

EXPLANATORY MEMORANDUM TO
THE RE-USE OF PUBLIC SECTOR INFORMATION REGULATIONS 2015
2015 No. 1415

1. This explanatory memorandum has been prepared by The National Archives and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 Council Directive 2003/98/EC¹ (“the 2003 Directive”) on the re-use of public sector information, which binds the UK as a Member State of the EU, was implemented in the UK by the Re-Use of Public Sector Information Regulations 2005² (“the 2005 Regulations”).

2.2 Council Directive 2013/37/EU³ (“the 2013 Directive”) on re-use amends the 2003 Directive in several respects. These new regulations implement the new Directive. In doing so they revoke and replace the 2005 Regulations.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The attention of the JCSI is drawn to the amendment of the Freedom of Information Act 2000 made by regulation 21 of these regulations.

4. **Legislative Context**

4.1 The 2003 Directive and the 2005 Regulations created a framework which governed the position whenever a public sector body, as defined in those Regulations, exercised its discretion to make information available for re-use by the public. The 2013 Directive was adopted by the Council and European Parliament on 26 June 2013. It makes a number of key changes to the re-use framework, the most significant of which is that, save in certain circumstances, a public sector body will now be required to allow re-use of its information. The deadline for transposition of the 2013 Directive by Member States is 18 July 2015.

4.2 By way of parliamentary scrutiny the Government submitted an explanatory memorandum dated 12 January 2012 (doc 18555/11). The House of Commons Select Committee on European Scrutiny reported on the draft Directive in its report 57 (2010-12) (29 February 2012), paragraphs 7 and 3

¹ OJ No L 345, 31.12.2003, p 90

² S.I. 2005/1515.

³ OJ No L 175, 26.6.2013, p

(2013-14) (21 May 2013) and paragraph 16, clearing it after ministerial correspondence. The House of Lords European Union Committee considered the draft Directive in its Sub-Committee B and cleared it from scrutiny on 3 June 2013.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Parliamentary Under-Secretary of State for Justice has made the following statement regarding Human Rights:

In my view the provisions of the Re-Use of Public Sector Information Regulations 2015 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 Any information, whatever its form – including print, digital or electronic, and sound recordings – produced, held or disseminated by a public sector body is considered public sector information. This includes an enormous range of corporate information such as reports and financial data, mapping, codes of practice, public records, legislation, statistics, video, press releases, local planning and tourist information, artefacts, publication schemes, and so on.

7.2 Enabling the re-use of public sector information aims to realise economic, societal and democratic benefits in permitting re-users other than the originating public authorities to create new products and services using official information, thereby stimulating economic activity, and to increase the efficiency and transparency of public functions. That said, as enacted at EU level it is accepted that re-use should only extend so far. So, for example, it should not require public sector bodies to make material available that could validly be withheld under its domestic information access legislation (e.g. the Freedom of Information Act 2000). Nor should it be required where allowing re-use would have a harmful public policy effect (e.g. on national security).

7.3 Against this backdrop the 2003 Directive encouraged public sector bodies to make their information available by providing for various rules to apply when a discretionary choice was made to permit re-use. The 2013 Directive goes further and increases the rights of re-users by making re-use mandatory for most public authorities, setting a default charging mechanism of marginal cost recovery in most circumstances and bringing public sector museums, libraries (including university libraries) and archives within the regime for the first time. Exclusive arrangements are generally disallowed and subject to fixed expiry deadlines. Enhanced transparency on the existence and identity of re-usable information assets and any applicable charges is required.

7.4 Under the 2013 Directive there are some areas of the public sector where these general principles can be applied more flexibly. Bodies required by their constitution or their accounting rules to trade in information to recover their costs are able to go beyond marginal cost. The duty to permit re-use is not imposed on libraries, museums and archives which are brought within its ambit for the first time. Instead they are able to permit re-use if they wish. Those cultural bodies are also granted derogations from some of the charging and counter-exclusivity provisions to permit them to continue to increase access to collections through digitisation projects and partnerships.

7.5 As well as implementing the above aspects of the 2013 Directive these regulations take into account relevant pre-existing domestic legislative provisions in two important respects.

7.6 Firstly, implementation of the new EU rules on re-use has to take notice of amendments made to the Freedom of Information Act 2000 (“the 2000 Act”) by the Protection of Freedoms Act 2010. Broadly speaking, those changes provided (some way in advance of the 2013 Directive) that public authorities within the meaning of the 2000 Act should provide information in an electronic format capable of re-use, either when obliged to disclose information under the 2000 Act or when releasing information proactively as part of the publication schemes they are required to operate under it. In order to ensure full implementation of the 2013 Directive, these regulations now disapply those changes for public authorities that are subject also to these regulations. However, there is a small sub-set of public authorities subject to the 2000 Act but which is not subject to these regulations. The regulations preserves the effect of the 2000 Act in respect of those bodies.

7.7 Secondly, the 2013 Directive requires Member States to provide for redress by an impartial review body in respect of any complaint against a decision taken by a public sector body about re-use. The approach taken by the regulations is to apply (with appropriate modifications) the appeal provisions of the Freedom of Information Act 2000, with the result that an initial complaint against a public sector body’s decision can be made to the Information Commissioner with a subsequent appeal to the First-tier Tribunal. That is modified further where the complaint is against the basis on which a public sector body has levied a charge for permitting re-use. In such a case the information Commissioner will consider the initial complaint and make a non-binding recommendation. If the public sector body decides not to follow that recommendation it must notify the complainant and give its reasons and it is open to the complainant to seek a binding decision from the First-tier Tribunal. This approach to charging complaints has been adopted to ensure that under the new redress process only a judicial authority can make a binding decision affecting the funding of a public sector body.

8. Consultation outcome

8.1 A public consultation ran between 20 August and 7 October 2014 on the two main questions requiring implementation options beyond copy out: the charging criteria and the means of redress. The consultation document, responses and a summary are published at: <http://www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/psi-directive-transposition/consultation/>.

8.2 Respondents broadly accepted the proposal in the consultation that the criteria for calculating charges should be set out in the transposing Regulations, particularly where above marginal cost.

8.3 The majority of respondents supported what was at the time the preferred option for the redress mechanism, with the Office of Public Sector Information continuing to investigate complaints and making recommendations, becoming binding on reference to the First-tier Tribunal. Others - particularly from the open data community - urged the appointment of the Information Commissioner owing to his binding decision making powers and broader general regulatory remit for information rights.

8.4 Responding to the views expressed in the consultation, the Government reconsidered the options for the redress mechanism. In the interests of a streamlined approach to information rights complaint handling across the public sector, the preferred approach has been modified to transferring the role to the Information Commissioner, as outlined at paragraph 4.11 above. This role would operate UK-wide with a requirement to consult the Scottish Information Commissioner where a complaint concerned a Scottish Public Authority under the Freedom of Information (Scotland) Act 2002. This approach has been agreed with officials from the Scottish Government and the Procedure Committee of the General Regulatory Chamber of the First-tier Tribunal.

9. Guidance

9.1 A suite of guidance has been prepared to support the implementation of the regulations and published at: <http://www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/re-use-and-licensing/>. The three main elements are guidance for public sector bodies generally, public sector libraries, museums and archives and for prospective re-users. Several more specific supporting documents have also been amended in the light of transposition, for example, the UK Government Licensing Framework, guidance on public task statements and the Information Fair Trader Scheme aimed mainly at Crown bodies.

9.2 Given that a new body is taking responsibility for the handling of complaints against the Regulations, it is expected that the Information Commissioner will issue guidance based on his casework in due course.

10. Impact

10.1 A Regulatory Impact Assessment is attached to this memorandum

10.2 The impact on the public sector comprises one-off monetised implementation costs of £35,000 incurred by the Information Commissioner's Office receiving the regulatory power. The on-going annual costs to the Information Commissioner's Office and First-tier Tribunal are £11,570 and £860 respectively, almost exactly offset by the savings in discontinuing the complaints investigation role of the Office of Public Sector Information (£11,570) and abolishing the appeals role of the Advisory Panel on Public Sector Information (£1300).

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 A post-implementation review will be conducted five years after implementation

13. Contact

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