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

Weekend 365 and Ordnance Survey

DATE
JUNE 2014
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Aim of this report

1. The Office of Public Sector Information (OPSI, part of The National Archives) received a complaint on 23 March 2014 from Mr Graeme Bell of Weekend 365 (the Complainant) against Ordnance Survey (the Public Sector Information Holder (PSIH)). This complaint was submitted under the Re-use of Public Sector Information Regulations (SI 2005/1515) (the Regulations) and the Information Fair Trader Scheme (IFTS).

2. This aim of this report is to outline the matters which are the subject of this complaint and publish OPSI's findings and recommendations. The PSIH will be required to implement the recommendations within the specified timescales OPSI will work with the PSIH to ensure it implements the recommendations to its satisfaction.

Outcome of this report

3. OPSI has not upheld the complaint under the Regulations, but has partially upheld the complaint under IFTS. OPSI will work with the PSIH to ensure its recommendation is implemented.

OPSI's role in the redress mechanism

4. OPSI is responsible for investigating complaints under the Regulations for failure to comply with any requirement of the Regulations. Complaints can also be brought against PSIHs who are members of IFTS if they are thought to have breached one or more of the IFTS principles. Complaints can be made under one or both regimes. Where complaints are brought under IFTS, OPSI will consider whether the principles of IFTS have been met.

5. The procedures for investigating complaints can be found at www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/psi-complaints-procedure.doc.
6. It is not necessary for the Complainant to have a contractual relationship with a PSIH or be directly affected by the actions of the PSIH in order to bring a complaint.

7. Any complaint referred to OPSI must first been have made to the PSIH and it must have exhausted its own internal complaints procedure.

**OPSI's role under the PSI Regulations**


9. 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 Regulations, a PSIH is expected to encourage re-use of its information. Although the Regulations impose no obligation on a PSIH 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 PSIH must:

   - 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 PSIH’s actions and this should be made clear in the internal procedures
OPSIs role under IFTS

10. IFTS was introduced in 2002 following the Cross-Cutting Review of the Knowledge Economy.

11. IFTS was introduced to monitor and regulate the information trading activities of Crown bodies that produce Crown Copyright material, although it has since expanded in scope to admit volunteer members. It sets a higher standard than the Regulations. Government bodies such as the PSIH are required to be part of the scheme as a condition of being granted a Delegation of Authority from the Controller of Her Majesty's Stationery Office (HMSO) to license Crown Copyright material themselves.

12. The IFTS principles are explained in Annex 3 of this report.

Summary of the complaint

The Complainant

13. Weekend365 is a small business developing products in the merchandising sector, based on information produced by the public sector. These products include mugs, coasters and mouse mats.

The Public Sector Information Holder (PSIH)

14. Ordnance Survey (OS) is a government agency responsible for the official definitive surveying and topographic mapping of Great Britain. As the importance of geographic information increases, it is also responsible for maintaining consistent national coverage of other nationally important datasets. It was established as an Executive Agency in May 1990 and has operated as a Trading Fund since April 1999. It is responsible to Ministers at the Department for Business, Innovation and Skills (BIS) through the Shareholder Executive (ShEx). The PSIH manages Crown Copyright material under a delegation of authority from the Controller of HMSO and is therefore regulated under the IFTS. As a PSIH, it is also subject to the Regulations.
Initial Assessment of Complaint

Public Task

15. OPSI carried out an initial assessment as to whether the complaint was within the scope of the Regulations as required by paragraph 10 of its published investigation procedures. This initial assessment was concluded in May 2014.

16. 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”. While OPSI’s Best Practice Guide provides guidance on the concept of public task that is referred to in the EU Directive 2003/98/EC, the term 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. Ordnance Survey has published a statement of its public task.

17. OPSI considers that the mapping information in question does fall within the scope of the PSIH’s public task and the Regulations are, therefore, applicable.

Re-Use

18. 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)). As stated in paragraph 13 above, the Complainant wishes to re-use the information on printed merchandise. As this is not the purpose for which the document was produced this does constitute re-use.
Internal Complaints Procedure

19. On 30 September 2013, the Complainant submitted its complaint to OPSI which redirected the Complainant to the PSIH as its complaints process had not been exhausted. The PSIH carried out an internal investigation and responded by letter on 18 October 2013. The Complainant then requested a review of the internal investigation and received a response to this on 17 December 2013. The Complainant remained dissatisfied and referred his complaint to OPSI on 23 March 2014.

Summary of the complaint

20. The Complainant wishes to reproduce a map produced by the PSIH on his merchandise, which includes mugs, coasters and mouse mats. A royalty fee is payable per item sold. This is subject to an annual minimum royalty fee of £1,000 from the third year of the licence to re-use information. The Complainant alleges that the PSIH is in breach of regulation 13(1) (non-discrimination) of the Regulations and the ‘Fairness’ principle of the IFTS. OPSI considers that the ‘Maximisation’ principle of the IFTS is also relevant to this complaint. The Regulations and IFTS Principles are set out in Annex 1.

Overall Assessment

21. Having carefully considered the documentation supplied to us in the form of the written statements and email correspondence from both parties, and having met both parties, OPSI does not uphold the complaint under the Regulations. OPSI partially upholds the complaint under IFTS. Our reasons and recommendations are developed below.

Detailed Assessment of the Complaint under the Regulations

The Complainant

22. The Complainant contends that the specific effect of the minimum royalty regime causes very clear discrimination between licensees in that one
group pays up to six times as much in royalty payments as another for precisely the same quantity of data for the same purpose.

23. The Complainant alleges that the obligation to pay a minimum royalty fee of £1,000 per year is a breach of regulation 13(1) as different licensees will in effect pay different amounts of royalty per unit sold. The Complainant considers that no minimum royalty can comply with the Regulations. Those licensees, such as the Complainant, who sell merchandise that generates less than £1,000 in royalty payments per year will see their royalties increased up to the minimum limit. For those that sell merchandise that generates royalties in excess of £1,000 per year the minimum royalty has no effect as their turnover is greater. If the minimum royalty provision were abolished, those licensees would be unaware. The Complainant cites statistics from BIS that over 75% of all private sector enterprises in the UK had turnovers which fall far below this threshold, and there is no reason to believe that the profile of PSIH re-users varies significantly from this.

24. The Complainant in particular refers to the effect in March 2013 of the PSIH replacing the Publishing SUC contract with the PPC contract. Although both contracts were subject to the £1,000 threshold, the later contract in effect imposed a lower per use royalty fee. The effect of the reduced rate royalty fee was that the minimum turnover required to generate a per use royalty fee above the annual minimum significantly increased. The Complainant calculates the ‘increase’ in threshold has been from £48,000 to £402,900, an 834% increase. The Complainant contends that this increase is unreasonable.

25. The Complainant considers that if the headline rate of royalty payments complies with Regulation 15(1) then simultaneously charging some licensees 6 times above the headline rate cannot comply with this Regulation. The Complainant has calculated that the minimum royalty is 6 times higher than his current royalty payments. In addition, the Complainant argues that if the headline rate fails to cover business costs and return on investment as permitted in regulation 15(2), then the
Complainant considers that the PSIH is discriminating between licensees by loading an undue proportion of its business costs and return on investment onto those subject to the minimum royalty floor.

26. The Complainant also states that there is no indication in the Regulations that regulation 15 should take precedence over regulation 13, or can be used to justify failure to comply with regulation 13.

The PSIH

27. The PSIH explained that it introduced minimum royalties in 2004 as part of its Specific Use Contract (SUC) model. The minimum royalty was reduced from £5,000 per annum to £1,000 per annum in 2008/9.

28. The PSIH explained that the Complainant became a Licensed Partner on 25 May 2010 at the time of signing the Specific Use Framework Partner Licence (SUFPL) and Publishing Specific Use Contract (Publishing SUC) Minimum royalties of £1,000 per annum applied at that time.

29. In March 2011, the Complainant was given 12 months notice that the Publishing SUC would be changed to the Printed Products Contract (PPC). The PSIH also explained that prior to the Pricing and Licensing Review carried out in 2010/2011. The SUCs prescribed minimum royalties per contract. Since the contract change, they have been calculated per licensee, resulting in lower royalties and greater consistency in the way royalties are calculated.

30. The PSIH states that the royalties themselves reduced as part of the contract change; however the decision was that the minimum royalty should remain at £1,000.

31. The PSIH has outlined the reasons behind the £1,000 annual minimum royalty. The PSIH stated that the minimum royalty reflects the costs to serve Licensed Partners and the benefits of being a Licensed Partner. Licensed partners benefit from an Account Manager, partner events, access to meeting rooms and use of the logo; and are able to access national holdings of Ordnance Survey data (with updates) from which they can then develop their products. The PSIH stated that it
understands that the Complainant wishes to use the logo and have an Account Manager, hence needing to be a Licensed Partner. If this were not the case, the PSIH explained that Complainant could obtain the data through one of its distributors. The PSIH explained that it considers the minimum royalties are consistent with the Regulations and the IFTS. In particular, in relation to the claimed breach of the Regulations, the PSIH considers that there is no case to answer, as it has not made any return on investment in this instance, and the current model for setting minimum royalties ensures that there is no discrimination between Licensed Partners licensing PSIH data.

32. The PSIH explained that it has considered the use of different minimum royalties, but it is difficult to ensure fairness. In particular, minimum royalties that varied according to thresholds in company turnover / size were problematic, and had the potential to discriminate against Licensed Partners depending on their financial structures and position.

33. The PSIH has considered the concept of minimum royalty (the costs of doing business) and states that it is not set with reference to a multiplier of per unit royalty. It is set by the PSIH’s overhead cost to serve per Licensed Partner and the requirement for the PSIH to generate a return on investment. The minimum royalty level will continue to be reviewed six monthly.

34. The PSIH does not believe that the minimum royalty is in breach of the Regulations or IFTS. It considers it is the most effective means of ensuring fair and equitable treatment of all Licensed Partners. The PSIH asserts that it is required to deliver a return on investment and that the minimum royalties provide an effective means of ensuring this in the Licensed Partner channel.

35. The PSIH claims that it is not in breach of regulation 15 as the minimum royalty ensures that it is able to deliver a return on investment, which is permitted under regulation 15 (2)(b).

36. The PSIH claims that it is not in breach of regulation 13 (1). The PSIH states that it is required to ensure non-discrimination for re-use for
comparable purposes but not by the type of applicant i.e. the size and turnover of the re-user is not relevant. Therefore, the PSIH considers that a minimum royalty is the best way of ensuring that it complies with regulation 13 (1).

**OPSI's Assessment of complaint under the Regulations**

37. **Complaint not upheld.** As there is no statutory breach, we recommend that no further action is required by the PSIH under the Regulations.

38. Regulation 13(1) states that a PSIH ‘shall not discriminate between applicants who make a request for re-use for comparable purposes.’ The minimum £1,000 royalty is applicable to all Licensed Partners from the third contract year. As such, OPSI considers that there is no discrimination for re-use for comparable purposes and the PSIH is not in breach of 13(1). We note that the effect of the contract change in March 2013 was to produce a greater percentage difference between the fee that would otherwise be payable on a per use basis and the minimum royalty fee, but this does not change our analysis under regulation 13. The Regulations do not prohibit a PSIH from charging a royalty fee and the fact that the minimum royalty has a greater impact on Licensed Partners with a smaller turnover does not make it discriminatory under regulation 13 as all applicants are subject to the same licensing terms.

39. Regulation 15(1) allows the PSIH to charge for allowing re-use and regulation 15(2) (b) requires that the total income from any charge must not exceed a reasonable return on investment. The minimum royalty covers the PSIH’s costs involved to manage its Licensed Partner channel and OPSI considers that it does not exceed a reasonable return on investment. In addition, the minimum royalty does not come into force until the third contract year to give re-users a chance to grow their business prior to any minimum royalty payment. OPSI considers, therefore, that there is no breach of regulation 15(1).
Assessment of the Complaint under the Information Fair Trader Scheme

40. The PSIH was an accredited member of IFTS at the time the Complainant submitted his initial request for information; therefore we find that the complaint does arise under the IFTS. The Complainant alleges that the PSIH is in breach of the ‘Fairness’ principle. OPSI considers that the ‘Maximisation’ principle is also relevant to this complaint.

The Complainant

41. The Complainant considers that the PSIH is in breach of the Fairness principle as it alleges that the PSIH is using the mechanism of a minimum royalty payment to discriminate between customers with different turnovers (which would be a breach of the Regulations, as discussed above).

42. The Complainant also considers that maintaining a situation where small-volume customers in one particular business sector effectively pay a higher royalty rate per sale than that paid by higher volume customers whose annual royalties exceed the £1,000 minimum is discrimination between customers for the same type of re-use.

The PSIH

43. The PSIH has stated that the minimum royalty is consistently applied to all customers for the same type of re-use, regardless of the type of customer or nature of its business and maintains that it is not in breach of the Fairness principle.
OPSI's Assessment

Fairness

44. As explained in paragraph 36 above, the PSIH applies its minimum royalties equally to all re-users for the same type of re-use. As such this is not a breach of the Fairness principle.

Maximisation

45. Under the Maximisation principle, the PSIH actively promotes re-use of its information and allows re-use across the board. The PSIH clearly understands the importance of permitting re-use of its information. Re-users can take out a developer licence to allow them to develop their product before moving on to a Partner Licence. However, smaller re-users with a lower turnover may be discouraged from becoming a Licensed Partner due to the minimum royalty.

46. The PSIH acts reasonably by giving a re-user three years before minimum royalties are due, yet smaller re-users may require further time to build their turnover prior to paying a minimum royalty. In order to fulfil its obligations under the Maximisation principle, OPSI recommends that the PSIH should introduce conditions and pricing to encourage small businesses to re-use its information, for example by reviewing turnover levels and/or reducing minimum royalty thresholds.

Role of APPSI Review Board

47. In accordance with regulation 20 of the Regulations, the PSIH 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 Regulations in this report if they are dissatisfied with them.
# IFTS Recommendation

<table>
<thead>
<tr>
<th>No.</th>
<th>Recommendation</th>
<th>Deadline</th>
<th>Paragraph Reference</th>
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<tr>
<td>1.</td>
<td>OPSI recommends that the PSIH should introduce conditions and pricing to encourage small businesses to re-use its information, for example by reviewing turnover levels and/or reducing minimum royalty thresholds.</td>
<td>Next IFTS verification</td>
<td>46</td>
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Annex 1

Applicable Regulations

Conditions

12. (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.

Non-discrimination

13. (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.

Charging

15. (1) a public sector body may charge for allowing re-use.

(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.

(4) A public sector body shall not charge an applicant for costs incurred in respect of activities mentioned under paragraph (2)(a) in respect of a request for re-use, if the same applicant had been charged in respect of those same activities by that public sector body for access to the same document under information access legislation.

(5) Where a public sector body charges for re-use, so far as is reasonably practicable, it shall establish standard charges.

(6) A public sector body shall specify in writing the basis on which a standard charge has been calculated if requested to do so by an applicant.

(7) Where a standard charge for re-use has not been established, the public sector body shall specify in writing the factors that will be taken into account in calculating the charge if requested to do so by an applicant.
Annex 2

**IFTS Principles**

**Maximisation**

An obligation to allow others to re-use information. The default position should be that information can be re-used unless there are strong reasons (for example personal information) not to allow re-use.

**Simplicity**

Simple processes, policies and licences.

**Innovation**

Public sector information holders actively remove obstacles to re-use, and facilitate the development of new and innovative forms of re-use.

**Transparency**

Transparency of the terms of re-use, including licence terms, where used. There should also be transparency about charges and the details of what information is available for re-use.

**Fairness**

All re-users must be treated in a non-discriminatory way for the same type of re-use. Public sector information holders should not use their market power to compete unfairly by virtue of having produced the information.

**Challenge**

A robust complaints process to reconsider licensing decisions. The process should include appropriate references to OPSI, which will investigate any complaints that the public sector information holder cannot resolve to the customer's satisfaction.