



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

Peter [REDACTED]

Our ref: [REDACTED]  
25 June 2008

Dear M [REDACTED]

### **Request for Information**

Further to my acknowledgement of 12 June 2008, we are now in a position to provide you with a response to your request for information dated 22 May 2008. Hopefully you will also by now have received a response from Lee Taylor of our Data Protection Practice Department in response to your further letter to the Information Commissioner, Richard Thomas, of 9 June 2008.

With the assistance of colleagues from our Data Protection Practice Department and our Customer Services Team please find below the various items of information you asked for in your letter of 22 May 2008:

#### **Did the ICO authorise secret trials conducted by BT/Phorm in 2006/07?**

No. The Information Commissioner's Office (ICO) does not authorise the activity of companies, however we will give companies our view on whether or not their proposals are in compliance with the Privacy and Electronic Communication Regulations 2003 and the Data Protection Act 1998. There was no discussion about the trials between the ICO and BT or Phorm prior to or at the time of those trials in 2006 and 2007.

#### **When was the Information Commissioner first made aware of secret trials of 'behavioural profiling' software by BT/Phorm?**

The first record the ICO has of being made aware of the June 2007 trial was in a written complaint from a BT customer received at the office on 10 March 2008 and scanned to the ICO's electronic case handling system awaiting allocation with other cases in the backlog. The first record we have of the ICO being made aware of the 2006 trial was a reference to a discussion between BT and the ICO on 2<sup>nd</sup> April 2008 in an email exchange about an article on the BBC website dated 1<sup>st</sup> April which discussed both trials.

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**Dates of contacts between the Information Commissioner's Office and each of Phorm, BT, 80/20 Thinking concerning Phorm's Webwise product since that date.**

Phorm:

Teleconferences on 20/03/08, 28/03/08, 11/04/08, 22/04/08 and 06/05/08.

Email from Phorm on 22/04/08 and 27/05/08.

BT:

Email between ICO and BT 03/04/08, 04/04/08, 07/04/08, 09/04/08, 10/04/08, 11/04/08, 05/06/08, 11/06/08

Telephone 02/04/08, 29/05/08

(The contact between the ICO and BT listed above has included references to the trials in 2006 and 2007, and is included where the subject line refers to 'Webwise'. Correspondence between the ICO and BT specifically on the trials with no reference to Webwise is not included above, but is listed below.)

80/20 Thinking:

There is no record of contact between the ICO and 80/20 Thinking about Webwise.

**Dates of contacts between the Information Commissioner's Office and independent experts, if any, concerning Phorm's Webwise product since that date.**

The ICO has not contacted any independent IT experts for their view on Webwise since being made aware of the 2007 trials on 10 March 2007. The ICO are not technical experts and so encouraged Phorm to be transparent and directly engage with technical experts to address concerns raised by such experts about the safeguards and nature of the Webwise product.

**All correspondence between ICO and 80/20 Thinking, Phorm and BT concerning Phorm since that date.**

We corresponded with Phorm on 10/04/08, 14/04/08, 15/04/08, 22/04/08 and 27/05/08 (copies enclosed). Please note that the statements which were sent to us by Phorm on 10 April (titled 'Statement - D2'), 15 April (titled 'Phorm Opt-Out Statement') and 22 April 2008 (titled 'Phorm Informed Consent Update') are draft versions, and to our knowledge final versions were not completed, or issued, by Phorm.

We corresponded with BT on 03/04/08, 04/04/08, 07/04/08, 09/04/08, 10/04/08, 11/04/08, 25/04/08, 05/06/08, 09/05/08, 30/05/08 and 11/06/08 (copies enclosed).

There has been no correspondence between the ICO and 80/20 Thinking on the Phorm product.

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**Reveal which organisations – specifically 80/20 Thinking, Phorm, BT and/or other parties – asked for your opinion on PECR and DPA with respect to Phorm prior to 14 February 2008.**

BT and Phorm contacted the ICO prior to 14 February 2008 to discuss the Phorm products.

You have also asked for the following statistical information:

**How many complaints have ICO received concerning secret trials of Phorm?**

We have received a number of enquiries and questions about potential **future** use of the Phorm technology by ISP's. It is possible that in their correspondence with us some of these individuals may also have mentioned the previous trials, however without reading through all of the correspondence received by the office relating to Phorm it is not possible to identify the exact number of people who may have mentioned the previous trials in passing.

However, we have received a small number of specific queries or concerns from individuals (we have 12 currently on record relating specifically and primarily to this issue to date) focusing on the 2006 and/or 2007 BT trials of a prototype advertising platform. The majority of these 12 were raising concerns about the trials but did not indicate they believed they were directly affected by either trial. From the information provided it appears that a very small number of those 12 individuals (only 2) specifically believe they were involved in the trials themselves.

**How many complaints have resulted in PECR prosecutions?**

I should initially explain that a breach of the Privacy and Electronic Communications (EC Directive) Regulations 2003 is not a criminal offence. The powers we have in this area are designed to ensure that an organisation complies with the law, rather than to punish.

If the ICO believes that an organisation is breaching the PECR, and will not comply with the law voluntarily, the power we have to compel them to comply is to serve that organisation with an Enforcement Notice. This notice would set out what they need to do (or stop doing) in order to comply with the legislation in future. Only where an organisation receives an Enforcement Notice and still fails to comply with the requirements of that notice could they be prosecuted (breach of an Enforcement Notice is a criminal offence).

In the vast majority of complaints we receive the Information Commissioner can achieve compliance with the law without having to resort to serving an Enforcement Notice. Our Data Protection Regulatory Action Strategy, setting out the types circumstances in which we may consider enforcement action necessary, and the factors we take into account, can be accessed on our website [www.ico.gov.uk](http://www.ico.gov.uk)

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In this case we have not served a PECR Enforcement Notice on BT in connection with use of Phorm technology (or on Phorm themselves). There have therefore been no prosecutions as a result of these complaints.

#### **How many complaints have resulted in DPA prosecutions?**

In common with PECR a breach of the Data Protection Act 1998 (DPA) principles is not a criminal offence.

If the ICO believes that an organisation is breaching the DPA the power we have to compel them to comply is to serve that organisation with an Enforcement Notice. This notice would set out what they need to do (or stop doing) in order to comply with the legislation in future. Only where an organisation receives an Enforcement Notice and still fails to comply with the requirements of that notice could they be prosecuted (breach of an Enforcement Notice is a criminal offence).

In the vast majority of complaints we receive the Information Commissioner can achieve compliance with the law without having to resort to serving an Enforcement Notice. Our Data Protection Regulatory Action Strategy, setting out the types circumstances in which we may consider enforcement action necessary, and the factors we take into account, can be accessed on our website [www.ico.gov.uk](http://www.ico.gov.uk)

In this case we have not served an Enforcement Notice on BT in connection with use of Phorm technology (or on Phorm themselves). There have therefore been no DPA prosecutions as a result of these complaints.

Where we do need to take Enforcement action against organisations through an enforcement notice we usually make details of the action we have taken available on our website.

#### **How many complaints are currently under investigation?**

As above we have received a very small number of actual 'complaints' from individuals potentially involved in the trials. However we do not simply consider issues raised with us based on the volume of complaints from individuals. Where concerns about compliance with the DPA or PECR are brought to our attention through other channels, or through the concerns of individuals who are not necessarily directly affected by the issues, we will still look into those concerns where we consider it appropriate to do so.

In this case as you will see from the attached correspondence we have asked BT for information about the trials, and their compliance with PECR and the DPA in this area. Having considered their response (and the concerns raised with us by those who have contacted us) we do not currently envisage pursuing this issue further with BT.

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In answer to the question therefore as we have considered this issue and do not envisage pursuing it further there are no complaints 'under investigation' in terms of being actively pursued with BT. However due to some backlogs in our case work departments I should clarify that not every individual who has contacted us about Phorm or the trials has currently received an individual response to their concerns to date.

#### **How many complaints have been upheld and what action has the ICO taken?**

As above, we have only received a very small number of complaints from individuals who have indicated they think they were directly involved in the 2006/ 2007 trials.

Cases relating to individuals writing to us to raise concerns, or ask questions about the previous trials, are not recorded in this manner (upheld/ not upheld).

Where a specific 'complaint' has been raised with us we would record whether we considered a breach is likely to have occurred. In this instance we consider that it is likely BT breached the Regulations in the trials and therefore the complaints where we can identify that an individual was involved in the relevant trial would be likely to constitute a breach of the Regulations. At present it appears that we have received 2 complaints from individuals who have specific reason to think they were involved in the trials.

#### **How many complaints have been rejected and for what reasons?**

We have no record to indicate any complaints about the BT 2006 and 2007 trials have been 'rejected' from the ICO.

#### **Information that has been withheld**

You will notice from the enclosed documents that certain information has been withheld, or redacted. The following points explain what information has been withheld from you in response to your request of 22 May 2008, and why:

- The contact details of the individuals we corresponded with at BT and Phorm have been removed to protect their identities. This personal information is exempt from disclosure to you under section 40(2) of the Freedom of Information Act 2000 as to provide it to you would contravene the Data Protection Act 1998.
- Similarly, the contact details of ICO employees who do not carry out a public facing role have been removed in reliance on the exemption at Section 40(2) of the Freedom of Information Act 2000.
- The personal details of those individuals who have contacted us to complain about the trials carried out by BT and Phorm have also been withheld. This too is in reliance on Section 40(2) of the Freedom of Information Act 2000.

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- We have also redacted the personal information contained within the letter we hold that was sent by the Home Office Covert Investigation Policy Team on 4 February 2008, and which was provided to the ICO as an attachment to an e-mail sent to us by Phorm on 28 March 2008. This has also been withheld in reliance on section 40(2) of the Freedom of Information Act 2000. The Home Office document *'Targeted Online Advertising: interception of communications or not?'* which was also attached to this e-mail has been provided to you in its entirety.
- We have also been provided with a copy of a document prepared by BT titled *'Premium Browsing: Research Findings'*. We were advised that this document was for internal use by BT alone, it does not appear on their website and was not intended to be made public. However, as we hold this information in connection with our correspondence with BT we have had to consider whether or not this document should be disclosed in response to your request for information. Having done so it is our view that this document is exempt from disclosure in accordance with section 43(2) of the Freedom of Information Act 2000, which states that *"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."*

In applying this exemption we must consider the public interest. Whilst there is an argument that the information you have requested is 'of interest' to members of the public, this is different from being in the public interest. In this case we have considered the purpose of the document, which is to provide appropriate BT staff with relevant research findings in order to inform their own commercial decisions and interests, and accordingly we take the view that the disclosure of this information would prejudice BT's commercial interests if this research was obtained by their competitors. In our view this outweighs the public interest in disclosure.

- Some of the correspondence we have exchanged with BT and Phorm has been marked as confidential, primarily where commercial sensitivities and interests were at stake, and also in relation to the first complaint we received from a member of the public. We have considered each of these items of information carefully, as we are aware that with the passage of time some of this information has already been made publicly available, or has 'lost' its confidential nature (for example, suggested trial dates that are now in the past). Therefore, some information that is marked 'confidential' is now being provided to you in response to your request, but some of that information, in our view, remains confidential. Where this is the case this information has been withheld in reliance on section 41 of the Freedom of Information Act 2000, which applies to information that has been provided to the public authority in confidence, and the disclosure of that information to the public by the public authority holding it would constitute an actionable breach of confidence.

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Finally, I have also enclosed a copy of a press release which we issued on 4 April 2008 titled 'Phorm advertising – ICO statement', as well as a more detailed piece titled 'Phorm – Webwise and Open Internet Exchange' which I have also enclosed. Both documents can be found on our website via the following links:

[http://www.ico.gov.uk/upload/documents/pressreleases/2008/new\\_phorm\\_statement\\_040408.pdf](http://www.ico.gov.uk/upload/documents/pressreleases/2008/new_phorm_statement_040408.pdf)

[http://www.ico.gov.uk/Home/about\\_us/news\\_and\\_views/current\\_topics/phorm\\_webwise\\_and\\_oie.aspx](http://www.ico.gov.uk/Home/about_us/news_and_views/current_topics/phorm_webwise_and_oie.aspx)

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 below or e-mail [Internalcomplianceteam@ico.gsi.gov.uk](mailto:Internalcomplianceteam@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 below or e-mail [mail@ico.gsi.gov.uk](mailto: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 cursive script that reads 'Antonia Swann'.

Antonia Swann  
Assistant Internal Compliance Manager



## ICO Requests for Information - Review Procedure

### Scope of Procedure

Although the EIR is the only legislation that requires the Information Commissioner to have a review procedure, this procedure will be adopted for use in relation to complaints made to the Information Commissioner regarding **any** request for information.

Any applicant for information may make representations to the Information Commissioner if it appears to them that he has failed to comply with any of his duties to:

- make environmental information available in accordance with the EIR,
- provide a data subject with access to his personal data in accordance with the DPA,
- provide a right of access to information held by the Information Commissioner in accordance with the FOIA.

### Timescale

Representations must be made in writing within 40 working days of the date on which it appears to the applicant that the Information Commissioner is in breach of his duty.

### Procedure on Receipt of a Complaint

When such representations have been received they must immediately be copied to the Internal Compliance Team who will log the complaint and send an acknowledgement letter to the applicant.

The Internal Compliance Team will notify the Internal Compliance Board (ICB) giving a brief explanation of why the complaint has been submitted and to whom it has been allocated. It will then be referred, together with the Request Report to the complaint handler.

The complaint will not be handled by anyone who dealt with the original decision, although it may be necessary to consult the original request handler and/or the Chair of the ICB. It will be referred to an Assistant Commissioner, the Chief Operating Officer or a Deputy Commissioner. Any legal advice will be provided by a solicitor not involved in advising on the original request. Advice may also be sought by the complaint handler from a FOI Complaints Resolution Manager or Casework and Advice Manager.



The complaint handler will consider the representations and any supporting evidence produced by the applicant and decide if the Information Commissioner has complied with his duties.

Where the request relates to personal data in accordance with the DPA or environmental information in accordance with the EIR, the applicant will be notified of the decision in writing within 40 calendar days of receipt of the representations. Where the request relates to information held by the Information Commissioner in accordance with the FOIA, the applicant will be notified of the decision in writing within 20 working days of receipt of the representations.

If it is decided that the Information Commissioner has not complied with his duties the breach shall be remedied immediately and the ICB and request handler will be notified. The Internal Compliance Team will ensure the proper recording and processing of the internal review.

### **Formal Complaints**

If the applicant remains dissatisfied with a request for information which has been dealt with under FOIA, he has the right to make a formal complaint/request for a decision notice to the Information Commissioner.

Should the applicant do this, the complaint will be dealt with as any other similar request by a FOI Complaints Resolution Manager not previously involved in consideration of the request. Legal advice will be provided by a lawyer not involved in the original decision or review (a Principal Solicitor where possible).

In the event that a decision notice is appealed, the Information Commissioner himself will be consulted and advised by a FOI Complaints Resolution Team member and a lawyer not previously involved in dealing with the request, internal review or complaint.

If the applicant remains dissatisfied with a request for their personal data which has been dealt with under the DPA, he has the right to ask the Commissioner to make an assessment as to whether the request has been handled in accordance with the DPA.

Should the applicant do this, the complaint will be dealt with as any similar request by a Casework and Advice Manager.

A summary of the Information Commissioner's Enforcement Powers and Appeal procedures are available on request.



**4 April 2008**

## **Phorm advertising – ICO statement**

A spokesperson for the Information Commissioner's Office said:

"The ICO has received a number of queries concerning the recent announcement by Phorm that 3 major UK Internet Service Providers have agreed to allow them to use technology, developed by Phorm, to present adverts to their customers based on the nature of the websites they visit.

"Understandably, this has provoked considerable public concern. We have had detailed discussions with Phorm. They assure us that their system does not allow the retention of individual profiles of sites visited and adverts presented, and that they hold no personally identifiable information on web users. Indeed, Phorm assert that their system has been designed specifically to allow the appropriate targeting of adverts whilst rigorously protecting the privacy of web users. They clearly recognise the need to address the concerns raised by a number of individuals and organisations including the Open Rights Group. We welcome the efforts they are making to engage with sceptical technical experts and believe that it is only by allowing their technology to be subject to detailed scrutiny by independent technical experts that they will be able to prove their assertions regarding privacy. The ICO strongly supports the use of technology in ways which enhance rather than intrude upon privacy, and plans to produce a report on "Privacy by Design" later this year.

"We understand that the technology is not yet in use and that BT intends to run a trial involving around 10,000 broadband users later this month. We have spoken to BT about this trial and they have made clear that unless customers positively opt in to the trial their web browsing will not be monitored in order to deliver adverts. BT has also stated that the system does not store personally identifiable information, URLs, IP addresses or retain browsing histories and that search information is deleted almost immediately, and is not retrievable.

"We will continue to maintain close contact with Phorm and BT throughout the trial. Clearly the trial should reveal whether this is a service that web users want, whether it is privacy friendly and that users are comfortable with the privacy safeguards put in place by Phorm."

**For all media enquires, please contact the ICO press office on 0207 025 7580.**

**For all general enquires, please contact the ICO customer service team on 08456 306060.**



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## Phorm – Webwise and Open Internet Exchange

The Information Commissioner has been approached by a number of individuals and organisations for a view on Phorm's Webwise and Open Internet Exchange (OIX) products. Phorm also approached the Commissioner immediately prior to announcing a deal to work with 3 major UK internet service providers (ISP) and launch of the Webwise and OIX products to explain the nature of their products and in particular what they believe to be the privacy friendly elements of them. The Commissioner has also had contact with the ISPs working with Phorm about the scope and nature of their roll out of the Phorm products.

The Commissioner is responsible for enforcing the Data Protection Act 1998 (DPA) and the Privacy and Electronic Communications Regulations 2003 (PECR). Therefore the Commissioner is confining himself to the question of whether the use of the products offered by Phorm complies with the DPA and PECR. Furthermore the Commissioner's views are based on the current understanding of the Phorm products before the upcoming trial or roll out by any of the ISP have taken place which should provide more information about their use in practice.

Phorm has developed a system where, with the cooperation of an individual's ISP they can profile the addresses and certain content of websites visited by users and then use that information to match that user against predefined broad advertising categories. Phorm assert that this targeted marketing takes place in a way that rigorously protects the privacy of web users.

Phorm has explained that the user profiling occurs with the knowledge and agreement of customer and within the technological infrastructure of the ISP. The profile is based on a unique ID allocated at random to each internet user which is held only on their computer and by Phorm so that the advertising and profiling can take place in such a way that there is no need to know the identity of the individual users. When a user visits a website that has an agreement with Phorm their user ID is recognised and Phorm will use the broad advertising categories associated with that ID to enable relevant advertising channel to be shown on the website. The advertising is displayed instead of non-targeted advertising that would be displayed to users regardless of the roll out of the Phorm products.

Phorm has provided assurances that the systems have been configured so that the company does not have a record of the actual sites visited and search terms used by the user and in addition the advertising categories exclude certain sensitive terms and have been drawn widely so that the profiles that they hold for users will not inadvertently reveal the identity of a user or return advertising of a sensitive nature. Phorm also assures us that the ISP does not hold or have access to either the advertising categories users have been matched against or the user ID and does not keep a lasting record of internet traffic for any reason other than it would have originally.

Whether the use of the products offered by Phorm complies with the DPA will depend, in the first instance, on the extent to which the company is processing personal data. Personal data is information that relates to a living individual who can be identified from that information or other information in the possession of or likely to come into the possession of the person holding it. Phorm has asserted



### In this section

[ICO's new model publication scheme](#)

[Criminal Justice and Immigration Bill – ICO briefing, April 2008](#)

[Phorm – Webwise and Open Internet Exchange](#)

[ICO statement in response to the 2008 BCC's Burdens Barometer report](#)

[Richard Thomas lecture to the Centre for Regulated Industries](#)

[ICO's Data Protection Officer Conference](#)

[Our approach to encryption](#)

[Privacy Impact Assessment handbook and surveillance](#)