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Mr. Peter [REDACTED]

Case Ref: 9419

Date: 25th March 2009

Dear Mr. [REDACTED]

I write further to my email of the 29th January 2009 and with reference to your request for an Internal Review into the decision and handling of your Freedom of Information Act (the Act) request concerning the Home Office, Phorm and Phorm's *Webwise* product.

I have now completed a full and independent review that has covered the procedural handling of your request and of the reasons and rationale behind the decisions by the Home Office to withhold the information you requested. This review has been conducted on its own merits and all areas of this request have been re-considered as part of this Internal Review process.

In your email to the Home Office on the 4th June 2008, you requested that we conduct a procedural review of your request as you believed that the Home Office had not provided you with a response within the twenty working day deadline provided under the Act. As we discussed at the time, I have combined a full procedural review into this Internal Review and I have provided the findings of this procedural review in **Annex A** to this letter.

I have noted from your emails on and around the 7th July 2008 that you have requested that our review cover the use of the exemption provisions of sections 40(3), 41(1), s42(1) and 43(2) of the Act. I have also noted that in your emails to the Home Office at this time you have alleged that the information released to you under this request was contradictory to the answers you had been given in response to some of your previous enquiries. You also assert that our response to this request is misleading.

In handling this Internal Review I have made a clear distinction between the information that has been provided to you in response to your request under the Freedom of Information Act (FoIA) and the answers that were provided to the questions you posed outside of this legislation. The scope of this Internal Review is to review those decisions and the manner in which the request under the FoIA was processed to ensure that we have met all of the obligations placed on us by this legislation, to provide you with a right of complaint as to the decisions reached in responding to your request for information under this Act, and to facilitate your right of access to the information held by the department which is not exempt under the Act.

The Internal Review process does not cover the answers that were given in response to your general questions, answered outside of the scope of this Act. It will focus on whether or not

we have met our obligations under s1(1) of the Act – to confirm whether or not the information you had requested under the FoIA is held by the Home Office and, if so, provide that information to you.

Furthermore, the Internal Review process covers the information you originally requested. It does not cover any follow-up questions or requests that were made in light of our response to this request. I note that Andrew Knight has continued to answer your normal business questions submitted outside of the scope of this Act to help your research on this matter, as well as your more recent FoIA requests.

Having reviewed the response to your request and the public interest considerations discussed therein, I am of the opinion that the exemption provisions of s40(3), s41(1), s42(1) and s43(2) of the Act were applied correctly. The potential harm and prejudice evidenced at the time your request was being handled is sufficient for me to agree with the decision to withhold the information you have requested.

I have included my considerations regarding the use of these exemptions in **ANNEX C** to this letter. I have also provided clarification as to the remit and scope of the Public Interest Test in **ANNEX B**.

In summary, therefore, I have decided to uphold the original decisions and the exemptions applied in all aspects of this request.

If you are still dissatisfied with this decision you may make an application to the Information Commissioner for a decision on whether the request and this review have been dealt with in accordance with the requirements of the Act.

For information on how to make an application to the Information Commissioner's Office, please visit their website at <http://www.ico.gov.uk> or write to:

*Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF*

Allow me to apologise for the delay in providing you with the findings of this Internal Review. I hope that this has not caused you any undue inconvenience.

Thank you for your interest in the Home Office.

Yours sincerely,



Ian Lister
Information Access Consultant
Information Access Team

ANNEX A – Procedural Review

I have conducted this procedural review in consideration of your letter of the 3rd June 2008 in which you stated that, at the time, you had yet to receive a response and the twenty working day deadline provided in s10 of the Act had expired.

Section 10(1) of the Act states that a public authority, “...must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt”.

Subsection 6 of this section goes on to clarify that a “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Our records show that your request was sent at 19:22 on the 5th May 2008. As the 5th May was a Bank Holiday Monday, the date of receipt for your request was Tuesday 6th May. Therefore, in consideration of the fact that Monday 26th May was also a Bank Holiday, the twenty working-day deadline for this request fell on the 4th June 2008.

I note from the material passed to me by Mr Knight that a letter was sent to your [REDACTED].biz’ email address on the 4th June 2008 explaining that, in accordance with the provisions of section 10(3) of the Act, we would not be able to provide you with a full response to your request within the original twenty-working day deadline.

Section 10 of the Act provides:

(3) – *If, and to the extent that –*

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or*
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied, the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstance; but this subsection does not affect the time by which any notice under section 17(1) must be given.*

In other words, in circumstances where a public authority is considering whether or not a qualified exemption or a ‘neither confirm nor deny’ provision of the Act applies, and are balancing the Public Interest consideration for and against disclosure, they may extend the deadline to respond to that request until ‘*such time as is reasonable in the circumstances*’.

If this is the case, the authority must inform the applicant of this in writing so as to comply with their duty under section 17 of the Act. Such written notice is referred to under the Act as a Refusal Notice.

Section 17(2) of the Act provides that any such notice, where they are extending the deadline for a request because they are balancing the public interest considerations, must provide an estimate date by which they expect that a decision will have been reached as to whether or not an exemption applies. Furthermore, in accordance with s17(1), the letter must also:

- (a) clearly state that fact;
- (b) specify what exemption provisions are being considered; and
- (c) explain why those exemption apply.

It cannot, however, be reasonably expected that a public authority can comply with part (c) when extending a deadline for public interest considerations – a full explanation as to the

precise application of any exemption provisions cannot be provided whilst it is still being debated whether or not they actually apply in the first place.

In his letter of the 4th June, Mr Knight met his obligations under section 17 of the Act insofar as he provided you with a letter stating that he was unable to supply you with a full response that answered every part of your request. He made it clear in an annex to this letter which parts of the request he was able to answer at that time and provided you with our response to those areas. He then explained which of the parts of your request he was unable to answer at that time because of ongoing Public Interest Test considerations.

The letter also includes an explanation of what the Public Interest Test is and why he was seeking to extend the deadline to reply to your request, as is required under section 17(1)(a). The letter also confirms the exemption provisions that were being considered in regards to the unanswered parts of your request and provides a new deadline twenty days hence – the 1st July 2008. This letter therefore also meets our obligations under s17(1)(b), s17(2) and section XI (para. 50) of the Section 45 Code of Practice – the Secretary of State's Code of Practice on the Discharge of Public Authorities' Functions.

This letter did not however provide you with the details of either our internal complaints procedure or with information on your right of complaint to the Information Commissioner's Office as we are obliged to include in any s17 Refusal Notice as provided under s17(7).

I do not consider, however, that the deadline was extended without due cause or without consideration of s10(3) of the Act. From the information that has been presented to me, I am satisfied that the practitioners handling your request were involved in deliberating and balancing the public interest considerations throughout the duration your request was ongoing.

The final response letter sent to you on the 2nd July 2008 meets our obligations under s17(1), 17(3) and 17(7) of the Act and section XI (para. 50) of the section 45 Code of Practice. The letter states clearly what sections of the Act under which it was considered the information was exempt, and provides comprehensive public interest arguments for and against disclosure of the information you requested.

Regrettably, though, this letter was sent to you the day after the revised deadline you were given in the letter from Andrew Knight on the 4th June 2008. Here we have failed to meet our obligations under section IV (para. 18) of the Section 45 Code of Practice in that we were not able to meet our revised deadline and failed to advise you accordingly.

ANNEX B – The Public Interest Test

The Public Interest Test (PIT) is integral in the application of any of the qualified exemption provision in the Act. Where a public authority is considering the use of one or more qualified exemption in response to a request for information, they must conduct a PIT to balance considerations favouring disclosure of the requested information against those favouring non-disclosure.

Under section 2(2)(b) of the Act, such an exemption will only be effective in excluding the duty to communicate information where:

"...in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

The Public Interest Test focuses not on what is of interest to the public but what will be of greater good, if released, to the community as a whole - what is in the best interest of the general public if you will.

You may be aware that FoIA is applicant blind. This means that we cannot, and do not, request the motives of any applicant for information. We have no doubt that the vast majority of applications under the Act are both laudable and proper. However, in providing material to one applicant, we are expressing a willingness to provide to anyone in the world. This means that a disclosure to a genuinely interested and concerned applicant automatically opens it up for disclosure to anyone, including those who might represent a threat to the UK.

ANNEX C – Application of the exemption provisions of s40(3), s41(1), s42(1) and s43(2)

All four of these exemptions can be engaged when complying with our duty laid out in section 1(1)(b); to communicate the information held by a public authority to an applicant.

Section 40 – Personal Information

- (2) *Any information to which a request for information relates is also exempt information if-*
- (a) *it constitutes personal data which do not fall within subsection (1), and*
 - (b) *either the first or the second condition below is satisfied.*
- (3) *The first condition is-*
- (a) *in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*
 - (i) *any of the data protection principles,*

Section 40(2) is an absolute exemption and does not require the supporting arguments of a Public Interest Test. In applying this exemption, the Andrew Knight replied on the first condition cited in s40(3)(a)(i) – the disclosure of the ‘*incidental references in the information to identifiable individuals*’, as stated in our response letter, would constitute as unfair processing of an individuals’ personal data.

The first data protection principal in Schedule 1, Part 1 of the DPA provides:

1. *Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless*
 - a. *at least one of the conditions in Schedule 2 is met, and*
 - b. *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met*

The DPA clarifies that the term ‘processing’ (in Part 1, 1. (1)) as both the

- ‘*recording or holding of information or data*’, and the
- ‘*retrieval, consultation or disclosure of the information or data by transmission, dissemination or otherwise making available*’.

The disclosure of this information under FoIA constitutes as the processing of data. This would therefore breach the first Data Protection Principle of the Data Protection Act.

Section 41 - Information provided in confidence.

- (1) *Information is exempt information if-*
- (a) *it was obtained by the public authority from any other person (including another public authority), and*
 - (b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

Section 41(1) is also an absolute exemption and similarly does not require the supporting arguments of a Public Interest Test under FoIA. However, the common law duty of confidence contains an inherent public interest test which must be considered in order to decide if the information is exempt. This form of the PIT is the reverse of that normally applied under FoIA, in that it assumes that information should be withheld unless the public interest

considerations favouring disclosure outweigh the public interest in maintaining the duty of confidence.

There are two components to the exemption:

- The information must have been obtained by the public authority from another person. A person may be an individual, a company, a local authority or any other "legal entity". It is not restricted to information provided verbally or in writing. The exemption does not cover information which the public authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these contain confidential information provided by a third party. It is the information itself, and not the document or other form in which it is recorded, which needs to be considered.
- Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider or a third party could take the authority to court.

The provisions of s41(1) were applied to both the private company staff names and that private company names themselves in the information requested under parts (b) and (c) of this request. Our response letter clearly states that the exempt information was provided to the Home Office by a third party, that it 'explicitly' has the necessary quality of confidence and that releasing it would be a breach of that confidence which would be actionable under the Common Law duty of confidence by those companies and/or individuals.

The response letter also acknowledges the fact that they are satisfied that the arguments for maintaining the duty of confidence in this instance would not be overridden by any common law public interest considerations. In other words, it is felt that in this instance, there are no general public interest considerations (or considerations that carry sufficient weight) in favour of disclosure of the confidential information to mean that it would not constitute as an actionable breach of confidence in court.

Section 42 – Legal Professional Privilege

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

Section 42(1) is a qualified exemption provision of the Act and requires the supporting arguments of a Public Interest Test before it can be engaged. The provisions of this exemption have been applied to parts of the information you requested in part (b) of your request. Information falls within scope of this section of the Act if a claim to legal professional privilege could be maintained in legal proceedings.

The information to which this exemption applies falls into the category of 'legal advice privilege' in that it encompasses communications between the Home Office and its legal advisers. This type of communication is privileged, whether or not litigation is contemplated or pending if they are for the purpose of seeking or giving legal advice.

Subject to very limited exceptions, legal professional privilege can be maintained in proceedings regardless of the circumstances. In particular, there is not scope for the court in proceedings to decide that the privilege should be overridden because of a wider public interest in disclosure. There is considerable public interest in any party being able to

communicate with its lawyers and prepare for litigation in the knowledge that those communications or preparations will not be disclosed.

The public interest considerations that were detailed in our letter dated the 2nd July 2008 provide a clear explanation of the potential harm and prejudice that the disclosure of information subject to Legal Professional Privilege could cause. I am satisfied that this exemption applies to the information requested in part (b) of this request.

Section 43 – Commercial Interests

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).

Section 43(2) is also a qualified exemption provision of the Act and similarly requires the supporting arguments of a Public Interest Test before it can be engaged. The provisions of this exemption have been applied to parts of the information requested in parts (b) and (c) of your request. The provision of subsection (2) of this exemption can be applied help protect the ability of any person to successfully participate in commercial activity.

The 'person' whose interests may be prejudiced could be any company, sole trader or private individual or the public authority itself. It could relate to more than one person or, for example, all businesses in a particular sector of the economy.

It is acknowledged in recently published FoIA guidance by the Ministry of Justice (<http://www.justice.gov.uk/whatwedo/guidancefoi.htm>) that certain government departments are likely to hold a wide range of information the disclosure of which could come within the terms of s43(2) by virtue of the effects of the disclosure on a third party. The information to which this exemption applies is commercially sensitive information voluntarily shared with the Home Office by companies and other third party bodies, and is also information developed by the department about various companies and businesses.

Some of the information that falls within scope of parts (b) and (c) of this request is information that was shared with the Home Office in confidence about commercially sensitive ideas, proposals, new products and services. There is a considerable overlap in this instance with the provisions of s41 (information provided in confidence) discussed earlier in this letter. The release of some of the information to which s43(2) applies would also be likely to constitute a breach of that duty of confidence and, for this reason, is also exempt information under s41(1) of the Act.

The information which does not technically fall within the terms of s41 is prejudicial to the commercial interests inherent in the maintenance of good commercial relations between the Home Office and the businesses and companies that information. The release of this information could also prejudice the ability of these organisations and businesses to remain commercially competitive in this area of the economy.

Again, the public interest considerations that were detailed in our letter dated the 2nd July 2008 provide a clear explanation of the potential harm and prejudice that could result from the disclosure of commercially sensitive information. The considerations that were detailed by Andrew Knight provide evidence as to how the public interest arguments for and against disclosure affect that prejudice. It is in the public interest for the various businesses, companies and organisations to be able to share sensitive commercial information with the Home Office without fear that it will be disclosed at the expense of their ability to operate successfully within a competitive marketplace.

Our Decision

Having reviewed the original response, the public interest considerations discussed therein, and having contacted the stakeholders of the information you have requested, I am of the opinion that the exemption provisions of the aforementioned sections of the Act were applied correctly. The potential harm and prejudice evidenced at the time of the original response is also sufficient for me to agree with the original position favouring the non-disclosure of the information you have requested in all aspects of your request.

It is acknowledged that there are strong public interest arguments favouring disclosure of some of the requested information. However, at this time, we consider that there is a stronger argument favouring the withholding of this information for the reasons I have covered above.

Having re-evaluated the relevant public interest considerations and the resulting harm and prejudice, it is not in the public interest for this information to be disclosed at this time.