



Ministry of JUSTICE

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Peter [REDACTED]

28 May 2009

Our Ref: FOI/59177

Dear Mr. [REDACTED]

I am writing following on from my letter to you of 14 May 2009 setting out the Ministry of Justice's initial substantive response to your request for an internal review. Having now considered the public interest arguments in relation to the use of section 36(2)(b)(i) and (ii) of the Freedom of Information Act, I am now in a position to provide you with the Ministry of Justice's final reply.

We have decided that s.36(2)(b)(i) does not apply to the information in question and I am therefore releasing in part a draft background note to the parliamentary questions referred to in my previous letter. The note is being released in its entirety aside from references to an individual's name and so I have made a number of redactions to the background note in question in order to protect the personal data of the individual 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 was provided to the Ministry of Justice by a Home Office official who would not have expected their personal information to enter the public domain as a result. Releasing the information would be unfair and therefore in breach of the First Data Protection Principle.

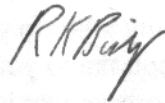
I enclose a copy of the information we are releasing under the Freedom of Information Act. The Ministry of Justice does not hold any further information that falls within the scope of your original request.

I realise that this response will be disappointing to you, particularly in light of the substantial delay in responding to your original request. Once again, on behalf of the Ministry of Justice, I am very sorry for the unacceptable delay in responding to your first request for information. I hope, through this internal review, that we have been able to provide some reassurance to you that the Ministry of Justice will improve its performance in this area over 2009.

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

BACKGROUND

Member: David Hamilton has been Labour member for Midlothian since June 2001.

He sits on the following All-Party Groups: Treasurer Civil Contingency and Preparedness Group 2004-; Vice-chair Occupational Safety and Health Group 2004-; Secretary Channel Islands Group 2006-; Chair Coalfield Communities Group 2007- .

He has been a member of the Commons Select Committee for Defence since 2005. Prior to that he was a member of the following Select Committees: Broadcasting 2001-05, Procedure 2001-05, Scottish Affairs 2003-05, 2007-08, Work and Pensions 2003-05, and European Scrutiny 2005-07.

He is Treasurer All-Party Civil Contingency and Preparedness Group 2004-; Vice-chair All-Party Occupational Safety and Health Group 2004-; Member Select Committee on Defence 2005-; Secretary All-Party Channel Islands Group 2006-; and Chair All-Party Coalfield Communities Group 2007- .

Under the Convention of Scottish Local Authorities (COSLA), he sits on the MidLothian Innovation Technology Trust (since 2002). Prior to that he was: Chair Economic Development, Planning and Transport Committee 1997-99, Midlothian Chamber of Commerce -2002; and Midlothian Enterprise Trust -2002.

As a councillor for Midlothian Council (1995-2001) he was Convenor Strategic Services Committee. He was also Chair of the PLP Scottish Regional Group (Commons Backbench Committee) 2007-08 and Vice-chair 2005-07.

Mr Hamilton has not previously raised any PQs with the DCA/MoJ. He asks most questions -

- of: Trade and Industry, Work and Pensions, Defence, Home Department, Treasury.
- about: Coal Industry, Terrorism: Detainees, Defence Activities: Scotland, Iraq, Gibraltar

Mr Hamilton's political interests include Defence, energy, Europe and biotechnology. His Countries of interest include EU, USA, Gibraltar and Cyprus.

The Earl of Northesk has raised a similar PQ for answer on 31 March:

QUESTION Earl of 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. HL2635

DN – answer will be inserted here when cleared.

The questions may have been raised following the statement by the Information Commissioner's office this month on the Phorm advertising system, and as a result of controversial media attention that Phorm has recently been receiving.

Subject:

Phorm is a company which tracks web activity to create personalised advertisements. Plans by leading Internet service providers (ISPs) such as BT, Talk Talk and Virgin Media to trial using Phorm have sparked controversy.

The Open Rights Group, which campaigns for the digital civil rights of British citizens, has concerns over potential privacy violations caused by the Phorm system. It is calling for a

detailed explanation of the exact workings of Phorm to ensure that it complies with privacy legislation.

Approximately 6,500 people have signed up to a Downing Street petition highlighting their worries.

On 3 March 2008, the Information Commissioner's Office (ICO) published a statement on its web site to announce that, at the ICO's request, Phorm has provided written information about the way in which the company intends to meet privacy standards. The statement confirms that Phorm has informed the ICO about the product and how it works to provide targeted online advertising content. The ICO is currently reviewing the information, and is also in contact with the ISPs who are working with Phorm. The ICO says that it will be in a position to comment further in due course and will advise MoJ of the outcome.

On 17 March, the Foundation for Information Policy Research (FIPR) issued an open letter to the Information Commissioner urging him to look at the legality of the Phorm system <http://www.fipr.org/080317icoletter.html>. In FIPR's view, Phorm will be processing data illegally. Excerpts from the FIPR's press release of the same date include:

- (The Phorm system] 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 registration, and only make their contents available to specific people.
- Many websites or particular pages within a website are part of the "unconnected web" -- their existence is only made known to a small number of trusted people.

FIPR spokesperson (and Open Rights Group Advisory Council member) Richard Clayton has said:

"The Phorm system is highly intrusive — it's like the Post Office opening all my letters to see what I'm interested in, merely so that I can be sent a better class of junk mail. Not surprisingly, when you look closely, this activity turns out to be illegal. We hope that the Information Commissioner will take careful note of our analysis when he expresses his opinion upon the scheme."

On 17th March, the creator of the Internet, Sir Tim Berners-Lee, told BBC News that consumers need to be protected against systems that can track their activity on the Internet, and that he would change his Internet provider if it introduced such a system <http://news.bbc.co.uk/1/hi/technology/7299875.stm>

Phorm describes itself on its web site as "an innovative digital technology company. Our company is focused on creating a new "gold standard" for user privacy, a more relevant Internet experience, and more value for advertisers, publishers, Internet Service Providers and others in the online ecosystem".

In response to the furore, Phorm issued a statement denying any lack of compliance with privacy legislation. "Our technology complies with the Data Protection Act, RIP Act and other applicable UK laws. Consumers are in control. They can switch the service off or on... Meanwhile the system does not know who they are or where they have browsed as it does not gather personally identifiable information, does not store IP addresses or retain browsing histories... We are currently in conversation with the Open Rights Group to meet with them and look forward to explaining how our technology sets a new standard in online privacy."

Mr Simon Davies (Director of 80/20 Limited and also of Privacy International) has said that the onus would be on ISPs to ensure customers had enough information about the scheme in order to have "informed consent". He said unless ISPs were extremely clear they could run foul of the RIPA. 80/20 Limited conducted the Privacy Impact Assessment (PIA) for Phorm. The Open Rights Group is calling for the PIA to be published.

[section 40] of RIPA was consulted regarding this PQ. He is aware of the Phorm issue (there is also another company offering the same service but he does not know them) and has given informal advice to Phorm. He does not accept the allegations that FIPR have made about Phorm and privacy issues. His view is that what Phorm plan to do will maintain anonymity of the user and does have the potential to provide an 'opt-in' agreement for users. He stresses that this is an informal, personal view and he is pleased that the ICO are looking into the issue. [Section 40] will be talking to the ICO about their investigation.

BERR have been consulted because of their interest in internet issues. They have expressed the opinion that this particular issue is not within their remit.