

FOUNDATION FOR INFORMATION POLICY RESEARCH

The Rt Hon Jacqui Smith PC MP
Home Office
2 Marsham Street
London
SW1P 4DF

23rd April 2008

Dear Secretary of State,

The Phorm "Webwise" System Interception of Communications

In February 2008 your department began to circulate to interested parties a note addressing the question of whether the operations of Internet Service Providers in scrutinising their customers' web browsing for the purposes of targeted online advertising involved the interception of communications, and whether it was lawful if it did. On 11th March Mr Simon Watkin of your department helpfully published that note on the ukcrypto mailing list. In response to questions about the note, he made the point that the note was not, and did not purport to be, based upon a detailed technical examination of any particular technology. The purpose of this letter is to explain why that note should be withdrawn.

Phorm Inc have announced that they treat the statement as confirming the lawfulness of their proposed operations in the UK, and the Information Commissioner has stated that in examining the data protection aspects of Phorm's proposed operations he will not take account of matters covered by the Home Office statement. And after it emerged that BT had conducted secret trials of the service in 2006 and 2007, complaints to the Avon and Somerset police about illegal interception were met with a refusal to investigate them, on the basis that it was a matter for the Home Office.

A detailed technical analysis of the Phorm system by Dr Richard Clayton is now available which sheds much new light on its proposed operations. A detailed legal analysis by Nicholas Bohm has also now been published. These documents are at:

Technical analysis: <http://www.cl.cam.ac.uk/~rnc1/080404phorm.pdf>

Legal analysis: <http://www.fipr.org/080423phormlegal.pdf>

The documents show that the operation of Phorm's systems involve:

- interception of communications, an offence contrary to section 1 of the Regulation of Investigatory Powers Act 2000
- fraud, an offence contrary to section 1 of the Fraud Act 2006, and
- unlawful processing of sensitive personal data, contrary to the Data Protection Act 1998

The documents also highlight a number of technical errors as well as some very significant oversights in the Home Office note that was circulated in February.

We therefore urge you to make it clear to Phorm, to such ISPs as may have consulted the Home Office, to the Information Commissioner, and to chief officers of police:

- that the Home Office does not condone illegal interception for the purposes of targeted online advertising,
- that the law is for the courts and not for the Home Office to decide, and that it is for the police and prosecuting authorities to investigate reports of crime and make decisions about prosecutions without deferring to the views of the Home Office, and
- that where complaints under the Data Protection Act are concerned, it is for the Information Commissioner and not the Home Office to investigate whether the data processing involved in targeted online advertising amounts to illegal interception.

Your department's note can now be seen to be significantly incomplete and dangerously misleading. We call on you to withdraw it.

We have provided copies of this letter to Mr Simon Watkin in your department and to the Information Commissioner.

Yours sincerely,

Nicholas Bohm

Richard Clayton