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

PinPoint Information Limited and The Coal Authority

October 2011
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Background Information

1. The Office of Public Sector Information (OPSI) received a complaint in February 2011 from PinPoint Information Limited (the Complainant) against The Coal Authority (the Public Sector Body (PSB)). This complaint was submitted under both the Re-use of Public Sector Information Regulations (SI 2005 No. 1515) (the Regulations) and under the Information Fair Trader Scheme (IFTS).

2. The formal complaint was preceded by a request from the Complainant to enter into an OPSI-facilitated mediation with the PSB with a view to resolving the dispute. This request was declined by the PSB. This was an entirely separate exercise from the statutory formal complaint investigation that this report covers.

3. OPSI has investigated the complaint and has made recommendations as appropriate.

The role of OPSI in Investigating Complaints

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

5. As the PSB is a member of IFTS, OPSI can also investigate complaints that fall within the scope of IFTS. The procedure for investigating complaints made under IFTS can be found at http://www.nationalarchives.gov.uk/documents/ifts-complaints-procedure.pdf.

6. In this case it was not immediately clear whether some aspects of the complaint fell under the Regulations. OPSI therefore carried out a single investigation under both the Regulations and IFTS in parallel.

Summary of the PSI Regulations and IFTS


8. Although the Regulations impose no obligation on a public sector body 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 public sector body should:

   - Publish a list of the main documents available for re-use
   - Respond promptly to requests for re-use
   - Put in place copyright and licensing arrangements
• Ensure that any conditions on re-use do not unnecessarily restrict re-use or competition

• Ensure there is no discrimination between applicants. If a public sector body wishes to re-use a document for activities which fall outside its public task, the same conditions shall apply to that re-use as would apply to re-use by any other applicant for comparable purposes

• Discourage exclusive arrangements

• Set up appropriate internal complaints procedures. There is also the option of asking OPSI to investigate the public sector body’s actions and this should be made clear in the internal procedures

9. IFTS was introduced in 2002 following the Cross-Cutting Review of the Knowledge Economy. The aim is to regulate bodies with a Delegation of Authority to license the re-use of Crown copyright material on the Controller of HMSO’s behalf. Non-Crown bodies may apply to join IFTS on a voluntary basis, as the PSB has done. The five original principles were reviewed and enhanced in 2009. The current six IFTS principles establish a higher standard of compliance than the baseline set by the Regulations. The principles are:

• **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 The National Archives, which will investigate any complaints that the public sector information holder cannot resolve to the customer’s satisfaction.

The PSB was accredited to IFTS in April 2009.
The Parties

The Complainant

10. PinPoint Information Limited (PPIL) is a private limited company. Its business model involves using official geospatial data accessed remotely, overlaying that with further data and interpreting the results in the provision of commercial reports specific to a particular property for the conveyancing market. PPIL operates through two trading companies, RightSearch Limited and PinPoint Chancel Limited.

The Public Sector Body (PSB)

11. The Coal Authority is a non-departmental public body sponsored by the Department for the Energy and Climate Change, established in 1994 by the Coal Industry Act. It owns former coal mines and unextracted coal in Great Britain. The Coal Authority has specific statutory responsibility under the 1994 Act for licensing coal mining operations, subsidence (where this is not the responsibility of licensed coal mining undertakings), property and historic liability issues, an emergency response service and, (most significantly for the purposes of this investigation), providing public access to relevant information.

Office of Fair Trading

12. There is a Memorandum of Understanding (MoU) between OPSI and the Office of Fair Trading (OFT) dated 26 August 2005 concerning the handling of complaints.

13. Having consulted the OFT, it was agreed that, where the complaint alleged a breach of paragraph 12(2)(b) of the Regulations, the complaint should be investigated by OPSI rather than OFT. Having found in the course of our investigation that Regulation 12 does not, in this case, apply (see paragraph 36 below) we have not considered the conditions imposed by the PSB further.

CON29M report information

14. The information that the Complainant has asked the PSB for permission to re-use may be described as a complete copy of the content of the databases that may be used to compile a CON29M report. This information is presently held across a number of databases which are still being regularly updated – this is not static data. There are potential re-uses for this information, (not so far realised), but it is necessary to understand CON29M reports to appreciate key aspects of this complaint.

15. A number of standard forms to document property searches made in the course of buying property, known as CON29 forms, are provided by the Law Society. There is no statutory requirement to use these forms, but they are the standard forms used to document property searches and in
practice must be used. One of these forms, used to report on the potential risk to property from former or current coal mining activities, is the CON29M form, and this is used in conveyancing for property transactions in all parts of England and Wales where coal mining is or has taken place. Similar but separate arrangements are in place in Scotland. Other CON29 reports cover other aspects of potential issues affecting property purchases – the CON29M report is concerned primarily with coal mining risks.

16. Coal mining information used to compile CON29M reports is held by the PSB, which is under a statutory obligation to maintain and make this information available. The PSB makes the information available to those requiring a CON29M report by producing a report for a particular property in response to a request. Arrangements are also provided for third parties to carry out a check of their own research and interpretation of the abandoned mine plans and related records held by the PSB at Mansfield, Nottinghamshire, against the PSB’s own database interpretation of these and other source records.

17. Commercial firms, other than the Complainant, have arrangements in place with the PSB, whereby the PSB provides CON29M reports as a part of the commercial firm’s broader conveyancing search services to prospective property buyers. It is not in dispute that the Complainant could have entered into a similar arrangement on the same terms and conditions as other commercial firms. However, the Complainant’s proposal was for a different arrangement since it would involve the licensing of a complete copy of the databases themselves. Although the PSB does not make the information in the databases available for use in the way proposed by the Complainant, it is the PSB’s current intention to make the live databases available to access the data online in the future.

18. Whether the activity of providing CON29M reports is a part of the PSB’s public task is an issue for this investigation. The PSB has not previously formally defined and published a statement of its public task. Our view of the PSB’s informal understanding of its public task has been based on information gathered during the accreditation of the PSB as a member of IFTS (April 2009). It was that the PSB’s public task covered the maintenance of the information and providing access to it, while producing CON29M reports was an added value activity outside of its public task. The PSB is now asserting that its public task also covers the provision of CON29M reports, and has provided evidence to show that the provision of Mining Reports (the predecessor of CON29M reports) was an intended core function of the PSB when it was established. Public task issues are discussed further below.

**Context of the Dispute**

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1 CON29M reports at present also include geological data and information relating to risk from Cheshire brine subsidence. This investigation is concerned solely with coal mining risk information.
19. The Complainant approached the PSB in August 2010 with his original request to re-use information. The information that the Complainant asked to re-use was a copy of the databases containing the following information:

- Coal mining mine entry location data (shafts and adits)
- Data regarding past, current and future proposed coal mining – surface mining (opencast) and underground
- Areas of potential shallow coal measures i.e. where coal is present within 30m of the surface whether records suggest it is worked or not
- Coal mining abandonment plans, seam plans or rationalized plans
- Records of coal mining subsidence events
- Data held in the PSB’s ‘site investigation database’
- Coal extraction licences – surface mining (opencast) and underground

20. There followed a series of e-mails and meetings between the Complainant and the PSB, the end result of which was that the Complainant submitted an outline business proposal to the PSB (at the PSB’s request for submission to the Management Board) on 3 November 2010. This proposal was to offer a joint venture between the Complainant’s company and the PSB, rather than being a simple request to re-use information. The PSB responded to this offer by sending a refusal letter on 11 November 2010.

21. The Complainant made a formal complaint to the PSB as a result of this refusal on 19 November 2010, and the PSB sent its response on 15 December 2010. The Complainant requested mediation through OPSI at this point, but the PSB declined the request to enter into mediation, its view being that there was no value in entering mediation to discuss possible re-use for the purposes of producing CON29M reports.

22. The Complainant submitted his complaint to OPSI in February 2011, having first corresponded with OPSI to establish the processes involved in making a complaint under the Regulations and/or IFTS. While the complaint as submitted to OPSI relates to the PSB’s rejection of the joint venture proposal, the issues raised by the Complainant are in fact broader and include a complaint that by failing to grant a licence to re-use the databases in the way proposed the PSB has breached the Regulations.

23. The complaint is framed in terms of the reasons given by the PSB for declining the proposed offer in its letter of 11 November 2010, and in particular to the PSB’s published licence exception referenced as 4.ii on
its website. The Complainant states that the reasons advanced by the PSB for refusing the offered joint venture are that the proposal is not innovative, nor of value either to the PSB or to the public, and that since these reasons are not listed in the published licence exceptions, the refusal amounts to a breach of Regulation 12 of the Regulations and of IFTS. The Complainant also cites breaches of the Competition Act 1998 (see paragraphs 12-13 above) and the Environmental Information Regulations 2004 (EIRs). Aspects of the complaint relating to the EIRs are appropriate to be referred to the Information Commissioner once internal complaints processes have been exhausted, and are not considered as part of this investigation.

24. The PSB maintains that the refusal letter of 11 November 2010 was intended solely to reject the offer of a joint venture between the PSB and the Complainant. This letter did not deal with the request to re-use information held by the PSB, and indeed the PSB has stated that it was prepared to continue discussions with the Complainant about his proposed re-use up until the formal complaint was received. Having considered the content of the Complaint, OPSI is satisfied that it is eligible for consideration as a complaint that the Regulations and the terms of the IFTS scheme have been breached.

25. Establishing a baseline for this complaint has not been clear-cut. After the initial request for information on 3 August 2010, there were a series of correspondence and meetings, during which time the precise content of the request changed, more than once, as negotiations continued. Finally, a business case was requested by the PSB and submitted in draft on 14 October by the Complainant. As it was this business case, and the rejection letter that followed it, which was the subject of the Complainant’s complaint to the PSB and subsequently to OPSI, we have taken the draft business case to be the request for information to re-use. This has been a point of judgment exercised by OPSI, and was made on the basis that it was the last, and only, fixed point of the request for re-use of information in this case, and the subject of the internal complaint. We accept that it is a feature of this case that aspects of the investigation would have followed a different course had another baseline request for information been chosen.

**The PSI Regulations**

26. The Regulations only apply to a document where certain conditions set out in regulation 5 are met. These are that the activity of supplying the document falls within the public task of the public sector body, that there are no third party intellectual property rights in the document and that it is

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2 The exception reads: “You should, however, note that [The Coal Authority] may refuse a licence in certain circumstances listed below…Where the Authority considers the use of its data to be inappropriate, for example if…ii. it is for the production of CON29M coal mining reports or successor products…” ([http://coal.decc.gov.uk/en/coal/cms/about_us/ifts/licence/licence.aspx](http://coal.decc.gov.uk/en/coal/cms/about_us/ifts/licence/licence.aspx))
identified as being available for re-use or is otherwise accessible to the applicant. It was not clear at the outset of this investigation whether or not these conditions were met. We therefore investigated whether or not the Regulations applied to the information that the Complainant wishes to re-use. Our conclusions are set out below.

**Public Task**

27. The Regulations do not apply where the activity of supplying a document falls outside the public task of the PSB (Regulation 5(1)(a)). There is no dispute that holding and maintaining the information in the databases used to create CON29M reports and providing that information to the public when asked for, falls within the PSB’s public task. This is admitted by the PSB in its response to the complaint. This is as set out in the Coal Industry Act which established the PSB.

28. The PSB also maintains that the activity of supplying CON29M reports (i.e. not just the information, but the information formatted into the prescribed layout and content for conveyancing purposes) is also a part of its public task. Evidence was provided by the PSB to show this, in the form of extracts from a Revised Coal Authority Explanatory Note, produced by the Department of Trade and Industry for Parliament in June 1994 to explain the intended provisions of the Coal Industry Bill. As enacted, these provisions became s57 of the Coal Industry Act 1994. The Explanatory Note sets out the intention when this legislation was drafted that “It is envisaged that the Authority will provide a Mining Reports service much in line with British Coal’s present practice.” As this was the intention of the legislation when introduced, we take it that providing a Mining Reports service, (the equivalent of which is now the CON29M reports) does fall within the public task of the PSB. As Explanatory Notes are available to Parliament when legislation is considered and passed, they do form part of the understood context of the intentions of the legislation. This is significant when determining public task, as public task is not defined solely by responsibilities and duties set down in primary or secondary legislation. This Explanatory Note establishes that the intention of the legislation in setting out the PSB’s responsibility for providing access to information included an expectation that this would include the provision of Mining Reports. We accept that, given the evidence of the Explanatory Note, the production of CON29M reports by the PSB and supplying them to members of the public or to commercial companies does fall within the public task of the PSB.

29. To aid the transparency of the PSB’s position in this respect, and to reduce the likelihood of future disagreements or misunderstandings about the scope of the PSB’s public task, we strongly recommend that the PSB should publish a statement of its public task under the Regulations.

**Is the information available for re-use or accessible to the applicant?**

30. The Regulations do not apply to a document that has not been identified by the PSB as available for re-use, or that has not been provided to the applicant or that is not otherwise accessible to the applicant (regulation
There is no dispute that the information in the databases to which the complaint relates is available by way of supplying CON29M reports as part of the PSB’s public task. Alternatively, the PSB makes the information available to those who wish to directly interrogate the databases on a property-by-property basis so as to allow them to check their own research and interpretation of the abandoned mine plans and related records held and made available for inspection by the PSB. There is no dispute that had the Complainant requested information for a single property, it would have been provided by the PSB under the standard terms and conditions, even if it were then to be used to produce a CON29M report.

31. The Complainant, however, was not requesting the information on a property-by-property basis. Rather, he requested the information comprising the entire databases covering the information listed in paragraph 19 above (typically used to compile individual CON29M reports for specific properties). The PSB has not specifically identified the entire databases as available for re-use. However, it does not appear to be in dispute that the information on large numbers of individual properties could in theory be requested and from the PSB and aggregated over time, and thereby the whole set of data acquired (though this would be a very lengthy task, would produce a database containing out-of-date information and might also breach existing terms and conditions). Further, the PSB has been content to provide the Complainant samples of the databases containing information for more than one property and to enter into discussions with the Complainant about the ways in which the whole of the databases could be re-used to create new products. Therefore, in OPSI’s view it seems that the information that constitutes the whole databases is “otherwise available” for re-use for the purposes of regulation 5(2)(c).

**Third Party Intellectual Property Rights**

32. The Regulations do not apply where a third party owns relevant IP rights in the information (Regulation 5(1)(b)). The PSB holds some of the relevant information on behalf of the Health and Safety Executive. However, it is not a part of the PSB’s case that third party copyright exists in the information, and this has not been advanced in evidence for this complaint. We find therefore that on this point, the Regulations do apply.

33. In view of our conclusions on the issues set out above, we are satisfied that the Regulations do apply to the databases that are the subject of the Complainant’s request to re-use. Having reached that conclusion, we then turn to the question of whether the PSB has fulfilled the substantive requirements of the Regulations.

**Does the PSB currently permit re-use?**

34. As noted above, Regulation 7 of the Regulations only provides that a public sector body is bound to comply with Regulations 11 to 16 of the Regulations (i.e. the restrictions concerning licensing practice) where it permits re-use of a document. The definition of re-use is given in.
regulation 4 of the Regulations. Regulation 4(1) provides that re-use “means 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(2)(a) expressly excludes from this definition use within a public sector body for the purpose of carrying out its public task.

35. Having accepted that the production of CON29M reports by the PSB is part of its public task, we also find that use of the information in the databases to create equivalent products to the CON29M would not constitute re-use of the information in the databases for the purposes of regulation 4 of the Regulations. Consequently, we also conclude that the PSB does not currently permit re-use of the information in the databases for the purposes of producing CON29M reports as proposed by the Claimant.

36. In view of the above, we are satisfied that Regulation 12(2)(b) (regarding unnecessary restriction of competition) does not apply to the use of information in the databases maintained by the PSB to compile CON29M reports and that this head of the Complainant’s complaint must therefore fail.

Form of the request for re-use

37. The Complainant submitted a request for re-use and therefore, if the requirements of regulation 6 of the Regulations are met, then the PSB was obliged to handle that request in accordance the Regulations. Regulation 6(1)(d) requires, among other things, that a request for re-use shall “state the purpose for which the document is to be re-used.”

38. OPSI considers the request for re-use to be the Complainant’s Draft Business Case submitted to the PSB on 14 October as it was the Draft Business Case that triggered the PSB’s letter of refusal, which in turn triggered the complaint to the PSB. However, we do not find that the request for re-use meets the requirement of Regulation 6(1)(d).

39. The request states that the Complainant intends to use the requested information “to create a number of reports (primarily a Coal report) that have the necessary level of content and detail to equate to that of a Con29M.” The Complainant has also asserted that he intends to use the information to produce further applications beyond production of CON29M reports, which he was not willing to share with the PSB for fear of losing his commercial advantage.

40. It is unfortunate that the negotiations between the PSB and the Complainant ended before they got to the stage where the Complainant was willing to explain those products that he maintains go beyond production of CON29M reports in his proposal to the PSB. The Complainant confirmed during his interview with us that he had not been willing to share his plans with the PSB. In such circumstances the PSB declined the Complainant’s proposal of mediation.

41. Having accepted that the production of CON29M reports by the PSB is part of its public task we are also satisfied that the productions of such
We heard evidence from the PSB that it does not believe that the Complainant intended to produce any products other than CON29M reports, and we heard evidence from the Complainant that he was not willing to share with the PSB his ideas for other products. It is not our view that requests for re-use must set out full details of the intended re-use. However, PSBs must be provided with enough information about proposed re-uses to determine whether or not the proposed new product is indeed a re-use, and to determine what terms and conditions should apply to the proposed re-use. The Complainant did not provide enough information to the PSB about the additional products he wishes to create in this case to enable the PSB to do this.

Given the open reference to Coal reports and CON29M in the Draft Business Case, and the Complainant’s unwillingness to share details of his further plans with the PSB, it was not unreasonable for the PSB to come to the conclusion that the primary or sole reason for requesting the information was to compile CON29M reports. As the Complainant maintains that it was his intention in making his original request to re-use the whole database information to produce new products beyond CON29M reports, his failure to document these reports in his Draft Business Case or elsewhere at least to the level indicated in paragraph 41 above inevitably means that the request for re-use does not “state the purpose for which the document is to be re-used”. As the request for re-use does not set out what the alternative products are that the Complainant wishes to produce, we do not consider that the request satisfies regulation 6(1)(d), because it does not set out the purposes for which the information would be re-used.

As it was not a valid request for re-use, the regulations do not require OPSI to carry out any further examination as to whether the way in which the request was handled breached any other provision of the Regulations.

However, it should be noted that this decision reflects a technical fault in the application for re-use, and not one that the PSB advanced in its response to the complaint. In our view it would have been preferable for the PSB to press the Complainant further on his planned products, rather than simply assuming that they did not exist; and it would have been preferable for the Complainant to identify to the PSB what the new products he intended to produce were. We believe this should have been done prior to the request being refused; that there was a further opportunity to do it during the PSB’s consideration of the subsequent complaint; and finally when mediation was considered, then rejected by the PSB.

The Information Fair Trader Scheme

In his complaint to OPSI, the Complainant identified failings to live up to the expected standards under four of the six IFTS principles (Maximisation; Fairness; Transparency; and Innovation). In investigating this complaint, we have ourselves been concerned at some aspects of the way the PSB handled the internal complaint, and therefore we have
also considered the PSB’s performance under the Challenge principle. The PSB was an accredited member of IFTS at the time the Complainant submitted his initial request for information; so we therefore find that the complaint does concern the IFTS. We found that there were aspects of the complaint to be considered under various principles of the IFTS and these are considered now in turn. As is set out below, we have found that in certain respects the PSB has not met the standards required of members of IFTS.

Maximisation

46. The Complainant asserts that the presumption in favour of allowing re-use under the Maximisation principle has not been applied, and that no explanation has been provided on the PSB’s website, or in face-to-face meetings and correspondence as to why the exception clause 4.ii is applied by the PSB. As set out below, we feel there are reasons why the maximisation principle has been met. However, we feel that the handling of this issue by the PSB did not meet required standards, and this is discussed further under the Transparency principle below.

47. Further, the Complainant draws on the OPSI IFTS verification report for the PSB, published in July 2009. In particular the complaint highlights the recommendation at paragraph 37: “With the agreement of the Coal Authority’s sponsoring Department to disseminate information to the public about areas of potential risk, and as the impact is reviewed, the Coal Authority should offer full access to its mining database for these areas for commercial re-use.”

48. This recommendation remains valid and as soon as it is possible, the PSB should progress to make this information available for commercial re-use. We heard evidence during our investigation of the progress being made by the PSB in disseminating this information to the public in effected areas. In particular we were told that the residential inspection programme, the critical path event in this dissemination programme, is in train and is due for completion in September 2012, at which point work can begin to make this information available for commercial re-use. We were also presented with evidence about the expected adverse effect of the baseline information being made available before the inspection programme has been completed in any given area. There is potential for a housing blight effect to be caused without good reason if the release of the information is not managed by the PSB, and the need to avoid this happening prior to the completion of the inspection programme does constitute a strong reason not to allow re-use. Therefore, we find that the PSB has abided by the Maximisation principle. However, more should be done to assure potential re-users that this information will become available for commercial re-use, and the time-table for achieving this. In particular, as the inspection programme advances region-by-region, the PSB should explore the potential for making subsets of the information available for commercial re-use for each area as the process is completed there.

49. In the course of our investigation, we found evidence that prior to the business proposal being submitted, the PSB had provided the
Complainant with sample data from the whole databases to be used for the purpose of testing proposed new working methods, which shows good commitment to the Maximisation and Innovation principles. However, the PSB’s failure to properly communicate the reasons why it considers commercial re-use of its information for conveyancing purposes inappropriate, either in its publications or during the course of the transactions that led to this complaint, contributed significantly to the dissatisfaction of the Complainant. There is a reason why maximised re-use of this information is not (yet) to be considered, but this was not adequately communicated.

**Fairness**

50. The complaint asserts that under the CON29M licensing exception, “it is impossible for anyone to create products through the licensing of data that compete with those of the CA.” This is true, and that is the express purpose of the exemption. The PSB sees the provision of CON29M reports as part of its public task, as discussed above.

51. In its response, the PSB accepted that an argument could be made for allowing persons other than the PSB to provide CON29M reports. The PSB advanced reasons why this was not considered appropriate in its response. Some of these are persuasive (for instance, the argument that the purpose of IFTS is “to encourage commercial re-use for the purpose of creating new products, not alternative versions of the CON29M reports”); others are less convincing (for instance, “the arrangements would need to guarantee the continued provision of the service”). The PSB did not, however, explain to the Complainant what appears to us to be its most important objection to the proposed licensing of information to produce CON29M reports in its response – this was only advanced during our investigation. A fundamental requirement of CON29M reports is that they contain accurate, up-to-date information about the property in question. The databases used by the PSB to produce CON29M reports are not fixed, but are instead being constantly updated. That means that it is possible to licence and enable other bodies to produce CON29M reports by reference to the live data, as is currently done. It is not in dispute that this route would be open to the Complainant. But it would not be possible to licence a copy of the data to be made and then used to produce CON29M reports, as it would swiftly become out-of-date, and not fit for this purpose.

52. As noted above (paragraph 42) it is the PSB’s view that the joint venture proposal made by the Complainant included production of CON29M reports using a copy of the relevant data. In our view it was inevitable that this proposal was rejected by the PSB as being fundamentally a replication of its public task (but using out-of-date information). We do not find that this refusal breached the Fairness principle, because the same refusal would have happened whoever had made such a proposal. Equally, it would have been open to the Complainant to apply to access and use the information in the same way as other providers of property search information presently do, and this would not have been blocked by the PSB.
Transparency

53. Under IFTS, member organisations are expected to be proactive in publishing relevant information and opening up their processes, terms and conditions to potential re-users. The Complainant highlighted the fact that the exception 4.ii listed on the PSB’s website is open to interpretation. He takes the phrase “The Coal Authority may refuse a licence...where the Authority considers the use of its data to be inappropriate, for example if...it is for the production of CON29M coal mining reports or successor products” to mean that the PSB will refuse a licence if it suspects that a proposed innovation is likely to be in competition with a new product being developed by the PSB. He feels that it places developers in the position of having to attempt to guess what products the PSB is developing. This is not our interpretation of this exception – we take “or successor products” to mean successors to CON29M if the relevant authorities at some point decide to change the form or content of such mining conveyancing reports, and not to mean any products being developed by the PSB. The fact that it is possible to draw these two widely differing interpretations of this short exception clause indicates clearly that the phrase used is not transparent and does not adequately convey the meaning intended by the PSB. A new, clearer expression of the exception should be developed and published. Further, we feel that there is no adequate, plain English description on the PSB’s website of the reasons why it cannot, at present, license this information for use for conveyancing purposes. A full explanation should be provided for the avoidance of future confusion. Further, this explanation should explain the linkage of this exception to the inspection programme, and that it is expected that licensed commercial re-use will be possible once that programme is completed, giving expected time-tables.

54. Our concerns under the Transparency principle go further than the matter raised by the Complainant, however. In the course of our investigation, we checked as a matter of routine that the form of the exception currently on the PSB’s website (item 4.ii here) is identical to that in place when the Complainant originally submitted his request to re-use the information. To do this we used archived web pages from the UK Government Web Archive (and found the archived web site for 19 September 2010 here). Exception 4.ii was absent from this archived web site, and on further enquiry, the PSB provided information that the web site was updated by the addition of exception 4.ii on 9 November, only two days before the PSB wrote refusing the Complainant’s proposal.

55. In that refusal letter, which refers throughout to CON29M reports, there is no mention to the Complainant that a new exception to cover this has been added to the PSB’s website, or to explain the reasons why this exception applied. The rejection letter advances the following reasons for declining the proposal:

- “There are no apparent benefits accruing to the Authority from an alternative CON29M service, and potentially significant disbenefits...”;

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• “There does not appear to be a benefit to the public from an alternative service.”

There is clearly a lack of transparency by the PSB in this response. There do not seem to be any legitimate grounds for not informing the Complainant of that new exception and couching this refusal in its terms, only two days after the exception was published. The refusal letter should have set out the linkage of this information to the ongoing inspection programme and that it is expected that the information will be made available to be licensed for re-use once that programme is complete, and setting out the time-table for this. It is also our view that the PSB, having made this linkage, could also have explained the relevance of the existing exception 4.iii (previously exception 4.ii before 9 November) to its rejection of the proposal, as it has the potential to adversely affect property prices in effected areas. Exception 4.iii sets out that licences will be refused where in the PSB’s opinion they have “the potential to prejudice the communication of information from it to the public about their safety and property valuations in advance of the conclusion of the Authority’s information dissemination programme.”

56. It further appears that the PSB has not been transparent with OPSI (either as administrator of the IFTS, or as the investigator of appealed complaints under the Re-use Regulations and IFTS) in respect of this new exception. The PSB as a member of IFTS should have informed OPSI as a matter of routine that it was introducing a new exception, explaining the reasons why; but did not do so. And the PSB should have informed us either in written evidence or during the meeting held to explore relevant issues and events during this investigation that this was a new exception introduced at the same time as the Complainant’s proposal was being assessed. The PSB did not do this. It is clear that had we not decided to refer back to archived web pages, it would not have emerged that this new exception had been added while the Complainant’s request was being considered. This is a failure in Transparency.

57. Having raised this issue with the PSB, we were, however, provided with timely information as to when and why the new exception was introduced. We were told that the issue was one of a lack of clarity in the existing exceptions, which had not made it clear that use of the information for CON29M report purposes was not possible outside the standard per property terms and conditions. We were told that this matter was discussed at the July 2010 Board meeting (and on request, relevant minutes were provided), that staff worked on proposals following that meeting on 3 and 4 August, prior to the PSB’s website being updated in November 2010. We agree that it was not clear from the previous exceptions that production of CON29M reports from the information outside the existing terms and conditions was not possible, and therefore that it was legitimate for the PSB to introduce a new exception in order to clarify this.

58. We also asked the PSB for information about what steps it took to inform its existing licensees when this new exception was introduced, and were
told that a news item was published on the PSB’s website at the time the new exception was introduced, and that the exception was placed on the PSB’s licence exception pages. This also appears to be a failure in Transparency. If the PSB felt that its existing terms and licence exceptions needed clarifying, the PSB should have proactively communicated to its existing licensees that a new licence exception had been introduced. It did not do so – there may be existing licensees using the information contrary to the new licence exception who are still in ignorance that the new licence exception has been introduced. This should be rectified.

59. We were told that the introduction of the new exception was approved by the PSB’s Board in July 2010. Work to introduce it then proceeded in parallel with the handling of the Complainant’s request, so creating the impression that the two were closely connected. That impression was enhanced by the PSB’s failure to notify either the Complainant or OPSI that a new exception had been introduced. Whatever the merits of this exception, (and we have set out above (paragraph 57) that we do feel the exception can be justified at the present time, though it requires fuller and clearer explanation, and we note that the Complainant asserts that the exception is in his view anti-competitive), the manner of its introduction has fallen well short of the standards of transparency expected of members of IFTS. The PSB must urgently address these failings and implement an open and transparent approach to its dealings both with its licensees and potential licensees, and with OPSI.

**Innovation**

60. The Complainant has asserted that citing a lack of innovation as a reason to refuse the proposal goes against the PSB’s statement of commitment to the principles of IFTS. The refusal letter states:

“The authority is keen to encourage innovation and is facilitating this through its new GIS. However, this proposal merely replicates the Authority’s mining report without any innovation or new product for the public, as is required by the PSI regulations.”

We point out that this is not, in fact, what is required by the Regulations, which merely state that re-use is where a person uses a document “for a purpose other than the initial purpose within the public sector body’s public task.” If the PSB decides to reject proposals by reference to the Regulations, it should do so carefully – and it is clear that the Regulations do not “require” innovation or a new product – they require a use other than that within the PSB’s public task. By coupling this refusal with the idea of the PSB encouraging innovation, this refusal does suggest that the PSB’s commitment to innovation is not as thoroughgoing as is expected of IFTS members. The letter could have stated that the PSB would not be in a position to agree to the proposal at this stage as it seemed that the proposal just related to CON29M reports, and explained why this would not be allowed. It could then have gone on to encourage the Complainant to give more detail, under guarantees of commercial confidentiality, of any innovative products that it might be
possible to support. This would have shown true commitment to the principle of Innovation.

61. Further, there seems to us to be a logical inconsistency in the approach taken by the PSB in this rejection letter. Having decided that the proposal made was only concerned with production of CON29M reports, and that the production of such reports was not covered by the Regulations because it was use, rather than re-use, it does not seem logical to refer to the supposed requirements of the Regulations for innovation as a reason to reject the proposal – the Regulations should already have been excluded from the picture.

62. Having decided not to licence the information under the Regulations, the PSB should then have considered its position under IFTS. IFTS requires a higher standard of performance than that required in the Regulations, and we would expect more effort to be made to encourage innovation than was done here. Though we note that the Complainant had already been supplied with trial data to test the proposed new working method, showing practical encouragement of innovation, it was disappointing that this commitment did not extend as far as continuing the dialogue with the Complainant to build relationships and thereby encourage him to set out his ideas for innovative products; or at a later stage to agreeing to the proposal of mediation.

63. Our view is that the PSB has, potentially, a good news story to tell with this data. It is proactively engaging with residents of the effected areas to tell them what information is held about their properties and what it means. Once this is done, the plan to make the database information available for commercial re-use should be implemented, and there is an opportunity to engage with potential re-users now to work toward this event. We would like to see the PSB commit now to making the information available for commercial re-use, and to open the way for developers to begin producing innovative applications through access to trial data (as was supplied to the Complainant). There should be a proactive engagement plan to publicise this work.

Challenge

64. The Complainant did not raise any issues about the PSB’s complaints handling process in referring this matter to OPSI. However, in our investigation of this complaint, we have identified some concerns with the handling of the complaint by the PSB.

65. Firstly, we note that the response to the complaint (letter of 15 December 2010 from the PSB to the Complainant) was viewed by the PSB as being about the rejection of the Complainant’s business proposal, rather than a refusal of a request to re-use information. This response did include an offer to the Complainant to enter into confidential discussions about alternative product ideas, which we welcome. As noted above, it is our view that the Complainant should have trusted the PSB more and fully shared his ideas with the PSB; and the PSB should have continued discussions with the Complainant. We find it hard to reconcile the offer to
enter into confidential discussions on 15 December with the PSB’s subsequent refusal of the offered mediation.

66. Another area of the handling of the complaint that causes us concern is that in considering the complaint, it does not appear that the PSB looked beyond the rejection of the business proposal. We accept without reservation that it was open to the PSB to reject the proposed joint venture. However, we do not believe that in doing this, the PSB took note that the business proposal was made at the PSB’s suggestion, and that in turn it originated from the Complainant’s original request to re-use information made in August 2010. We do not feel that that original request has ever been properly addressed under the Re-use Regulations, and this should have been picked up by the PSB’s consideration of the complaint. Had the response to the complaint done this, steps should have been taken to address the original request for information. This was not done. It remains the case that the Complainant submitted a request to re-use some of the PSB’s information in August 2010, but this request has still not been responded to as required by Regulations 8 and 9. While we accept that the PSB’s initial positive reaction to the request was to work with the Complainant to try to reach an agreed method to enable his use of the information, we feel that once this chosen method had been terminated by the rejection of the joint venture proposal, the PSB should have formally responded the original request to re-use the information as required by the Regulations.

**Overall Assessment**

67. Having carefully considered the documentation supplied to us, and, having met both parties, **OPSI partially upholds the complaint.**

68. Our reasons and recommendations are detailed below.

**The Re-use Regulations**

69. The substance of the complaint is not, we feel, covered by the PSI Regulations, for the technical reason that the Complainant did not set out his proposed use of the information in writing as required by Regulation 6(d). Indeed the Complainant told us in interview that he specifically did not tell the PSB what his ideas for re-use were because he did not feel he could trust them with his commercial confidential information. We did not find any evidence in our investigation that the PSB could not be trusted to keep commercially confidential information securely – but it must be a concern for the PSB that in this case it was perceived as an organisation that could not be so trusted.

- **Issue 1 – Transparency:** We consider that it would serve the PSB well to take steps to improve the levels of trust felt towards it by the re-use community, as a way to maximise re-use. Regulation 16.(1)(a) requires the PSB to publish information about applicable conditions for re-use, and we recommend that the PSB publishes details about its commitment to respecting commercial confidentiality in these conditions.
70. Had the complaint been made against the handling of the original request for information to be re-used, rather than against the rejection of the joint venture business proposal, other aspects under the re-use regulations would have come into consideration. In its response to the complaint, the PSB went a long way towards defining its public task in respect of this information. The clarity of the PSB’s role and availability of its information under the Re-use Regulations would be enhanced if it published its definition of its public task in respect of this information.

- **Issue 2 – Public task:** The PSB should publish a statement of its public task under the Re-use Regulations. This should be done directly in the case of the information considered under this complaint, where the PSB has produced a statement of its public task in response to the complaint; and should be done for other information held by the PSB following The National Archives central guidance on drawing up a statement of public task.

- **Issue 3 – Availability of documents for re-use:** Having published a definition of its public task under the Re-use Regulations, making clear its view that compilation of CON29M reports is use rather than re-use, the PSB should be well positioned to make available information listing the main documents it holds that are available for re-use, as required under Regulation 16(1)(c).

- **Issue 4 – Responding to the original request:** While the joint venture proposal has been considered and rejected, the original request to re-use information, which led to that joint venture proposal, remains to be dealt with. Albeit late, the PSB should respond as indicated by Regulations 8 and 9 to the Complainant’s original request to re-use the information.

**Information Fair Trader Scheme**

71. **Maximisation** We do not find that the PSB breached the Maximisation principle directly in its rejection of the Complainant’s proposal. But we do find that the PSB could do more to explain the restrictions applying to the information in question, and to set out the future expectation that it will become possible for the information in question to be commercially re-usable once the domestic investigation programme is completed.

- **Issue 5 – Publication of timetable for information becoming available:** The PSB should demonstrate its commitment to maximising re-use of the data covered by this complaint by publishing a statement that the information will be available for re-use at the end of the information dissemination work in September 2012, and should set out, and keep up-to-date, the timetable and key events to make this happen.

72. **Fairness and Simplicity** We did not find that the PSB had breached these IFTS principles.

73. **Transparency** We found a number of significant failings against the Transparency principle in the way the PSB has set about amending its published exceptions and handling its dealings with the Complainant.
• **Issue 6 – Review of the PSB’s transparency in its communications with the Complainant and licensees:** The PSB was not, we feel, fully transparent in its communications with the Complainant, and should review its approach to future communications to ensure compliance with the Transparency principle of IFTS both for individual applicants for re-use, and with its existing licensees.

• **Issue 7 – Review of the PSB’s transparency in its communications with OPSI:** We were shocked to discover during investigations that the PSB had introduced a key licensing exception change on its website during consideration of the Complainant’s proposal, but had not seen fit to communicate this to OPSI or to draw it to our attention during the investigation. The PSB must commit to a more transparent relationship with OPSI as its regulator in future and must detail what form this will take.

74. **Innovation** Much of this case hinges on the differing perceptions of whether or not the proposal was innovative or not. We regret that the PSB did not work harder to uncover the full extent of the Complainant’s proposal; and we regret that the Complainant did not trust the PSB enough to share his proposals for re-use. In the absence of any explanation from the Complainant as to what his proposals were beyond that contained in the joint venture proposal, we are not able to express a view as to whether or not they were innovative. A further issue arose from the PSB’s reference to innovation in the letter rejecting the joint venture proposal.

• **Issue 8 – Rejection of the joint venture proposal:** despite deciding that the Complainant’s proposal fell outside of the Re-use Regulations, the PSB’s letter rejecting the proposal referred incorrectly to the Regulations requiring re-use to be innovative or a new product. The regulations only require the re-use product to be different to that of the initial purpose within the PSB’s public task. The PSB should review its communications with licensees and potential licensees to ensure that where they quote the Regulations, they do so accurately. Where the PSB has decided that the Regulations are not engaged, communications should not then draw on points from the Regulations to justify not taking up proposals of joint ventures. The Regulations deal with re-use of information and are not concerned with potential joint ventures.

75. **Challenge** Though the Complainant did not raise issues under the Challenge principle of IFTS, we do have some concerns about the handling of the initial complaint by the PSB.

• **Issue 9 – Complaint handling failed to identify that the original request for re-use had not been properly addressed:** It is our view that the PSB’s consideration of the complaint made to it by the Complainant was not rigorous enough – in that it did not identify that the joint venture proposal originated in a request to re-use
information which had not been responded to as required by the Regulations. The PSB should examine its complaint handling procedures to ensure that a similar lack of rigour is avoided in future.

**Recommendations**

i. The PSB should publish a statement of its public task under the Re-use Regulations to provide clarity to re-users and potential re-users of the PSB’s information.

ii. Having determined and published its public task under the Re-use Regulations, the PSB should ensure that it complies fully with Regulation 16 (Information to be published by a public sector body), in particular Regulation 16(1)(c).

iii. The PSB should formally respond to the Complainant’s original request to re-use information as required by Regulations 8 and 9.

iv. The PSB should review its communications with OPSI as Regulator under the Re-use Regulations and ensure that any future significant changes to the PSB’s licensing policies and practice, terms and conditions are discussed with and reported to OPSI in a timely manner. The PSB should report on steps taken to OPSI.

**Suggested areas for Improvement**

v. The PSB should demonstrate its commitment to maximising re-use of the data covered by this complaint by publishing a statement that the information will be available for re-use (not for CON29M purposes) at the end of the information dissemination work in September 2012, and should set out, and keep up-to-date, the timetable and key events to make this happen.

vi. Having done this, the PSB could begin to engage with potential re-users working with trial data to allow them to start developing innovative applications.

vii. The PSB should explore the possibility of making the database information available for commercial re-use on a region-by-region basis as the information dissemination programme is completed in each area.

viii. The PSB should review its communications with licensees and potential licensees to ensure that they are transparent and report on steps taken to OPSI.

ix. The above recommendations should be acted upon within six months of publication of this report.

**Role of APPSI Review Board**

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