



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

Peter

30 September 2008

Our reference: 101/08

Dear Mr

### **Request for Information**

Thank you for your letter of 31 August 2008, in which you have asked for various items of information. Please accept our apologies for not having acknowledged receipt of your letter before now.

We have dealt with your letter as a request for information under the Freedom of Information Act 2000 (FOIA), and as we received your request on 2 September 2008 we are required to provide you with a response within 20 working days after receipt of your letter, ie by 30 September 2008.

In your letter of 31 August you asked for copies of:

- The correspondence between the Information Commissioner's Office and Downing Street concerning the letter from Fabio Colasanti (dated 30 June 2008, and sent to Downing Street).
- All correspondence between the Information Commissioner's Office and the Information Society and Media Directorate of the European Commission since 30 June 2008.
- All correspondence between the ICO and 80/20 Thinking, Phorm and BT concerning Phorm since your last FOI request, 11 June 2008.
- All correspondence between ICO and BERR, Home Office and the Cabinet Office concerning Phorm since 14 February 2008.

### **Downing Street**

In response to your first query, I can confirm that the ICO has not had, and therefore does not hold, any correspondence with Downing Street concerning Mr Colasanti's letter.

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### **The European Commission**

In response to your second query, please find enclosed copies of the three e-mails that have been exchanged between the ICO and the European Commission since 30 June 2008 concerning Phorm. The first of these e-mails is dated 17 July 2008, and the final two are both dated 29 July 2008. The contact details of the individuals we corresponded with at the EC 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.

### **80/20 Thinking**

Further to your third query, I can confirm that we have not had any correspondence with 80/20 Thinking concerning Phorm since 11 June 2008. Therefore, there is no recorded information to provide to you.

### **Phorm**

We have corresponded with Phorm since 11 June, and copies of our exchange of correspondence (3 e-mails, all dated 17 July 2008) are enclosed. Again, the contact details of the Phorm representative have been removed to protect their identity, in accordance with the Data Protection Act 1998.

In addition, the Privacy Impact Assessment (PIA) referred to in Phorm's e-mail of 17 July (sent at 14:21) and attached to that e-mail, is exempt from disclosure under the FOIA, and as a result is not being provided to you. In this case we have decided that the exemption at section 43 of the FOIA is applicable to this information. Section 43 applies to 'commercial interests', and states:

*43(1) Information is exempt information if it constitutes a trade secret.*

*(2) 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 have considered the public interest test in whether it would be appropriate to provide this information to you or not.

The factors in favour of providing it to you are the apparent interest to many members of the public in all issues relating to the development and subsequent use of Phorm technology, and the impact that technology has on those individuals whose details (ie personal data) are processed when the technology is used in relation to them.

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The factors in favour of withholding that information from you, and as a result the general public, relate to the commercial interests of Phorm, and those organisations who are planning to use the Phorm technologies. For example, Phorm have advised us that although the subject title of the e-mail suggests that the PIA is the final version, they have recently advised us that the version sent to the ICO on 17 July has in fact been amended. Therefore, we do not hold a copy of the latest version of the PIA, and do not know and therefore cannot advise you of the specific amendments that have been made to the version that we hold. We also appreciate that due to the continuing development of the technologies involved, it would be damaging to Phorm's commercial interests if their competitors were able to obtain this information prior to the official launch of the product, and what steps Phorm have taken to mitigate the privacy risks involved. We have also been advised by Phorm that the timing of the publication of the final PIA has been planned to coincide with the launch of the pilot, and therefore it is likely that any disclosure by the ICO of the copy of the PIA that we hold (which is now out of date) prior to the official publication by Phorm of the final version would be damaging to the commercial interests of Phorm and their clients. Finally, Phorm did advise us at the time they provided us with copies of the PIA that it was embargoed until final publication. Therefore, we take the view that it would be prejudicial if we were to disclose the version of the PIA we hold whilst it is still embargoed.

#### **BT**

We have exchanged correspondence with BT since 11 June 2008 in respect of Phorm, but this is limited to a single e-mail we received from BT dated 18 July 2008. I have enclosed a copy, and again we have removed the contact details of the BT representatives and other individuals referred to in order to protect their identities, in accordance with the requirements of the Data Protection Act 1998.

Although the BT representative asked us to provide a response to their e-mail of 18 July 2008, I am advised by my colleagues they contacted BT by phone, and no record was kept of the subsequent telephone conversation.

#### **BERR**

Further to your final query, I can confirm that we have exchanged correspondence with BERR since 14 February 2008 about Phorm. We have already collated this information, but having considered it further we take the view that the exemption at section 36(2)(b)(ii) of the FOIA is likely to apply to this information. Section 36 broadly applies to information which, if disclosed, may 'prejudice the effective conduct of public affairs', and section 36(2)(b)(ii) specifically allows information to be withheld from a response to a request for information under the Act if the disclosure of the information "*would, or would be likely to, inhibit ... the free and frank exchange of views for the purposes of deliberation ...*".

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As you know the FOIA obliges us to respond to requests promptly, and in any case no later than 20 working days after receiving the request. However when a qualified exemption applies to the information and the public interest test is engaged, section 10(3) of the FOIA allows the time for response to be longer than the 20 working days, and a full response must be provided within such time as is reasonable in all circumstances of the case.

Whilst we always aim to make all decisions within 20 working days, including cases where we need to consider where the public interest lies in respect of a request for exempt information, we have not yet reached a decision on where the balance of the public interest lies in this case. We estimate that it may take up to an additional 20 working days to take this decision. We therefore aim to provide you with a response to this part of your request for information by 28 October 2008.

I apologise for this delay, but we will certainly respond to your request as soon as possible within this timeframe.

#### **Home Office**

The ICO has not exchanged any correspondence with the Home Office concerning Phorm since 14 February 2008. Therefore, we do not hold any recorded information that falls within the scope of your request.

#### **Cabinet Office**

Again, we have not exchanged any correspondence with the Cabinet Office about Phorm since 14 February 2008, and as such there is no recorded information to provide to you in response to this part of your request.

#### **Conclusion**

With the exception of the BERR information, which is still under consideration, I hope that this provides you with the information you require. However, if you are dissatisfied with the response you have received to date 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 [Internalcompliance@ico.gsi.gov.uk](mailto: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

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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 blue ink that reads 'Antonia Swann'. The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

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.

**From:** [REDACTED]  
**Sent:** 18 July 2008 09:55  
**To:** Phil Jones; Katherine Vander  
**Subject:** FW: EU Commission Wants UK Govt To Probe Targeted Advertising

**Importance:** High  
Phil & Katherine

Can you shed any light on the report below about Commissioner Reding's alleged concerns about Phorm (previous trials ?) and the alleged pre-warning letter to UK authorities ?

Seems to be an awful lot of confusion at the moment- and some suggestions from our Brussels Office that this all relates to possible infringement proceedings against the Uk for mis-implementation.

Would be grateful for a quick steer if possible, as we have a significant level of concern at senior level.

Thanks

[REDACTED]

[REDACTED]

[REDACTED]  
BT Retail - Commercial, Legal and Regulatory

Tel: [REDACTED]  
Mobile: [REDACTED]

Intranet: [REDACTED]

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**From:** [REDACTED]  
**Sent:** 16 July 2008 16:34  
**To:** [REDACTED]  
**Subject:** EU Commission Wants UK Govt To Probe Targeted Advertising

Hey [REDACTED]

I was wondering do you know anything about this?

**LONDON (Dow Jones)--The European Commission has warned the U.K. government it needs to take action to protect consumer privacy due to concerns about targeted advertising company *Phorm Inc.* (PHRM.LN), European Union communications commissioner Viviane Reding said Wednesday.**

**Reding said the commission was concerned Phorm was breaching consumer privacy directives and that the U.K. government needed to take action.**

**Phorm's technology tracks consumer activity on the Internet. The company has agreements with the U.K.'s three largest Internet service providers - BT Group PLC (BT), Carphone Warehouse's (CPW.LN) Talk Talk and Virgin Media.**

**"It is very clear in E.U. directives that unless someone specifically gives**




authorization (to track consumer activity on the Web) then you don't have the right to do that," Reding said. She said she was "a little bit worried about this development, and as a result her office sent pre-warning letter to U.K. authorities earlier this month.


If the U.K. government didn't resolve the issue, the commission could take it to the European Court of Justice.

A Phorm spokesman said he wasn't aware of this development. He said the company complies with all the relevant U.K. laws.

A U.K. government spokesman wasn't immediately available for comment.

  
[Click here to go to Dow Jones NewsPlus, a web front page of today's](#)

  
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Email from Phorm re Privacy Impact Assessment by Simon Davies 17 July 08.txt  
From: [REDACTED]  
Sent: 17 July 2008 14:21  
To: Phil Jones; Lee Taylor  
Cc: [REDACTED]  
Subject: Final Phorm Privacy Impact Assessment by Simon Davies

Dear Phil, Lee,

As discussed and attached. Do let me know if you have any questions or observations or would like any further information on this.

Thanks for making the time to speak with us today.

Best wishes,

[REDACTED]

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[REDACTED]  
Phorm  
Liberty House  
222 Regent Street  
London W1B 5TR  
UK

T: [REDACTED]

M: [REDACTED]

[REDACTED]  
[www.phorm.com](http://www.phorm.com)

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**From:** [REDACTED]  
**Sent:** 17 July 2008 13:33  
**To:** Lee Taylor  
**Subject:** Re: Phorm and Eu Commission  
Thanks Lee,

The Register's article is a repeat of the Dow Jones story yesterday, which we are still trying to verify. Reding's spokesperson is not aware of any such statement Reding made, so it looks as though the journalist has misinterpreted Reding's earlier statement. Has the ICO heard anything new?

Thanks and looking forward to speaking with you and Phil at 2pm

[REDACTED]

On 17/7/08 12:18, "Lee Taylor" <Lee.Taylor@ico.gsi.gov.uk> wrote:

[REDACTED]

The link below appears to have the details of what you referring to yesterday.

Regards  
Lee

[http://www.theregister.co.uk/2008/07/16/eu\\_warns\\_uk\\_over\\_phorm/](http://www.theregister.co.uk/2008/07/16/eu_warns_uk_over_phorm/)

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[REDACTED]  
Phorm  
Liberty House  
222 Regent Street  
London W1B 5TR  
UK

T: [REDACTED]  
M: [REDACTED]

[REDACTED]  
[www.phorm.com](http://www.phorm.com)

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**From:** Lee Taylor  
**Sent:** 29 July 2008 09:27  
**To:** [REDACTED]  
**Subject:** RE: Letter to the UK government from the European Commission  
Dear [REDACTED]

Thank you this is very helpful.

Regards  
Lee

-----Original Message-----

**From:** [REDACTED]  
**Sent:** 29 July 2008 08:50  
**To:** Lee Taylor  
**Cc:** [REDACTED]  
**Subject:** RE: Letter to the UK government from the European Commission

Dear Lee,

Indeed, a letter on the issue was sent to the UK via the (new) EU Pilot system. The UK contact point who received the letter is [REDACTED]. On the Commission side, unit INFSO/B2 dealing with the implementation of EU law is in charge. If you wish, I can put you in contact with the colleagues or you may contact them directly at [INFSO-B2@ec.europa.eu](mailto:INFSO-B2@ec.europa.eu).

I hope this is helpful.

Best regards,

[REDACTED]

European Commission  
DG INFSO B1: Policy Development - ePrivacy  
tel. [REDACTED]  
<http://ec.europa.eu/ecom>

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**From:** Lee Taylor [mailto:Lee.Taylor@ico.gsi.gov.uk]  
**Sent:** Thursday, July 17, 2008 2:04 PM  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** FW: Letter to the UK government from the European Commission

Hello [REDACTED]

Are you aware of any correspondence to the UK Government (the Ministry of Justice I would assume) from the European Commission concerning the Phorm webwise product? This article indicates that Viviane Reding has called for action against Phorm because they are offering a product that breaches the privacy directive (2002/58/EC not 95/46/EC I think). [http://www.theregister.co.uk/2008/07/16/eu\\_warns\\_uk\\_over\\_phorm/](http://www.theregister.co.uk/2008/07/16/eu_warns_uk_over_phorm/)

Thanks  
Lee

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