



Home Office

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Leigh Park Initiative

request-49933-5538fbdf@whatdotheyknow.com

15 December 2010

Dear Sirs

Freedom of Information request (our ref. 16529): internal review

I am writing further to my e-mail of 19 November 2010 about your request for an internal review of our response to your Freedom of Information (Fol) request about the Internet Service Provider Talk Talk.

I have now completed the review. I have examined all the relevant papers, including the information that was withheld from you, and have consulted the unit which provided the original response. I have considered whether the correct procedures were followed and assessed the reasons why information was withheld from you. I confirm that I was not involved in the initial handling of your request.

My findings are set out in the attached report. My conclusion is that the original response was incorrect and your request should not have been refused under section 14(1) of the Act (vexatious requests). The information which you requested is given in paragraph 30 of the report.

This completes the internal review process by the Home Office. If you remain dissatisfied with the response to your Fol request, you have the right of complaint to the Information Commissioner at the following address:

The Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Yours sincerely

L. Fisher
Information Access Team

Internal review of response to request under the Freedom of Information (Fol) Act 2000 by Leigh Park Initiative (LPI) (reference 16529)

Responding Unit: Information Management Services (IMS)

Chronology

Original Fol request:	22 October 2010
IMS response:	17 November 2010
Request for internal review:	18 November 2010

Subject of request

1. The LPI request of 22 October 2010 is set out in full at Annex A. The request specifically asks for the following:

As the website registrant pursuing this matter, and being in dispute with Talk Talk, I would be grateful if you could indicate whether Talk Talk Group plc or any of their constituent companies, had meetings with the Home Office to discuss the legality of their malware scanning project, between July 2009 and July 2010, prior to the malware scanning project becoming a matter of public knowledge.

The response by IMS

2. The IMS response of 17 November 2010 refused LPI's request of 22 October 2010 as it was deemed vexatious and refused under section 14(1) of the Act.
3. IMS deemed the request as vexatious as it was viewed to be part of a campaign by users of communication surveillance and *Phorm*-related websites. The full response is set out at Annex A.

LPI's request for an internal review

4. LPI's internal review request is set out in full at Annex B. The specific points raised by the LPI in its request are as follows.
5. It considers that clear and legitimate reasons have been given why this information is of specific interest to its charitable organisation. It is concerned about whether Talk Talk has accessed its religious charity website "covertly and without consent".
6. It has the view that the Home Office is "following a clear policy to reject requests on this matter as vexatious without considering them on their merits."

7. LPI states that if there are legitimate grounds for refusing the request within the terms of the Fol Act then they should be stated, rather than refusing as a vexatious request.
8. LPI also comments on Nick Herbert MP's answer to a recent written question from Annette Brooke MP on 26 October 2010 (Hansard <http://services.parliament.uk/hansard/Commons/bydate/20101108/writtenanswers/part022.html>), which indicated that he had received "no recent representations" on this matter (referring to representations received by the Department on the Internet Service Provider Talk Talk) and questions whether the Minister had "unwittingly misled parliament"

Procedural issues

9. IMS responded on the eighteenth working day following receipt of the request, complying with section 10(1) of the Act.
10. IMS complied with section 17(5) of the Act in stating the reasons for refusing the request by virtue of section 14(1) of the Act. This can be used to refuse requests when they are considered as vexatious.
11. The Leigh Park Initiative was informed of its right to request an independent internal review of the handling of his request, as required by section 17(7) of the Act. The IMS response also informed LPI of its right of complaint to the Information Commissioner, as specified in section 17(7) of the Act.
12. IMS did not send LPI a letter to acknowledge receipt of its request. This is not a requirement of the Act, but it is considered good practice and is set out in the Home Office Fol guidance.

Consideration of the response

13. I have reviewed the original IMS response to the Leigh Park Initiative and the refusal of the request under section 14(1) of the Act. Section 14 can be invoked to protect public authorities from those that may abuse the right to request information. The Act states:
 14. *(1) Section (1)(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*
 - (2) 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 the previous request and the making of the current request.*

14. A public authority is not obliged to comply with a request for information under section 1(1) of the Act if the request is deemed vexatious. Section 14 is similar to an absolute exemption in that the public authority does not have to consider the public interest test.

15. According to guidance from the Information Commissioner's Office (ICO) a key question in deeming a request vexatious, is whether the request is 'likely to cause distress, disruption or irritation, without any proper or justified cause'. To help public authorities make this decision the ICO advises that the following factors should be evaluated when deciding whether a request should be treated as vexatious:

- Could the request fairly be seen as obsessive?
- Is the request harassing the authority or causing distress to staff?
- Would complying with the request impose a significant burden?
- Is the request designed to cause disruption or annoyance?
- Does the request lack any serious purpose or value?

16. Using the questions above, I will determine whether section 14(1) was applied appropriately for this Freedom of Information request. The ICO state that 'to judge a request vexatious, the public authority should usually be able to make relatively strong arguments under more than one of these headings.'

Can this request fairly be seen as **obsessive**?

17. We have received only one request from the Leigh Park Initiative relating to Talk Talk. The charity has also submitted one other request relating to Talk Talk to the Information Commissioner's Office. We have no record of receiving any other requests from this organisation. The request is therefore not obsessive.

Is the request **harassing** the authority or **causing distress** to staff?

18. The Leigh Park Initiative does not appear to be operating as part of a campaign, although it is possible that an individual member of the LPI trustees could belong to one of the campaigning websites.

19. The organisation's requests are polite and considered. They are certainly not harassing or causing any distress to staff.

20. LPI has made several annotations on *whatdotheyknow*, specifically on two requests that have been deemed as vexatious under section 14(1) of the Act by the Home Office. Whilst this might suggest that the LPI could be working with other requesters that have had similar requests refused as vexatious by the Home Office, this is not sufficient evidence in itself. The identical annotations from the LPI on the aforementioned requests state:

"Suggest where else the requester might find the information." Try using the "dial-a-minister" service. <http://www.telegraph.co.uk/finance/china...>

Would complying with the request impose a **significant burden**?

21. According to the *whatdotheyknow* website, the Leigh Park Initiative has only submitted two FoI requests using this facility (one to the Home Office and one to the ICO). This is not placing a significant burden on the Home Office to provide a response.

Is the request designed to cause **disruption or annoyance**?

22. There is no evidence to suggest that this request is designed to cause disruption and annoyance. It does not appear to be part of a campaign.
23. We have no strong evidence that the Leigh Park Initiative or that any of the people listed as the trustees of the charity are actively part of any Phorm-related campaigning.

Does the request lack any **serious purpose or value**?

24. The request does have a serious purpose and LPI puts forward arguments for the release of information in its internal review request. LPI makes the points that they have "clear and legitimate reasons" for making the request. The charity is concerned about potential security issues for its website. LPI states that its request relates to:

"the actions of Talk Talk in accessing one of our religious charity websites, covertly and without consent, contrary to our website settings, during May- August 2010 and our ongoing active attempts to get to the bottom of why that happened and what we can do, within the criminal and civil law to stop it."

25. The ICO states that we have to make strong arguments under at least two of the above headings in order to deem a request as vexatious. As a result of this review, it is clear that we cannot make a strong argument under even one of these headings. Therefore, I do not consider section 14(1) (vexatious request) to be engaged.
26. LPI also refers to the recent written question from Annette Brooke MP on 26th October 2010, ([Hansard](#)), which indicated that the Minister had received "no recent representations" on this matter. LPI asks whether the Minister has "unwittingly misled parliament".
27. Home Office officials have clarified with Annette Brooke MP's office as to what exactly was behind the question and they were informed that it was to find out whether the "Home Office and TalkTalk [have had] discussions on the topic of the TalkTalk malware monitoring programme".

28. For the avoidance of doubt the Home Office has not had discussions with TalkTalk about its malware monitoring programme. Furthermore, we do not regard Freedom of Information requests as representations to Ministers and hence there is no inconsistency with the answer made in the Parliamentary Question.

Conclusion

29. IMS complied with section 10(1) of the Act in responding to LPI within the statutory 20 working days.

30. IMS incorrectly applied section 14(1) to refuse the request as vexatious. The Home Office therefore has a duty to comply with the request, unless one or more exemptions apply to the information requested. I am satisfied that no exemptions apply and the information requested should therefore be provided. That is, whether Talk Talk or any of their constituent companies had meetings with the Home Office to discuss the legality of their malware scanning project, between July 2009 and July 2010. No such meeting took place.

31. The Leigh Park initiative says that the Home Office has a 'clear policy' on rejecting such requests as vexatious. We would disagree with this statement as each individual case is considered on its merits. A request should only be refused under section 14(1) of the Act if it meets the vexatious criteria set out by the Information Commissioner's Office.

**Information Access Team
Home Office
December 2010**

ANNEX A – LPI's original request and the IMS response

Request

Dear Home Office,

I run the website of a registered charity which during the summer experienced the unwanted attentions of scanner "bots", which were repeatedly and covertly scanning my charity's website without identifying their origin or identity, nor seeking my consent, nor observing the access restrictions coded, according to recognised internet protocols, into my site servers. My website logs reveal that these scanning bots emanated from the TalkTalk Group plc. and subsequent publicity revealed that the system was purporting to be scanning websites for "malware" although without either the TalkTalk customer's or the website owner's consent or knowledge.

During subsequent correspondence between TalkTalk Group plc. and our charity, TalkTalk claimed that their system's legality had been fully investigated and that it complied with current UK and EU legislation.

As the charity's webmaster, I believe I have a legitimate interest in trying to ascertain whether TalkTalk discussed the legality of their project in advance with the relevant regulatory, advisory and enforcement bodies responsible for RIPA, DPA and PECR legislation. I need to do this so that I may fulfil my statutory responsibilities in protecting both the personal data of our charity's site users, and also the intellectual property of the website, against unlawful commercial exploitation, contrary to our charitable objectives.

With regard to the malware scanning system's compliance with PECR and DPA, I have already reported the situation to the Information Commissioner's Office (responsible to the Ministry of Justice), and they openly and promptly communicated that they were investigating this incident.

They also revealed, both in private correspondence, and also in public statements, that TalkTalk had not discussed the legal compliance of their proposed malware detection system with the ICO, prior to the malware scanning project becoming public knowledge. Indeed the ICO even publicly communicated their disappointment that such consultation had not taken place.

That leaves the matter of RIPA compliance. RIPA legislation is something the Home Office have responsibility for, and the ICO are unable to comment on it. So I am asking the same question of yourselves as I asked the ICO.

My request is:

As the website registrant pursuing this matter, and being in dispute with TalkTalk, I would be grateful if you could indicate whether TalkTalk Group plc or any of their constituent companies, had meetings with the Home Office to discuss the legality of their malware scanning project, between July 2009 and July 2010, prior to the malware scanning project becoming a matter of public knowledge.

This information will be of value to me in investigating TalkTalk's claims that their malware scanning project is compliant with UK and EU legislation, and clarity on this matter would clearly be in the public interest, particularly in the light of EU interest in the way the UK enforces the ePrivacy Directive.

The only way I can personally obtain this information is by asking the Home Office, the government department with responsibility for RIPA legislation. The purpose of asking is solely to elicit the information requested which is not available via any other source and is required by me in fulfilling my responsibilities as charity webmaster and charity data protection officer (for which purpose I registered and attended an ICO DPO training conference in March 2009 in Manchester, in the name of the above charity). Had the information been published already, in accordance with the above mentioned precedents, I would not need to make this request.

I look forward to you dealing with this enquiry in the open manner in which similar enquiries on this matter have been handled by the Information Commissioner's Office. I would also draw your attention to the precedent of earlier Home Office public statements on their contacts and discussions with other internet related companies in connection with RIPA compliance matters, including public responses to similar questions relating to discussions with companies such as Phorm Inc, BT and Detica, some of which responses were published without any intervention from the general public whatsoever. For example:

<http://cryptome.org/ho-phorm.htm>

http://www.whatdotheyknow.com/request/meetings_with_detica_in_the_last_2

http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information1/foi-archive-about-us/12003_HO_contracts_with_Detica?view=Standard&pubID=792300

I am therefore hopeful that a similar statement, either positive or negative may be made about contacts with TalkTalk regarding their malware scanning project.

Incidentally, my status to make FOI enquiries on behalf of a

registered charity, and in that charity's name has previously been approved by the Information Commissioner's Office.

"Further to your subsequent email regarding the name used on the request, we have further considered your comments and agree that the name provided is valid for the purposes of the Freedom of Information Act 2000 (FOIA). Consequently your request has been dealt with as a valid FOIA request and, as explained in the attached response, you have the right to request an internal review and appeal if required. Please accept my apologies for any concerns caused previously."

This is my second ever FOI request, and both enquiries, concerning TalkTalk, have resulted from me attempting to fulfil my responsibilities as a registered charity webmaster and respond to unwanted exploitation of the charity's website data and also the charity's intellectual property. I am confident the Home Office would want to assist me in that task, and look forward to receiving a prompt answer to my question. I thank you in anticipation of your co-operation.

Yours faithfully,

Leigh Park Initiative

Response

Dear Sirs

I write in response to your Freedom of Information request sent to the Home Office on 22 October 2010 in which you asked for information relating to the Internet Service Provider Talk Talk.

We have considered your request and we deem it to be vexatious, when considered in conjunction with previous requests that have been submitted across Government, in relation to Communication Surveillance topics. We therefore believe your request is part of a campaign by users of Communication Surveillance and Phorm-related websites.

Section 14(1) of the Act provides that the Home Office is not obliged to comply with a request for information of this nature. We have decided that this request is vexatious because it meets with the criteria laid out by the Information Commissioner's Office. A copy of this guidance can be viewed here:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detail_ed_specialist_guides/awareness_guidance_22_vexatious_and_repeated_requests_final.pdf

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting the case reference number 16529.

Home Office
Ground Floor, Seacole Building
2 Marsham Street
London
SW1P 4DF

Alternatively, you can email: info.access@homeoffice.gsi.gov.uk

As part of any internal review the Department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Please also note that, should we consider that any future requests on this topic to also be vexatious, we will not respond to them.

Yours sincerely

Martin Riddle
Information Access Caseworker

ANNEX B – Leigh Park Initiative's internal review request

Dear Home Office,

Please pass this on to the person who conducts Freedom of Information reviews.

We are writing to request an internal review of Home Office's handling of our FOI request 'Malware monitoring by TalkTalk'.

We strongly resent our request being regarded as vexatious. Vexatious implies that our main goal is to cause annoyance or distress. This is untrue, our main goal is to discover the answer to our question, and as a secondary matter, to discover why there is such reluctance to provide it on the part of the Home Office. It is the Home Office's blatant obstructiveness that has become annoying and distressing - not a charity's simple request for information.

We have given clear and legitimate relevant reasons why this information is of specific interest to our registered charity as it relates to the actions of TalkTalk in accessing one of our religious charity websites, covertly and without consent, contrary to our website settings, during May-August 2010 and our ongoing active attempts to get to the bottom of why that happened and what we can do, within the criminal and civil law to stop it.

We believe that the Home Office are now following a clear policy to reject requests on this matter as vexatious without considering them on their merits. If it is vexatious to enquire about the contacts that an ISP may have had with government prior to covertly monitoring the users of our religious-themed charity websites, and then scraping the content of such religious themed websites, then we have somehow moved away from democratic principles to something much more worrying.

If the Home Office believes there are legitimate grounds for refusing the request then they should state them, within the terms of the FOI legislation. But this resort to the "vexatious" argument is totally unconvincing as well as democratically offensive. I can see no public interest in this line of argument whatsoever.

We are also puzzled that the Home Office Minister Mr Nick Herbert, in answering a recent written question from Annette Brooke MP on 26th October 2010, (Hansard

<http://services.parliament.uk/hansard/Commons/bydate/20101108/writtenanswers/part022.html>

)indicated that he had received "no recent representations" on this matter when his department would seem to have spent their time

since the summer rejecting representation after representation on exactly this subject, including this one. (As a search via Whatdotheyknow.com reveals) Perhaps his officials are not keeping him fully informed?

"Nick Herbert [holding answer 26 October 2010]: I have had no recent representations in respect of the practices of TalkTalk in monitoring internet browsing activity by its customers." - the most charitable interpretation I can put on this answer is that it seems to have unwittingly misled parliament.

A full history of my FOI request and all correspondence is available on the Internet at this address:

http://www.whatdotheyknow.com/request/malware_monitoring_by_talktalk

The Home Office could save a great deal of everyone's time and public money by simply answering what is a reasonable question from a charitable organisation with a legitimate interest in the matter, answering with a simple yes or no - they have answered similar questions in the past. Their refusal to do so looks bad in the light of current European Court of Justice interest in the policing of ePrivacy in the United Kingdom.

If they have not discussed this issue with TalkTalk we cannot see why they do not say so; and if they HAVE discussed it, prior to its implementation, then that is a matter of legitimate, indeed pressing, public interest, bearing directly as it does, on the government's goodwill in implementing the ePrivacy Directive in the United Kingdom and protecting the privacy from commercial snooping, of internet users browsing religious themed sites - and - possibly - avoiding a heavy fine for taxpayers, in the European Court of Justice. We are keeping the EU Commission informed of progress in this matter.

Yours faithfully,

Leigh Park Initiative