

**OFFICE OF PUBLIC SECTOR INFORMATION, PART OF
THE NATIONAL ARCHIVES, REPORT ON ITS
INVESTIGATION
OF A COMPLAINT**

**Van Haren Publishing and the Office of Government
Commerce**

July 2010

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Background Information

1. The Office of Public Sector Information (OPSI), part of The National Archives, received a complaint in August 2009 from Van Haren Publishing (the Complainant) against the Office of Government Commerce (the Public Sector Body (PSB)). This complaint was submitted under the Re-use of Public Sector Information Regulations (SI 2005 No. 1515) (the Regulations).
2. The formal complaint was preceded by a number of exchanges over a significant period of time relating to the terms and conditions that applied to the Complainant's re-use of the PSB's material by comparison with those which applied to its official accretor and official publisher. The parties also entered into an OPSI-facilitated mediation with a view to resolving their dispute. However, this was an entirely separate exercise from the statutory formal complaint investigation that this report covers.
3. OPSI has investigated the complaint and has made recommendations as appropriate.

The role of OPSI in Investigating Complaints

4. OPSI, part of The National Archives, is responsible for investigating complaints under the PSI Regulations for failure to comply with any requirement of the Regulations. The procedure for investigating complaints can be found at <http://nationalarchives.gov.uk/documents/psi-complaints-procedure.pdf>.

Summary of the PSI Regulations

5. The PSI Regulations came into force on 1 July 2005. They implemented Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the Re-use of Public Sector Information.
6. The main aim of the Regulations is to maximise the re-use of public sector information and to stimulate the economy. Within the spirit of the PSI Regulations, a PSB is expected to encourage re-use of its information. Although the PSI Regulations impose no obligation on a PSB to allow re-use of its information, the purpose of the Regulations is to establish a framework that provides for the effective re-use of public sector information. If re-use is allowed, a PSB should:
 - Publish a list of the main documents available for re-use
 - Respond promptly to requests for re-use
 - Put in place copyright and licensing arrangements
 - Ensure that any conditions on re-use do not unnecessarily restrict re-use or competition

- Ensure there is no discrimination between applicants. If a public sector body wishes to re-use a document for activities which fall outside its public task, the same conditions shall apply to that re-use as would apply to re-use by any other applicant for comparable purposes
- Discourage exclusive arrangements
- Set up appropriate internal complaints procedures. There is also the option of asking OPSI to investigate the PSB's actions and this should be made clear in the internal procedures

The Parties

The Complainant

7. Van Haren Publishing (VHP) is a private company which produces a variety of publications on project management and IT service management in a number of European languages.

The Public Sector Body (PSB)

8. During the course of this investigation, the Office of Government Commerce (OGC) was an independent office of HM Treasury, established to help Government deliver best value from its spending. Following an announcement on Tuesday 15 June 2010, OGC is now part of the Efficiency and Reform Group within the Cabinet Office. Should this change have an impact on the recommendations in this report, this will be reflected in our subsequent progress report.

Office of Fair Trading

9. There is a Memorandum of Understanding (MoU) between OPSI, part of The National Archives, and the Office of Fair Trading (OFT) dated 26 August 2005 concerning the handling of complaints - <http://www.nationalarchives.gov.uk/documents/opsi-oft-memorandum-of-understanding-2005-08.pdf>.
10. Having consulted the OFT, it was agreed that, where the complaint alleged a breach of paragraph 12(2)(b) of the Regulations, the complaint should be investigated by OPSI rather than OFT.

Context of the Dispute

11. The Complainant has been concerned for some time that the letting of contracts by the PSB to an official accreditor – APM Group (APMG) – and an official publisher – The Stationery Office (TSO) - has given these organisations a privileged status and their re-use of the PSB's material cannot take place on an equitable basis as compared with that of the Complainant.

12. The Complainant has argued that the process by which it can fully re-use the PSB's information is unduly onerous, that the manner in which the PSB licences the use of its trade marks, together with the stipulation that licensees cannot replicate the "look and feel" of its products, provides its contractors with an unfair competitive advantage. The Complainant is also unhappy that it cannot claim any official status or endorsement from its re-use of the PSB's material except, in the latter case, where it has passed the tests that apply to any products that they submit for approval under the trade mark licensing process.
13. The Complainant considers that the PSB's accreditor also being the administrator of the PSB'S combined trade mark and copyright licences is a conflict of interest. Furthermore, it is concerned that contractor organisations do not need to go through the same application process when seeking to re-use the PSB's material.
14. The various points made in the Complainant's complaint document can be summarised into five themes:
 - a restrictive approach by the PSB to the permitted design of third party products
 - concerns about ascribing the word "official" to both core and derivative publications
 - timeliness of access to the raw material to be re-used
 - an overly time-consuming and complex application process by comparison with that which was available when some of the chargeable material was licensed by OPSI on behalf of the PSB
 - a lack of parity between licensees and contractors

Does the Complaint Concern the PSI Regulations?

Public Task

15. OPSI, part of The National Archives, carried out an initial assessment as to whether the complaint was formally within the scope of the Regulations as required by paragraph 10 of its published investigation procedures. This initial assessment was concluded in December 2009. One of the key questions that OPSI addressed as part of its initial assessment of the complaint was whether or not the material that was the subject of the complaint – ITIL (IT service management information) and PRINCE2 (a project management methodology) - fell within the PSB's "public task". Regulation 5(1)(a) provides that the Regulations do not apply where "the activity of supplying a document is one which falls outside the public task of the public sector body".
16. While OPSI's Best Practice Guide considers the concept of public task that is referred to in the EU Directive 2003/98/EC, it is not defined in the Regulations. However, an organisation's public task can be construed

from its statutory obligations or the obligations defined in its framework document or document of similar standing.

17. Given that the PSB has no statutory obligations, we analysed its statement of its core aims and found no reference to the promotion of IT service management. Furthermore, in its response to a request by OPSI for an analysis of its public task, the PSB stated unambiguously that it had no policy remit in the area of IT service management. While this begs the question as to why it sponsors the publication of proprietary IT service management guides, we consider that ITIL cannot be construed as being within OGC's public task and it falls outside the scope of the Regulations and this complaints procedure.
18. In the case of PRINCE2, the PSB's core aims contain a number of references to supporting project delivery and developing project management skills. Given PRINCE2's widely-recognised position as an important project management methodology in the UK (the PSB's own website describes it as the "de facto" standard) and the authoritative status which its sponsorship by government affords it, we found PRINCE2 core publications to be within the PSB's public task.
19. Referring to OPSI's Best Practice Guide to the Regulations, and the European Commission's guidance on public task that, typically, value added commercial activity would be outside an organisation's public task, we consider the extent of the PSB's public task relating to PRINCE2 publications to be the core publications which are contained in the PSB's Official Portfolio of core, derived and complementary titles. This is because the core manual, for example, serves the purpose of putting the PRINCE2 information into the public domain and enabling it to be utilised by the public for the purposes of project delivery and project management skill development.
20. The manual cannot be replicated as that would not be a secondary use of the material and would not be re-use as defined by paragraph 4 of the Regulations. Indeed, the manual is the definitive version of the methodology, but derivations in the form of study guides and translations from the primary source material of the core publications can be and are made by third parties. As such, while we do not say that the PSB has a monopoly on project management methodologies, the viable commercial market in the material in question is in derivatives and on this basis we consider the production of these derivatives to be outside the PSB's public task.
21. Our initial assessment as to public task is appended to this report and we confirm that this assessment is intended to refer to PRINCE2, the successor product to PRINCE.

Re-use

22. Re-use is defined in the Regulations as "the use by a person of a document held by a public sector body for a purpose other than the initial purpose within that public sector body's public task for which the document was produced" (Regulation 4(1)). In this context, the issuing of

core PRINCE2 publications by the PSB through its official publisher does not constitute re-use as it falls within its public task and was the initial purpose for which the document was produced. However, where derivative publications are being produced, there is a re-use of the core material for a secondary purpose.

Trade Marks

23. The European Directive, which the Regulations implement, clearly states that the use of trade marks is not within its scope. In the preamble, paragraph 22, it states, “The Directive does not apply to documents covered by industrial property rights, such as patents, registered designs and trademarks.”
24. This analysis is supported by OPSI’s Best Practice Guide at paragraph 2.13: “The Regulations only apply to copyright and related rights (database rights, publication rights and rights in performances). They do not apply to other intellectual property rights, such as patents, trade marks, and design rights.”
25. Some of the concerns expressed in the complaint document are therefore outside the scope of this investigation because the conditions that are attached to the use of the PSB’s trade marks, whether by direct reference to PRINCE2 products or by virtue of the entry requirements to receive the trade marked badge of endorsement as an accredited publication, are primarily a matter for that organisation.
26. Consequently, the focus of our analysis has been the copyright re-use conditions in the combined trade mark and copyright licence and the conditions set out in the standalone Crown copyright licence.

Applicable Regulations

27. Where the issues raised by the Complainant are within the scope of the Regulations, they engage Regulations 12 and 13.
28. Regulation 12 states that:
 - “(1) A public sector body may impose conditions on re-use.
 - (2) Where conditions are imposed they shall not unnecessarily restrict -
 - (a) the way in which a document can be re-used; or
 - (b) competition.”
29. Regulation 13 states that:
 - “(1) Any conditions imposed under regulation 12(1) shall not discriminate between applicants who make a request for re-use for comparable purposes.
 - (2) If a public sector body which holds a document wishes to re-use the document for activities which fall outside the scope of its public task,

the same conditions shall apply to that re-use as would apply to re-use by any other applicant for comparable purposes.”

Overall Assessment

30. Having carefully considered the documentation supplied to us, and, having met both parties, **OPSI, part of The National Archives, partially upholds the complaint. The PSB should further align the basis on which third parties and its official publishing contractor can re-use PRINCE2 core publications.**
31. Our reasons and recommendations are detailed below.

Issues raised in the Complaint

The Complainant

32. The Complainant claims that it is not able to re-use material on the same basis as the PSB's official publisher and official accreditor.
33. Specific issues raised are summarised below.
 - Issue 1 - The ability of the official publisher to use trade marks, design rights and its official status to its advantage
 - Issue 2 - Anti-competitive behaviour on the part of the official publisher.
 - Issue 3 - Overly complex licensing arrangements.
 - Issue 4: A widely defined "Official Portfolio" which does not make a clear distinction between core material and non-core material.
 - Issue 5 – The official publisher having access to core material at an earlier stage than third parties and thereby having an advantage in the production of derivative materials
 - Issue 6 – The official publisher's ability to retain copyright in some of the material that it produces would affect the PSB's ability to re-tender the official publishing contract on a fair basis.
34. The Complainant considers its treatment as compared with the official accreditor and official publisher to be discriminatory in respect of Crown copyright licensing, the use of marks, wording and design, the right to "sub-license", the duration of licences, charges paid, and publishing rights.
35. Under Crown copyright licensing, the Complainant claims that
 - the official publisher can self-license as it does not need to go through the licensing process to which external applicants are subject
 - this results in a faster process for the official publisher

- the official accreditor is subject to a different fee structure to the Complainant
 - the official publisher has access to draft documents for the preparation of derivatives prior to third parties
36. The Complainant considers the official publisher's ability to use marks and designs and the wording "official" to be unfair and regards the process by which applicants can utilise trade marks to be time-consuming and complex.
37. Under sub-licensing, the Complainant argues that the official accreditor can sub-license the use of trade marks and Crown copyright and has some publishing rights which external third parties do not have. It considers this state of affairs to be contrary to published guidance. It also asserts that the official publisher has claimed to be the only organisation able to license the relevant Crown copyright and that the official publisher has engaged in sub-licensing which was subsequently reclassified as sub-contracting.
38. In terms of duration of licences, the Complainant considers it discriminatory that the official publisher's contract has a longer term than the standard term for licensees and that the official publisher has not been subject to transitional arrangements concerning the full delegation of licensing from OPSI to the PSB.
39. As far as charges are concerned, the Complainant is unaware of the charges to which the official publisher is subject. It regards the fees that it is liable for under the PSB's licensing scheme as excessive.
40. The Complainant considers that the publishing rights that the official publisher has, including its ability to use trade marks, designs and the word "official", leads to confusion in the marketplace as to which products are those that it is publishing on behalf of the PSB and those which are the official publisher's own products.
41. The Complainant also believes that the official publisher and official accreditor have conducted themselves anti-competitively and lists four points under this heading. It alleges
- inappropriate conduct on the part of the official publisher in its dealings with the Complainant.
 - that the official accreditor has advised Accredited Training Organisations (ATOs) that it should not offer unaccredited products. This would be to the detriment of competing third party products
 - the official publisher and official accreditor have acted anti-competitively in concert with a major IT service management forum
 - that the requirement to submit business information to a potential competitor in the form of the official accreditor is inappropriate and that it is subject to a product approval process that may not be administered objectively.

The PSB

42. The PSB argues that, although it does not consider the material in question to be within its public task and therefore regards it as outside the scope of the Regulations, it believes that the basis on which third parties re-use its material to be equitable.
43. The PSB accepts that its publishing contractor does not apply for re-use as do third party applicants, but regards the same conditions which attach to the re-use of its material by third parties – that it be professionally produced, accurate in its sourcing, fit for purpose and of use to the market - to apply to the publishing contractor. The PSB further states that adherence to these conditions is overseen through the PSB's internal contract monitoring.
44. The PSB's response to specific points made by the Complainant is summarised below.
 - Issue 1 – It regards the use of trade marks and design rights to be outside the scope of the Regulations.
 - Issue 2 – It states that this issue as a complaint about a company that is not party to the dispute as opposed to a complaint about the PSB's licensing arrangements.
 - Issue 3 – It considers its licensing arrangements to be straightforward.
 - Issue 4 – It does not see how a lack of a clear distinction between core and derived materials is necessarily contrary to the Regulations. Where it exercises its trade mark and design rights across the two types of material, it does not consider use of such rights to be within the scope of the Regulations.
 - Issue 5 – Its official publisher is in receipt of manuscripts of core PRINCE2 material in order that it can typeset and format it for publication. All core material is available to third parties for re-use on the same basis – at publication of the core material. It considers that the advantage of having earlier sight of core manuscripts is overstated.
 - Issue 6 - Where the PSB commissions or pays for material there is provision for copyright to be assigned to the Crown. Where its official publisher produces derivative material which the PSB has not commissioned or paid for, there is no requirement to assign copyright, nor would there be for any other third party. It does not consider the manner in which its current official publishing contractor has fulfilled its contract will have any bearing on its ability to fairly re-tender its official publishing contract.
45. Under Crown copyright licensing

- the PSB does not accept that the official publisher can self-license. It states that where it operates outside its official publishing contract, the official publisher would need to make a Crown copyright licensing application and that where it carries out its contractual obligations it would be subject to a rigorous internal process.
 - It consequently does not accept that its official publisher goes through a faster process
 - As far as different fees applying to its official accreditor are concerned, the PSB argues that this is permissible as the re-use purpose is different - the provision of accredited training services as opposed to general publishing.
 - On earlier access to manuscripts for the production of derivatives, the PSB repeats its view that the advantage of inevitable prior access can be overstated and highlights an instance of the Complainant advertising a new derivative for sale prior to the publication of a revised version of the relevant official core publication.
46. On marks and designs and wording, the PSB confirms its view that such matters are outside the scope of the Regulations and refers to its argument that the process and criteria for Crown copyright applications are reasonable and that its use of trade marks is consistent with trade mark law.
47. In the case of sub-licensing, the PSB confirms that its official accreditor can sub-license Crown copyright in accordance with its contract in order that ATOs can produce training materials and that its official publisher can sub-license so that it can produce translations. The PSB's official accreditor is also authorised to issue joint trade mark and copyright licences on behalf of the PSB. It is unaware of the other third party activities to which Complainant refers.
48. On the duration of licences, the PSB points out that the term of the official publishing contract covers the official publisher's activity as a whole as distinct from the duration of specific licensing contracts. It restates the argument that its official publisher is subject to a thorough product approval process for each product that it produces under contract.
49. With regard to charging, the PSB notes that there is no specific accusation about charging as it relates to its official publisher. It points out that the fees that applicants are subject to relate to trade mark and copyright licensing and not just copyright licensing. The PSB also states that the arrangements by which it took over responsibility for the full licensing function from OPSI were decided by OPSI, not the PSB.
50. On publishing rights and the use of marks, design rights and wording in products, the PSB says that there is no confusion about which products are the PSB's products as they are clearly marked as such. It repeats its

view that this part of the complaint is outside the scope of the Regulations.

51. On the four points that the Complainant cites as examples of anti-competitive behaviour, the PSB's view is that
- this issue does not concern the PSB, but refers to a dispute directly between the Complainant and the official publisher which was subsequently resolved.
 - contrary to the claim that the official accreditor advised ATOs not to offer unaccredited products, the PSB believes that ATOs do offer project management products other than PRINCE2.
 - this relates to ITIL and so the PSB has not responded on the grounds that it is outside the scope of this complaint investigation.
 - the Complainant is not obliged to submit any information to the official accreditor as it could opt for a standalone Crown copyright licence which is administered by the PSB. Where the Complainant chooses to apply for a combined trade mark and copyright licence, the official accreditor would be subject to a strict confidentiality clause and the Complainant has the further option of having an independent product review carried out.

OPSI, part of The National Archives

52. Our summary view on the specific issues raised, which is expanded on in some cases later in this report, is as follows:
- Issue 1 – We consider this issue to be outside the scope of this complaint with the exception of the use of the word “official” as its use when applied to derivative products which are non-public task is inappropriate.
 - Issue 2 – We agree with the PSB that this issue is not relevant to the complaint in that this is a complaint about the conduct of a company that is not party to the dispute as opposed to a complaint about the PSB's licensing arrangements.
 - Issue 3 – Having reviewed the relevant licensing documentation and procedural guidance, it is indicative of a straightforward procedure.
 - Issue 4 – Although the PSB does make a distinction between core and non-core materials in its Official Portfolio, there is scope for explaining more fully the difference between derivative and complementary material and the re-use conditions which apply to these different classes of material.
 - Issue 5 – We agree with the Complainant that there is an advantage to the official publisher in having the manuscript of a

core publication to hand when preparing derivative publications and recommend a fixed embargo period between core and derivative publication for the material that is within the scope of the complaint.

- Issue 6 - We accept the PSB's assurances that it obtains assignment of copyright within its official publishing contract where it has commissioned or paid for the material. It would be of benefit to re-users if the PSB could confirm that any publication in the official publisher's own name is subject to the standard third party application process.

53. Under Crown copyright licensing

- We do not consider the conditions which attach to the official publisher to constitute self-licensing as it is subject to an internal approval process by the PSB
- To demonstrate that the internal process operates to a comparable timescale with the external process, we have advised the PSB to publish figures on this
- On the fees that the official accreditor is subject to, it is permissible to charge differentially for different re-use purposes
- We consider earlier access to the source material of derivative products to be of potential benefit to the official publisher and have made a recommendation accordingly.

54. The Complainant considers the official publisher's ability to use marks and designs and the wording "official" to be unfair. The use of trade marks and design rights is outside the scope of this complaint, but we do not consider these to cover the use of the word "official" in publications. Given our analysis of public task, we advise that a publication produced outside of public task should not carry the designation "official". The conditions of the application process which apply to trade marks are outside the scope of this complaint investigation.

55. In the case of sub-licensing, the Regulations do not prohibit sub-licensing and we recognise that some functions are sub-contracted by the official accreditor and official publisher in pursuit of their contractual obligations. As far as the combined trade mark and copyright licence is concerned, this clearly states that the licence itself is with the PSB as part of HM Treasury. The other points made under this heading are not within the scope of the Regulations.

56. On the duration of licences, we view the length of the official publishing contract as a whole to be different from the term which is applied to specific re-use licences. However, we advocate the publication of figures on the timescale for internal product review and approval as compared with that of applicants.

57. Although there is no specific claim made by the Complainant about the charges that the official publisher is subject to, it does query the charges

that apply to the application process. Where these charges relate to copyright re-use they are standardised and fall within the pricing criteria which apply under the Regulations. The arrangements by which the PSB assumed responsibility for the full licensing function from OPSI were in accordance with OPSI's standard procedures for delegating licensing authority. All licensing is now taking place through the PSB or its sub-contractor, the official accreditor. Up until 31 December 2009, some chargeable licensing was carried out by OPSI on behalf of the PSB. Under OPSI, the right to pre-approve publications was not always exercised. The PSB is perfectly within its rights to ensure that material is re-used in accordance with the licence terms and that products are tested to ensure that they are fit for purpose.

58. With respect to publishing rights and the use of trade marks and design rights, we accept that these are outside the scope of our investigation. However, we do agree with the general point that the official publisher's ability to produce official publications and publications outside of its contract under its own name are a source of potential ambiguity.

59. There are four points where anti-competitive behaviour is alleged.

- We consider the allegation of inappropriate conduct on the part of the official publisher in its dealings with the Complainant, to be about the conduct of a third party which is not the subject of the complaint and not relevant to the re-use conditions that the PSB applies.
- There is a claim that the official accreditor has advised Accredited Training Organisations (ATOs) that it should not offer unaccredited products to the detriment of competing third party products. Although the PSB does not believe that this is the case, we do not consider this issue to be relevant to the re-use conditions to which applicants are subject.
- The assertion that the official publisher and official accreditor have acted anti-competitively in concert with a major IT service management forum, were it to be considered to be within the scope of the relevant Regulation on competition would relate to ITIL which is beyond the ambit of this investigation as we consider ITIL to be outside the public task of the PSB.
- The Complainant objects to submitting business information to a potential competitor in the form of the official accreditor and doubts whether the product approval process can be administered objectively. Although the PSB's official accreditor having a dual function – accreditor and administrator of the combined trademark and copyright licensing process - could legitimately be seen as having the potential to inhibit competition, we are satisfied that the PSB has confidentiality clauses in the application process and that applicants have the option of providing an independent product review if they wish.

60. Having reviewed the conditions which apply to applicants for re-use, in this case third party publishers, we have found that there is a standardised licensing regime in place and that, where the conditions are within the scope of the Regulations, those conditions do not unnecessarily restrict the way in which the relevant documents can be re-used. Subject to the PSB meeting the recommendation relating to the intention of Product Review, we find that the conditions which apply are reasonable requirements to re-use the information accurately and professionally.
61. Some of the points put forward by the Complainant under the heading of competition are not within the scope of Regulations.
62. An indicator that competition on the part of re-use applicants is not unnecessarily restricted is the existence of a variety of third party publishers who successfully re-use PRINCE2 core material and are able to produce translations and study guides.
63. While the official accreditator also having the function of administrator of the combined trade mark and copyright licences could theoretically inhibit competition, the PSB has adopted safeguards in the form of confidentiality clauses in the licensing process and offering applicants the option of obtaining an independent product review if they wish.
64. Given the degree of standardisation apparent in the licensing process that falls within the scope of the Regulations, we do not consider there to be discrimination between applicants. What is at issue, however, is whether re-use conditions apply equally to the official publishing contractor when it does not go through a formal re-use application process.
65. In respect of Regulation 13(2) and the stipulation that an organisation that re-uses its own material should do so on the same terms as applicants, we do not consider the PSB's official publisher to be subject to identical terms to those of third parties, nor does the PSB claim that its official publisher goes through the same route to publication. When it is producing material under contract, it is not an applicant, but a contractor.
66. The contract that the PSB's official publisher operates was competitively tendered prior to the Regulations taking effect and, at the time it was let, the PSB did not know precisely how re-use would be defined.
67. The same conditions should apply to re-use of its own public task material by a PSB as compared with re-use by an applicant. The PSB may be able to demonstrate valid practical limitations to its ability to re-use its public task material on identical conditions to a third party when it has appointed a contractor to publish its material. For example, a contractor may have more obligations than an applicant or be subject to different financial arrangements by virtue of being commissioned to carry out work.

Recommendations

68. **OPSI, part of The National Archives, recommends that, given the provisions of Regulation 13(2) and our finding that PRINCE2**

derivative materials are outside the public task, a review of the basis on which the PSB's official publishing contract is let be initiated in advance of its renewal. This will be to ensure that the terms on which the official publisher re-uses PRINCE2 core material more fully equate to those which apply to third party applicants. The review should consider whether contractual separation between core and derived material will be necessary.

69. **To ensure equity in bringing derivative PRINCE2 publications to market, the PSB should establish a fixed embargo period so that the official publisher and third parties have an equal time period within which to prepare derivatives for publication.**
70. An embargo period for the publication of derivatives will address the issue of timeliness of access to the raw material to be re-used. Electronic provision of the raw material would also be of potential benefit to applicants.
71. **We recommend that the PSB publishes an explanatory note on the circumstances in which its official publisher would produce material outside of its official publishing contract and the application process and conditions that it would be subject to. This would eliminate any perceived ambiguities in the existing arrangements.**
72. In the PSB'S Product Review process, testing whether a product "extends the range of products available by providing a product or service with a different purpose to the portfolio of Official Material" could be construed as constraining the activity of prospective re-users. **We recommend that the PSB makes it clear that the intention of such clauses is to ensure that third party publications are clearly differentiated from the PSB's publications. It should be confirmed by the PSB that it does not intend to veto derivatives that occupy broadly the same market space as its own publications, but that it is simply seeking to ensure that third party publications do not replicate its official publications.**
73. The PSB has stated that the internal contract monitoring conditions to which its official publisher is subject are equally as rigorous as those which applicants need to go through. **We recommend that the PSB publishes figures on the timescales for internal product review and approval of official derivatives as compared with third party product review and approval.**
74. **The above recommendations should be acted upon within six months of publication of this report.**

Suggested areas for Improvement

75. We did not find that there is an overly restrictive approach to the permitted "look and feel" of rival products to the extent that trade marks and design rights being out of scope permitted us to look at this question. It is reasonable to require a third party licensee not to present its material in such a way as to claim endorsement by the PSB where no such endorsement has occurred, or to present its material so that it could be

confused with a product of the PSB. However, given our analysis of public task, **we do not advocate the use of the term “official” in respect of derivative PRINCE2 publications.** We would expect to associate the promotion of official status and the consequent reliance that a consumer might expect to place on the material to be aligned with an organisation’s public task.

76. The PSB’s official accreditor, which has some publishing rights which are intended to address its need to publish syllabus information, has the dual roles of official accreditor and the PSB’s combined trademark and copyright licensing sub-contractor. It can also function as a translation sub-contractor. **We suggest that the PSB considers whether there are further ways in which the perceived tensions between these roles can be mitigated beyond the existing policy of confidentiality clauses and the option of independent product review in combined trademark and copyright licensing.**
77. In the course of examining relevant documentation, the basis on which material is classed as “complementary” as opposed to “derivative” was not immediately apparent. **We suggest that, in its Official Portfolio brochure, the PSB provides an explanation of the criteria under which material would be deemed to be complementary as distinct from derivative.**

Scope of the Complaint

78. Some points that the Complainant raised were out of scope of the Regulations. It should be noted that the PSB will be subject to an Information Fair Trader Scheme verification later this year in accordance with its receipt of delegation of authority to license Crown copyright material. This verification will be able to consider some of the issues that the Complainant has raised which could not be addressed within the scope of this investigation under the Regulations.

Role of APPSI Review Board

79. In accordance with Regulation 20 of the PSI Regulations, the PSB and the Complainant have the right to apply to the Advisory Panel on Public Sector Information (APPSI) Review Board for review of the recommendations made under the PSI Regulations in this report if they are dissatisfied with them.

Appendix

Analysis of OGC's Public Task in Respect of PRINCE and ITIL, December 2009

Purpose

The purpose of this paper is to assess formally whether documents produced by OGC, which are the subject of a complaint by Van Haren Publishing to OPSI under the Re-Use of Public Sector Information Regulations 2005 ("the Regulations"), are within OGC's public task and therefore within the scope of the Regulations.

Regulation 5(1)(a) states that the Regulations do not apply to a document where "the activity of supplying the document is one which falls outside the public task of the public sector body."

Public Task

The term "public task" is not defined in statute. Legal advice has been that Article 1 of the Directive can be interpreted by reference to statute and an organisation's framework document and that OPSI's Best Practice Guide can be regarded as an authoritative source of guidance on the matter.

In addition to reviewing submissions from the two parties to the complaint, a number of sources have been examined to assess whether the above material falls within the scope of OGC's public task. These sources are:

- The Regulations
- Directive 2003/98/EC on the Re-Use of Public Sector Information ("the Directive")
- Commission guidance on the Directive
- The OPSI Best Practice Guide
- OGC's statutory functions and published documents which set out its key purposes

The Regulations

"Public task" is not defined in the Regulations.

The Directive

Article 1(2)(a) states that the term public task is "as defined by law or by other binding rules in the Member State, or in the absence of such rules as defined in line with common administrative practice in the Member State in question" (Article 1(2)(a)).

Recital 9 of the Directive states that "activities falling outside the public task typically include supply of documents that are provided or charged for exclusively on a commercial basis and in competition with others in the market".

Commission Guidance

The 2009 European Commission Staff Working Document on the Directive refers to Article 1 and Recital 9 as key reference points for the interpretation of public task.

The OPSI Best Practice Guide

OPSI's Best Practice Guide states at paragraph 3.13 that, "The production of documents may fall outside the scope of a public sector body's public task where they are not directed to its core responsibility, such as where they are optional commercial products competing in the open market".

Characteristics are listed in the Best Practice Guide as likely to feature in a public sector's particular activity so as to identify it as a public task at paragraph 3.14 as follows:

- "It is essential to the business of the public sector;
- It explains the policy of public sector bodies;
- It sets out how the law, in both UK and EU, must be complied with;
- The citizen will consider the information to be key to their relationship with the public sector;
- There may be a statutory requirement to produce or issue such information;
- It enjoys an authoritative status by virtue of its issue by the public sector."

The Guide also states that there is a working assumption that value added information is outside the public task unless there are persuasive factors arguing otherwise. At paragraph 3.16, it states that "Value-added information, however, is not automatically outside the public task, though it would be a reasonable working assumption that it was unless there are other persuasive factors arguing otherwise."

OGC's Statutory Role and Documents Describing Key Functions

There is no specific legislation setting out discrete functions for OGC. It is an office of HM Treasury, set up in April 2000. OGC took on the staff of Central Computer Telecommunications Agency (CCTA), Property Advisers to the Civil Estate (PACE), The Buying Agency (TBA), and some procurement staff from HM Treasury. The CCTA was previously responsible for PRINCE and ITIL.

In the absence of a clear statutory role and framework document – a separate document which defines an organisation's status, aims and objectives, it would be reasonable to look for the most recent authoritative published statement setting out OGC's key tasks. When OGC was created, its focus was government procurement. This continues to be central to its activities, although its stated aims have become broader since then. As noted in its own submission on public task and as published on its website in March 2009, OGC has six key goals:

- “Delivery of value for money from third party spend;
- Delivery of projects to time, quality and cost, realising benefits;
- Getting the best from the Government's £30bn estate;
- Improving the sustainability of the Government estate and operations, including reducing carbon emissions by 12.5% by 2010-11, through stronger performance management and guidance;
- Helping achieve delivery of further Government policy goals, including innovation, equality, and support for small and medium enterprises (SMEs);
- And driving forward the improvement of central Government capability in procurement, project and programme management, and estates management through the development of people skills, processes and tools.”

Further to the six goals, it “provides policy standards and guidance on best practice in procurement, projects and estate management, and monitors and challenges Departments' performance against these standards, grounded in an evidence base of information and assurance. It promotes and fosters collaborative procurement across the public sector to deliver better value for money and better public services; and it provides innovative ways to develop Government's commercial and procurement capability, including leadership of the Government Procurement Service.”

OPSI's Findings

Ownership by a Predecessor Body

OGC's argument that it inherited PRINCE and ITIL from the CCTA which was absorbed into OGC and therefore the two methodologies cannot form part of its public task is not a strong one. PRINCE and ITIL are its responsibility and it has continued to develop the methodologies. The fact that a predecessor body established them is not relevant to whether or not they are within OGC's public task.

Crown Copyright

OGC states in its paper that it has received advice from OPSI from time to time on contractual arrangements and delegations of authority. We regard this advice as focused on the handling of Crown copyright material as distinct from advice on whether or not particular classes of material fall within OGC's public task. The material at issue does contain Crown copyright material, either by virtue of having been created by a Crown servant or by the material having been assigned to the Crown. Public servants are employed in overseeing the process by which OGC produces and licenses the use of its trade mark protected and copyrighted material, including its dealings with its official publisher – TSO and its official accreditor for training and examinations – APMG. However, these factors do not determine whether the material is public task. This is because a public body can employ people in activities which it chooses to do as opposed to activities which it has an obligation to carry out.

ITIL

Our understanding is that PRINCE is a project management methodology and that ITIL is an IT service management methodology. There is a distinction to be drawn between a project, which has a defined end, and a framework for the ongoing management of an IT service. While one of OGC's stated key aims is "driving forward the improvement of Government capability in procurement, project and programme management", there is no reference in any of the statements setting out OGC's key functions to IT service management. It should also be recognised that OGC, in its submission on public task, has clearly stated that "OGC has no policy, best practice, or delivery remit in relation to the subject matter covered by ITIL."

ITIL features in OGC's Best Practice Portfolio which contains a variety of publications, both "official" and "complementary". "ITIL" also appears as a sub-page of the "Programmes and Projects Resource Toolkit" which in turn is a sub-page of "Programmes & Projects" on the OGC website. While the latter positioning appears to be more a question of convenient website categorisation than a deliberate association with programmes and projects, there is scope for OGC reviewing the presentation of its activities so that it is fully consistent with its statement that it has no best practice remit in ITIL's subject matter. Nevertheless, it is possible to detach ITIL from OGC's core tasks. IT service management does not feature in the organisation's key aims and we therefore do not construe it as being one of its core responsibilities. **We conclude that ITIL materials do not form part of OGC's public task.**

PRINCE

We now examine PRINCE in more detail. The second and sixth of OGC's key goals – "Delivery of projects to time, quality and cost, realising benefits," and "driving forward the improvement of central Government capability in procurement, project and programme management, and estates management through the development of people skills, processes and tools" indicate that supporting project delivery and project management capability are key organisational obligations. OGC argues that these activities are entirely government-facing and that its role in monitoring progress on major government projects and supporting the development of project management capability is discharged through the promotion of generic concepts and principles. It contends that PRINCE is a specific methodology used in both the private and public sectors which should be viewed separately from its public task role.

Given that OGC holds a registered trademark in PRINCE and that, on its own website, http://www.ogc.gov.uk/methods_prince_2_background.asp, it says that PRINCE "is now the UK's de facto standard for project management," it becomes difficult to detach PRINCE from OGC's public task. In a document cited in its submission on public task, "Transforming Government Procurement", page 7, OGC refers to one of its achievements as "PRINCE2 (a project management tool) ... helping departments and local authorities manage programmes and projects." This demonstrates how PRINCE supports the organisation's key aim of supporting project delivery within government. It is a reasonable assumption that

many, if not all, of the projects that OGC scrutinises will be run on the basis of PRINCE and PRINCE is presented as one of the “tools” for improving project management capability. As such, we cannot wholly separate PRINCE from OGC’s public task.

OGC is the public sector body tasked with promoting good programme and project management and also the organisation that “owns” the pre-eminent UK project management methodology, PRINCE. The symbiotic relationship between these two responsibilities means that we do not place all of OGC’s activities relating to PRINCE outside of its public task and therefore outside the scope of the PSI Regulations. To do so would mean that no PRINCE content is “public sector information” as defined by the PSI Regulations.

OPSI Best Practice Guide

By reference to OPSI’s Best Practice Guide, we have looked at the six criteria for the characteristics of public task information. Of these, we find that four of them are not self-evidently supportive of PRINCE being part of OGC’s public task. The first criterion that “It is essential to the business of the public sector” could be seen to apply given that effective management of projects is widely regarded as a key government priority. The sixth criterion, that the information “enjoys an authoritative status by virtue of its issue by the public sector,” when viewed alongside OGC’s numerous public statements about its role in project delivery and project management capability is relevant given that the average consumer is likely to make an association between OGC’s project management remit and its publication of PRINCE materials, regarding it as a trusted source.

Core and Derivative Products

As part of its Best Practice Portfolio, OGC has “core reference material” which includes manuals. This core material is the primary source for secondary uses of the information in the form of study guides and translations. OGC classes such publications as “derived” products. We regard “core” and “derived” as equating to “raw” and “value added”. Van Haren Publishing cites a Treasury report from 2000 which states that providing analysis, summarising, and enhancing and facilitating use and effectiveness for the user constitutes adding value. On this basis, producing study guides and translations adds value. The OPSI Best Practice Guide states that there is a working assumption that value added information is outside the public task.

Furthermore, looking at Recital 9 of the PSI Directive, the core reference materials are not in unconstrained competition with others in the market. There is only one definitive and agreed PRINCE manual for each version of the methodology. Derivations of the core reference material which add value, for example through summary in the form of a study guide or translation, do compete with others in the market.

We conclude that the core PRINCE materials are within OGC’s public task and that derived PRINCE materials are outside OGC’s public task.

Conclusion

In summary, we find that:

- ITIL is outside OGC's public task because IT service management does not feature in any of OGC's key stated obligations as a public body.
- Both project delivery and project management capability do feature in OGC's stated obligations and we find that the core PRINCE materials are part of OGC's public task.
- We regard OGC's derived PRINCE materials as resulting from value adding activities – producing translations and pocket guides from the core materials - and therefore outside OGC's public task.