

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 13 September 2011

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

#### Summary

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The complainant requested information from the Cabinet Office relating to dealings between the Prime Minister and 121Media / Phorm and British Telecom (BT). The Cabinet Office responded and stated that no information was held. The Commissioner investigated and found that although the Cabinet Office holds some information on related issues it does not hold information which falls within the scope of the request. The Commissioner requires no further remedial steps to be taken by the Cabinet Office.

#### 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.

#### The Request

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2. On 26 March 2009 the complainant requested the following information:

*"In 2006 and 2007, British Telecom conducted covert mass trials of a communication surveillance system supplied by 121Media. The system intercepted the private telecommunications of tens of thousands of UK subjects (possibly hundreds of thousands) and the organisations and businesses that served them.*

*Please could you disclose to me;*

*1) the date on which Prime Minister Tony Blair was first advised that British Telecom were conducting, or proposed to conduct, covert mass trials of 121Media products in 2006 and 2007.*

*2) the date on which Prime Minister Gordon Brown was first advised that British Telecom were conducting, or proposed to conduct, covert mass trials of 121Media products in 2006 and 2007.*

*I would also be grateful if you would disclose*

*3) the dates of meetings between the Prime Minister and BT/121Media/Phorm to discuss the use of 121Media/Phorm products (PageSense, NetSense, ProxySense, Webwise) since January 2005*

*4) the topic, agenda, and minutes of those meetings*

*5) all correspondence (letters, fax, email, etc) between the Prime Ministers Office and 121Media since January 2005*

*6) all correspondence (letters, fax, email, etc) between the Prime Ministers Office and BT concerning the use of 121Media/Phorm products since January 2005*

*7) all correspondence (letters, fax, email, etc) between the Prime Ministers Office and BERR, DIUS, DCMS, Home Office, and the UK IPO concerning 121Media/Phorm since January 2008*

*8) all correspondence (letters, fax, email, etc) between the Prime Ministers Office and the European Commission concerning EC case reference 64/08/INSO (proceedings against the UK Government for failing to prosecute BT)*

*Noting particularly that Phorm claim to have recently engaged with the Prime Ministers Office (23 February 2009)."*

3. On 24 April 2009 the Cabinet Office responded to the complainant and informed him that no information pertaining to his request was held.
4. On 1 May 2009 the complainant requested an internal review of the Cabinet Office's decision.
5. On 18 August 2010 the Cabinet Office provided a response to the complainant. The internal review upheld the original decision that no information was held.

## The Investigation

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### Scope of the case

6. On 14 September 2010 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 fact that the Cabinet Office had stated that no information was held, and the severe delay in dealing with his request. Parts seven and eight of the request are the focus of this Decision Notice as explained in the Chronology of the Commissioner's investigation below.

### Chronology

7. On 1 December 2010 the Commissioner wrote to the Cabinet Office to investigate whether relevant information to the entire request was held. He asked the Cabinet Office what searches for the information had been undertaken and how the information would be recorded if held.
8. On 24 December 2010 the Cabinet Office responded to the Commissioner with brief details about what information would be held and the searches it had carried out. The Cabinet Office concluded that no information relating to parts one to eight of the request was held.
9. On 26 January 2011 the Commissioner wrote to the Cabinet Office. He redefined the scope of his investigation, owing to the fact that parts one to six of the request had been previously dealt with in an earlier request to the Cabinet Office and subsequent complaint to the ICO.
10. The Commissioner's investigation (and, therefore, this Decision Notice) now only focussed on parts seven and eight of the request. Based on information obtained from the previous case, the Commissioner put detailed questions to the Cabinet Office concerning a particular department that may be dealing with a European infraction case (reference given in request) where information might now be held.
11. On 17 February 2011 the Cabinet Office telephoned the Commissioner to discuss the case. The Cabinet Office explained that some related information may have been identified; however, it was unsure as to whether it fell within the scope of the request.
12. On 9 March 2011 the Commissioner chased the Cabinet Office for its substantive response and copies of the withheld information.
13. On 23 March 2011 the Commissioner sent a further letter chasing the response.

14. On 10 May 2011 the Commissioner telephoned the Cabinet Office to chase its response.
15. On 17 May 2011 the Commissioner issued an Information Notice requiring the Cabinet Office to provide a substantive response.
16. On 10 August 2011 the Commissioner received a response from the Cabinet Office.

## Analysis

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### Substantive Procedural Matters

#### Section 1 – General right of access

17. Section 1 of the Act states that any person making a request for information to a public authority is entitled to be told in writing whether the public authority holds the information. If information is held, pending any exemptions that may apply, the applicant is entitled to have the information communicated to him.
18. In scenarios where there is some dispute about whether information is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request and was held at the time of the request.
19. Before considering whether the Cabinet Office holds the requested information it should be noted that during his investigation into this case the Commissioner clarified the scope of the request with both the complainant and the Cabinet Office. He had previously included, in his initial correspondence to the Cabinet Office on 1 December 2010, a full quotation of the complainant's request. However, after considering the details of a previous related case where the complainant had requested similar information and disputed the Cabinet Office's position that no information was held, the Commissioner decided that elements of the request made on 26 March 2009 were repeat attempts by the complainant to access the same information dealt with in the earlier case (Cabinet Office reference FOI259233).
20. Points one to six of the request submitted on 26 March 2009 sought information already requested on 24 July 2008. Concerning, for example, dates on which the Prime Minister was first made aware of covert mass trials of 121Media products, details of meetings between

the Prime Minister and BT/121Media/Phorm and all correspondence between the Prime Minister and BT. The complainant had specified the years 2006 and 2007 as the relevant period of time in his earlier 2008 request and the same dates were also given again in the 2009 request.

21. The Commissioner notes that the complainant broadened points three to six in the March 2009 request slightly by requesting information falling within 2005 to 2009, therefore adding two years on to the scope of the original request. However, he is prepared to accept the Cabinet Office's original position in respect of the earlier request that no information was held as previous arguments relating to the 2006 – 2007 scope can be applied to the recent request. Furthermore, the Commissioner understands that the previous ICO case dealing with the July 2008 request was closed informally with the complainant accepting the Cabinet Office's position that no information was held pertaining to his request.
22. Points seven and eight of the request dated 26 March 2009, which this Decision Notice is concerned with, were identified as requests for different information and as such formed the basis of the Commissioner's investigation. The complainant requested the following information in the 26 March 2009 request:

*"7) all correspondence (letters, fax, email, etc) between the Prime Ministers Office and BERR, DIUS, DCMS, Home Office, and the UK IPO concerning 121Media/Phorm since January 2008*

*8) all correspondence (letters, fax, email, etc) between the Prime Ministers Office and the European Commission concerning EC case reference 64/08/INSO (proceedings against the UK Government for failing to prosecute BT)".*

23. In relation to the full 26 March 2009 request quoted in the Commissioner's initial correspondence, the Cabinet Office responded that no information was held. As stated above, the Commissioner accepts this position regarding points one to six of the request based on the investigation he carried out under the previous case. In relation to the revised scope of the March request, points seven and eight, the Cabinet Office stated in its response to the Commissioner:

*"The only information that Cabinet Office holds relating to [the complainant]'s requests is in relation to a European Commission infraction. Cabinet Office coordinates the infractions process across HM Government and so holds some information on the infraction case..."*

24. From his previous investigation carried out in the case concerning the 2008 request, the Commissioner accepts that there is a specific department within the Cabinet Office that would be likely to hold

information relating to the infraction case. The Commissioner is also aware that the complainant received eight emails from this department. The emails were between the European Commission and the Cabinet Office dated July 2008, which were disclosed to him following his previous request.

25. The Commissioner is aware of the advice given to the complainant by the ICO when closing the original case that it may be reasonable to assume that the Cabinet Office would hold more information on the European infraction case in the future as the matter grows in importance. This appears to have now been confirmed in correspondence to the Commissioner by the Cabinet Office in its explanation that it is coordinating the infraction case across the government.
26. In correspondence to the Commissioner, the Cabinet Office went on to explain that although it holds some information relating to the European infraction case it does not hold any information falling within the scope of the complainant's request. The Cabinet Office wrote:

*"The Cabinet Office outside of the Prime Minister's Office holds administrative information relating to the infraction proceedings but the Cabinet Office, including the Prime Minister's Office, does not hold any information within the scope of [the complainant's] request, that is any correspondence to or from the Prime Minister or the Prime Minister's Office and the European Commission or any of the other organisations mentioned in [the] request.*

27. The Cabinet Office continued:

*"We do hold information on the infraction proceedings but this is not within the scope of the request. Although the Cabinet Office as a public authority includes the Prime Minister's Office, the request is not for correspondence held by the Cabinet Office as a whole but for information about correspondence to and from the Prime Minister's Office, which is a specific unit within Cabinet Office, and certain named government departments and organisations. We do not hold information fitting this description."*

28. The Cabinet Office provided the Commissioner with details as to how it coordinates informal and formal infraction cases internally and how this is linked to the way in which the European Commission administers infraction cases in order to illustrate in greater depth why the Prime Minister, the Prime Minister's Office and the named departments in the complainant's request would not hold the information.
29. The Cabinet Office drew the Commissioner's attention to the fact that although for the purposes of freedom of information the Cabinet Office



and the Prime Minister's Office are the same public authority, the complainant wanted to distinguish between the two departments and showed particular interest in the correspondence related to the Prime Minister and the Prime Minister's Office. The Cabinet Office explained that it had received a further request from the complainant in which the disclosure of correspondence between the Cabinet Office specifically and the European Commission in relation to the infraction proceedings had been sought. The Cabinet Office told the Commissioner:

*"In the request that is the subject of this complaint he specified information related to the Prime Minister's Office and it is clear that the distinction was intentional on the part of the applicant... That he wants records relating to the Prime Minister and his staff is clear from his application for a review of the decision in which he expresses his surprise that the Prime Minister was not advised of the trial and the EU infraction proceedings. He also expressed concern that the reply came from the Cabinet Office rather than the Prime Minister's Office."*

30. The Commissioner is aware that in the Cabinet Office's completed internal review it explained that searches had been carried out in both the Prime Minister's office and the rest of the Cabinet Office for information pertaining to the request. In answer to the Commissioner's enquiries the Cabinet Office again stated that *"no part of the Cabinet Office holds correspondence to or from the Prime Minister's Office and the specified organisations."* Therefore the Cabinet Office again concluded that *"neither the Prime Minister's Office nor any other unit in the Cabinet Office holds information within the scope of [the complainant's] request."*

31. Following the description as to how infraction cases are coordinated across Whitehall, the Cabinet Office stated that:

*"It is extremely rare for the Prime Minister to be made aware of an infraction since infraction cases are routine departmental business. The minister of the lead department may be sighted on a case at an early stage, depending on the seriousness or policy impact of the case... In the normal course of business the Prime Minister would not have been made aware of the 'Phorm' infractions case. No unusual circumstance arose that would have required the Prime Minister or the Prime Minister's Office to be made aware of the case."*

32. The Commissioner has taken into account both the complainant's and the Cabinet Office's submissions. Although he understands why the complainant may expect that the Prime Minister or the Prime Minister's Office may have been involved with the infraction case concerning the mass trials of telecommunications products, the evidence presented by the Cabinet Office offers a strong argument to the contrary.

33. The Commissioner considers that the Cabinet Office was correct to decide that certain information it does hold falls outside the scope of the request. The complainant specifically focused his request on information originating between the Prime Minister or the Prime Minister's Office and named government departments as being the requested information. From the nature of work undertaken in the Cabinet Office regarding coordinating the infraction case and correspondence dealing with any issues relating to Phorm or 121Media it is evident that no information pertaining to the request is held.
34. The Commissioner is therefore satisfied that the Cabinet Office holds no information that falls within the request.

### **The Decision**

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35. The Commissioner's decision is that the Cabinet Office dealt with the request for information in accordance with the Act.

### **Steps Required**

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36. The Commissioner requires no steps to be taken.

### **Other matters**

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37. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is very concerned that in this case, it took a wholly excessive 15 months for an internal review to be completed, despite the publication of his guidance on the matter.



## Right of Appeal

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38. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 13<sup>th</sup> day of September 2011**

**Signed .....**

**Steve Wood  
Head of Policy Delivery  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### 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."