

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 20 December 2010

**Public Authority:** Department for Education (formerly the  
Department for Children Schools and Families)  
**Address:** Sanctuary Buildings  
Great Smith Street  
Westminster  
London  
SW1P 3BT

### Summary

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The complainant requested a copy of Phorm's application to join the UK Council for Child Internet Safety from the Department for Children, Schools and Families. The public authority refused to provide the requested information as it considered the information to be exempt under section 43(2) of the Freedom of Information Act 2000 and that the public interest in maintaining the exemption outweighed the public interest in disclosure. During the investigation, the public authority argued that it may not hold the requested information. Further, it suggested that the request was vexatious under section 14(1) and that section 41 applied to the information. The Commissioner has investigated and has concluded that the requested information is held by the public authority for the purposes of the Act. He refused to consider the applicability of sections 14(1) and 41 as these were cited at a late stage in the investigation. The Commissioner has found that some information was properly withheld however that section 43(2) doesn't apply to the remaining information. The Commissioner requires this information to be disclosed. In addition, the Commissioner has noted some procedural breaches of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the

requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

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2. The UK Council for Child Internet Safety (UKCCIS) was set up by the Department for Children, Schools and Families (the Department) and the Home Office in September 2008. The Department has explained that UKCCIS brings together over 100 organisations from the public and private sector to work with the Government to deliver recommendations from Dr Tanya Byron's report "Safer Children in a Digital World". The Byron Review considered the risk to children from exposure to potentially harmful or inappropriate material on the internet and in video games.

## The Request

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3. On 2 April 2009 the complainant wrote to the Department by email and made 12 requests for information concerning UKCCIS. These requests are set out at Annex 1 to this Decision Notice.
4. On 23 April 2009 the Department responded and provided the information requested (where it was held) in respect of the majority of the complainant's requests. However, it failed to provide information in relation to some of the requests.
5. Later the same day, the complainant wrote to the Department and asked to be provided with the full correspondence items relating to his request for all correspondence between the Department and Phorm/121 Media between 1 January 2006 and the date of his request.
6. On 11 May 2009 the Department responded to the complainant and provided some information however informed him that the remaining information (Phorm's application to join UKCCIS) was considered to be exempt under sections 43(2) and 40(2) of the Act. Later the same day, the complainant requested an internal review into the decision to apply section 43(2), but not section 40(2) of the Act.
7. On 12 June 2009 the Department contacted the complainant again and provided some information in response to his request. It invited the complainant to apply for an internal review if he was not satisfied with the Department's response. The complainant responded that he had already applied for an internal review.

8. On 24 June 2009 the Department contacted the complainant again. It disclosed a redacted copy of Phorm's application to join UKCCIS however confirmed its application of the earlier cited exemptions to the redacted information.

## **The Investigation**

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### **Scope of the case**

9. On 16 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The Department's application of the section 43(2) exemption to Phorm's application to join UKCCIS and its consideration of the public interest test in relation to this matter; and
  - The internal review conducted into the handling of his request.
10. The complainant did not ask the Commissioner to consider the Department's application of section 40(2) to the requested information and therefore he has not investigated this matter. The disputed information comprises two paragraphs that have been redacted from Phorm's application to join UKCCIS and withheld in response to request 2.

### **Chronology**

11. The Commissioner wrote to the Department on 16 September 2009 to request a copy of the information that had been withheld from the complainant. This was provided on 21 September 2009.
12. On 24 September 2009 the Commissioner wrote to the Department to begin his investigation. He asked the public authority to explain why it considered section 43(2) to apply, why it considered the public interest in maintaining the exemption outweighed the public interest in disclosing the information and for information surrounding the refusal notice and internal review processes in relation to this case. The Commissioner asked the Department to respond by 23 October 2009.
13. Having not received a response, the Commissioner wrote to the public authority on 27 October 2009 to enquire as to progress in answering his queries.

14. On 29 October 2009 the Commissioner and the public authority spoke on the telephone. The Department explained that it was in the process of consulting with Phorm as a third party likely to be affected by disclosure of the requested information. Phorm had indicated that it would be unlikely to be in a position to respond to the Department until 4 November 2009, and following this time the Department would need to digest the response, before providing its own response to the Commissioner.
15. On 5 November 2009 the Department telephoned the Commissioner. It explained that it was seeking legal advice following receipt of Phorm's views and that it would provide a response to the Commissioner the following week.
16. On 20 November 2009 the Department provided the Commissioner with a response to his letter of 24 September 2009.
17. On 19 January 2010 the Commissioner wrote to the Department. He provided his preliminary conclusions with regard to one part of the request and asked further questions of the Department with regard to its application of the exemption and the public interest test.
18. The Department responded on 2 February 2010. It provided further submissions to rebut the Commissioner's preliminary view in respect of one matter, further arguments regarding the application of section 43(2) and its assessment of the public interest test, and raised the possibility of section 14(1) of the Act being applicable.
19. On 4 February 2010 the Commissioner wrote again to the Department and requested further information, some of which he accepted would have to be provided by Phorm.
20. The Department responded on 23 February 2010. It provided a copy of Phorm's letter to the Department to expedite the investigation. Further explanation was given in response to the Commissioner's queries. In addition, the Department invited the Commissioner to consider whether section 14(1) may apply, and further explained that Phorm believed the withheld information was exempt under section 41 of the Act. Phorm had declined to provide the information the Commissioner had specifically requested on 4 February 2010.

## Analysis

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21. Sections of the Act referred to in this Notice are set out in full in the legal annex.

### Substantive Procedural Matters

*Is the requested information held by the Department for the purposes of the Act?*

22. During its consultation, Phorm argued to the Department that it did not consider that the Department held the requested information for the purposes of the Act, and instead that it held this information on behalf of the UKCCIS. If this is correct, the information requested would fall outside the scope of the Act, as UKCCIS is not itself a public authority.
23. The Department explained that it had considered the Commissioner's guidance<sup>1</sup> on the matter and had reached the view that it did in fact hold the information for its own purposes. It communicated this view to Phorm, who put forward further reasons as to why it had reached the opposing view.
24. The Department then explained to the Commissioner that "this is... a complex area... Accordingly we would be grateful for the Commissioner to express a view as to whether it considers that the withheld information that forms the basis of ... [the] complaint is held for the purposes of the Act or not".
25. The Commissioner has therefore considered whether the Department holds the requested information for the purposes of the Act.
26. Section 3(2) provides that –
- “For the purposes of the Act, information is held by a public authority if –
- (a) it is held by the authority, otherwise than on behalf of another person, or

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/information\\_held\\_on\\_behalf\\_of\\_another\\_v1.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/information_held_on_behalf_of_another_v1.pdf)

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_12\\_info\\_caught\\_by\\_foi\\_act.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_12_info_caught_by_foi_act.pdf)

(b) it is held by another person on behalf of the authority.”

27. The Department’s views, which it put forward having considered the Commissioner’s guidance, are as follows:

- The Department has controlled admittance to UKCCIS and maintains its membership.
- The UKCCIS Secretariat are mostly employees of the Department. They form the Government’s lead policy team on child internet safety and put forward the Government’s views to members of UKCCIS. The Secretariat controls the requested information as part of its function.
- The Department itself created the process by which members were admitted to UKCCIS and the Secretariat receives support from elsewhere in the Department to manage and store the requested information.
- The Department and the Secretariat use the information rather than simply providing a storage facility for it.
- The information is only accessible to the Secretariat and members of the Department.
- The Secretariat deals with requests about UKCCIS membership as part of normal departmental requests for information.
- The Department bears all administrative costs for holding the information.
- The Department provides the bulk of clerical and administrative support to UKCCIS including staff, funding and accommodation, in addition to its role in leading UKCCIS.
- The Department maintains control of the budget which is used to implement UKCCIS decisions.

28. Phorm advised the Department that it considered the Commissioner’s guidance had been overtaken by case law. It stated that, in its view, the information could be held otherwise than by Department even if the Department did not solely hold it on behalf of another. In particular, Phorm relied on the decision of the High Court in the case of *BBC v Information Commissioner* [2009] EWHC 2348 (Admin) (the “BBC case”). The BBC case concerned a question of whether the BBC held information for purposes other than those of journalism, art or literature” in relation to section 7 and Schedule 1 of the Act.

29. Phorm’s arguments are as follows:

- The BBC case demonstrates that the ‘predominant purpose’ test should be rejected; in that case information that was held to any

- significant extent for the purposes of journalism, art or literature was not disclosable, whether or not it was also held for other purposes. In this case, information held by the Department to any significant extent on behalf of another person is not disclosable, whether or not it is also held by the Department in its own right.
- There was no statutory justification for the Commissioner's guidance note. However, the Commissioner is bound by the High Court's decision in the BBC case.
  - The test to consider is the statutory test in section 3 of the Act; namely whether the information is held by the Department otherwise than on behalf of another person. In this case, an application form addressed to UKCCIS is held by the Department to a significant extent on behalf of UKCCIS.
30. The Commissioner cannot agree with Phorm's arguments. The BBC case dealt with the matter of section 7 of the Act and whether the organisation had obligations under the Act with regard to certain types of information, ie information that is held otherwise than for the purposes of art, journalism or literature. The wording of section 7 provides that the BBC is a public authority listed in Schedule 1 only in relation to information of a specified description. It continues to add that "nothing in Parts I to V of this Act applies to any other information held by the authority".
31. The Commissioner's approach to section 7 prior to the BBC case was to apply a dominant purpose test such that if the information was held for both journalistic and non-journalistic purposes, he would consider the information to be held for the purposes of the Act if it was predominantly held for non-journalistic purposes. However, the Commissioner's approach to section 3 does not involve a dominant purpose test. Instead, the Commissioner's position is that if the information is held by a public authority to any significant degree otherwise than on behalf of another person, it is held for the purposes of section 3(2) of the Act. This was the approach taken by the Information Tribunal in the case of *McBride v Information Commissioner* (EA/2007/105).
32. The Commissioner's view in this case is that the Department holds the requested information for its own purposes to a significant degree, beyond the purposes for which it holds the information on behalf of UKCCIS. Therefore, the information is held by the Department and is caught by the Act.

## **Exemptions**

### *Section 43: Commercial interests*

33. The Department argued that, subject to the requested information being caught by the Act, it is exempt from disclosure by virtue of section 43(2).
34. Section 43(2) provides 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).”
35. The Tribunal, in the case of *Hogan v Information Commissioner and Oxford City Council (EA/2005/0030)*, explained that the application of the ‘prejudice’ test involved a number of steps: “First, there is a need to identify the applicable interest(s) within the relevant exemption... second, the nature of the ‘prejudice’ being claimed must be considered... a third step for the decision-maker concerns the likelihood of occurrence of prejudice” (paragraphs 28 to 34).

#### Identifying the applicable interests

36. In order to engage section 43(2) the Commissioner considers that the information in question would have to relate to or impact upon a commercial activity. He considers that commercial information relates to the activity of buying or selling goods and services. He draws a distinction between commercial interests and the wider concept of financial interests.
37. In this case, the withheld information comprises two paragraphs withheld from Phorm’s application to join UKCCIS. One paragraph falls under the heading “background information: please describe your organisation and its work” (the “background paragraph”) and the other falls under the section of the form stating “please describe your particular areas of knowledge, interest and expertise in child internet safety” (the “expertise paragraph”).
38. The background paragraph discusses a product under development by Phorm which has not yet been brought to market. The expertise paragraph again makes reference to this product and further provides details of partnership arrangements with third parties Phorm claims to have consulted with in development.
39. The Department has explained that the disclosure of the disputed information would be likely to prejudice Phorm’s commercial interests (rather than its own). In relation to the product which has not been brought to market, the Department has explained that disclosing this



information would reveal commercially sensitive information to Phorm's competitors and would thus provide them with an competitive advantage. The competitors could use the information to develop similar products, which would undermine the uniqueness of Phorm's product.

40. In relation to the information in the background paragraph and the reference in the expertise paragraph to a product under development, the Commissioner accepts that the commercial interests are at issue. This is because the information relates to the intention to sell goods and provide a service in a competitive market.
41. In relation to the expertise paragraph, which makes reference to third parties Phorm claims to have worked with in developing this product, the Commissioner accepts that this paragraph is also relevant to their commercial interests.
42. The Commissioner has gone on to consider the disclosure of the information under remaining elements of the test under section 43(2).

#### The nature of the prejudice

43. The Information Tribunal (the "Tribunal"), in the Hogan case, commented that "...an evidential burden rests with the decision-maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice..." (paragraph 30).
44. In the case of *Derry City Council v Information Commissioner* (EA/2006/0014), the Tribunal rejected the view that a third party's commercial interests would be prejudiced by disclosure of the requested information, on the grounds that there was no evidence the third party itself had provided the arguments raised. The Tribunal was not prepared to speculate as to the third party's concerns.
45. In this instance, the Commissioner is satisfied that Phorm has been consulted by the Department and that the arguments presented with regard to the commercial sensitivity of the requested information are Phorm's own.
46. As explained at paragraph 39, above, the Department has argued that disclosure of information that relates to the product under development by Phorm would be likely to prejudice Phorm's commercial interests. The Department has explained that disclosure of this information would reveal Phorm's new product to competitors before it has been launched. This would allow competitors the opportunity to develop

their own products to rival Phorm's, which could undermine Phorm's competitive advantage.

47. The Commissioner has considered the nature of Phorm's business and the market it operates in. He is of the view that in order to be able to operate efficiently, companies such as Phorm must be able to offer products that allow their customers to keep pace with developments in technology. To disclose details of Phorm's research and development could weaken its ability to offer an innovative product, as competitors may be able to build on the work already undertaken by Phorm and market their own versions of its products. The Commissioner also accepts this is a reasonable argument relating to the information which details the third parties Phorm was collaborating with.
48. The Commissioner is therefore satisfied that the Department has demonstrated that there is a causal link between the disclosure of the information and the prejudice argued in this case.

#### The likelihood of prejudice

49. The Tribunal, in the case of *John Connor Press Associates v Information Commissioner (EA/2005/0005)*, stated that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). The Commissioner has interpreted this to mean that, in order for a public authority to satisfy him that disclosure of the requested information would be likely to prejudice parties' commercial interests, it must demonstrate that the risk of prejudice need not be more likely than not, but it must be substantially more than remote.
50. The Department did not give specific reasons as to why it considered that disclosure of the requested information it would be likely to prejudice Phorm's commercial interests. Instead, it relied on arguments it had already made, and which have already been set out in this Notice, to explain why disclosure of the requested information would create a real and significant risk of the identified prejudice occurring.
51. The Commissioner has considered the arguments set out at paragraph 47. He considers that, given the competitiveness of the market in which Phorm operates, there is a real and significant risk that information about a product under development would be used by competitors to develop their own products and thus undermine the commercial advantage Phorm would have in being able to bring a unique product to market.

52. The Commissioner therefore asked the Department to provide evidence to support its position about relationships referred to in the expertise paragraph of the withheld information. In particular, the Commissioner has been made aware that Phorm had entered into a confidentiality agreement with one of the parties mentioned in the paragraph, and he asked to be provided with a copy of this agreement. In relation to another party, the Department had explained that Phorm had asked the party to keep details of its discussions confidential. The Department argued that "potential partners maybe less interested in working with Phorm on projects such as this if details of their initial discussions and contact become public before there have been any real agreements made with Phorm".
53. The Department responded to the Commissioner that Phorm had refused to supply it with a copy of the agreement. Further, it explained that the party bound by the agreement was content for it to be known that Phorm had consulted him. The Commissioner has been provided with limited evidence and does not accept that the disclosure of this particular information, about certain third parties Phorm has a relationship with, would be likely to affect their commercial interests.
54. The Commissioner considers that Phorm's commercial interests would be likely to be prejudiced by disclosure of the information which concerns the product under development. The Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure for the product information.

### **Public interest arguments in favour of disclosing the requested information**

55. The Department identified the following factors in favour of disclosing the requested information:
- there should be transparency in the accountability of public funds and decisions;
  - that the public are reassured that members of UKCCIS are appropriate and that each member has a valued contribution to make to the Council's work;
  - the importance of proper scrutiny of government actions; and
  - the way in which the Government engages with outside organisations, in particular, where advisory committees are established, they are conducted in an open and honest way.

The Commissioner agrees that these are all valid factors to be considered.

## **Public interest arguments in favour of maintaining the exemption**

56. Conversely, the Department has identified the following factors in favour of maintaining the exemption:

- disclosure would be likely to prejudice Phorm's commercial interests, both in terms of Phorm's ability to develop a product in private as well as the ability to manage the launch of this product;
- disclosure of the information would create confusion in the industry and amongst the public about Phorm's commercial offering and the issue of the online protection of children. This, it argued, would cause further prejudice to Phorm's commercial position in the time and resources needed to deal with this confusion;
- the Department established UKCCIS to protect children from harm and therefore it is important that UKCCIS should be able to operate as effectively as possible to achieve that aim;
- disclosure would make it less likely that companies or individuals would provide the department with commercially sensitive information in the future and consequently undermine the department's ability to achieve its objectives; and
- disclosure could adversely affect the amount of trust between government and commercial organisations, resulting in companies being less likely to become involved in public affairs, such as participating in UKCCIS.

## **Balance of the public interest arguments**

57. The Commissioner is only able to consider the public interest factors that are inherent in the exemption. This is supported by the comments of the Tribunal in the case of *Bellamy v Information Commissioner* and the DTI (EA/2005/0023), where it stated that:

“as section 2(2)(b) makes clear, the relevant exercise is to weigh the public interest in maintaining the exemption which is manifested by the relevant provisions against the public interest in disclosing the information. If the weighing process is in favour of the maintenance of the exemption, then any duty to communicate or disclose is disapplied. It necessarily follows that not all public interest considerations which might otherwise appear to be relevant to the subject matter should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied upon”.

58. Therefore, of the public interest factors identified by the Department in favour of maintaining the exemption, only the first two relate to the

commercial interests exemption. The remaining factors relate to the Government's engagement with third parties and the effective running of UKCCIS and similar organisations. The Commissioner may only take into account the first two factors in favour of maintaining the exemption when balancing the public interest arguments.

59. In relation to the second of the factors, the Commissioner does not usually give weight to arguments where it is suggested that disclosure of requested information would confuse or mislead the public. This is because public authorities may provide additional information alongside any information that is disclosed, in order to explain the information or put it into context. The Department has not provided any specific evidence to suggest that disclosure of the information would be likely to cause the prejudice to Phorm's commercial position arising from responding to queries. It was raised only in the context of the public interest. The Commissioner has therefore given no further consideration to this point.
60. The complainant has argued that it is in the public interest to have confidence in the UKCCIS and that to do so "it is necessary to have transparency in the way UKCCIS selects its membership and evidence that membership has been granted on the basis of accurate and truthful information". Further, the complainant is concerned that Phorm may have failed to accurately describe its background when making its application to join UKCCIS.
61. The Commissioner has afforded some weight to the general principle of the openness and transparency in the way public authorities make decisions (such as the way the membership of UKCCIS may have been decided). However, the Commissioner considers that the withheld information would not provide the significant insight into the background of Phorm in the way the complainant suggests. The withheld information relates only to a new product under development and not to any of Phorm's products or general background information that is already in the public domain.
62. The Commissioner considers that the public interest in protecting organisations against prejudice to their commercial interests is particularly strong where the withheld information relates to a product which, at the time of the request, was under development. He is of the view that the public interest in protecting damage to Phorm's commercial interests outweighs the public interest in the information being disclosed.

*Section 41: information provided in confidence*

63. The Department's letter to the Commissioner of 23 February 2010 sought to apply the section 41 exemption to the requested information for the first time. Given the finding above section 41 is now only relevant to the remaining information that was not correctly withheld under section 43.
64. The Commissioner considers that the Department had ample opportunity to decide which exemptions were relevant and to apply them both in correspondence with the complainant and in earlier correspondence with the Commissioner (though he stresses that this would be far from ideal). As the section 41 exemption was raised for the first time at a very late stage in the investigation, and was not fully reasoned at the time of application, the Commissioner has refused to consider the application of this exemption. The Commissioner considers he has the discretion to do so, following the Information Tribunal decision in the case of Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/072). The Tribunal questioned whether a new exemption can be claimed for the first time before the Commissioner, concluding that the Tribunal (and presumably the Commissioner) "may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case".
65. The Commissioner also notes that any finding on detriment under the common law test of confidence would be same as his section 43 finding above. He again notes that he has not been provided a copy of the agreement referred to.

*Section 14: vexatious requests*

66. The Department has explained that during its consultations Phorm raised the possibility of section 14(1) being applicable. Phorm provided arguments to the Department to explain why this request from a particular individual who was known to it should be considered vexatious.
67. The Department explained to Phorm that it had identified the wrong individual. Phorm contacted the Department again, citing the name of a different individual and explaining why it considered the request to be vexatious. The Department contacted the Commissioner to put the arguments before him, however it stated that:

“for the avoidance of doubt, the Department would like to confirm that this specific request has not been more burdensome than many others it routinely answers, but is aware that Phorm draws attention to a further 77 requests made to a range of public authorities and which in the main relate to Phorm. The Information Commissioner may wish to consider this, alongside other evidence provided in [Phorm’s letter to the Department of 19 February 2010] which has been submitted in support of Phorm’s suggestion that the request is vexatious.”

68. Again, the Department sought to raise these arguments at a late stage of the investigation. Further, the Commissioner does not consider that there is clear evidence to suggest that the Department believes the request is vexatious; instead it is clear that it was Phorm rather than the public authority that purported to apply section 14(1). For these reasons, the Commissioner has not considered whether the request is vexatious.

## **Procedural Requirements**

### *Section 1: general right of access*

69. For the reasons outlined above, the information withheld by the Department that does not relate to the product under development by Phorm is not exempt from disclosure. It should therefore be provided to the complainant. By not providing this information, the Department has breached section 1(1)(b) of the Act.

### *Section 10: time for compliance*

70. Section 10(1) requires public authorities to provide requesters with all of the information to which they are entitled within twenty working days of receipt of the request. By failing to provide the complainant with the information described at paragraph 69, the Department has breached section 10(1).

### *Section 17: refusal notices*

71. Section 17 sets out the requirements on a public authority when it is refusing to supply information requested.
72. Section 17(1) requires a refusal notice to be provided within twenty working days of receipt of the request. The complainant requested a copy of Phorm’s application to join UKCCIS on 2 April 2009. The Department wrote to the complainant and cited two exemptions in relation to this information on 11 May 2009. This was outside the

twenty working day period for a response. The Department has therefore breached section 17(1) in relation to this request.

## **The Decision**

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73. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

## **Steps Required**

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74. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose to the complainant the information previously withheld that does not relate to the product under development by Phorm.

75. The Commissioner has set out, in a confidential schedule to this Notice, the exact information he requires to be disclosed.
76. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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77. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Other matters**

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78. Although they do not form part of this Decision Notice the Commissioner wishes to highlight a number of matters of concern.



### *Consultation*

79. The Code of Practice issued under section 45 of the Act sets out the circumstances in which it may be necessary for public authorities to consult with third parties, and suggests best practice guidelines for conducting these consultations. Paragraph 27 of the Code of Practice states:

“in some cases it will be necessary to consult, directly and individually, with such persons in order to determine whether or not an exemption applies to the information requested...”

80. It is clear from the correspondence that has been put before the Commissioner that the Department consulted Phorm with regard to the request for information at issue. The Commissioner recognises the need for such consultation to take place. However, in this case, the Commissioner is concerned that the Department appears not only to have consulted Phorm, but to have delegated its decision-making responsibilities regarding the request to Phorm. This is evidenced by the comments concerning the proposed application of section 14(1) to the request and the fact the Department asked the Commissioner to decide whether it held the requested information, despite having reached its own conclusion that it did so.
81. The Commissioner would like to take this opportunity to remind the Department that it is responsible for requests for information made to it under the Act and whilst it should consult with third parties where appropriate, decisions about how to handle requests ultimately rest with the Department.

### *Internal reviews*

82. Paragraph 38 of the Code of Practice issued under section 45 provides that:

“any written reply from the applicant...expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint... These communications should be handled in accordance with the authority's complaints procedure...”

83. The complainant wrote to the Department on 23 April 2009 and repeated his request to be provided with the requested information (a description of this information had previously been given however the information itself had not). The Department disputes that this constituted a request for internal review, however it is clear that the

complainant was not satisfied with the original response (the requested information had not been provided) and therefore, as paragraph 38 demonstrates, the communication should have been treated as a request for internal review.

84. Neither the Act nor the Code of Practice sets a time limit by which internal reviews should be conducted. However, the Commissioner has produced guidance which states that internal reviews should be conducted within twenty working days of receipt of the request for review, or within forty working days if there are exceptional circumstances. The Commissioner is concerned that in this case it took approximately 42 working days for an internal review to be completed.
85. The Commissioner's guidance on the time limits for internal reviews is available online at the following link:

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/time\\_limits\\_internal\\_reviews.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/time_limits_internal_reviews.pdf)

*The Data Protection Act 1998*

86. The Commissioner also regulates the Data Protection Act 1998 (the "DPA").
87. Regarding his comments in paragraph 67, the Commissioner would usually expect public authorities to refuse to confirm or deny whether individuals had made requests for information to them. This is to avoid revealing when a request for information has been made, and by whom, as this information is likely to be the requester's personal data. However, in this case, the request was made via the [www.whatdotheyknow.com](http://www.whatdotheyknow.com) website and therefore the complainant is already publicly attributable with having made the request.

## Right of Appeal

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88. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 20<sup>th</sup> day of December 2010**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## **Annex 1: requests for information made by the complainant on 2 April 2009**

1. The names of officials on the secretariat of the UK Council for Child Internet Safety (UKCCIS) from Home Office, Becta and DCSF.
2. The application for membership of UKCCIS made by Phorm and the response to that request, or invitation supplied by UKCCIS and response to that invitation.
3. The date on which UKCCIS were first advised that Phorm previously traded under the name 121Media.
4. The date when UKCCIS were advised that 121Media supplied the application known as 'Apropos', classified as 'high risk spyware' by Symantec.
5. The date of which UKCCIS were first advised that BT had conducted covert trials in 2006 and 2007 of communication interception and profiling technology supplied by 121Media/Phorm, called PageSense/ ProxySense/ NetSense/ Webwise.
6. The date on which Beverley Hughes MP was first advised that BT had conducted covert trials in 2006 and 2006 of communication interception and profiling technology supplied by 121Media/Phorm.
7. Dates, agenda, and minutes of any meeting between UKCCIS and Phorm/121Media since 1 January 2006.
8. Dates, agenda and minutes of any meeting between the DCSF and Phorm/121Media since 1 January 2006.
9. All correspondence between the UKCCIS and Phorm/121Media since 1 January 2006.
10. All correspondence between the DCSF and Phorm/121Media since 1 January 2006.
11. All correspondence between the DCSF and other Government Departments (BERR/Home Office/DCMS/Cabinet Office/Prime Minister's Office) concerning Phorm/121Media since 1 January 2006.
12. Any advice therefore given to Phorm/121Media concerning membership obligations of UKCCIS, Human Rights of children and protection of children's private telecommunications.

## Legal Annex

### General Right of Access

**Section 1(1)** provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

**Section 1(2)** provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

**Section 1(4)** provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or

deletion that would have been made regardless of the receipt of the request."

**Section 1(5)** provides that –

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

**Section 1(6)** provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

## **Public authorities**

**Section 3(1)** provides that –

"In this Act "public authority" means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
  - (i) is listed in Schedule 1, or
  - (ii) is designated by order under section 5, or
- (b) a publicly owned company as defined in section 6."

**Section 3(2)** provides that –

"For the purposes of this Act, information is held by a public authority if–

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority."

## **Public authorities to which the Act has limited application**

**Section 7(1)** provides that –

“Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to IV of this Act applies to any other information held by the authority.”

**Section 7(2)** provides that –

“An order under section 4(1) may, in adding an entry to Schedule 1, list the public authority only in relation to information of a specified description.”

**Section 7(3)** provides that –

“The Secretary of State may by order amend Schedule 1 –

- (a) by limiting to information of a specified description the entry of any public authority, or
- (b) by removing or amending any limitation to information of a specified description which is for the time being contained in any entry.”

**Section 7(4)** provides that –

“Before making an order under subsection (3), the Secretary of State shall –

- (a) if the order relates to the National Assembly for Wales or a Welsh public authority, consult the National Assembly for Wales,
- (b) if the order relates to the Northern Ireland Assembly, consult the Presiding Officer of that Assembly, and
- (c) if the order relates to a Northern Ireland department or a Northern Ireland public authority, consult the First Minister in Northern Ireland.”

**Section 7(5)** provides that –

“An order under section 5(1)(a) must specify the functions of the public authority designated by the order with respect to which the designation is to have effect; and nothing in Parts I to V of this Act applies to

information which is held by the authority but does not relate to the exercise of those functions.”

**Section 7(6)** provides that –

“An order under section 5(1)(b) must specify the services provided under contract with respect to which the designation is to have effect; and nothing in parts I to V of this Act applies to information which is held by the public authority designated by the order but does not relate to the provision of those services.”

**Section 7(7)** provides that –

“Nothing in Parts I to V of this Act applies in relation to any information held by a publicly-owned company which is excluded information in relation to that company.”

**Section 7(8)** provides that –

“In subsection (7) “excluded information”, in relation to a publicly-owned company, means information which is of a description specified in relation to that company in an order made by the Secretary of State for the purpose of this subsection.”

**Section 7(9)** provides that –

“In this section “publicly-owned company” has the meaning given in section 6”.

## **Time for Compliance**

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), 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.”

**Section 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”



**Section 10(3)** provides that –

“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 circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“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.”

## **Vexatious or Repeated Requests**

**Section 14(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

**Section 14(2)** provides that –

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request.”

## **Refusal of Request**

**Section 17(1)** provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 17(2)** states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

- (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3)** provides that –

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

**Section 17(4)** provides that –

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6)** provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

**Section 17(7)** provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

### **Information provided in confidence**

**Section 41(1)** provides that –

“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(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

## **Commercial interests**

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides 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).”

**Section 43(3)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”