

Public sector information Simplifying the Legal Framework

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Introduction

This short paper¹ examines the legal framework governing the re-use of public sector information (PSI)² in the United Kingdom, and considers the desirability and feasibility of simplifying it.

One of the priorities that the Coalition Government stated early on was the reduction of regulation. In a document published in December 2010,³ the following statements appeared:

Reducing regulation is a key priority for the Coalition Government. Red tape has become a huge problem and we are determined to get to grips with it - to encourage sustainable economic growth and increase personal freedom and fairness

Through eliminating the avoidable burdens of regulation and bureaucracy, the Government aims to promote growth, innovation and social action

Among other objectives, the document spoke of removing regulation that unnecessarily impeded growth, improving the quality of the design of new regulation, and reducing the regulatory cost to business.

The growth imperative now explicitly underpins the Government's commitment to its Open Data strategy. As the Chancellor said in his Autumn Statement:⁴

Making more public sector information available will help catalyse new markets and innovative products and services as well as improving standards and transparency in public services.⁵

In a separate document⁶ the Government announced that:

The Government will establish a Data Strategy Board and a Public Data Group that will maximise the value of the data from the Met Office, Ordnance Survey, the Land Registry and Companies House. It will make available for free a range of core reference datasets from these bodies to support the development of high-value data businesses.

This suggests that certain core reference datasets are seen as of sufficient importance to be liberated from regulatory shackles. These are significant policy initiatives in the world of PSI. They have important implications for the ways in which

¹ Presented to the APPSI Seminar, 8 December 2011.

² The term used in the source legislation (see notes 5 and 7), although it should be noted that there are other overlapping concepts.

³ 'Reducing Regulation Made Simple', Better Regulation Executive, December 2010.

⁴ See: http://www.hm-treasury.gov.uk/as2011_index.htm.

⁵ Autumn Statement 2011, 1.125 (http://cdn.hm-treasury.gov.uk/autumn_statement.pdf).

⁶ Further Detail on Open Data Measures in the Autumn Statement 2011, Cabinet Office, 29 November 2011 – see:

http://www.cabinetoffice.gov.uk/sites/default/files/resources/Further_detail_on_Open_Data_measures_in_the_Autumn_Statement_2011.pdf.

PSI has been managed across the public and private sectors until now. They appear to have a de-regulatory aim, although this is likely to be as much about de-regulation by administrative decision as by reform of the legal framework.

In the meantime, the European Commission has, as part of its Open Data strategy, announced a proposal⁷ to amend the Directive on re-use of public sector information ("the PSI Directive").⁸ The apparently small changes in the proposal (especially the requirements for re-use to be mandatory, and for most charges to move to a marginal costs basis) are likely to have far-reaching implications if the proposal is adopted – and could provide a platform for simplification of the regulatory regime in the UK.

Given these recent and impending policy initiatives, and that it is nearly nine years since the Advisory Panel on Public Sector Information was established⁹, this is an opportune moment to consider simplification of the legal framework in line with the Government's aspirations to reduce the regulatory burden.

What is the legal framework?

Re-use legislation

Reference has been made to the Directive on re-use of public sector information. The UK Regulations implementing it¹⁰ ("the RPSI Regulations") might be regarded as setting out the regulatory framework. However, the RPSI Regulations themselves refer to four other sets of regulations, and fourteen Acts of Parliament. Even discounting references that are included purely for the purposes of defining terms, there are at least five or six other pieces of legislation referred to which play an important substantive role in the RPSI Regulations.

What this illustrates is the extent to which the RPSI Regulations sit at the juncture between a number of different areas of law and regulation, and that the subject of re-use of public sector information brings into play a wider regulatory backdrop.

The PSI Regulations are concerned to ensure that, once access to information has been given,¹¹ its re-use is regulated on a non-discriminatory and pro-competitive basis, without prejudicing the rights of individuals in relation to personal data, or the rights of third party owners of copyright and database right. These aspects hint at the range of statutory material that is relevant to consideration of PSI re-use.

Access legislation

Since information cannot be re-used unless it has been made available, the regimes governing access to, and release of, information are a critical part of the overall regulatory framework. The over-arching piece of access legislation is the Freedom of

⁷ See: http://ec.europa.eu/information_society/policy/psi/index_en.htm.

⁸ Directive 2003/98/EC.

⁹ Established (originally as the Advisory Panel on Crown Copyright) as a Non-Departmental Public Body by Douglas Alexander MP, Minister for the Cabinet Office in April 2003. In October 2006, APPSI became a Non-Departmental Public Body of the Ministry of Justice (then the Department of Constitutional Affairs).

¹⁰ The Re-use of Public Sector Information Regulations 2005 SI 2005 No 1515.

¹¹ One effect of the European Commission's recent proposal may, however, be to elide access and re-use, by making re-use mandatory (see below).

Information Act 2000 (FOIA). This provides for a right of access to information held by public authorities. In principle, it is purely concerned with access, rather than re-use, but this is blurred for a number of reasons:

- (i) perception: many non-specialists assume that access gives rise to re-use as night follows day, and this reflects the common sense assumption that you would not want access to information unless you were going to do something with it; but in fact, as is made plain in the legislation and in policy statements,¹² this is not the case, because re-use has a particular technical meaning;
- (ii) a number of applications to the Information Commissioner for a decision and appeals to the Information Tribunal, while concerned with access and the terms of access to information (especially the charges), plainly cover situations where the applicant also intends to re-use the information;¹³
- (iii) the legislation itself does not always maintain a pristine segregation between access and re-use. For example:
 - 1. the INSPIRE Regulations 2009¹⁴ require metadata relating to spatial datasets to include information about conditions relating not just to access but also to re-use of the dataset;¹⁵
 - 2. Clause 100 of the Protection of Freedoms Bill¹⁶ contains an amendment to FOIA which imposes an obligation on public authorities to make datasets in which the authority is the copyright owner available for re-use.¹⁷ This will be enforced in accordance with Parts IV and V of FOIA by the ICO (with appeals to the Tribunal).

There are other pieces of legislation that are concerned with access to information. For example:

- (i) the Environmental Information Regulations 2004 (EIR)¹⁸ – these create a regime similar (but not identical) to that under FOIA, and are specifically concerned with access to a wide range of information pertaining to the environment and human health and safety;
- (ii) the INSPIRE Regulations – these negatively provide for public access to spatial datasets and spatial data services (in that such access can only be limited in the circumstance specified in the Regulations);
- (iii) the Data Protection Act 1998 ("DPA") allows individuals a right of access to personal data of which the individual is the data subject; in addition to this,

¹² See for example the answer to the question "What is the difference between access and re-use?" at <http://www.nationalarchives.gov.uk/information-management/policies/psi-fags.htm#31>.

¹³ For example, ICO Decision Notice FER0311744 (Kirklees Council) and Information Tribunal decision, East Riding of Yorkshire Council v Information Commissioner (EA/2009/0069).

¹⁴ The INSPIRE Regulations 2009 SI 2009 No 3157, implementing Directive 2007/2/EC. Regulation 6(2).

¹⁵ HL Bill 99 - for the current version see: <http://services.parliament.uk/bills/2010-11/protectionoffreedoms.html>.

¹⁶ Note that, as currently drafted, the datasets to which these provisions apply *exclude* datasets the copyright or database right in which is owned by the Crown.

¹⁷ Implementing Council Directive 2003/4/EC.

¹⁸

FOIA and EIR contain an exemption for personal data (though not necessarily for all personal information).¹⁹

Competition law

Regulation 12(2) of the RPSI Regulations state that any conditions imposed by a public sector body on re-use shall not unnecessarily restrict competition. Regulation 13 also requires that any such conditions shall not "discriminate between applicants who make a request for re-use for comparable purposes".

Regulation 13(2) states that:

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.

Regulation 14 prohibits exclusive arrangements (except where it necessary for the provision of a service in the public interest).

These provisions, which give effect to the equivalent provisions in the PSI Directive,²⁰ plainly echo the requirements of competition law, notably the Chapter I and II Prohibitions – in particular the prohibition, if it affects trade in the UK or between Member States, against agreements, decisions or concerted practices, or against abuses of a dominant position, which result in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or involve abusive conduct such as excessive pricing.²¹

Competition law certainly has a bearing on the conduct of public sector bodies in PSI. Many public sector bodies are the sole source of certain types of information, which puts them *de facto* into a dominant position. The applicability of competition law to public sector bodies is at its greatest where those bodies undertake commercial use of PSI, or impose terms on which it is made available for commercial re-use by others, as these activities are most likely to have an impact on competition. These issues have been especially evident in the UK in the case of the trading funds, which are tasked with a duty to derive commercial benefit from the PSI they hold.

The UK competition authorities have considered PSI to be a sufficiently important area to have conducted a market study (in 2006, by the OFT).²² This followed an OFT market study on the market for property searches in 2005.²³ The OFT has also considered one complaint of anti-competitive behaviour by a public sector body in its supply of information. This was a complaint from a member of the Business Information Providers Association alleging that Companies House was abusing a dominant position by subsidising prices for its commercial products.²⁴

¹⁹ FOIA, Section 40.

²⁰ Articles 8 (Licences), 10 (Non-discrimination) and 11 (Prohibition of exclusive arrangements).

²¹ Competition Act 1998 s 18(2)(c) and Articles 81 and 82 of the EC Treaty.

²² The commercial use of public information (CUPI), December 2006, OFT 861 - see:

http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft861.pdf .

²³ Property searches: a market study, September 2005, OFT 810 – see:

http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft810.pdf.

²⁴ Decision No. CP/1139-01, 25 October 2002 (no predatory pricing or cross-subsidy found).

Intellectual property

Intellectual property law plays several critical roles in the regulatory framework relating to PSI.

On the one hand, the exclusive rights of the IP owner can, if vested in a public authority, be used to block or obstruct re-use of PSI. Indeed, it is primarily on the basis of IP rights that public sector bodies are in a position to prevent re-use: in the absence of IP rights there would be little, in most cases, to prevent information from being re-used once access to it had been obtained. The concept of 're-use' is therefore closely bound up with – though never in the legislation explicitly described as – the acts that would infringe copyright or database right (in the absence of permission from the copyright or database right holder).

PSI is often of interest to re-users because of its currency, and such PSI is likely to fall well within the periods for which IP protection lasts. The subsistence of IP rights – mainly copyright, but potentially also database right, enables public sector bodies to impose licensing conditions regulating re-use, and it is precisely this freedom that the PSI Directive and PSI Regulations aim to curtail or restrict (and, in the case of datasets to which Clause 100 of the Protection of Freedoms Bill applies, remove altogether).²⁵

On the other hand, in the UK, Crown copyright subsists in all works created by an officer or servant of the Crown in the course of his duties,²⁶ and this covers all works created by central government departments.²⁷ The Creative Commons system demonstrated that frameworks for licensing copyright were as much a bridge permitting use of copyright material as a barrier, and the Open Government Licence (OGL)²⁸ and Non-Commercial Government Licence apply the Creative Commons model to support the UK Government's stated policy of making material available as simply as possible, and in many cases free of charge. This system is made possible, ironically, precisely because of the existence of Crown copyright,²⁹ which is also seen as a guardian of authenticity.³⁰ The fact that there is a single licensing authority³¹ means that a unified set of principles can be imposed, via licence terms, across the entirety of central government. Under the system of delegation of authority,³² a requirement can be imposed to pass these principles down the licensing chain. This is how, for example, the Information Fair Trader Scheme (IFTS)³³ is enforced, since all Crown bodies that have a full licensing delegation from the Controller of HMSO must become IFTS accredited.

²⁵ Relying on Article 17 of the Berne Convention for the Protection of Literary and Artistic Works - see http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P203_40049: this allows Governments of signatory countries to permit, control, or prohibit, by legislation or regulation, the circulation, presentation etc of any work.

²⁶ Copyright, Designs and Patents Act 1988, Section 163(1).

²⁷ This contrasts with the position in the USA where a work prepared by an officer or employee of the US (federal) government is devoid of copyright.

²⁸ See: <http://www.nationalarchives.gov.uk/doc/open-government-licence/>.

²⁹ In practice, works commissioned by central government departments, where copyright vests in the Crown by assignment, and databases created by central government departments and which are protected by database right, are brought into the same regime of licensing by HMSO. "[Crown copyright] enables guarantees to be given as to the integrity, accuracy and authenticity of the information"; 'Crown Copyright in the Information Age, Green Paper, January 1998.

³⁰ The Controller of Her Majesty's Stationery Office (HMSO).

³¹ The system whereby a government department or agency is authorised to license the re-use of Crown copyright material (by others) *on behalf of* the Controller of HMSO.

³² See: <http://www.nationalarchives.gov.uk/information-management/ifts.htm>.

It should be noted, however, that swathes of the public sector lie outside the reach of Crown copyright. Local authorities and the National Health Service, for example, are not part of central government, and are outside the reach of any licence-based regulatory system (unless, of course, they need to use Crown copyright material). Nevertheless, they hold information in forms that are protected by copyright and/or database right, and rely on this protection to require payment in return for a licence to reproduce or re-utilise the information.

Finally, underlining the point made earlier that the concept of re-use in PSI regulation must be understood as involving an exploitation of IP rights, if *third party* IP rights subsist in any material, the RPSI Regulations do not apply.³⁴ However, recent UK Government proposals to amend copyright law may result in an extension of the scope of the existing exceptions enabling copying of works for the purposes of public administration.³⁵ These proposals would permit publication of the relevant documents online, specifically to enable greater access to public services and information, although safeguards are envisaged (for example, public bodies could only issue copies of material sent to them by third parties in the course of public business if directly connected to the purpose for which they were sent, or for a purpose that could reasonably have been anticipated by the copyright owner).

Trade secrets and confidential information are sometimes treated as a form of intellectual property, but in the regulatory framework for PSI are treated differently. The existence of confidentiality obligations or trade secrets (in practice the same thing from a UK law perspective) gives rise to exemptions under FOIA,³⁶ and hence may prevent access to the information in question. If disclosure of information would prejudice the commercial interests of any person, then this information is also exempt.³⁷ The common law duty of confidence which underpins the confidentiality of patient health records is, similarly, buttressed by the tight controls around access to such records.³⁸ If, however, the exemptions fail to apply, such that a person requesting information is entitled to have it communicated to him, there is no (further) hurdle in the RPSI Regulations to re-use of that information, unless it is protected by third party IP rights (such as copyright or database right).

Contract

It is worth mentioning in passing that contract supports the regulatory framework outlined above. The system of licensing of Crown copyright and delegation of authority involves what is, in effect, a series of arrangements in which policy principles (for example the Fair Trader principles) can be embedded as contractually enforceable licence conditions, and this is part of the wider system of (non-statutory) regulation.

³⁴ RPSI Regulations, regulation 5(1)(b).

³⁵ Consultation on Copyright, published 14 December 2011, paragraphs 7.198 – 7.207: see <http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2011-copyright.htm>

³⁶ FOIA, sections 41, 42 and 43.

³⁷ FOIA, sub-section 43(2).

³⁸ Section 251 National Health Service Act 2006.

Public records

Brief mention may be made of the Public Records Acts.³⁹ So far as access to public records is concerned, this is now effectively dealt with under FOIA. However, the obligations to preserve public records, and to select those records which ought to be permanently preserved, remain important as, in the absence of any other statutory requirement to maintain information, the Public Records Act ensures that material is preserved – without which any access or re-use regime would be otiose.

Treasury standards

There are non-statutory aspects to the regulatory framework, especially in relation to charging. While the Government's policy is that most public sector information will be made available for re-use at marginal cost (effectively for free where it is made available electronically), exceptions are permitted where certain criteria are satisfied.⁴⁰ In these exceptional cases, both IFTS principles and the RPSI Regulations must be complied with.

However, Regulation 15 of the RPSI Regulations acknowledges that fees must be calculated (so far as reasonably practicable) with the accounting principles applicable to the public sector body from time to time.⁴¹ It also permits the total income from any charge to include "a reasonable return on investment".⁴² The scope of what is a "reasonable return on investment" is a matter of interpretation.

The Treasury is responsible for standards and guidance on charging for information, covering such aspects as rates of return on investment. If an application for exception to marginal cost pricing is to be successful it must show that proposed fees or charges are in line with applicable Treasury standards.⁴³

Sector or information-specific regulation

In addition to the over-arching regimes described above, there is a plethora of legislation or regulation aimed at particular types of information. This paper does not aim to set out a comprehensive list, but a few examples follow. In many of these the duty to collect, charge for, or provide access to information appears as a minor adjunct to legislation concerned with a wide range of other matters.

- (i) The **Local Government, Planning and Land Act 1980** requires "authorities" (essentially local government) to publish information about the discharge of their functions and other matters (including forecasts) in accordance with a code of practice.⁴⁴ The secretary of state can go further and make regulations, which would have the effect of the non-binding recommendations in a code of practice a matter of statutory duty.⁴⁵ In September 2011 the

³⁹ Public Records Act 1958, as amended in 1967 and 2000.

⁴⁰ <http://www.nationalarchives.gov.uk/documents/information-management/criteria-exceptions-marginal-cost-pricing.pdf>.

⁴¹ This requirement remains unaffected by the European Commission's recent proposal to amend the PSI Directive.

⁴² RPSI Regulations, Regulation 15(2)(b) and 15(3)(a).

⁴³ See 'Managing Public Money' (http://www.hm-treasury.gov.uk/psr_mpm_index.htm), particularly annex 6.3, Charging for Information.

⁴⁴ Local Government, Planning and Land Act 1980, Section 2.

⁴⁵ Local Government, Planning and Land Act 1980, Section 3.

Department for Communities and Local Government issued a Code of Recommended Practice for Local Authorities on Data Transparency.⁴⁶ This specifically states that it does not supersede or replace FOIA, EIR, the RPSI Regulations or the INSPIRE Regulations. Unhelpfully, however, the Code directly contradicts the RPSI Regulations (for example, the recommendation that local authorities should not pre-determine the level of public demand).⁴⁷ The Code also contains a strong recommendation to local authorities to make information freely available, without charge, under an Open Government Licence (OGL).⁴⁸

- (ii) The **Local Authorities (England) (Charges for Property Searches) Regulations 2008**⁴⁹ establishes a method of calculating charges for the provision of access to property records. In principle these charges are "to be no more than the costs to the local authority of granting access to property records".⁵⁰
- (iii) In the health sector the paramount need to maintain patient confidentiality, with the acknowledgement that use of patient data could play a huge role in improving patient care, or in monitoring care standards, creates a need for provisions controlling the release of and access to patient information. Aside from general legislation which applies here (the DPA, and the Human Rights Act 1998⁵¹), a special regime exists under **section 251 of the National Health Service Act 2006**, under which regulations may be made "*requiring or regulating the processing of prescribed patient information for medical purposes*" which are "*necessary or expedient—*
 - (a) *in the interests of improving patient care, or*
 - (b) *in the public interest.*"⁵²

The extensive amendments to the NHS Act 2006 that are contained in the Health and Social Care Bill do not appear to remove section 251 NHS Act 2006, but recent Government announcements following the Autumn Statement 2011 about linking primary and secondary healthcare datasets, and publishing prescribing data suggest that the old regulations will need amendment. The National Information Governance Board (NIGB), which was established to consider applications for permission to gain access to, and use, confidential data, is to be abolished.⁵³ Separately, the body responsible for

⁴⁶ See: <http://www.communities.gov.uk/publications/localgovernment/transparencycode>.
⁴⁷ Code of Practice, paragraph 8.
⁴⁸ Code of Practice, paragraph 14.
⁴⁹ Made in exercise of the powers conferred by section 150 of the Local Government and Housing Act 1989.
⁵⁰ The 2008 Regulations, Regulation 6(1).
⁵¹ Especially as engaging Article 8 of the Convention, the right to respect for private and family life.
⁵² The Health Service (Control of Patient Information) Regulations 2002 (SI 1438) were made under Section 60 of the Health and Social Care Act 2001 and continue to have effect under Section 251 of the NHS Act 2006.
⁵³ The National Information Governance Board (NIGB) was established to promote, improve and monitor information governance in health and adult social care. It executed its statutory function to advise the Secretary of State in regard to applications under section 251 through its own sub-committee, The Ethics and Confidentiality Committee (ECC). This committee assessed applications to access and use confidential (explicitly identifiable health data).

handling applications to access and use sensitive data has also been re-organised.⁵⁴

- (iv) Information about companies has to be maintained and made available by the registrar of companies under the **Companies Act 2006** (Part 35).
- (vi) Statistical information is another domain with its own set of statutes and regulations, starting with the **Statistics and Registration Service Act 2007**, under which the Office for National Statistics (ONS) the UK Government's main survey organisation and main producer of official statistics, became the executive office of the UK Statistics Authority.
- (vii) Information about past and present coal mining operations is required to be made available by the Coal Authority under the **Coal Industry Act 1994**.
- (viii) A register of street works has to be maintained by a street authority under section 53 of the **New Roads and Street Works Act 1991**, as amended by section 45 of the **Traffic Management Act 2004**, and the register must be made available for inspection at all reasonable hours and free of charge.

Bodies having jurisdiction

As can be expected from the complexity of the statutory and regulatory background, there are a number of bodies having jurisdiction to enforce different parts of the framework, or to hear complaints.

The **Office of Public Sector Information** (OPSI), part of The National Archives (TNA), is tasked with responsibility for hearing complaints under the RPSI Regulations. Anyone dissatisfied with a recommendation of OPSI can request it to be reviewed by the **Advisory Panel on Public Sector Information** (APPSI).⁵⁵ The underlying aim of the complaints review procedures in the RPSI Regulations was to create a light touch regime, whereby speed and cost-effectiveness should have priority. It was feared that a system which culminated in binding determinations would attract an overly legalistic approach. The European Commission's proposed amendments to the PSI Directive, however, which reflect APPSI submissions in 2010, indicate a feeling in some quarters that the time has come for stronger sanctions.

As operator of IFTS, **TNA** also hears complaints about non-compliance with IFTS. Given the non-statutory foundation of the IFTS, APPSI has no role in reviewing any recommendation made by TNA in relation to IFTS. Although there is no stated means of appealing a decision of TNA relating to IFTS, a disagreement relating to a determination of TNA is likely to be escalated to the Secretary of State.⁵⁶ A complainant is not barred from pursuing legal action or referring issues to other regulatory bodies,⁵⁷ provided that a cause of action or basis for complaint exists.

⁵⁴ The Database Monitoring sub-Group (DMsG) used to entertain applications for certain types of data classed as sensitive. It was disbanded in October 2010, its functions being taken over by the Data Access Advisory Group (DAAG) hosted by the NHS Information Centre: see <http://www.ic.nhs.uk/services/data-access-advisory-group-daag>.

⁵⁵ RPSI Regulations, Regulation 20.

⁵⁶ See paragraph 25 of OPSI's procedures for investigating complaints arising under IFTS at www.nationalarchives.gov.uk/documents/information-management/ifts-complaints-procedure.pdf.

⁵⁷ Ibid, paragraph 20.

Complaints of non-compliance with FOIA, EIR and DPA are heard by the **Information Commissioner** (ICO) or, in Scotland, the Office of the Scottish Information Commissioner (OSIC). ICO decision notices can be appealed to the **Information Tribunal**.

As noted above, the new dataset re-use provisions contained in Clause 100 of the Protection of Freedoms Bill would insert new provisions in FOIA and, as such, would be enforced by the ICO. It should be noted, however, that, as currently drafted⁵⁸ the datasets to which these provisions apply *exclude* datasets the copyright or database right in which is owned by the Crown. So far as these excluded datasets are concerned, their re-use presumably remains governed by the RPSI Regulations, compliance with which is a matter for OPSI. It seems potentially most confusing that similar types of PSI should fall to be handled under two different regimes and by different regulatory entities.

Complaints of anti-competitive behaviour in breach of the Competition Act are heard by the **Office of Fair Trading** (OFT) or the courts. **Ofcom** is the regulator and competition authority for the UK communications industries.

Complaints of infringement of copyright are handled by the courts although the **Copyright Tribunal** adjudicates in commercial licensing disputes between collecting societies and users of copyright material in their business (it does not deal with copyright infringement cases).

There are also complaints procedures in specific areas. For example, the UK Statistics Authority and ONS each have their own complaints procedures.

It should be noted that TNA / OPSI has established arrangements for co-operating with the ICO and the OFT in relation to disputes. These are set out in a Memorandum of Understanding with the OFT and Protocols with the ICO and the Scottish Information Commissioner respectively.⁵⁹

Should all this be simplified and, if so, can it be?

Simplification could embrace a number of objectives. It could involve rationalisation, consolidation or simply improvement within a particular domain. There is no doubt that all of these are desirable. However, they may not all be practicable.

There are, no doubt, limits to any sensible re-codification. For example, legislation dealing with personal data, IPRs and competition law is based on separate legal principles and indeed sources (largely EU Directives or Treaties). It makes sense for more specialist areas to continue to be dealt with under specific legislation, a good example being the sensitive area of patient data.

However, there are overlapping regimes that deal with access to and re-use of data. FOI and EIR are very similar. The Protection of Freedoms Bill is amending FOI to deal with release of datasets and current clauses in the Bill bring in elements of re-use. RPSI refers to FOIA and EIR. There is confusion between the concepts of

⁵⁸ See definitions of "relevant copyright work" in Clause 100.

⁵⁹ See: <http://www.nationalarchives.gov.uk/information-management/legislation/dispute-regulation-protocols.htm>

access and re-use. In an ideal world, there would be a consolidated statute dealing with public data rights.

This is perhaps utopian, although it does not mean one should not state the ideal. But there are some specific areas where simplification would be helpful. As noted above, the European Commission's recent proposals to amend the PSI Directive⁶⁰ may provide the opportunity to review the current framework and, where possible, to simplify it.

Terminology and definitions

It is confusing that different terms are in use in different pieces of legislation, in spite of considerable overlap of content.

For example, the RPSI Regulations refer to "documents". The definition of "documents" is very wide, and tracks the definition in the PSI Directive as "*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording), and any part of such content.*" Essentially this means information. "Information" is of course the term used in FOIA.

Elsewhere policy documents refer to "public data" and "public sector information". The bodies that collect or produce this information are differently referred to. In the RPSI Regulations they are referred to as "public sector bodies". In FOIA they are called "public authorities". In other legislation they are referred to as "authorities".

A (if not the) reason for this terminological inconsistency is that the terms used in the RPSI Regulations derive from the PSI Directive. This was implemented under the European Communities Act 1972. This, and also the aim of harmonisation, justified preserving the language of the Directive. But in an ideal world it would be preferable to consolidate this terminology and highlight where there are any substantive differences as an exception. The proposed amendments to the PSI Directive do not include any significant changes of terminology, but implementing these amendments into UK law may afford an opportunity for simplification.

More fundamentally, perhaps, are terms such as "public task". This plays a key role in PSI legislation because unless the supply of PSI is an activity falling within the scope of the public task of the public sector body concerned, the PSI Directive (and hence the regulatory regime it imposes) does not apply.⁶¹ Consequently there is an implication that this information is not open to re-use. This is of particular relevance to bodies that have a hybrid role. However, the term is not defined as such in the PSI Directive. Instead, the meaning of 'public task' is stated to be:

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.

UK legislation rarely (except in the case of the national museums, for example) states explicitly what the public task of public sector bodies is. The need for greater definition was a key recommendation of the Review Board of APPSI in its only review under the RPSI Regulations to date.⁶² The National Archives has developed a set of

⁶⁰ See: http://ec.europa.eu/information_society/policy/psi/index_en.htm.

⁶¹ PSI Directive, Article 1(2)(a); see also RPSI Regulations, Regulation 5(1)(a).

⁶² In its report on the Intelligent Addressing and Ordnance Survey complaint, 2007.

principles and guidance to assist public sector bodies in drawing up a statement of public task.⁶³ In the absence of explicit statutory statements, the reference in the PSI Directive to "common administrative practice" has, perhaps, been helpful, but the proposed amendments to the PSI Directive would remove it, so that only law or binding rules could be taken into account in establishing public task. The aim is no doubt to reduce the scope for governments or public sector bodies to re-define public task to suit their own convenience, but it might also lead to a narrowing of the scope of the Directive.

Former public sector bodies

An aspect which the current legislation fails to deal with is the position of bodies that have moved from the public sector to the private sector, yet which continue to gather information in pursuance of a statutory duty, or which it is in the public interest to gather or maintain. The principle examples are the privatised utilities, such as water or transport. Here, information is gathered which, arguably, should be part of the national data infrastructure. At the very least, this information has a public significance which suggests that its use and re-use should be regulated. An example is information gathered by the water companies pursuant to their statutory responsibilities.

Access versus re-use

As noted above, this is one of the key fault-lines in the regulatory regime, but also a major source of misunderstanding and confusion. The interface between these concepts is not explicitly stated in the legislation. The PSI Directive makes clear that it "*builds on the existing access regimes in the Member States and does not change the national rules for access to documents*".⁶⁴ Rather, it is left to policy statements and guidance to clarify the relationship between access and re-use.⁶⁵ Non-specialists often believe that access to information via a FOI or EIR request will mean that re-use of that information is allowed. This is partly encouraged by the extraordinarily wide definition of re-use:

're-use' means the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. [Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use]⁶⁶

The distinction between access and re-use matters, currently, because:

- (i) re-use is not, currently, mandatory under the PSI Directive⁶⁷ or the RPSI Regulations;

⁶³ See: <http://www.nationalarchives.gov.uk/information-management/ifts/public-task.htm>. The drawing up of statements of public task was a key recommendation of APPSI in its review of OPSI's investigation of a complaint made by Intelligent Addressing against Ordnance Survey.

⁶⁴ PSI Directive, Recital 9.

⁶⁵ See: Public Sector Information Guidance Note 1: Links between access and re-use (OPSI, July 2008 – see: <http://www.nationalarchives.gov.uk/documents/information-management/links-between-access-and-reuse.pdf>).

⁶⁶ PSI Directive, Article 2(4).

⁶⁷ "This Directive does not contain an obligation to allow re-use of documents" - PSI Directive, Recital 9; see also Article 1(3).

- (ii) the charging regimes for access and re-use are different: the regime for charging for re-use permits charges higher than those which would result from recovery of the marginal costs of providing the information alone; whereas the fees for responding to a FOI request are essentially only those for answering a request, subject to a limit⁶⁸ and, in the case of the EIR, where there is no limit, the fees cannot exceed the cost of providing the information;⁶⁹
- (iii) the subsistence of IP rights in most if not all PSI creates a basis for refusing to permit re-uses that would be commercially attractive;
- (iv) some of these IP rights belong to third parties, although such third party IP-protected information falls outside the PSI regulatory regime.⁷⁰

However, points (i) and (ii) may be set to change as a result of the European Commission's proposal to amend the PSI Directive. In relation to point (i), the proposed amendment would read:

Member States shall ensure that documents referred to in Article 1 shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in [this Directive].

This would apply to almost all public sector bodies, though not to libraries, museums and archives, which (under the proposals) would lose the exemption for documents held by them, but would be subject to the current permissive regime:

For documents for which libraries (including university libraries), museums and archives have intellectual property rights, Member States shall ensure that, where the re-use of documents is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with [this Directive]

In relation to point (ii), as noted below, the basic charging regime for *re-use* would move to one in which the amount charged cannot exceed the marginal costs of reproduction and dissemination. This would mean that point (iii) would become less relevant (except in those exceptional cases where public sector bodies generate a substantial part of their operating costs from IP exploitation, or in the case of libraries, museums and archives – see below) and – but for the subsistence of third party IP-protected content – the distinction between access and re-use would cease to matter.

In fact, we are already not far from such a position with some PSI. Where, under UK Government policy material should be made available as simply as possible, and in many cases free of charge, then access and re-use are already on the point of merging, since the principle that there should be no double-charging is enshrined in the RPSI Regulations.⁷¹

⁶⁸ See: The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.(SI 2004 No 3244).

⁶⁹ Markinson v Information Commissioner 28 March 2006, Appeal Number: EA/2005/0014, FER0061168

⁷⁰ PSI Directive, Regulation 1(2)(b) and RPSI Regulations, Regulation 5(1)(b).

⁷¹ RPSI Regulations, Regulation 15(4).

Charges

This leads onto the issue of charging, which is itself a fraught area. The regime for charging for *re-use* of PSI is contained, in principle, in Regulation 15 of the RPSI Regulations, implementing Article 6 of the PSI Directive. There are various dimensions to charging: the clarity of the regime created by Regulation 15, and overlap or conflict with other regimes of charging.

Regulations 15(2) and 15(3) state:

- "(2) The total income from any charge shall not exceed the sum of —
 - (a) the cost of collection, production, reproduction and dissemination of documents; and
 - (b) a reasonable return on investment.

- (3) Any charges for re-use shall, so far as is reasonably practicable, be calculated—
 - (a) in accordance with the accounting principles applicable to the public sector body from time to time; and
 - (b) on the basis of a reasonable estimate of the demand for documents over the appropriate accounting period."

This is a reasonably faithful transposition of Article 6 of the PSI Directive. However, the number of questions begged by the drafting makes for serious difficulties of interpretation. For example:

- (i) is the reference to "charge" in Regulation 15(2) intended to refer to the charge for a particular instance of re-use? If so, then it would appear that the costs relating to all documents can be brought into account;
- (ii) if this is thought an absurdly wide interpretation, which documents is one to take into account? Are they all the documents subject to the re-use request, or all documents of a similar type? Or are they all documents capable of being re-used?
- (iii) what is a reasonable return on investment?
- (iv) what happens if the accounting principles say little or nothing about re-use charges?

These are merely illustrative, but show that simplification is an issue that goes to the heart of some of the legislation.

Separately there are areas where different charging regimes apply. The difference between the charging regimes applicable to access and to re-use has been noted above, but in addition to this, there are other regimes for particular types of data – such as that created by the Local Authorities (England) (Charges for Property Searches) Regulations 2008 ("CPSR"), for example. The legislation does, it is fair to say, contain provisions to prevent duplication or overlap. For example, the CPSR provisions are disapplied in the case of EIR requests.⁷² Under the RPSI Regulations, an applicant cannot be charged twice for activities that have already been charged under FOIA or the EIR.

⁷² EIR, Regulation 5(6), applied in ICO Decision Notice Ref FER0372748 (City of York Council, 18 October 2011).

Finally, reference has been made to the Code of Recommended Practice for Local Authorities on Data Transparency, issued in September 2011 by the Department for Communities and Local Government, and to its recommendation that local authorities should not pre-determine the level of public demand. Even if more information is to be made available at marginal cost, it is difficult to see how the need to estimate demand can be avoided in all cases, as the charges should reflect demand.

The European Commission's proposed amendments to the PSI Directive include some important changes to the charging regime permitted under the current regime. Under the proposal, there would be a three-tier system of charging:⁷³

1. Where charges are made for the re-use of documents, the total amount charged by public sector bodies shall be limited to the marginal costs incurred for their reproduction and dissemination.
2. In exceptional cases, in particular where public sector bodies generate a substantial part of their operating costs relating to the performance of their public service tasks from the exploitation of their intellectual property rights, public sector bodies may be allowed to charge for the re-use of documents over and above the marginal costs, according to objective, transparent and verifiable criteria, provided this is in the public interest and subject to the approval of the [independent regulatory authority – see below].
3. Notwithstanding paragraphs 1 and 2, libraries (including university libraries), museums and archives may charge over and above the marginal costs for the re-use of documents they hold.

The existing provision on charging, permitting recovery (via any charges) of the costs of collection and production of information (as well as reproduction and dissemination), and a reasonable return on investment, would remain. It is not entirely clear how this interacts with the new provisions, but the intent would appear to be that where charges exceeding marginal costs can be made under articles 6(2) and (3) above, these can recover the higher costs and a reasonable return on investment.

It should be noted that the proposed wording of article 6(2) above is apparently restrictive, although this may be due to obscure drafting. It appears that it is not *any* public sector bodies that exploit IP that can rely on this provision, or even those that rely on the proceeds of IP exploitation to cover their costs, but only those whose IP exploitation itself generates a substantial part of their operating costs.

In any event the move towards a simpler, marginal cost-based charging regime should help to reduce or even eliminate the interpretative difficulties which, as identified above, burden the existing regime – and this should help achieve a measure of simplification.

Statutory and non-statutory regulation

To an outsider, the existence of two parallel, and in many respects similar regimes, one statutory (the RPSI Regulations) and the other non-statutory (the IFTS) might seem strange. Both have similar objectives, and impose similar requirements, though IFTS is wider and, as might be expected of a system that has developed as a

⁷³ Amending Article 6 of the PSI Directive: see : http://ec.europa.eu/information_society/policy/psi/index_en.htm.

means of delivering policy objectives, is geared to achieve improvement on a continuum, rather than compliance with a set of strictly defined objective requirements. Nevertheless, the IFTS has been described as:

"the best practice model for public sector bodies wishing to demonstrate compliance with the Re-use of Public Sector Information Regulations 2005"⁷⁴

The reason for the existence of a dual system is not hard to find. The PSI Directive does not require public sector bodies to allow re-use of PSI. The RPSI Regulations adopted a very light touch scheme of regulation. Although there is a process for referring non-compliant public sector bodies to OPSI (with a right to request a review of OPSI's recommendations by APPSI), this does not, as noted above, result in legally binding determinations or offer complainants remedies in the courts (except, possibly, via judicial review).

The levers of enforcement provided by the RPSI Regulations are therefore relatively weak. The IFTS offers a regime in which the existing Crown copyright licensing framework allows greater leverage to be applied, one that has more significant sanctions, culminating, *in extremis*, in the termination of the delegation of authority.

One could envisage a world in which such a dual system of regulation was not necessary, or at least where there was a clearer distinction between the legal regime and the policy framework. If permitting re-use of PSI were mandatory, provided that there were no obstacles under the access regime to release, and if the RPSI Regulations contained more powerful sanctions, then the IFTS would no longer need to bear the weight of enforcement, leaving it to deal with matters that cannot easily be captured in a system of regulation (such as the principle of 'maximisation'). This is, potentially, the world envisaged in the European Commission's proposed amendment to the PSI Directive. The requirement to make PSI available for re-use is mentioned above. In relation to enforcement, the proposal requires a means of redress which:

shall include the possibility of review by an independent authority that is vested with specific regulatory powers regarding the re-use of public sector information and whose decisions are binding upon the public sector body concerned.⁷⁵

Although this refers to a 'possibility', this is in the context of the redress offered by the internal complaints procedures of public sector bodies, and the implication is that Member States must enable the possibility to exist. As noted above there is, in the UK, an independent⁷⁶ authority, namely OPSI, but its findings under the RPSI Regulations are currently non-binding. If it were given the power to make binding decisions, this would have several possible consequences. In particular, it would require:

- (i) a review of the need to rely on the IFTS to enforce non-compliance with the regulatory framework; IFTS already or primarily serves the purpose of encouraging compliance with certain policy objectives, and this could become its sole role;

⁷⁴ See: IFTS report on Companies House, March 2009, at <http://www.nationalarchives.gov.uk/documents/information-management/ch-ifts-report.pdf>.

⁷⁵ Amending Article 4 of the PSI Directive: see : http://ec.europa.eu/information_society/policy/psi/index_en.htm

⁷⁶ Independent, at least in relation to any complaints that do not involve the information supply activities of OPSI (or The National Archives).

- (ii) a review of the appeal process. If OPSI's decisions were binding then, instead of referring the matter to another body that can only make a non-binding decision (APPSI), it would seem more logical to allow an appeal to a tribunal or indeed the court (rather like the process that applies to complaints lodged with the ICO).

The involvement of the courts in relation to non-compliance would, as with FOI complaints, perhaps be best in the role of hearing appeals against an initial determination by a specialist regulatory body. Currently, apart (perhaps) from judicial review, there is no clear basis for a claim against a public sector body for breach of statutory duty in the event of non-compliance with the RPSI Regulations. It is not clear from the RPSI Regulations that they contemplate the creation of civil liability in the event of non-compliance: in fact, the inclusion in the RPSI Regulations of the complaints process (via OPSI and APPSI) reduces the chances that civil liability (for breach of a statutory duty) would be implied. This would need to be re-visited on any consideration of how best to implement the Commission's proposed amendments to the PSI Directive into UK law.

Crown bodies and non-Crown bodies

One of the aspects of the dual regulatory framework that exists in the UK is that the part of the framework that has the more powerful sanctions, IFTS, does not extend to all parts of the public sector. Whereas the RPSI Regulations apply to all public sector bodies, including central government departments, local authorities and NHS trusts, the IFTS only extends to local authorities, for example, on a voluntary basis. This is because regulation under the IFTS is exercised via delegated authority granted by the Controller of HMSO, and so is at its most powerful in relation to central government departments that generate Crown copyright material.

Ideally, however, there would be a single, unified system of regulation that applied the same set of rules consistently across all parts of the public sector. Again, the European Commission proposals would help here. Making it mandatory to permit re-use would re-balance the system and mean that Crown bodies and non-Crown bodies would be subject to the same sanctions (especially if the consequences noted above in relation to the role of IFTS were to follow).

Regulatory bodies

As has been noted, there are several bodies with regulatory functions that are relevant to PSI – OPSI / TNA, the ICO (and its Scottish equivalent) and the OFT being the main ones. To be fair, there is little evidence that this has caused problems in the past, and there are arrangements between these bodies that are intended to clarify who does what.⁷⁷

Were one starting from scratch, one would want to consider whether it makes sense to have potentially three regulatory bodies dealing with different aspects of PSI re-use in the broadest sense. If a re-user of PSI considers that a public sector body is obstructing access, applying incorrect re-use charges and abusing its monopoly position, then he may need to have recourse to the ICO, TNA (OPSI) and the OFT,

⁷⁷ As between OPSI and the ICO, and as between OPSI and the OFT.

which does not, in principle, seem to make for a streamlined, efficient or cost-effective framework. As noted above, new legislation in the form of the Protection of Freedoms Bill seems set to add a layer of complexity by dealing with non-Crown datasets in FOIA, leaving Crown datasets to be dealt with under RPSI.

It should be recognised that certain benefits have accrued from the current system. The work done by TNA (OPSI) in discharging its role means that considerable specialist expertise has been built up, centred on personnel who are familiar with the detailed issues. The value of these assets is internationally recognised, and should be maintained and indeed developed. The existence of different regulatory entities has not stood in the way of efficient sharing of expertise and good working relationships between the personnel in each entity. However, this is not institutionally enshrined. It is also possible that a more rigorous PSI regime, based on mandatory permission for re-use and more powerful means of enforcement, might reduce the need for separate bodies. As noted above, this would also call into question the role that APPSI has in relation to requests for reviews of recommendations made by OPSI under the RPSI Regulations.

The European Commission's proposed amendments to the PSI Directive suggest that there may be scope to review the current framework. The proposal is subject to the co-decision procedure. It could potentially be adopted, following review and amendment by the Council and Parliament, in the course of 2012. Implementation of the amended PSI Directive in the UK may therefore provide an excellent opportunity to consider whether any of the issues raised in this paper can be addressed at the same time.

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