

**OFFICE OF PUBLIC SECTOR INFORMATION
REPORT ON ITS INVESTIGATION
OF A COMPLAINT**

Mr Dan Henderson and Falkirk Council

4 March 2013

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Background Information

1. The Office of Public Sector Information (OPSI) received a complaint on 21 November 2012 from Mr Dan Henderson (the Complainant) against Falkirk Council (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. Submission of the formal complaint was preceded by correspondence with Mr Henderson, beginning on 26 September 2012.

The role of OPSI in Investigating Complaints

3. OPSI is responsible for investigating complaints under the Regulations for failure to comply with any requirement of the Regulations. The procedure for investigating complaints under the Regulations can be found on its website¹.

Summary of the PSI Regulations

4. 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.
5. 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

¹ <http://www.nationalarchives.gov.uk/information-management/ifts/complaints-procedure.htm>

- 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

6. Mr Dan Henderson (DH) is an independent consultant who provides services relating to planning and development policy.

The Public Sector Body (PSB)

7. Falkirk Council (FC) is a unitary authority which provides all local government services for the Falkirk Council area.

Context of the Dispute

8. The complainant was engaged by a private sector developer to produce a report pursuant to the development of a site in the FC area. This report was required to contain information regarding potential contamination of

land on or around the development site. In addition to being the relevant planning authority for the development site, FC held certain environmental information relating to the site. Access to this material (the Documents) was provided primarily under the Environmental Information Regulations (Scotland) (2004) via email, hardcopy and on-site inspection during June 2012.

9. OPSI is informed that DH and FC had previously been in correspondence with respect to FC's policies on the treatment of contaminated land issues in the planning process; in which DH suggested that various aspects of FC's policies should be revised. These issues are not within OPSI's competence, however, this context is noted as it may be relevant elsewhere.
10. We understand that FC advised DH that any onward use of the material would require its written consent. DH submitted a request and on 9 August 2012 FC advised DH that the request would be dealt with in line with the Regulations. On 5 September 2012 FC formally declined the request. The initial reasons given for refusal appear to suggest that since FC could not provide a warranty that its environmental information was fit for the intended purpose that the information should not be reproduced in planning documentation to be submitted to FC. DH requested that FC review its decision on 13 October, details of the substance of the complaint are set out below.

Does the Complaint Concern the PSI Regulations?

Public Task

11. It is understood that the Documents were developed or commissioned as part of FC's public task with respect to monitoring of the local environment, in accordance with its Inspection Strategy for the Identification of Contaminated Land (2001) pursuant to its duties under the Environmental Protection Act 1990. The Documents were supplied to

DH under statutory duties arising from the Freedom of Information (Scotland) Act 2002 and/ or The Environmental Information (Scotland) Regulations 2004. As such it is not anticipated that creation or supply of the Documents would have fallen outside FC's public task. However, where rights in the material were found to be owned by a third party, this assessment would not be relevant.

Exhaustion of Internal Complaints Procedure

12. DH has complained to FC regarding the matters that are the subject of this complaint. FC has responded to DH's complaint through correspondence from the Director of Development Services and the Chief Executive. DH is not satisfied with the final outcome of FC's internal complaints procedure, and has therefore referred the matter to OPSI as a complaint under the Regulations.
13. OPSI sees no opportunity for the matter to be escalated further within FC, and therefore agrees that the internal complaints procedure has been exhausted. Furthermore the establishment of an appropriate internal complaints procedure within FC is itself a subject of the complaint.

Overall Assessment

14. Having carefully considered the documentation supplied to us **OPSI partially upholds the complaint.**
15. Recommendations to improve FC's compliance with the Regulations are made, and these relate to: the provision of adequate information with respect to re-use; appropriate notification of refusal to permit re-use; and the embedding of an internal complaints procedure.
16. Suggestions for best practice improvements are made with respect to: ownership of re-use decisions within FC to facilitate accurate application

of the Regulations and reduce the potential for discriminatory treatment against re-users; the extension of lessons learned from DH's case to other areas; and the potential for improvements to policy on copyright in works commissioned by FC.

17. The existence of third party rights in the Documents limits the scope of applicability of the Regulations. However, as the Complaint relates not only to the decision to refuse re-use but also to the manner in which the refusal was made, the provision of adequate information and other matters, a number of points are relevant regardless of the implications of issues relating to third party rights.
18. It is also acknowledged that FC has taken steps to remedy some of the issues covered by the complaint. For instance:
 - 18.1. Agreeing to revise, in principle, its position regarding licensing of environmental information for use in planning documentation.
 - 18.2. Publishing an internal complaints procedure.
19. The next sections detail DH's complaint, FC's response and OPSI's analysis. OPSI's recommendations under the Regulations and in terms of best practice are then set out.

Issues raised in the Complaint

The Complainant

20. The complaint made by DH alleges that FC's actions have breached the Regulations, expressed in the following Issues.
21. Issue 1 – Failure to provide required information, including on applicable terms and conditions and fees (Regulation 16);
22. Issue 2 – Not establishing internal procedures for dealing with requests to re-use information and subsequent complaints (primarily Regulation 17);
23. Issue 3 - Inconsistent policies leading to the imposition of conditions which would unnecessarily restrict the way in which a document could be re-used. The main inconsistency arising between the refusal to permit re-use and a requirement within FC's Supplementary Planning Guidance that planning applicants' documentation contain information of the type in the Documents. So that DH's compliance with FC's planning policy was unnecessarily restricted by FC's re-use policy (potentially relevant to Regulation 12).
24. Issue 4 - That since the Regulations came into force in 2005 FC had not invoked them previously to assert its ability either to permit or restrict re-use. The situation in which the Documents were to be re-used was common; and so similar re-use of information within planning documentation must have occurred previously, without being restricted by FC. On this basis DH holds that FC's conduct, by refusing to permit re-use in his case, must have constituted discriminatory treatment (in OPSI's analysis a complaint under Regulation 13).
25. Issue 5 - The adequacy of notifications of refusal to re-use information (Regulation 9).
26. Issue 6 – Whether FC was correct to assert that DH was required to request permission to re-use the Documents, given DH's belief that his use of the Documents would not breach any copyright in them. Essentially that FC claimed that its rights were being infringed, and thus that it had

the ability to require DH to submit a request for re-use under the Regulations and to refuse that request, when they were not.

26.1. Note that analysis of Issue 6 is complicated by the later identification of third party copyright in the Documents covered by the complaint.

The PSB

27. FC has responded to the statement of complaint, and provided OPSI with previous correspondence from Director of Development Services and the Chief Executive setting out FC's position on the complaint. FC's response made comment on the Issues set out above.
28. Issue 1: the complaint, which was put to FC, was not the subject of a detailed reply. However, the response information provided by FC does point out instances in which certain required information was supplied to DH.
29. Issue 2: the response information submitted by FC shows that FC holds that it was legitimate to treat requests under the Regulations in a manner similar to that with which it treats enquiries under the Freedom of Information (Scotland) Act 2002. It also holds that DH's enquiries were dealt with in a sensible, non-bureaucratic fashion, and that the timescales were in accordance with best practice guidelines issued by The National Archives (of which OPSI is a part).
30. Issue 3: FC's response information indicates that having reviewed the potential for conflict between planning and re-use policy it agreed with DH. Therefore FC would in future make permission available in similar circumstances, where the Regulations applied.
31. Issue 4: the complaint was not the subject of a detailed response.
32. Issue 5: the complaint was not the subject of a detailed response.
33. Issue 6: the complaint was not the subject of a detailed reply. However correspondence seen by OPSI indicates that FC believed that DH's use of the Documents would infringe its copyright (Environmental Health Co-ordinator, 5 September 2012).
 - 33.1. Where FC later identified third party copyright in the Documents, it effectively deferred any further judgements regarding DH's use of the Documents to the rights holders.

OPSI

34. On the basis of the available correspondence and the evidence available OPSI makes the following observations.

35. Issue 1: on the matter of information to be made available by FC. We also comment on related information made available to DH through correspondence, as this will be referred to in later sections.
 - 35.1. Information available on Falkirk.gov.uk. FC's website terms and conditions and publication scheme both state that FC information may be available for re-use. Permission to re-use FC material must be obtained through correspondence with FC. Details of applicable conditions, such as a policy stating any limitations on the types of re-use permitted or standard licences, are not published. We note that DH did not obtain the Documents through FC's website.
 - 35.2. Regarding statements attached to the Documents: where access to environmental information was provided electronically, a set of disclaimers was attached. This was composed of two parts. The first placed caveats on the accuracy and interpretation of environmental information provided. The second disclaimer related to copyright, suggesting that onward use must be within the Copyright, Designs and Patents Act 1988 (CDPA). This is correct. The disclaimer then goes on to state that, "any commercial use or re-use of the information provided requires the prior written consent of the Council." This would be misleading with respect to the earlier statement where use of a copyright work for a commercial purpose would not be in breach of the CDPA. This observation is relevant since the situation described is similar to that of Issue 6, by potentially promoting a belief that requests to re-use are necessary in more situations than is the case.

- 35.3. FC appears to have two different publication schemes available on its website²³, with materially different statements on copyright and re-use. The re-use statement in one of these (a PDF document dated March 2010) takes a similar position to that outlined above with respect to commercial re-use, to which a similar criticism applies. The html publication scheme (undated) contains a more open (and accurate) statement in line with guidance produced by the Scottish Information Commissioner (2011). OPSI notes correspondence (Legal Services Manager, 19 October 2012) quoted re-use statements from the PDF document as the effective policy in response to an FOI request by DH.
- 35.4. The statements discussed above identify the potential for third party copyright to be included in information provided by FC, and that FC would not be in a position to permit its re-use.
- 35.5. Following from the above points, the information made available by FC with respect to re-use is limited to provision of contact details, and is not informative with respect to other conditions imposed by FC. As such, FC should provide further information on the conditions it would apply to re-use in order to bring it into compliance with Regulation 16(1)(a).
- 35.6. Standard charges. OPSI has not been able to identify any references to standard charges either on FC's website or in correspondence. However as FC did not attempt to levy charges for re-use and the Regulations do not require FC to do so, Regulation 16(1)(b) is not relevant in this instance.
- 35.7. Regarding regulation 16(1)(c). FC does not appear to publish a list of documents available for re-use. FC's website suggests that FC asserts that its publication scheme details available information. However, the attached re-use policy provides no indication of

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http://www.falkirk.gov.uk/services/chief_executive/governance/legal_services/publication_scheme.pdf

3

http://www.falkirk.gov.uk/services/chief_executive/governance/legal_services/publication_scheme/about_publication_scheme.aspx

whether FC would make permission to re-use the information available. As such it would not be clear to the public which documents in the scheme were available for re-use.

- 35.8. Regarding Regulation 16(1)(d) the original refusal of 5 September 2012 stated that requests for review, “should be submitted in writing to the Service who responded to your request for re-use.” No specific contact details were included, limiting the usefulness of the information. The statement also contained a reference to DH’s right in the event of being dissatisfied with the outcome of an internal review, to refer a complaint to OPSI.
- 35.9. In FC’s notification of refusal of 12 November 2012 further information about appeals was provided. However, this inaccurately referred to the Advisory Panel on Public Sector Information (APPSI) as the next-stage appeal body for DH’s complaint (the reference should have been to OPSI).
- 35.10. At the time of the events which are subject to complaint OPSI does not believe that FC published information regarding a complaints process for re-use on its website. OPSI notes that this information is now published.

36. Issue 2: regarding the establishment of an internal complaints procedure.

- 36.1. DH’s was the first and, at least at the relevant time, only request received under the Regulations by FC (correspondence with Legal Services Manager, 19 October 2012). As such DH’s case was also the first complaint received by FC regarding use of the Regulations. At that point, specific procedures for dealing with such a complaint were not pre-existing within FC, but were adapted from its FOI procedure.
- 36.2. OPSI notes however that FC did provide DH with a route to request a review of the initial refusal and that some reference was made to the opportunity for independent review through OPSI.
- 36.3. FC responded on 12 November to DH’s request for review of 13 October; a period of 21 working days. The period of time required for a response is required by the Regulations to be ‘reasonable’.

Non-statutory best practice guidelines for the Regulations suggest that a body should aim to respond to such a request within 20 working days. As such, while there may be room for improvement, the response time was not clearly in breach of regulation 17(3).

- 36.4. FC did provide both in its original refusal (5 September) and in its review (12 November) its reasons for refusing DH's request. These reasons differed, with the review noting that permission should, in principle, have been granted but that third party rights had been identified in the Documents, and that this prevented FC from granting permission.
- 36.5. In summary, FC supplied DH with information regarding the ability to request review of re-use decisions, and engaged in such a review when requested. However, with respect to Regulation 17(1) the requirement is to establish an internal complaints procedure. Prior to the DH case it would appear that FC had not established an adequate internal complaints procedure and as such would have been in breach of regulation 17(1).
- 36.6. OPSI notes that in January 2013 FC published a complaints procedure with respect to re-use, which would help to clarify its procedures in future cases.

37. Issue 3: regarding inconsistency of policies with respect to re-use. Correspondence from FC's Director of Development Services (12 November 2012) and Chief Executive (29 November 2012) commented on this issue. FC agreed in principle with DH that where FC policies required developers to submit certain environmental information, permission from FC to do so should not be withheld. OPSI notes that this action would resolve this element of the complaint, and constitute a sensible outcome.

38. Issue 4: discriminatory treatment through unequal application of the Regulations.

39. DH's was the first case of a developer or developer's agent being required to formally request permission to re-use environmental information in relevant planning; and that therefore it was also the first to be refused such

permission. This follows from DH's case being the first and only dealt with by FC under the Regulations at the relevant time.

40. OPSI notes that, in correspondence with DH, FC stated that, "Information supplied by the Contaminated Land Team in the form of the written EIR responses is regularly used by consultants in Phase 1 Contaminated Land Assessment reports acting on behalf of planning applicants." (Environmental Health Co-ordinator, 21 December 2012). This would support a theory of discriminatory treatment, since either:

40.1. Similar re-users have applied for and obtained permission from FC to re-use similar material for similar purposes when DH did not (in contradiction of the information from FC Legal Services – which there is no reason to doubt);

40.2. Or FC tacitly accepted use of such material previously. It is difficult to see how FC could be unaware of such re-use since it was the ultimate recipient of the documents in which the re-use occurred. In this case, given the regularity of the situation under discussion and the lapse of seven years since the introduction of the Regulations, the change of practice in the case of DH would be difficult to explain without discriminatory treatment.

41. In summary: at the point of the original refusal FC was in breach of Regulation 13(1) where it imposed a framework of requirements on the re-use of its material on DH that it had not done previously in comparable cases.

42. FC subsequently identified third party rights in the Documents as part of its review. This has the effect of removing the decision from the scope of the Regulations, in which case 13(1) is not applicable and so FC cannot be in breach of it. OPSI notes the anomalous situation in which DH remains the only person to have experienced this outcome despite the apparent regularity of the situation under consideration.

43. Issue 5: regarding the adequacy of notifications of refusal.

44. As noted above, FC notified DH in writing of its refusal of permission to re-use the Documents, and provided an explanation of its reasons for doing so

(5 September and 12 November 2012). The notifications contained some information on available redress mechanisms.

45. The review of 12 November concluded that the original refusal should have been made on the grounds that the Regulations did not apply by virtue of the Documents being protected by a third party's intellectual property rights, rather than for the reasons originally provided on 5 September. It does not appear FC provided DH with the identity of the owner of those third party rights or the person from whom the Documents were obtained. As such FC was in breach of Regulation 9(4).
46. Issue 6: whether FC was correct to claim that the DH had to request re-use of the Documents under the Regulations, as the use would otherwise be in breach of copyright.
47. OPSI notes that the use of the Documents in DH's report appears to have consisted of a short paraphrasing of the main points of the individual documents with respect to the development site under discussion. As such it is questionable whether use of the material would be in breach of copyright; on the basis that the 're-use' appears unlikely to have involved use of a substantial amount of the work.
48. While the accuracy of FC's judgement may have been questionable, the belief that the re-use may have infringed its copyright was not obviously unreasonable. As such OPSI makes a best practice recommendation below with respect to ownership within FC of decisions regarding re-use so as to facilitate the making of future decisions on a more expert and consistent basis.
49. Whether use of the Documents would in fact be in breach of copyright can only be determined in court. As such it was not unreasonable for FC to advise DH in accordance with its belief at the time that re-use of the Documents would infringe copyright, and so to suggest that a request for re-use of the Documents should be submitted.
50. OPSI notes that the Regulations do not make provisions about when a re-user should submit a request, but rather concern how a request, once submitted, is treated by a public sector body. DH did submit a request for re-use. Whether this was strictly necessary on the basis that the re-use would

otherwise be in breach of copyright may be questionable, but this point cannot be determined at present.

51. Given the later identification of third party rights in the material this would be a matter in which decisions could only be made by DH and the owners of those rights. OPSI acknowledges that it would not be appropriate for a public sector body to make a judgement on behalf of third parties as to whether particular use of a copyright could proceed without permission.

Recommendations

52. Given the information contained in DH's statement of complaint, FC's response to that complaint, correspondence between the two parties and also from FC's website, OPSI makes the following recommendations regarding breaches of the Regulations:
53. Issue 1: It is not clear from published information what requirements a request for re-use would have to meet in order to satisfy FC's conditions and requirements. It is also unclear which information FC would regularly make available for re-use. **Recommendation 1: FC should publish further information regarding its policies on re-use. This information should clarify conditions routinely imposed on re-use by FC, and should identify the main documents FC makes available for re-use.** Care should be taken to ensure such information is accurate with respect to the acts restricted by copyright and so for which FC's permission would be necessary.
54. Issue 2: the available evidence supports the complaint that FC did not have, prior to the Regulations being invoked in DH's case, an established internal complaints procedure. OPSI notes FC's subsequent publication of an internal complaints procedure on re-use. **Recommendation 2: FC should ensure that information in published policies and correspondence templates is updated to correctly reflect its internal complaints procedure and the role of OPSI as an independent review body.** This recommendation should be considered in conjunction with the recommended action on Issue 4 below.
55. Issue 5: Whilst noting that the recommendation on Issue 2 above also concerns the adequacy of notifications of refusal, **Recommendation 3: where FC is required to refuse a request on the basis of third party rights being present in the information it must fulfil its obligations with respect to identification of the owners.**

Suggested areas for Improvement

56. In addition to the Recommendations above to remedy breaches of the Regulations, the following points provide suggestions for improvements towards best practice:

57. Issue 3: OPSI notes FC's revision of policy with respect to the licensing, in principle, of environmental information it holds for the purposes of completing planning documentation. This revision was made to ensure that FC's policy on the licensing of re-use supported other areas of its operations and duties.

Suggested Improvement 1: Extending this analysis to other information held by FC would provide an opportunity to improve the usability of its services and help to reduce the risk of similar complaints arising with respect to other information.

58. Issues 4 and 6: As discussed above it appears that DH was, at least initially, subject to discriminatory treatment. OPSI notes that the final decision, based on the Documents being protected by third party rights would have removed FC's discretion in the matter and so would not in itself be discriminatory (in the sense of Regulation 13(1)); although DH's case remains anomalous where comparable re-use has not resulted in the same outcome experienced by DH. **Suggested Improvement 2: FC should consider appointing a central officer, independent of particular services, to decide on requests for re-use in the first instance.** Such a responsibility might sit with an officer responsible for information management within FC. This would help to mitigate the risk of bias in its decision making process. It would also help to ensure the consistent application of policy across information held by different services. An independent officer could also be more efficiently trained in copyright and other related information rights issues. This would help to mitigate the risk of misclassifying material in the future and improve FC's understanding of where, on the basis of copyright, permission to re-use was necessary and where it was not.

59. Issue 6: Correspondence from FC (Director of Development Services, 12 November 2012 and Chief Executive, 29 November 2012) suggests that it understands that it has an interest in planning applicants being able to

provide all relevant environmental information for its consideration. That being the case, where FC commissions information it would be in its interest to obtain assignments of copyright in any resulting works from the contractors. This is understood to be good administrative practice through mitigating the risks to public sector bodies where they later wish to, or to authorise others to, make use of material that they have commissioned but in which they do not own rights. **Suggested Improvement 3: FC should consider revising its procurement policies to ensure that, where appropriate, it retains copyright in works it has commissioned from third parties.**

Role of APPSI Review Board

60. In accordance with Regulation 20 of the PSI Regulations, “Where the person [the complainant] or the public sector body is dissatisfied with any recommendation made under regulation 19(3) he may request for it to be reviewed by the Advisory Panel on Public Sector Information⁴.”

⁴ <http://www.nationalarchives.gov.uk/appsi>