



# Ministry of JUSTICE

Information Policy Division  
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London SW1H 9AJ

T 020 3334 4543  
F 020 3334 3745

Peter [REDACTED]

14 May 2009

Our Ref: FOI/59177

Dear Mr.

I am writing further to my letter of 8 May 2009 regarding your application for an internal review of the response to your Freedom of Information request.

I have now conducted a full review of the handling of your request. This matter has been treated on its own merits and all papers originally considered have been re-considered as part of the internal review.

The original response, which you received on 8 April 2009, was provided well outside of the time limit set down in section 10(1) of the Freedom of Information Act. Please accept my apologies on behalf of the Ministry of Justice (MoJ) for the delay in replying to your request. By way of explanation I would like to draw your attention to the statistics on central government's performance for the fourth quarter of 2008 which can be viewed via the following link <http://www.justice.gov.uk/publications/freedomofinformationquarterly.htm>. As you will see by reference to Table 2 on page 12, the Ministry of Justice only managed to respond within the 20 day time limit in 51% of cases. Although Ministry of Justice received the most FOI cases in government, the performance in responding has not been good enough and we are taking action to change that. We hope, therefore, to see an improvement in performance over 2009.

In relation to questions one to seven of your request, the Ministry of Justice originally responded that information was not held. As a result of this internal review, I have concluded that one e-mail and its accompanying attachment held by the Ministry of Justice falls within the scope of your first question. I enclose this information with this letter. However section 40(2) of the Freedom of Information Act by virtue of paragraph (3)(a)(i) is engaged and so I have made a number of redactions to the e-mail in question in order to protect the personal data of the individuals concerned.

Section 40(2) and (3)(a)(i) of the Freedom of Information Act states that:

(2) Any information to which a request for information relates to 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, or*

This information consists in part of correspondence between an official at the Ministry of Justice and an employee of Phorm. It is unlikely that either of these individuals would have expected their personal information to enter the public domain as a result of this correspondence and so releasing the information would be unfair and therefore in breach of the First Data Protection Principle.

*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.*

Having reviewed all of the information previously considered and investigated matters in light of your clarification of the word 'issues' used in question eight, nine and ten of your request, I have concluded that the Ministry of Justice does hold one string of e-mails that falls within the scope of your request. As you will see from the enclosed correspondence, the 'issues' include the handling of two parliamentary questions from Don Foster MP (question Nos 2007/2205 & 2206), two other parliamentary questions submitted by David Hamilton MP, and one parliamentary question from the Earl of Northesk

For the same reasons outlined above, the names of the officials involved have been withheld under section 40(2) of the Freedom of Information Act. There was also a document attached to the string of e-mails but more time is, I am afraid, needed to consider this information. I wish, therefore, to advise you that the following exemption applies to this particular document:

Section 36(2)(b)(i) and (ii) of the Freedom of Information Act states:

- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act –*
  - (b) would, or would be likely to, inhibit –*
    - (i) the free and frank provision of advice, or*
    - (ii) the free and frank exchange of views for the purposes of deliberation, or*

By virtue of section 10(3), where public authorities have to consider the balance of the public interest in relation to a request, they do not have to comply with the request until such time as is reasonable in the circumstances. The Ministry of Justice has not yet reached a decision on the balance of the public interest. Due to the need to consider, in all circumstances of the case, where the balance of the public interest lies in relation to the information that you have requested, the Department will not be able to respond to your request in full within 20 working days.

I hope to let you have a response by 28 May 2009

For your convenience, though the parliamentary questions and the answers are exempt by virtue of section 21 of the Freedom of Information Act as they are already in the public domain, I have outside of the Act set them out below:

**First set of questions Internet: Data Protection (21 April 2008)**

*Mr. David Hamilton: To ask the Secretary of State for Justice (1) what assessment has been made of the adequacy of safeguards for internet users who have their online activities monitored by internet service providers; [194856]*

*(2) what consideration he has given to introducing legislation that would require an opt-in for internet users before internet service providers are allowed to collect information about which websites an individual visits. [194857]*

*Malcolm Wicks: I have been asked to reply.*

*The Office of the Information Commissioner made a statement on 3 March 2008 that it was in discussion with one company about the nature of its service and the way it uses information about ISP customers. My Department will consider the continued relevance of the current safeguards and legislation in the light of the outcome of those discussions.*

**Second set of questions Targeted Advertising Technology (21 April 2008)**

*Mr. Don Foster: To ask the Secretary of State for Business, Enterprise and Regulatory Reform (1) what assessment he has made of the implications for personal privacy of the use of targeted advertising technology by companies; [198365]*

*(2) whether he has had discussions with BT on its use of targeted advertising technology. [198366]*

*Mr. Malcolm Wicks: The Office of the Information Commissioner made a statement on 3 March 2008 that it was in discussion with one company about the nature of its service and the way it uses the information about ISP customers. My Department will consider the continued relevance of the current safeguards and legislation in the light of the outcome of those discussions. I have had no discussions with BT on this matter.*

**Third set of questions Advertising: Internet (Monday 21 April 2008)**

*The Earl of Northesk asked Her Majesty's Government: Whether they are taking any action on the targeted advertising service offered by Phorm in the light of the questions about its legality under the Data Protection and Regulation of Investigatory Powers Acts. [HL2635]*

*The Parliamentary Under-Secretary of State, Department for Business, Enterprise and Regulatory Reform (Baroness Vadera): The Office of the Information Commissioner made a statement on 3 March 2008 that it was in discussion with one company about the nature of its service and the way it uses information about ISP customers. My department will consider the continued relevance of the current safeguards and legislation in the light of the outcome of those discussions.*

I enclose a copy of the information we are releasing to you for the moment under the Freedom of Information Act. The Ministry of Justice does not hold any further information that falls within the scope of your original request. This may at first seem peculiar in light of the Ministry of Justice's responsibility for the Data Protection Act 1998. However, it is precisely because the Ministry of Justice is responsible for ensuring the legal framework is fit for purpose, rather than enforcement of the law, that so little information is held in relation to

your request. Responsibility for enforcement rests with the Information Commissioner's Office (ICO) who is the independent regulator of the DPA.

I realise that you may be disappointed with this response. However the information available has been considered with great care in this case, and the Ministry of Justice always seeks to provide as much information as it is able to.

Should you remain dissatisfied after this internal review, you have the right of complain to the Information Commissioner, as established under section 50 of the Freedom of Information Act. You can write to him at:

Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF

Yours sincerely,



**RICHARD BISHOP**  
Information Policy Division

annex c presentation intro.txt

FW: Privacy flash presentation from homepageFrom: [section 40]  
Sent: 10 October 2008 07:50  
To: [Section 40]  
Subject: FW: TRIM: FW: Privacy flash presentation from homepage

Attachments: Phorm Privacy Revolution Flash April 08.ppt

this might be helpful in understanding Phorm better.....

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

From: [section 40]  
Sent: 09 October 2008 18:35  
To: [section 40]; [section 40]; [section 40]; [section 40]; [section 40];  
[section 40]; [section 40]; [section 40]  
Subject: FW: TRIM: FW: Privacy flash presentation from homepage

Colleagues

Please see the attached powerpoint presentation slides which explain the Phorm technology - this is a version of the presentation that the company gave to us earlier this year.  
[section 40]

---

From: [section 40]  
Sent: 09 October 2008 18:06  
To: [section 40]  
Subject: TRIM: FW: Privacy flash presentation from homepage

Hi [section 40],

Good to see you today. As I mentioned, in case you can't access the flash version, here's a very low-tech but readable ppt of the presentation we showed you a few months back. It's also on the front page of our website if you want to access it online.

All the best,

[section 40]

--  
[section 40]  
Director of Corporate Communications  
Phorm  
Liberty House  
222 Regent Street  
London W1B 5TR  
UK

[section 40]

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annex c presentation intro.txt

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# **Introducing: The Phorm Privacy Revolution**



annex c pq correspondence.txt

Re: TRANSFERS From: [section 40]  
Sent: 12 May 2009 16:26  
To: [section 40]  
Subject: FW: Phorm - PQ transfers

Attachments: HAMILTON David1.doc

[section 40]  
Domestic Data Protection Policy  
102 Petty France  
[section 40]

---

From: [section 40]  
Sent: 28 March 2008 16:17  
To: '[section 40]; [section 40]; [section 40]; [section 40]; [section 40];  
[section 40]; [section 40]  
Subject: RE: Phorm - PQ transfers

Detailed background on David Hamilton drafted for the Phorm PQs. No attempt was made to edit it, sorry if it is rather long

[section 40]

[section 40]

NB We did not start any background for the Lords PQ

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

From: [section 40]  
Sent: 28 March 2008 15:57  
To: [section 40]; [section 40]; [section 40]; [section 40]; [section 40];  
[section 40]; [section 40]  
Cc: [section 40]; [section 40]; [section 40]  
Subject: RE: Phorm - PQ transfers

[section 40]

Yes, that's right. Please can [section 40] forward the data to [section 40] and [section 40] as [section 40] and I are both on leave next week.

I'll ask my colleague [section 40] to email you about setting up a meeting.

Thanks  
[section 40]

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From: [section 40]  
Sent: 28 March 2008 15:54  
To: [section 40]; [section 40]; [section 40]; [section 40]; [section 40];  
[section 40]; [section 40]  
Cc: [section 40]; [section 40]; [section 40]  
Subject: RE: Phorm - PQ transfers

[section 40]

Thanks for this. Am I right in thinking this offer covers the two David Hamilton PQs and the Earl of Northesk one that is linked?



(Questions as follows:

David Hamilton

what assessment has been made of the current safeguards for internet users who have their online activities monitored by internet service providers?

what consideration he has given to introducing legislation that would require an opt-in for internet users before internet service providers are allowed to collect information about which websites an individual visits?

Earl Northesk

To ask Her Majesty's Government, whether they are taking any action on the targeted advertising service offered by Phorm in the light of the questions about its legality under the Data Protection and Regulation of Investigatory Powers Acts).

I agree your suggestion to meet - happy to come over to you or would you like me to organise for a suitable day?

[section 40] - could you forward to [section 40] any of the stuff that you have pulled together which may be helpful to them for background on these PQs?

Thanks

[section 40]

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

From: [section 40]

Sent: 28 March 2008 15:44

To: [section 40]; [section 40]; [section 40]; [section 40]; [section 40]; [section 40]

Cc: [section 40]; [section 40]; [section 40]; [section 40]

Subject: Phorm - PQ transfers

[section 40]

In the interests of getting these PQs answered, we will accept them. However, this is without prejudice to our view that the policy lead for Phorm may well still lie with MoJ. We'll draft answers along the lines that [section 40] suggested to [section 40] some time ago - "The Office of the Information Commissioner made a statement on 3 March that it was in discussion with one company about the nature of its service and the way it uses information about ISP customers. My Department will consider the continued relevance of the current safeguards and legislation in the light of the outcome of those discussions."

It would be really useful to have a constructive chat between BERR, MoJ, ICO and Home Office about the legal and policy aspects of all this - could we do something in the 2nd or 3rd week of April? ([section 40] and I are both on leave next week).

All the best  
[section 40]

---

From: [section 40]

Sent: 28 March 2008 11:26

To: [section 40]; [section 40]; [section 40]

Cc: [section 40]; [section 40]; [section 40]; [section 40]

Subject: RE: TRANSFERS

Importance: High

annex c pq correspondence.txt  
Sorry to chase but any further thoughts on this please?

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

From: [section 40]  
Sent: 27 March 2008 15:37  
To: '[section 40]'; [section 40]; [section 40]  
Cc: [section 40]; [section 40]; [section 40]; [section 40]  
Subject: RE: TRANSFERS

We have spoken to our contacts at the ICO who feel that the main policy of these questions is about electronic marketing/cookies but has a possible underlying DP aspect to it. We quite often come across policy issues which might have a DP implication if the organisation breaks the law but until that happens it is a policy issue and not a DP issue - for example, the DVLA has a policy whereby they can release vehicle records where the applicant has reasonable cause for requesting it. Companies enforcing parking restrictions on private land meet the reasonable cause criteria. The release of this information is a DVLA/DfT issue and not a DPA issue.

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

From: [section 40]  
Sent: 27 March 2008 15:22  
To: [section 40]; [section 40]; [section 40]  
Cc: [section 40]; [section 40]; [section 40]; [section 40]  
Subject: Re: TRANSFERS

Or, as we believe, on on more fundanental issue around the protection of personal information. Cookies are not the central issue at stake here.

[section 40]

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

From: [section 40]  
To: [section 40]; [section 40]; [section 40]  
Cc: [section 40]; [section 40]; [section 40]; [section 40]  
Sent: Thu Mar 27 15:15:32 2008  
Subject: RE: TRANSFERS

[section 40]

So does this mean that they would fall under Privacy and Electronic Communications Regulations as they are to do with cookies and it is an electronic marketing issue?

[section 40]

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

From: [section 40]  
Sent: 27 March 2008 15:12  
To: [section 40]; [section 40]; [section 40]  
Cc: [section 40]; [section 40]; [section 40]; [section 40]  
Subject: Re: TRANSFERS

[section 40]

I would be surprised. These Regs deal with the exception allowed under RIPA for employers to intercept communications by employees (hence the message you get from switchboards that you call may be recorded). Nothing to do with the ISPs.

[section 40]

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

annex c pq correspondence.txt

From: [section 40]  
To: [section 40]; [section 40]; [section 40]  
CC: [section 40]; [section 40]; [section 40]; [section 40]  
Sent: Thu Mar 27 14:06:20 2008  
Subject: RE: TRANSFERS

[section 40]

It has also been suggested to me that these PQs may fall within the following legislation too - which I understand is a BERR lead.

SI 2000/2699 The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000

Thanks

[section 40]

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

From: [section 40]  
Sent: 27 March 2008 12:03  
To: [section 40]; [section 40]; [section 40]  
Cc: [section 40]; [section 40]  
Subject: RE: TRANSFERS

[section 40] cc [section 40]

Did you get an opinion from ICO and/or Home Office on this?

thanks  
[section 40]

---

From: [section 40]  
Sent: 26 March 2008 18:04  
To: [section 40]; [section 40]; [section 40]  
Cc: BR Information Hub; [section 40];  
Subject: RE: TRANSFERS

40]; [section 40]

[section 40]; [section 40]

[section 40]

Thanks v much for this. As this is about monitoring internet users surely the relevant legislation will be the Privacy and Electronic Communications Regulations? Please correct me if I am being really thick!

Thanks

[section 40]

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

From: [section 40]  
Sent: 26 March 2008 15:09  
To: [section 40]; S[section 40];  
Cc: BR Information Hub; [section 40]  
Subject: FW: TRANSFERS

[section 40]; [section 40]

40]; [section 40]

[section 40]

phone, and I need to leave at 4pm today so I think we won't be able to catch up today.

I don't think I have anything to add to [section 40] position in the email below. The PQs we are talking about seem to be about application of the DPA by certain companies in respect of customer information. The fact that it is Internet Service Providers who are the companies in question does not make this a BERR lead - they have to comply with general legislation, as do all companies, and the lead Department in question in each case is the Department with responsibility for that legislation.

However, we are happy to assist in formulating a response and in discussing the policy issues with you (see Geoff's suggested wording below).

I'll still be happy to chat tomorrow - I should be around in the afternoon.

all the best  
[section 40]

[section 40]; [section 40]

---

From: [section 40]  
Sent: 17 March 2008 15:57  
To: '[section 40]'  
Cc: [section 40]; [section 40];  
Subject: RE: TRANSFERS

[section 40]

I tried to call. I have looked again at the questions in the light of further research on Phorm. It is absolutely clear to me that these questions are entirely around the data protection issues that are becoming a matter of public conjecture. I have now seen the statement from the ICO dated 3 March that could well have given rise to these questions.

Given the involvement of the ICO, I think there is a strong case that you should answer the questions on the grounds that this is a general inquiry about the monitoring and use by a business of its customer information. I cannot see that this is related in any obvious way to our role in relation to the privacy regulations.

Since starting this note, I have received the appended note from FIPR which indicates that they think the breach is of DPA and RIPA. I have therefore copied this note to both [section 40] at ICO and [section 40] at the Home Office for a view on where the Ministerial responsibility for Phorm lies.

I suggest that the reply to both questions should be along the lines of:-

"The Office of the Information Commissioner made a statement on 3 March that it was in discussion with one company about the nature of its service and the way it uses information about ISP customers. My Department will consider the continued relevance of the current safeguards and legislation in the light of the outcome of those discussions."

But, I do not think that these generic DP issues should be taken by my Ministers.

[section 40]

Open Letter to the IC on the  
legality of Phorm's advertising system

---

The Foundation for Information Policy Research (FIPR) has today released the text of an open letter to Richard Thomas, the Information Commissioner (IC) on the legality of Phorm Inc's proposal to provide targeted advertising by snooping on Internet users' web browsing.

The controversial Phorm system is to be deployed by three of Britain's largest ISPs, BT, Talk Talk and Virgin Media. However, in FIPR's view the system will be processing data illegally:

- \* It will involve the processing of sensitive personal data: political opinions, sexual proclivities, religious views, and health -- but it will not be operated by all of the ISPs on an "opt-in" basis, as is required by European Data Protection Law.
- \* Despite the attempts at anonymisation within the system, some people will remain identifiable because of the nature of their searches and the sites they choose to visit.
- \* The system will inevitably be looking at the content of some people's email, into chat rooms and at social networking activity.

Although well-known sites are said to be excluded, there are tens or hundreds of thousands of other low volume or semi-private systems.

More significantly, the Phorm system will be "intercepting" traffic within the meaning of s1 of the Regulation of Investigatory Powers Act 2000 (RIPA). In order for this to be lawful then permission is needed from not only the person making the web request BUT ALSO from the operator of the web site involved (and if it is a web-mail system, the sender of the email as well).

FIPR believes that although in some cases this permission can be assumed, in many other cases, it is explicitly NOT given -- making the Phorm system illegal to operate in the UK:

- \* Many websites require

annex c pq correspondence.txt  
registration, and only make their contents

within a website are part of the

is only made known to a small

be viewed at:

<http://www.fipr.org/080317icoletter.html>  
<<http://www.fipr.org/080317icoletter.html>>

FIPR:

consent to interception in order for

basic principle within the

lightly ignored or treated as a

are investigating as serious a

and need to listen in to

the criminals, they must first

relevant Act of Parliament: the

itself sufficient to make their

FIPR:

intrusive -- it's like the Post Office

I'm interested in, merely so that

mail. Not surprisingly, when

turns out to be illegal. We hope

will take careful note of our

available to specific people.

\* Many websites or particular pages

"unconnected web" -- their existence

number of trusted people.

The full text of the open letter can

QUOTES

Said Nicholas Bohm, General Counsel,

"The need for both parties to

it to be lawful is an extremely

legislation, and it cannot be

technicality. Even when the police

crime as kidnapping, for example,

conversations between a family and

obtain an authorisation under the

consent of the family is not by

monitoring lawful."

Said Richard Clayton, Treasurer,

"The Phorm system is highly

opening all my letters to see what

I can be sent a better class of junk

you look closely, this activity

that the Information Commissioner



opinion upon the scheme."

analysis when he expresses his

#### CONTACTS

[section 40]

General Counsel, FIPR

[section 40]

[section 40]

[section 40]

Treasurer, FIPR

[section 40]

[section 40]

#### NOTES FOR EDITORS

Policy Research (<http://www.fipr.org> <<http://www.fipr.org/>> )

the interaction between

Its goal is to identify

significant social impact, commission

policy alternatives, and promote

between technologists and policy-

<<http://www.phorm.com/>> ) claims that their

revolutionises both audience segmenting

privacy" and has recently announced

UK Internet service providers BT,

its new online advertising

(OIX) and free consumer Internet

March the Information Commissioner's

1. The Foundation for Information

is an independent body that studies

information technology and society.

technical developments with

and undertaken research into public

public understanding and dialogue

makers in the UK and Europe.

2. Phorm (<http://www.phorm.com/>  
"proprietary,

patent-pending technology

techniques and online user data

that it has signed agreements with

TalkTalk and Virgin Media to offer

platform Open Internet Exchange

feature webwise.

3. In a statement released on 3rd

office (ICO) said:

Office has spoken with the  
Phorm, regarding its agreement  
providers. Phorm has informed us  
to provide targeted online  
written information to us  
intends to meet privacy  
reviewing this information. We are  
are working with Phorm and we  
further in due course."

"The Information Commissioner's  
advertising technology company,  
with some UK internet service  
about the product and how it works  
advertising content.  
"At our request, Phorm has provided  
about the way in which the company  
standards. We are currently  
also in contact with the ISPs who  
are discussing this issue with them.  
"We will be in a position to comment  
--ends

40]

From: [section 40]  
Sent: 17 March 2008 09:30  
To: [section 40]  
Cc: [section 40]; [section  
Subject: FW: TRANSFERS  
Importance: High

[section 40]

I have left you a voicemail  
about the PQs listed below. I was away from the office all day Friday so did not  
have chance to do anything until this morning.

I understand that you may  
have seen the questions already.

I can see that there may be  
a DPA aspect to the questions but primarily they are clearly about ISP issues.  
It is my understanding that the policy responsibility for Internet issues such  
as these fall somewhere within BERR.

Can you get back to me asap  
to discuss the ownership of the PQs.

I am not sure of target  
dates but guess it must be getting close.

Thanks

annex c pq correspondence.txt

[section 40]

[section 40]

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

From: [section 40]

Sent: 14 March 2008 10:10

To: [section 40]

Subject: FW:

Importance: High

[section 40],

Could you take a look at these two PQ's that we are trying to transfer to BERR, could you please advise as in to who is best to lead.

The official who turned them

TRANSFERS

down was a [section 40] on [section 40]

From: [section 40]

Sent: 13 March 2008 10:14

To: [section 40]

Subject: TRANSFERS

Importance: High

TODAY'S BLUES P.G 3503

POSSIBLE TRANSFERS FROM

276 Mr David

Hamilton|Midlothian|To ask the Secretary of State for Justice, what assessment has been made of the current safeguards for internet users who have their online activities monitored by internet service providers.194856

277 Mr David

Hamilton|Midlothian|To ask the Secretary of State for Justice, what consideration he has given to introducing legislation that would require an opt-in for internet users before internet service providers are allowed to collect information about which websites an individual visits. 194857

Regards

[section 40]

Parliamentary Team (MOJ)

[section 40]

P Please consider the environment - do you really need to print this email? Reduce. Re-use. Re-cycle

Regards

[section 40]

Parliamentary Team (MOJ)

[section 40]

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