, they would not feel able to include ICO in similar discussions in the future.
- Most of the substance of the requested information was generated by BERR or the European Commission, not by ICO.
- There were many drafting changes and there is a real risk in this case of inhibition of further consultation if the draft material were to be disclosed, especially where the content was speculative.
- The subject matter of the requested information remains "live", and therefore further consultation may be necessary.

The Commissioner has also concluded that disclosure of the requested information described at point 3 (consultation by BERR with the ICO in relation to the European Commission correspondence), would be likely to prejudice the effective conduct of public affairs for the reasons given below:

- BERR and the European Commission are resisting requests which they have received directly for the same information.
- The European Commission have expressed the view that it would not expect its formal correspondence to the UK Government (ie Fabio Colasanti's letter of 30 June 2008) to be disclosed.

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Accordingly the Commissioner considers the exemption at section 36(2)(c) of the FOIA applies to the requested information described at point 3.

The Commissioner has also gone on to consider the public interest arguments which arise in all the circumstances of this case. He considers there is a general public interest in disclosing the requested information which is strengthened by the actual and potential impact of behavioural advertising, widespread public concern, controversy and debate about its use and about its possible regulation. But, in this case, he considers that is outweighed by the current competing public interest in maintaining the exemption. He states the above factors summarise the nature of that public interest, and considers that both the likelihood and consequences of prejudice – especially BERR's refusal or failure to consult ICO in future - are fairly severe.

Therefore, for the reasons given above, the information you have requested is being withheld under the FOIA.

If you are dissatisfied with the response you have received and wish to request a review of our decision or make a complaint about how your request has been handled you should write to the Internal Compliance Team at the address given or e-mail Internalcompliance@ico.gsi.gov.uk

Your request for internal review should be submitted to us within 40 working days of receipt by you of this response. Any such request received after this time will only be considered at the discretion of the Commissioner.

If having exhausted the review process you are not content that your request or review has been dealt with correctly, you have a further right of appeal to this office in our capacity as the statutory complaint handler under the legislation. To make such an application, please write to the Senior Complaints Resolution Manager, Complaints Resolution Team at the address given or e-mail mail@ico.gsi.gov.uk.

A copy of our review procedure is enclosed along with details of our enforcement powers and your rights of appeal.

Yours sincerely

A handwritten signature in blue ink that reads 'Antonia Swann'. The signature is written in a cursive, flowing style.

Antonia Swann
Assistant Internal Compliance Manager