

# **CHARGES FOR INFORMATION: WHEN AND HOW**

## **GUIDANCE FOR GOVERNMENT DEPARTMENTS AND OTHER CROWN BODIES**

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## Foreword

The guidance in this document is set in the context of continued improvements in access to government information. It looks forward to the implementation of the Freedom of Information Act (the Act). No firm date has been set for the implementation of the Act in central government, but planning for implementation is proceeding and the Government hopes to implement it well before the statutory date for implementation of 30 November 2005.

It also reflects relevant decisions from last year's Review of Government Information (part of the Cross-Cutting Review of the Knowledge Economy in the Spending Review 2000) effective from April this year (2001).

1 April saw the introduction of the innovative Click-Use online Class Licence for easy application for a licence to re-use that information from government departments and agencies (other than those which are trading funds) which is central to Government's core responsibilities. The Licence is now available on the HMSO website.

The guidance in this document sets out for government departments and other Crown bodies the implications for determining any charges for information expected as a result of the Act, of other legislation, and of last year's Review of Government Information.

These are significant developments in improving access to information. But at the same time, we reassure individuals or companies who have dealings with government, that:

- The issue of the guidance in this document on charges for information does not mean that government departments and Crown bodies are expected to charge for everything. It is intended to help them decide whether particular information should be free of charge, charged at a subsidised rate, charged to recover the full costs involved, or (where the private sector produces similar information products and services) charged to recover a profit in the interests of fair competition. Paragraphs 5-8 of this guidance give examples of information supplied free or at substantially reduced cost.
- The introduction of the Class Licence does not affect what information can be disclosed by government or reproduced and reused by others. The Freedom of Information Act (and the existing code of practice until the Act comes into effect) provides protection for personal information covered by data protection, trade secrets and other information properly confidential for commercial reasons, information whose disclosure could prejudice judicial proceedings, etc.

A later edition of this guidance will be issued, probably in late 2001 or early 2002, when the plans for implementation of the Freedom of Information Act are more advanced.

HM Treasury  
July 2001

## ***Introduction***

1. **Information covered by this guidance.** This guidance sets out the principles on charging for information which is subject to **Crown copyright** or where the copyright is owned by the Crown. It is not about other forms of intellectual property such as patents, designs, etc.

2. **Organisations covered by this guidance.** Government departments, including next steps agencies and trading funds and other bodies which have Crown status. A list of such bodies can be found on the HMSO website ([www.hmso.gov.uk/crownbod.htm](http://www.hmso.gov.uk/crownbod.htm)). All such organisations should read and apply paragraphs 1-32 where appropriate, but in paragraphs 33-43 the procedure to follow may differ according to whether the organisation is, or is not, a trading fund.

## ***Improving access to government information***

3. **Pro-active release of information.** The Government attaches importance to the pro-active release of information by public authorities.

Information to pro-actively release:

- Facts and analysis which the Government considers important in framing major policy proposals and decisions;
- Explanatory material on dealings with the public;
- Reasons for administrative decisions to those affected by them;
- Operational information about how the public services are run, how much they cost, targets set, expected standards and results, and complaints procedures.

(From the White Paper *Your Right to Know*, Cm 3818 of December 1997 Para 2.18.)

4. Planning for implementation of the ***Freedom of Information Act 2000 (the Act)*** is proceeding and the Government hopes to implement it in central government well before the statutory date for implementation of 30 November 2005, although no firm date has been fixed as yet. For a relevant provision already in effect, see paragraph 6 below. For further information including application to public bodies or devolved territories see Annex 1. The ***Review of Government Information*** (part of the Cross-Cutting Review of the Knowledge Economy in the Spending Review 2000) led to the announcement of new plans to boost the knowledge economy by improving the way government information can be acquired and reused by publishing and internet businesses. Details are in Annex 4.

5. **Information supplied free or at substantially reduced cost.** Increasingly government departments are putting information on their public internet site for public access free of charge. New legislation is published on the HMSO website as well as in printed form. It is assumed departments will aim to put on, eg consultation documents, announcements of government policy (Press Notices, White papers, etc), guidance on how policies will be implemented or on what a person needs to do to meet particular legislative requirements, guides to the department's services and similar information. The Highway Code, for example can be read free of charge on the internet as well as purchased in printed form at a local bookshop; and Ordnance

Survey's Get-A-Map service is hit over 10,000 times a day providing road atlas scale mapping of anywhere in Britain.

6. Free leaflets explaining dealings with the public are encouraged where users may not have access to the internet. Many official publications such as White papers and other documents about government policy are also available in printed booklets where the price takes account only of printing and distribution costs and not of the cost of the civil servants' time spent collecting the information and writing the text. Where requests for details to be tailored to the users' specific requirements are expected at such a level that they should be met within a defined publication scheme, it is right that other additional costs, such as that of locating the information, should also be taken into account in assessing charges. However, under the Act, where information requested is not available under the authority's publication scheme, but is supplied under the general right of access, any charges will be no more than 10% of the relevant costs, where those costs are less than a ceiling which is expected to be about £500, and for disbursements (copying, postage, etc)

7. Where Government provides value-added information it is right that the full costs of the value-added element should be recovered, and a profit element in appropriate cases. Where similar information is produced by the private sector, government charges should reflect the market price in the interests of fair competition.

8. Government information which is published free of charge on the internet can normally be printed out free of charge for personal use, but a Crown copyright license may be required for its commercial or other wider reproduction or reuse. However, Government has waived the requirement for a licence for legislation and certain other classes of information (as advertised on the HMSO website). In addition, from 1 April 2001 government has introduced a "Click-Use" online Class Licence on the HMSO website. This will mean that, for information produced by departments and agencies (other than trading funds) which is central to government's core responsibilities, after any charges for supply have been paid, there will not normally be any charge for reproduction and reuse. Departments and agencies value-added information, and trading funds information, will raise licence fees reflecting the market price for the relevant information product or service as appropriate.

9. These arrangements are reflected in more detail in the remainder of this guidance note.

10. **Keeping lists of available information: Information Asset Registers (IARs)** Under the Government's Crown copyright policy, administered by HMSO, departments and other Crown bodies or their publishers are required to supply details for the official bibliographic database and to list other information which the Crown body can make available on IARs. IARs should be published on the departmental website but be searchable from the inforoute site maintained by HMSO. Most departments should have had an IAR in place, if not complete, by December 2000. All should have assembled the information for an IAR by the end of 2001.

11. **Keeping lists: Publication schemes.** There is a requirement under *the Act* for each public authority to agree a **publication scheme** with the Information Commissioner and publish in accordance with it. The scope is not identical to IARs.

(See Annex 1, paragraphs 11-18) *The Act* also provides for the Information Commissioner to approve model publication schemes for particular classes of authority prepared by him or some other persons. The relevant sections of *the Act* are in effect now in so far as they relate to approval of schemes. But public authorities are not debarred from publishing, supplying and/or licensing the reproduction of information which may be appropriate to a publication scheme but is not, or is not yet, in a scheme. Clearly it will be helpful if there is a model or models for use by government departments and other bodies subject to Crown copyright. No decisions on this have been made yet, but the Information Commissioner has started a consultation exercise with a view to publishing guidance on publication schemes and clear criteria for approval of schemes, hopefully around the turn of the year 2001.

12. **Copyright:** All material originated by government departments (and other Crown bodies) is subject to Crown copyright protection. When a non-Crown body is commissioned to produce research or other information, ownership of the rights would rest with that body as originator, unless the commissioning contract has specified otherwise (or the rights have been subsequently acquired).

13. When commissioning information from external bodies, departments and other Crown bodies should decide whether they need to:

- seek an assignment of copyright to the Crown (which would give the Crown both the right to publish the information and to license others to reproduce and reuse it);
- allow the copyright to rest with the originator but obtain a licence to publish and reuse the material, or a specified part of the material, supplied to the department (which would mean others would need to seek a licence to reproduce or reuse it from the originator).

The decision should be made in the light of *the Act*, of government policy on dissemination of the relevant information, of guidance on *Intellectual Property in Government Research Contracts*, and of whether the Crown should make the information available for reproduction and reuse as “raw data” (as defined in the box on page 14 and supplementary clarification in Annex 5). The decision should be implemented as part of the commissioning process. Publication would not necessarily be inconsistent with a decision to allow other intellectual property rights to remain with the originator - it should normally be possible to allow time before publication for eg, a patent application to be filed. HMSO Guidance Note 5 has additional guidance on copyright in works commissioned from non-Crown bodies. (For HMSO guidance notes on a range of copyright issues see HMSO website (<http://www.hmso.gov.uk/guides.htm>))

14. Private sector publishers (or other private partners or non-Crown parties) may, by open competition, be authorised to publish and distribute official versions of government information, provided that raw data is dealt with on non-exclusive terms which will enable supply and licensing to other applicants in accordance with the charging arrangements in paragraphs 33 and 40. Particularly for raw data, it is also advisable to consider whether to secure for the Crown the copyright in the typographical arrangement of any official printed publication (particularly eg

consultation documents, White Papers, etc) so that it can be placed on the internet in the same format as the officially published version and reproduction and reuse readily licensed. HMSO have already arranged for this to be covered in centrally controlled contracts, such as the one for command papers, which are administered by HMSO.

15. When information is supplied it should indicate any conditions relating to reproduction and reuse. HMSO has issued guidance notes on the form of notices to be used on official publications and other materials issued to the public, and on websites.

(Note: Within the Crown, where a department (or other Crown body) has specifically commissioned another department (or Crown body) to collect or create information on its behalf, it will be for the commissioning department to indicate the conditions applying to reproduction and reuse. But where a government department (or body) supplies an information product or service on the same terms and conditions to all comers (public or private), eg as in the case for some trading funds, it will be the responsibility of the supplying organisation.)

16. **Exemptions from disclosure.** The existing *Open Government Code of Practice on Access to Government Information (the Code)* provides for the exemption from disclosure of named categories of information, such as information which is the subject of judicial proceedings, or personal information protected under the *Data Protection Act*, or information which would, or would be likely to, prejudice the commercial interests of any person. Departments should be familiar with the existing *Code*. *The Act* also provides for exemptions but the classes of information, and the conditions attached, are not wholly identical. (See Annex 1, paragraphs 4-5) In some cases, of course, individual records may be exempt, eg under the *Data Protection Act*, but summaries which anonymise the information may not be exempt.

### ***Introduction to charging policy***

17. **General policy on fees and charges.** General policy on fees and charges is set out in *HM Treasury's Fees and Charges Guide*. The normal policy is that where fees and charges are made, the product or service should be priced to achieve full cost recovery or, where there is an element of competition with the private sector, the market price (including any appropriate profit element) in the interests of fair competition.

18. **Financial objective for information services.** The financial objective should normally be to recover costs appropriate to information products and services (see next paragraph) or, where there is an element of competition with the private sector, the market price (including any appropriate profit element). Exceptionally, the Treasury has agreed to some general departures from the full cost recovery policy for appropriate classes of information, in particular for information supplied in response to requests under *the Act's* general right of access. This is reflected in this guidance note.

19. **Products and services.** A first step is to identify separate products (information goods) and services (the whole process of providing goods and services) so as to make any necessary differentiation between them in costing and charging arrangements. It is important to distinguish between the costs of information and non-information products and services. In the charging guidance in paragraphs 23-43 the attribution of the cost of collection and creation of information varies. According to

the type of information it may be allocated to a non-information service (such as core government policy formulation or a statutory licensing or registration service) or to the information service. For more on identifying separate statutory charging services see Annex 2, and on product and service differentiation in general see Annex 3.

20. **Supply and/or licensing.** There is a distinction to be drawn between information which the recipient intends for their personal use; or for reproduction or reuse (often in the context of commercial publications, or other products and services) which is subject to **licensing** under the laws of copyright. **There may be a charge for supply (ie for the recipient to acquire the information), regardless of the purpose the recipient intends.** An additional charge for licensing the reproduction or reuse of Crown (and Crown-owned) copyright information may apply, but will not normally arise for certain types of information (see paragraphs 39-43).

21. **Supply free of charge.** As part of the Modernising Government strategy, departments are tasked with delivering services electronically via the Internet wherever possible. It is assumed departments will aim to put on their public internet site for access free of charge eg public consultation documents, announcements of government policy (eg Press Notices or White Papers), any guidance on how policies will be implemented or on what a person needs to do to meet particular legislative requirements, guides to the department's services and similar information (unless, exceptionally, there is in a specific case a legislative requirement always to charge). Departments may also have information which it would be appropriate to supply free of charge on paper, eg leaflets explaining dealings with the public for users who may not have access to the internet. The cost of this information would either be allocated to non-information services (where appropriate – see paragraph 19 above for examples and paragraph 28 below) or, eg met from income from those information products and services where it is proper to include a profit element in the interests of fair competition (see paragraphs 33-41).

22. It may, however, also be appropriate to charge for the supply of information which is available free of charge on an official web site when it is provided, in different format, such as printed versions, CD Rom, a specific IT format, or as part of a service tailored to the recipients requirements. Websites themselves may also be used to disseminate information which is available only for a charge, for example where similar information is published for a charge by the private sector. It may also be appropriate to charge for a copy of a document which has been viewed free of charge at a public office.

### ***Charging for supply of information***

23. *The Act*, when it comes into effect, will determine whether information should be supplied or may be exempt from supply (see paragraph 16 above). It will have the effect of identifying information into three main groups for charging purposes: information which is not already reasonably accessible and is requested under the general right of access; information which is already reasonably accessible because it is supplied under another enactment; and information which is already reasonably accessible because it is pro-actively supplied under a publication scheme.

24. **Requests under *the Code*.** The basis for setting any charges for supply of information which is not published, or part of an existing on-going charged service, in response to requests under *the Code* is set out in the *Guidance on the Interpretation of the Open Government Code of Practice on Access to Government Information*. The procedure has been in place for some years and is not described here.

25. **Requests under the general right of access in *the Act*.** Government policy, announced in the context of the passage of the Freedom of Information Bill, is that requests may be charged at 10 per cent of the marginal costs of locating and disclosing the information; plus disbursements such as printing, copying and postage. (By implication, the costs of collecting or creating information within Government are to be borne on general taxation, whilst the additional costs of supplying it externally are marginal costs to be taken into account in setting any charges.) This would apply except where the marginal costs exceed a certain limit, expected to be about £500, when there is discretion as to whether to supply the information. and, if supplied, charges should not recover more than 10 per cent of costs up to and including the limit, but may include all marginal costs above the limit. (See Annex 1 paragraphs 3 and 6-9)

26. However, a draft has not been agreed with the Treasury yet for the Lord Chancellor's regulations under *the Act* on charging for the general right of access and the appropriate limit. There has also been no decision (or draft) yet on whether any additional guidance should be published, eg in the Code of Practice which the Lord Chancellor will issue under *the Act*. (The Act as passed referred to the "Secretary of State" but the Government has announced (June 2001) that responsibility is transferring from the Home Secretary to the Lord Chancellor.)

27. **Supply of statutory charging services.** This refers to fees and charges for information products and services supplied under an enactment other than *the Act* and which are defined as statutory charging services in *HM Treasury's Fees and Charges Guide* (see box on page 14). The normal policy applies, ie full cost recovery including depreciation and a cost of capital of 6% unless, exceptionally, the legislation provides otherwise or a different financial target has been agreed with the Treasury in accordance with paragraph 2.9 of *the Guide*. See Annex 2 of this paper for more information about the legal issues.

28. Where information services are derived from another service which is subject to statutory fees and charges, such as issuing licences, registration, etc, it may be appropriate to attribute some or all of the costs of collecting and creating the information to the non-information service. See Annex 2.

29. **Other pro-actively supplied information products and services.** Until the general right of access under *the Act* comes into effect, these are anything not supplied under paragraphs 24 or 27-28 above. The Treasury's working presumption is that thereafter these will be both information which has been published in the traditional sense of official publication and that which is provided to the public on request as part of a clearly specified and pro-actively supplied product or service. No doubt the coverage will become clearer as discussion of publication schemes for government departments and other Crown bodies proceeds.

30. The main determinant of charging policy for these products and services is the *Review of Government Information* (see Annex 4). This related specifically to licensing and made decisions which apply to charging for the supply and licensing of information for reproduction and reuse, particularly by commercial publishers, etc under Crown copyright licences. Determining charges for supply, including data supply, is normally a matter for the originating department, agency or trading fund in accordance with the guidance in paragraphs 33-38 below. Any income from supply would go to that originator, or its publisher, whichever is appropriate. See paragraphs 39-43 for the charging arrangements for licensing reproduction or reuse, and the division of responsibility between HMSO and originators in respect of that licensing.

31. The same principles below should also be applied to traditional forms of publication and supply for personal use.

32. Where information is going to be supplied on a charging basis for placing on internal computer networks or intranets, charges per PC or per site are to be preferred to charges per individual access. But where access is granted to the department or agency's own IT database, charges per level of access may better reflect the costs of the service and the pattern of individual usage. The level of charges should be based on the principles in paragraphs 33-38 below.

33. For **departments and agencies (other than trading funds)** charging arrangements in accordance with *the Review* and **effective from 1 April 2001** are:

- a) **"raw data"**. Marginal costs for costing and pricing (unless, in any specific case, a statutory enactment indicates otherwise). The particular definitions of raw-data and marginal cost applied in *the Review* should be followed. They are in the box on page 14. New supplementary clarification is at Annex 5;
- b) **value-added information.** (The definition of value-added from *the Review* is in the box on page 14.) Where a user has requested the department or agency to supply value-added information based on raw data, the department or agency should consider whether the user would wish to be advised about the relevant raw data available at marginal costs (as above) to help them to decide whether to have the raw or the value-added product or service. It should be noted that:
  - i. *The Review* decided that value-added activity should preferably occur through partnership with the private sector under the Treasury's initiative *Selling Government Services into Wider Markets* and provided that this can be achieved in a transparent manner and in a way which creates a level playing

field among all market participants. This proviso should be considered met where there is no exclusive contract for supply of the raw data to the private partner (ie the raw data, as defined above, is available to all on a non-exclusive basis).

ii. Where value is added to “raw data” the costs of the service should be assessed with the “raw data” element costed as above (ie as the raw data alone would be costed for supply to the private sector for reproduction and reuse), but the value-added aspect should be costed, taking account of the full costs including the consumption of capital assets employed in providing the value added element of the service. Proper costing is particularly important in, for example, a situation where there is little or no competition and the government body is, in effect, setting the market price, or where there are doubts about whether it is economic to continue a service (see paragraphs 36-38 below).

iii. Charges should be at market prices (see paragraphs 36-38 below).

34. Allocation of particular products and services between raw data and value-added information (each will be either the one or the other) will be the subject of discussion between departments and agencies and HMSO, operating in its regulatory capacity. In the event of disagreement, the Controller of HMSO will determine whether this can be resolved at official level or may need to be referred to Ministers for a decision. In order that any users who want to reproduce or reuse the information will know which licensing arrangements would apply (see paragraph 40), it is essential that all future value-added items of departments and agencies (other than trading funds) carry appropriate statements denoting their value-added status.

35. For **trading funds** charging arrangements in accordance with *the Review* are: Government trading funds which trade information are not covered by the policy above. Instead the policy for all trading funds is price differentiation through product (or service) differentiation. Fixed costs should be recovered equally from users of the same services but on a differential basis between services according to the type of service, with pricing at the market price for the type of service. This can apply to both supply and licensing of reproduction or reuse. (See paragraphs 36-38 below, and Annex 7 for more information specific to trading funds.)

36. For **departments and agencies (excluding trading funds) value added services and trading funds commercial (non-statutory) products and services**, the aim is a price which, taking account of all the circumstances, it is reasonable to consider fair to both the purchasing public and any competitors supplying similar products and services to the public. A balance is most easily achieved where there are many buyers and sellers in the market to determine the market price. Where the government body may have few or no competitors, it should follow the guidelines in paragraph 7.5 of the Treasury’s *Fees and Charges Guide* (See Annex 8).

37. Government bodies should also have regard to the guidance in Annex 6 of this note on the application of the Competition Act and ensure that they keep within the terms of the Act.

38. On occasion, the charges for a particular product or service may be modified in the interests of greater sensitivity to patterns of demand or cost. For example, there may be a case for reducing charges with a view to stimulating demand and increasing output to the benefit of both existing and new customers. A cross-subsidy is allowable, at least on a temporary basis, between non-statutory services (it is not normally allowable for statutory services), however:

- prices should not be reduced in such a way as to stifle competition - too rapid a cut in prices could undermine developments in the private sector;
- a product or service may be charged at less than break-even point for a period, particularly if that can be shown to reflect the price in a competitive market, but no service should ever be provided at less than its average variable costs.

(Note: this is not intended to prevent a government body from funding copies itself, which funding would be taken into account in assessing whether average variable costs were recovered, in order to distribute them free (in effect, as a present) to a core audience. That is provided, of course, it has clear criteria for determining which persons are within the core audience and could show that it is acting reasonably, and not improperly favouring any persons in providing them with copies at the department's expense for which other recipients are required to pay.);

- if demand is insufficient for a service to break-even in the long term, the charge should be reviewed. If break-even cannot be achieved by a price increase, the government body should consider stopping the product or service.

### ***Copyright licensing***

39. See paragraphs 12-15 above on copyright, and “introduction to charging policy” paragraphs 17-22. The charging arrangements were decided in *the Review* (see Annex 4) and are summarised below. Where departments and/or agencies and trading funds produce integrated information, they will need to determine which government body is in the lead in order to determine which of the arrangements below apply.

40. For **departments and agencies (other than trading funds)** the charging arrangements effective from 1 April 2001 are:

- **Crown copyright waivers.** Exceptionally, the requirement for a licence has been waived for the following classes of information: legislation, unpublished public records (ie public records deposited with the relevant Public Record Office under the Public Records Acts which were available to the public and which were unpublished at the point when they were deposited), government press notices, and national curriculum material for England, and for Wales. (See HMSO guidance notes on the HMSO website for further information.) As no licence is required, there is no licensing fee, although there may be a charge for supplying the information.
- **Raw data** (as defined in the box on page 14 and supplementary guidance in Annex 5): For raw data not covered by the waiver, licensing will normally be

through the HMSO Class Licence. (which is on the HMSO website <http://www.clickanduse.hmso.gov.uk> ) After any charges for supply of the information have been paid (see paragraph 33(a) above), there will not normally be any additional charge under the licence for reproduction and reuse of the information.

However, *the Review* provided for the possibility in exceptional cases of annual fees for collection costs where a data set had been particularly expensive to collect (see Annex 4, recommendation 5). Any application for such fees should be made to HMSO. It will be considered by HMSO on its merits. Applications should be accompanied by evidence that the data set was more than ordinarily expensive compared to other data sets and, where appropriate, an explanation of how the Government has also gone beyond its own needs. If, exceptionally, an application is accepted, HMSO will exclude the material from the Class Licence (indicating this by including it on the list of value-added information with a note to explain its unusual status) and will use a tailored licence. For such cases the relevant costs should be averaged across the expected number of relevant licences as a guide to where the fees should be within the range set out in *the Review* (£1,000 - £10,000);

- **Value-added information.** Requests for licences should be addressed to HMSO. Licensing will be through a tailored licence with a similar ordering of paragraphs as the Class Licence as far as feasible, but reflecting the specific conditions and payment terms for the specific service covered by the licence. There may be charges both for supply of the information (paragraph 33(b)) and for licensing reproduction and reuse (so as not to undermine the market for private sector competitors, eg those who had acquired raw data with the intention of providing their own value-added services.) Any licence fee/royalty should be at the market level for such charges. HMSO should discuss with the originating department the level of charges to be entered in the licence before any final decision is made.

41. **Trading funds:**

- are free, in accordance with *the Review*, to be responsible for licensing under a delegation of authority from the Controller of HMSO. Standard delegation of authority documents will be offered to all trading funds. In these cases, requests for licences would go to the trading fund, either directly or redirected by HMSO, and the trading fund will be responsible for ensuring that the fund's specific needs are reflected in the licence terms. However, the licence should follow the general structure of the HMSO class licence as far as possible and HMSO will work closely with individual trading funds to advise them on this. The licence fees/royalties should be determined by the trading fund having regard to market rates and other factors (see paragraphs 36-38); or
- may take the view that supplying and licensing information is essentially subsidiary to the fund's main function, and that a policy for determining charges for supply and licensing based on the guidance to departments and agencies (other than trading funds) would make good operational sense for the

fund. If so, they can explain to HMSO why they consider this and ask HMSO to retain responsibility for licensing. (See Annex 7 paragraph 7).

42. **Invoicing.** Where there are charges for both supply and licensing, it may be convenient to put both charges on the same invoice (see paragraph 30 about destination of income from supply).

43. **Licensing income.** Any licensing income should go to the department, agency or trading fund which originated the material (in line with the policy with the retention of receipts under the Treasury's initiative on Selling Government Services into Wider Markets). Treasury's preference would be for all licences (HMSO and trading funds) to provide for the licensee to make payment direct to the originator, as that is administratively more efficient for Government.

## Key definitions

**Crown copyright.** All material originated by government departments and other Crown bodies is subject to Crown copyright protection.

**Fee or charge** are interchangeable terms. A fee is normally a charge under a statutory enactment.

**HMSO.** Responsibility for control and administration of Crown copyright rests with the Controller of Her Majesty's Stationery Office, an official appointed by the Queen, and residing in HMSO, part of the Cabinet Office. HMSO should not be confused with the private publisher, The Stationery Office Ltd.

**Licence** is a permission by the copyright holder to reproduce or reuse material protected by copyright.

**Marginal costs** (and marginal cost pricing) were defined in *the Review of Government Information* for the purpose of the decision covering raw data of departments and agencies (other than trading funds), as "relating to additional costs over and above those of collecting the information for the original government policy purpose. It covers costs, including costs of staff time, reasonably incurred in locating and retrieving the information, and giving effect to the requesters preferred medium for the reply (which could be different to that in which the department currently held it); and also the disbursements directly incurred in communicating the information, eg printing, postage." This would include the operating costs of relevant IT, accommodation, etc (including depreciation and cost of capital), if the quantity supplied is sufficient to warrant its inclusion. The definition in the Fees regulations and other guidance in relation to the general right of access under *the Freedom of Information Act* is expected to be broadly similar. The essential point in both cases is that the costs of collecting and creating information are excluded (ie they are attributed to a non-information service).

This definition is not appropriate where the costs of collecting and creating information (which may include both variable and fixed costs) are to be attributed to information services. In such cases, any reference to marginal costs is to either to short run marginal (or variable) costs, or to long-run marginal costs, as defined in economics (see glossary).

**Official publication** is publication by or on behalf of a government department or other body subject to Crown copyright in whatever medium, eg website, paper, etc.

**Products** are information goods, while **services** are the whole process of providing goods and services.

**Raw data** (or Crown copyright "Material", with a capital M, as the HMSO Class Licence puts it) was defined in *the Review of Government Information* as "information collected, created, or commissioned within Government which is central to Government's core responsibilities. The supply of selected components of a raw data package, exactly as in the package is raw data supply, but the supply with further analysis, summarisation etc, or of data at a different level of aggregation to that used by Government, is not raw data for the purposes of this report but is value-added information." See also the supplementary note in Annex 4 of this guidance note. Raw data is not synonymous with raw material, or with unchecked data. For example, the raw material for value-added services may, or may not, be raw data.

**Statutory charging service** defined in the *Fees and Charges and Guide* (paragraph 1.5). arises where there is provision in statute to recover a fee for a service including situations where the service itself is provided by virtue of the Royal prerogative, but for which there is a fee setting power in statute.

**Supply** results in the recipient acquiring the information whether for personal use or for reproduction or re-use (eg in a commercial publication).

**Value-added information** was defined in *the Review* as "information where value is added to raw data enhancing and facilitating its use and effectiveness for the user, for example through further manipulation, compilation and summarisation into a more convenient form for the end-user, editing and/or further analysis and interpretation, or commentary beyond that required for policy formulation by the relevant government department with policy responsibility. It also includes supplying retrieval software, or where work on material is included as part of the compilation of related data, and where there is not necessarily a statutory or operational requirement for Government to produce the material."

## FREEDOM OF INFORMATION ACT

1. This Annex is not intended to be a guide to the *Freedom of information Act 2000*. Guidance on the implementation of the Act is in general a matter for the Lord Chancellor's Department and the Information Commissioner. However, the Annex summarises some aspects of *the Act* which are particularly relevant to charging for information.

### Application of the Freedom of Information Act

2. *The Act* will apply to public authorities listed in Schedule 1 to *the Act* and publicly owned companies as defined in Section 6. Schedule 1 includes any government department, the Northern Ireland Assembly, the National Assembly for Wales, local authorities, and various other public bodies. It is also proposed to extend the coverage of *the Act* by Order by designating as public authorities for the purposes of *the Act* bodies undertaking functions of a public nature or providing under contract with a public authority any service whose provision is a function of that authority. The Act does not apply to Scottish public authorities, but it will cover UK public authorities operating in Scotland and cross-border public authorities. It is for the devolved administration in Scotland to determine policy on access to information for Scottish public authorities, and the Scottish Executive plans to introduce a freedom of information Bill this year following consultation on a draft Bill.

### General right of access to information

3. *The Act* gives an entitlement to any person making a request for information to a public authority to be informed in writing whether the information is held by the authority and, if so, to have the information supplied. (Section 1 – for more detail see also sections 1-17.)

### Exempt information

4. *The Act* includes a number of exemptions from requests under the general right of access to information, either absolute exemptions or exemptions subject to any overriding public interest in disclosure. Some are applicable to particular areas, such as the security services. Those of wider application include:

- information which is already reasonably accessible to the applicant, even though it is accessible only on payment. Published information would normally be reasonably accessible. Information which is available from the public authority on request is also exempt provided the information is made available in accordance with the authority's publication scheme as provided for in *the Act* (see Section 19), and any payment required is specified in, or determined in accordance with, the scheme (Section 21);
- information held, at the time the request for information was made, with a view to its publication by the authority or any other person, at some future date

(whether the date has been determined or not) is exempt provided it was already so held when the request was made and it is reasonable in all the circumstances to withhold the information until the future date (Section 22);

- information relating to the formulation of Government policy is exempt (except that, once a decision as to Government policy has been taken, any statistical information used to provide an informed background is no longer exempt, subject to the prejudice test in Section 36). Personal information subject to data protection, information where disclosure would constitute an actionable breach of confidence, trade secrets and information likely to prejudice the commercial interests of any person (including the public authority holding it) are also exempt (Sections 35,40,41,43).

5. For more details of exemptions and a full list, see Part II of *the Act*.

### **Charges for information under the general right of access**

6. Section 9 of *the Act* says that where information is not exempt from the general rights of access to information, any fee for complying with the request for information must be determined in accordance with regulations made by the Lord Chancellor, except where provision is made by or under any (other) enactment as to the fee that may be charged. Where a fees notice under section 9 has been given to the applicant within the period for reply to their request (normally 20 working days of receiving the request), there is no obligation to supply the information unless the fee is paid within three months.

7. The regulations under *the Act* may provide for:

- no fee to be payable in prescribed cases;
- that any fee should not exceed a maximum specified or determined in accordance with the regulations; and
- any fee is to be calculated as prescribed by the regulations.

8. However, Section 12 of *the Act* provides that a public authority is not obliged to comply with the request for information under the general right of access if the authority estimates the cost of complying would exceed “the appropriate limit”, ie such an amount as may be prescribed by the Secretary of State in regulations. The regulations can also prescribe costs to be estimated for this purpose, and the way in which they are to be estimated, and for the costs of two or more related requests to be combined for the purposes of applying the appropriate limit.. Public authorities which use their discretion to supply the information may charge such a fee as may be determined in accordance with regulations which may provide that the fee is not to exceed a maximum specified in, or determined in accordance with, the regulations, and how for the fee is to be calculated (Sections 12 and 13).

9. Announced government policy is that the regulations will not permit an authority to charge under section 9 more than 10% of the marginal cost of locating and disclosing the information, plus any reasonable cost for disbursements (copying,

postage etc). However, where an authority uses its discretion, under Section 12, to disclose information where the cost of complying is above the “appropriate limit”, it is government policy that charges under Section 13 should be set at a level reasonable in the circumstances. The government is minded to set the “appropriate limit” at about £500, that figure being the marginal cost of locating and disclosing the information. (Freedom of Information: Consultation on Draft Legislation Cm 4355 of May 1999). Marginal costs was assumed to include staff costs (and related variable costs such as computer running time) but to exclude fixed costs of accommodation. Where the costs are above the appropriate limit, Ministers agreed that 10% of the cost may be charged up to and including the limit, and all marginal cost above the limit may be charged.

[paragraphs 7-9 will need to be revised in due course to reflect the actual regulations, once they are agreed and ready to come into force.]

### **Crown copyright**

10. All material originated by government departments and other Crown bodies is subject to Crown copyright protection (but under a separate Act). In some cases, for example if a government department decides that, after the request has been met, the information supplied should in future be published and/or added to the department’s publication scheme, the department may wish to assert Crown copyright when responding to the request for information. [HMSO will supply appropriate forms of wording to accompany information which departments and other Crown bodies supply in response to requests under the Act. They will let Crown bodies have this before the general right of access comes into effect.]

### **Publication schemes**

11. Section 19 of *the Act* states that it shall be the duty of every public authority to adopt and maintain a scheme relating to the publication of information by the authority, to obtain the approval of the Information Commissioner to the scheme, and to publish information in accordance with the publication scheme, reviewing the scheme from time to time as necessary. A publication scheme must:

- specify classes of information which the public authority publishes or intends to publish;
- specify the manner in which information of each class is, or is intended to be, published; and
- specify whether the material is, or is intended to be, available to the public free of charge or on payment.

A public authority shall publish its publication scheme in such a manner as it sees fit.

12. The Information Commissioner may from time to time approve, in relation to public authorities falling into particular classes, model publication schemes prepared by him or some other persons. Using an appropriate model obviates the need for the

Commissioner's specific approval except in respect of any modifications the authority proposes to adopt.

13. The Commissioner may put a time limit on the duration of this approval of schemes or model schemes and may revoke approval giving six months notice of this intention.

### **Departments' publication schemes and charging**

14. There is no indication in *the Act* as to how charges for information issued under a publication scheme are to be determined. This is a matter of government policy and is explained in this guidance note. (The Lord Chancellor's regulations on calculating costs and fees under Sections 9, 12, and 13 of *the Act* apply specifically to requests under the general right of access in Section 1 and, as noted above, information provided under a publication scheme is exempt from disclosure under the general right of access, and hence from the regulations relating to information supplied under that right. The issue of whether information is core government information or sold in competition with the private sector also affects charging and makes the proposals for charging for the general right of access inappropriate for information generally.)

15. However, the concept of the publication scheme has a bearing on exemption from the general right of access (and the Lord Chancellor's Fees regulations thereon). Information which may be covered by a publication scheme includes:

- information published either free of charge or for charge, eg on paper, CD Rom, website, etc;
- information which the public authority holds with the prior intention of providing an information service to the public on request, provided the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme – the equivalent to what *the Code* paragraph 4 called "an existing charged service".
- although the guidance on charging in the main part of this guidance note deals separately with information supplied under a charging power in another enactment (reflecting (Section 21(2)) this too should be covered in a publication scheme for completeness.

16. Three matters (class of information, manner of publication, and whether free of charge or on payment) are an essential part of a publication scheme. However, decisions on what constitutes "class of information" or "manner of publication" have yet to be reached. For example, whether a class of information might be "policy consultation and announcement in White Papers, Green Papers, etc, covering all the department's functions" and/or whether a class might be a specific area of the department's functions. "Manner of publication" is also capable of interpretation in different ways, eg it could mean the format such as website, paper, etc. or it could mean whether available at bookshops (official publications published and distributed

on behalf of a department) or on request from the authority. It could mean something very summary or something quite detailed.

17. A possible example below is given specifically to illustrate potential differences in availability and pricing which might need to be covered in a publication scheme but is not in any way intended as a definitive proposal. The Information Commissioner has started a consultation exercise with a view to publishing guidance on publication schemes and clear criteria for approval of schemes, hopefully around the turn of the year 2001.

<p>Class of information:</p> <p>monthly and annual summary of wotsit statistics.</p> <p>Manner of publication:-</p> <ul style="list-style-type: none"><li>a. Brief summary Press Notice (or similar free handout) available from [...];</li><li>b. A more detailed summary and analysis in the department's defined format available from [eg department's website and/or...printers and bookshops];</li><li>c. A complete set of the raw data from which (a)-(c) were derived, available on request to [...];</li><li>d. Data extracted to the user's specification for data, analysis, interpretation, etc, eg detailed specific commodities and/or countries, available on request to [...];</li><li>e. A book on how you can compile your own wotsit import and export statistics, available from [eg commercial book sellers].</li></ul> <p>A charge, if any:</p> <p>This to be listed for each of the entries under "Manner of Publication" either "free of charge", or for payment, or the price, or the basis for assessing charges, whichever was appropriate.</p> <p>Various additional information might also appear with the essential matters, eg Crown copyright licence required? Where to apply for a Crown copyright licence, eg whether covered by HMSO class licence or not?</p>
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18. In preparing for publication schemes under *the Act*, government departments and other public bodies which have Crown status may be able to draw on work on preparing Information Asset Registers. But they should note that a publication scheme is intended for well defined and pro-actively supplied information products and services, and should not be used merely as a means of evading the charging arrangements for those requests which would be more appropriately met under the general right of access. The Information Commissioner would be concerned if a department appeared to be proposing to misuse its publication scheme in that way, and would be likely to withhold approval of its scheme until the matter was resolved.

## STATUTORY FEES AND CHARGES SERVICES

### Introduction

1. The *Fees and Charges Guide* (paragraph 1.5(i)) defines a statutory service as where there is provision in statute to recover a fee for a service including situations where the service itself is provided by virtue of the Royal prerogative, but for which there is a fee setting power in statute. The normal charging policy applies, ie full cost recovery including depreciation and a cost of capital of 6% unless, exceptionally, the legislation provides otherwise or a different financial target has been agreed with the Treasury in accordance with paragraph 2.9 of *the Guide*.

### Charges should not normally be deliberately set to achieve a surplus

2. Paragraph 4.6 of *the Guide* says that the fee for a statutory service should never be set deliberately to generate a surplus subject, that is, to the terms of the fee setting power (including any Section 102 order (as in paragraph 4.12 –4.15 of the Guide), and to some flexibility around edges described in paragraph 2.3 of the Guide (e.g. a fee may be rounded even though this may produce a small surplus or deficit on the service as a whole). Where the service itself is statutory but it has been concluded that a statutory fee setting power is not a necessary pre-requisite to charging activities, any charges are defined for the purposes of the Fees and Charges Guide as “commercial” rather than “statutory” – although that does not necessarily mean that a profit element will be appropriate.

### Separating services

3. The Government body should separately cost any services which are to be subject to full cost recovery. It should not wrap them up with any service where it has been agreed there shall be a contribution, or subsidy, from government. We advise departments against planning to deliberately use receipts on fees and charges for one statutory service to cross-subsidise another statutory service as, depending on the specific circumstances in each case, this might be thought an unreasonable imposition on the people paying for the service providing the cross subsidy. For the non-statutory services referred to in paragraph 2.6, there should normally be no legal obstacle to cross-subsidisation).

4. As to how a decision is made on whether there should be one or more related services, often for statutory services, the statutory framework will assist, but where, the fee charging powers are expressed generally and flexibly, it is often a question of reasonableness in all the circumstances. Apart from any indication to be drawn from the statutory framework, the main factors to consider would be how far activities fall into one or more distinct and identifiable categories, with broadly similar costs, which it would be fair, and administratively practicable, to treat as a single service separate from other activities. To put together as a single service two or more identifiably separate types of activity, each type of which tends to have its own significantly different typical unit cost, and then to charge recipients a single fee calculated to recover the average overall unit cost of dealing with all types of cases within the omnibus service, could be unreasonable. It could be viewed as levelling

supplementary taxation on recipients of the activity with the lower average unit cost to subsidise those consuming the activity with the higher cost profile.

5. A balance has to be drawn between varying cost and practical convenience. For example, dividing a service into two or more related services so as to give recipients a choice of a faster or fuller but more expensive service, or a slower or lesser but cheaper service may be well worth doing, or it may be a waste of time. It may be that hardly any recipients want one of the services, in which case the administrative cost of splitting the service could be greater than the resulting benefit and it would be better not to split it. But if the variation in cost between the related services was very considerable, it could still seem fairer to give people the choice even though comparatively few people wanted the higher quality service. However, to split a service into too many related services can increase the overall cost of administration and hence the level of fees and may also confuse users of the service.

6. Sometimes, a sensible charging structure may involve dividing what would otherwise be a single service into 'basic' and 'premium' variations for which a different charge would be made unrelated to differences in costs. For example, a service of processing a licence application could be offered at a basic level, where an answer would normally be given within, say, one month of receipt of the application. For a substantially higher fee, the same service might be offered on the basis that an answer would be given within one week. The basic unit cost of processing the application would remain largely the same, so typically those using the premium service would, in practice, subsidise those choosing the 'basic' variant. But, provided the aggregate fees recovered from both types of customer did not exceed the costs of processing all the licence applications, this is often seen as reasonable.

7. However, unless a significantly higher price was fixed for the premium service, everyone would tend to request it regardless of how much they really needed it, thus making it impossible to give such applications priority over routine cases. It is not unreasonable to expect the routine applicants whose cases are delayed by the queue jumpers to get some cost benefit in return. This illustrates how, in particular circumstances, pragmatic structural considerations may affect what is objectively reasonable in deciding at what level of generality to interpret the legal presumption that statutory charges should recover no more than costs (subject to the points made in paragraph 2 above).

8. For further information on statutory fees and charges, see also the Treasury's *Fees and Charges Guide* particularly chapter 4

### **Information services derived from a non-information statutory service**

9. Where information services are derived from another service which is subject to statutory fees and charges, such as issuing licences, registration, etc, it may be appropriate to attribute some or all of the costs of collecting and creating the information to the non-information service.

10. For statutory registers, for example, generally speaking, unless anything in the relevant legislation indicates otherwise, the collection and recording of information may reasonably be seen as an integral part of the regulatory function and the full costs

involved (as defined in paragraph 2.14 in Chapter 3 of *the Guide*) will form part of the total costs in respect of registration to be recovered in charges to those registered. Total costs could also reasonably be thought to include any free literature or website information to those applying for registration on matters such as how to register, and perhaps some overall statistics on numbers registered as part of the cost of managing the registration function and therefore of the cost of registration unless the relevant legislation was more specific.

11. It may be possible to use a Section 102 Order to put beyond doubt the extent of information which can be covered in registration or other fees and charges under specific legislation (see *the Guide* paragraphs 4.12-4.15). But the question of what information could fairly be taken into account in charges to those being registered, or to third parties receiving information in the statutory register concerned would need to be carefully considered first.

12. Subject to the terms of the specific legislation, information services based on the records, but which go beyond the needs of those being registered or the reasonable requirements of the management of the registration service itself, should be regarded as separate services and separately costed before charges are set.

13. The effects of this are that the costs of collecting the information required, as part of the registration function would be borne by those registered. The full costs of the information services over and above that, including the appropriate level of depreciation and cost of capital, would be borne by the users of the information services. To the extent that the same fixed assets are used for both non-information and information services, capital charges (i.e. depreciation and other costs of consuming capital as it is employed) should be allocated proportionate to usage in the different services. Likewise any other shared cost items should be allocated between the different services.

## PRODUCT (AND SERVICE) DIFFERENTIATION

In identifying the products to offer, points to consider include whether there are products or services which:

- a) are information which could be supplied to other persons to enable them to develop their own value-added products and services. The simplest form of product could be the entire “file” of basic items/observations collected by a government body, but there could be other products in which, eg a selected material from the “file” was identified for particular users;
- b) are value-added products in which information has been further analysed, interpreted, etc;
- c) could be further sub-divided into products or services:
  - where a specific user or principal users have, or could, define what is collected or created or how it is presented to meet their particular requirements;
  - which were or could be defined by the government body, but would be specific to a few users who would find them so useful as to be willing to pay more than average for them;
  - may offer interactive access to the government body’s own database;
  - may be required more quickly by some users than others, or may require more frequent update for some users, so that the initial product could be offered as several products, some offering a more ordinary service and others a premium service;
  - are likely to have appeal to a wider market and could be divided into a range of standardised products defined by the government body at a standard price per product (and preferably with a standard form of application for the service available on the government body’s website).

See also Annex 2, paragraphs 3-7 on statutory charging services.

## REVIEW OF GOVERNMENT INFORMATION

1. A *Review of Government Information* was carried out during the Government's Spending Review 2000 as part of the Cross-Cutting Review of the Knowledge Economy, co-chaired by Andrew Smith, the Chief Secretary to the Treasury, and Patricia Hewitt, DTI Minister for Small Businesses and e-Commerce. While this touched on initial publication of information, the key issue for the review was the licensing of the reproduction and reuse of Crown copyright material.

2. New plans to boost the knowledge economy by improving the way government information can be acquired and reused by publishing and internet businesses were announced by Ms Hewitt on 6 September. The full report of *the Review* was placed in the Treasury's public internet site in December 2000 (<http://www.hm-treasury.gov.uk/sr2000/associated/index.html>). All the recommendations from *the Review* were accepted and should be read as government decisions.

3. The key decisions from the Review of Government Information relevant to this guidance note are listed below. For definitions see the box on page 10 and the glossary.

### Recommendation 1. Government trading funds

- a. Government trading funds which trade information should improve their pricing and dissemination policies.
- b. A policy of encouraging price differentiation through product differentiation is appropriate. This would see fixed costs recovered equally between users of the same services but on a variable basis between services according to the type of service.

### Recommendation 2. Elsewhere

- a. In departments and agencies (other than trading funds) there should be a move to an immediate policy of marginal cost pricing (unless, in any specific case, a statutory enactment indicates otherwise). This should apply to the licensing of raw data but not where the government adds value to material.
- b. Marginal costs be defined as costs, including costs of staff time, reasonably incurred in locating and retrieving the information, and giving effect to the requesters preferred medium for the reply (which could be different to that in which the department currently held it); and also the disbursements directly incurred in communicating the information, eg printing, postage etc. (ie excluding the costs of collecting, creating or commissioning Government information which is central to Government's core responsibilities).

### Recommendation 3.

All government bodies, including those for whom the general rule of marginal cost pricing applied in relation to raw data should still be free to develop value-added services charged at market prices. This should preferably occur through partnership with the private sector under the Treasury's initiative *Selling Government Services into Wider Markets* and provided that this can be achieved in a transparent manner and in a way which creates a level playing field among all market participants.

#### Recommendation 4.

The draft class licence should be finalised in the light of the other recommendations of the review, agreed by the Crown copyright user group and implemented as soon as possible.

#### Recommendation 5. Annual fees

- a. Consideration should be given to levying annual fees where a data set or information source has been particularly expensive to collect, or where government has gone beyond its own needs - so that the commercial re-use of this data is subject to a fixed annual fee set at a level designed to make a contribution to overhead costs but preclude the necessity of negotiations.
- b. If this approach is adopted we think fees should be set on a data-set specific basis and in the range of around £1,000 to £10,000 and that they should only be levied with the prior agreement of HMSO.

#### Recommendation 7. HMSO

- a. A repositioned HMSO should be established as the regulatory body for government content.
- b. It would have the following functions:
  - act as a guide around departments and processes for private sector companies;
  - promoting dialogue with the private sector; ensuring a level playing field; help to ensure that departments comply with requests to release data, and that the quality of services are the same for private and public sector customers;
  - in due course to provide a single point of licensing for most Crown copyright.
- c. The new body should work closely with an advisory panel of representatives drawn from the public and private sectors.
- d. The new body will need to develop:
  - the ability to require minimum standards of departments, including abiding by a Fair Trading Charter;
  - a new complaints procedure which provides real and credible remedies where departments fail to adhere to their published service standards.

#### Recommendation 9.

Delegations of authority for the reuse of information, except for trading funds, should be rescinded on a timetable in line with the introduction of the new charging and licensing arrangements.

#### Recommendation 10.

The new regulatory body should develop proposals for a licensing task force comprising its own and Treasury staff whose remit will be to work closely with individual agencies (starting with the trading funds) to bring charging policies and licences into line with those set out in this report.

Recommendation 11.

All government bodies should meet the HMSO timescale for the creation of their information asset registers, and should be tasked with speeding-up where necessary to achieve this, so that these can be cross-searched from the HMSO “inforoute” site.

Recommendation 14.

There should be a presumption in favour of public information being made available in digital format and a prohibition on exclusive arrangements between departments and agencies and the private sector for the digitisation of public sector information where this unreasonably restricts access and/or commercial reuse of the information.

**SUPPLEMENTARY GUIDANCE ON DEFINITION OF RAW DATA**

1. Raw data central to the Government's core responsibilities is likely to be held by Government in one or more "data packages" whose coverage and format has been determined by Government, eg:

- strings of basic disaggregated data or observations as collected by the government body or supplied to it by other organisations or persons, and before analysis, compilation, editing, etc. However, some disaggregated records include information which is sensitive, eg because it was supplied on a personal or commercial-in-confidence basis, which should be respected, and some degree of aggregation used to anonymise the data before it can be circulated, even within Government;
- the level of aggregation in which the basic package of information material is supplied for use for Government policy with any analysis or interpretation supplied for that purpose;
- material which consults the public about proposed government policy, sets out policy decisions and provides guidance on how policy will be implemented.

2. For charging purposes, raw data does not include anything which is:

- defined by an external user to a different coverage to that used for Government's core responsibilities, unless it is merely an extraction from the raw data package with no additional interpretation, aggregation, etc. (Although the service of additional interpretation, aggregation, etc uses the same raw data as for government policy, it is defined as value-added because it could equally well be provided by an external purchaser of the complete raw data, so the possibility that there may be private sector competitors using the same information to provide a similar service should be taken into account in deciding charges);
- not central to the Government's core responsibilities, but is offered by Government as an additional service including services where similar information is independently collected or created by the private sector from non-Crown sources for sale by the private sector.
- commissioned by a private sector organisation from a government establishment for private sector use, for example, if the private sector wanted to take advantage of government testing facilities for testing a prototype. In such cases, the private sector organisation could be allowed to own the intellectual property rights and any Crown copyright assigned to it.

3. The use of the term "raw data" is not synonymous with raw material or with unchecked data. The term "raw data" was used for information central to Government's core responsibilities to distinguish the underlying material from typographical format. In a finished publication, the whole can be treated as raw data

where the department or agency owns all rights, including typographical where appropriate, but where the private publisher owns the typographical rights, the information excluding the typographical format (e.g. as supplied to the publisher) is the raw data to be released.

4. The raw material in value-added services may, or may not, be raw data. Examples of raw material which is not “raw data” are where material has been commissioned especially to help the public but is not needed for government policy; or where similar information is independently collected or created by the private sector from non-Crown sources (see paragraph 2 above).

5. “Material” is used in the HMSO Class Licence as an alternative name for raw data. But there too it should not be confused with references to material in its more generic sense. The key point about “raw data” (or “Material”) is that it is information central to Government’s core responsibilities.

## COMPETITION ACT 1998

1. Articles 81 and 82 of the EC Treaty (“Articles 81/2”) prohibit anti-competitive agreements and abuse of a dominant position which may affect trade between member states. These are directly effective and government bodies need to comply with them. In addition, the Competition Act 1998 (‘the Act’) introduced two very similar prohibitions into domestic law (referred to in the Act as the “Chapter I and Chapter II prohibitions) which apply in cases where there is an effect on trade within the United Kingdom. The chief enforcement body for the Act is the Director General of Fair Trading (DGFT); some sectoral regulators like OFTEL also have enforcement powers in relation to regulated matters.

2. The Act provides that to the extent possible the domestic prohibitions are to be interpreted in accordance with the jurisprudence on Articles 81 and 82. Both the EC and the Act prohibitions apply to “undertakings”. Broadly speaking, an undertaking includes any natural or legal person that is engaged in economic or commercial activity relating to goods or services, regardless of its legal status and the way in which it is funded. However, public sector bodies may be capable of falling within this definition, to the extent that they are carrying on such activity.

### The Chapter I prohibition

3. This is based on Article 81. It is as set out in section 2 of the Act and covers agreements between undertakings that have the object or effect of preventing, restricting or distorting competition. Examples of the sorts of agreements that will be caught by the Chapter I prohibition (unless excluded by or exempted under the Act – see paragraphs 5 and 9 below) are those which:

- Directly or indirectly fix purchase or selling prices or any other trading conditions;
- Limit or control production, markets, technical development or investment;
- Share markets or sources of supply;
- Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- Make the conclusion of contract subject to acceptance of unrelated conditions.

4. The Chapter I prohibition applies where the agreement in question has an ‘appreciable’ effect on trade. As a general rule, the DGFT has said that an agreement is unlikely to have an appreciable effect where the combined market share of the parties does not exceed 25 per cent. However, agreements to fix prices, impose minimum resale prices or share markets may have an appreciable effect even where the market share of the parties falls below 25 per cent. This also applies where the

agreement is one of a network of similar agreements that have a cumulative effect on the market.

5. Certain agreements may be exempted from the Chapter I prohibition if they meet the criteria set out in section 9 of the Act, which are modelled on the exemption criteria of Article 81(3).

## **The Chapter II prohibition**

6. This is based on Article 82, and is set out in section 18 of the Act. It covers conduct by one or more undertakings which amounts to abuse of a dominant position in a market within the United Kingdom. The prohibition is of the abuse, not the dominant position. So to determine whether it has been breached it is necessary to establish it first, whether an undertaking is dominant in a relevant market and, if so, second, whether it is abusing that dominant position.

7. To determine the relevant market will generally involve identifying two dimensions: the product market, and the geographic market. What constitutes a dominant position in that market will require analysis of all the circumstances of the particular market. One indicator of relevance, however, is likely to be the market share of undertakings. The Act does not set any market share thresholds for dominance. European Court of Justice case law suggests a presumption of dominance in the absence of evidence to the contrary if an undertaking has a market share persistently above 50 per cent. The Director General of the Office of Fair Trading considers it unlikely that an undertaking will be individually dominant if its market share is below 40 per cent, although dominance could be established below that figure if other relevant factors (such as the weak position of competitors in that market) provided strong evidence of dominance (See OFT guidance on the Chapter II prohibition.)

8. Abusive conduct generally falls into one of the following categories:

i. Conduct which exploits customers or suppliers, for example:

- Excessively high prices (to establish abuse prices would have to allow profits which significantly and persistently exceed the undertaking's cost of capital);
- Discriminatory (different) prices, or discrimination in other terms and conditions either for the same product to different customers (except for objective reasons such as differences in quality or quantity or other different characteristics in the items supplied, or the same prices to different customers where the costs of supply were very different;

ii. Anti-competitive behaviour which removes or limits competition from existing competitors, or excludes potential new entrants to the market, eg

- Predatory behaviour where prices are set so low as to threaten the competitive process. The OFT has given broad guidelines based on

judgements of the European Court that indicate that the price of the product should never be set:

- below the average variable cost of production, or
- above average variable costs, but below average total costs in any case where the pricing decision could be shown to be intended to eliminate a competitor (there could, of course, be other reasons for such pricing decisions eg short term special offers to move excess stock);
- Certain types of vertical restrictions – various common business practices, such as only supplying one distributor in a particular territory, can be an abuse, but only if they lead to a reduction in competition;
- Refusing to supply existing or potential competitors without objective justification (objective justification could include eg customer's poor creditworthiness, or supplies temporarily out of stock).

## **General**

9. Certain cases are excluded from the Chapter I and Chapter II prohibitions. For example, the Chapter I prohibition does not apply to an agreement made in order to comply with a specified legal requirement; or the Chapter II prohibition to conduct to the extent to which it is engaged in an order to comply with a specified legal requirement. Other exclusions are set out in the Act.

10. The DGFT has issued a series of guidelines on the Act. All the guidelines can be ordered or downloaded from the OFT's website [www.of.gov.uk](http://www.of.gov.uk).

11. Departments should take their own legal advice as appropriate, and if there are competition concerns in respect of their commercial activities they should consult the DTI. Departments should always consult the DTI before asserting that they are an "undertaking" which may have wider implications for other government bodies.

## TRADING FUNDS

1. The key recommendations of *the Review of Government Information* for charging by trading funds were recommendations 1, 3, and 9 (see Annex 4). But it recognised that each trading fund is different. A one size fits all solution is unlikely to provide a workable basis for the future development of each organisation. Trading funds can be divided into three main groups:

- Group A. Companies House, HM Land Registry, Patent Office, and Registers of Scotland where the main function is a registration activity under specific legislation, and with a specific charging power under that legislation to charge for registration (although other funds may also have some statutory registration responsibilities). The supply of summary or other information from the registration records to third parties may be an increasing by-product(s);
- Group B. The Meteorological Office, Ordnance Survey, the UK Hydrographic Office, etc, where the collection, analysis, interpretation, etc and supply of information is the main function and gives rise to a range of information products;
- Group C. Others such as the Royal Mint or the QEII Conference Centre, whose main functions (or “products”) are clearly not the collection and supply of information.

### All trading funds

2. All trading funds will need to consider:

- the implementation of recommendations of *the Review* must be set within the context of a business plan to achieve the trading fund’s financial objective under Section 4((a) of the Government Trading Funds Act 1973 (break even targets), and such further financial objectives as the Treasury has under Section 4(1)(b) by Minute laid before the House of Commons , indicated as having been determined by the responsible Minister ( with Treasury concurrence) to be desirable of achievement, usually a return on capital employed target. There may also be a need for some funds to consider additional performance targets, such as cost minimisation targets; while others may have such targets already;
- whether there is any other enactment relevant to the trading fund’s activities which has implications for the pricing of its information and may override or limit the application of the recommendations from *the Review*. This is most likely to be relevant to the trading funds in Group A – those where the main function is concerned with statutory registration requirements. But it could also affect any other trading funds where there is a statutory charging power (or bar on charging) affecting the collection or creation of information or its supply to others;

- the general guidance in paragraphs 1-32, 35-38 and 41-43 of the main text of this guidance note.

### **Funds which trade information**

3. It is suggested that private sector providers use product differentiation and price discrimination so that users of some services pay something approaching short run marginal costs. Among other means, the providers do this by passing most of the fixed costs of production to other users of their “high value-added” services.

4. For information for which a trading fund charges, recommendation 1 of *the Review* means that the trading fund should consider how each of the products identified should be priced differentially so that fixed costs are recovered equally between users of the same product (or service) but on a differential (or variable) basis between product according to the type of product.

5. Products which are higher cost, higher quality, lower sales per product unit (e.g. books with a low circulation) should attract a higher price per unit compared to those with lower costs, or with wider market appeal. Where there is a wider market appeal, the volume of sales is expected to enable total costs including a return to on capital employed to be recovered even though the proportion of fixed costs recovered with any one unit may be much smaller than for products attracting a higher price per unit. The example below could apply to a new product or to the additional cost of extending fixed assets and other costs to increase output.

	Product A	Product B.
Total cost: Fixed	£200	£200
Variable	£100	£600
Total	£300	£800
Expected sales	100 units	600 units
Price per unit	£3	£1.34
Variable cost per unit	£1	£1
Unit contribution to fixed costs	£2	£0.34

6. There is no one contribution to fixed costs which is right in every case. Trading funds need to consider what is reasonable in the light of all the circumstances.

### **Funds where HMSO retention of licensing may make sense**

7. A few trading funds in Group C, in particular, may consider that their functions and the place of information in their operations is such that a policy on determining charges for information and licensing the use and reuse should be based on the guidance to departments and agencies (other than trading funds) and HMSO should be asked to retain responsibility for the licensing. This need not imply that any data they have collected is peculiar to Government, but simply that trading

information is a minor aspect of their operations that it makes sense to use the HMSO's licensing services. If so, they can explain to HMSO why they consider this and ask HMSO to handle the Crown copyright licensing for them, provided they can assure HMSO that:

- The fund is not and does not expect to be involved to any significant extent in the trading of information;
- The information they propose to treat as if it were "raw data" is comparable to departments' "raw data" in the sense that it is right to allocate the cost of collection and creation of the information to a non-information service, and to assess any charges on that basis;
- They have separately identified any value added data;
- The policy is consistent with their business plan to achieve the trading fund's financial objectives;
- There is no enactment relevant to the fund's activities which would override the charging policy in *the Review*.

**CHARGING ACCORDING TO THE INTENSITY OF COMPETITION**

A balance between the interests of purchasers and competitors is most easily achieved where there are many buyers and sellers in the market. Where the government body may have few competitors, it should have regard to the guidelines below:

- where a body provides a risk-free commercial (non-statutory) product or service to the public (including industry where applicable), perhaps in support of an activity required by statute, and there is no competition from the private sector, it is appropriate for the body to achieve an average real return on capital of 6 per cent (ie to charge a cost of capital at 6 per cent);
- for low risk commercial activities typical of most public sector outputs, and where there may be competition from the private sector, commercial sales to wider markets should achieve an average real return of at least 8 per cent;
- where there is competition and the markets will bear a higher return, or if the activity is of medium to high risk and the private sector faces a significantly higher cost of capital, a return of more than 8 per cent may be appropriate.

## GLOSSARY

**Act.** *The Freedom of information Act.*

**Agencies.** In this report agencies includes all agencies which are, or are part of, government departments, except trading funds. Any non-departmental public bodies which are subject to Crown copyright may also be treated as agencies for the purpose of the recommendations of this report. (However, most NDPBs, which are set up to be at arm's length from government departments, are not subject to Crown copyright.)

**Class licence.** A class licence sets out standard terms and obligations enabling the reuse of a particular class or category of material

**Code.** *Open Government Code of Practice on Access to Government Information.*

**Crown copyright.** All material originated by Government is subject to Crown copyright protection under the Copyright, Designs and Patents Act 1988. However, local authorities, and most non-departmental public bodies, are not part of Government for Crown copyright purposes. Copyright is effectively the mechanism which controls how people can re-use or copy material. This means that if anyone wishes to photocopy, publish, adapt, download onto a computer system or sell material which is protected by copyright, they need the consent of the legal copyright holder. Consent is usually in the form of copyright licence, except where the requirement for a licence has been waived.

**Crown copyright user group.** A group including representatives drawn from the information industry and other groups with an interest in using Crown official information.

**Crown copyright waiver.** Categories of material on which the Crown asserts its copyright but waives it and which is not subject to formal licensing or payment.

**Departments.** UK Government departments which have Crown status. Government departments may be partly or wholly executive agencies or trading funds, but in the recommendations of this report, "departments" should be read as excluding trading funds.

**Fee or charge.** See box on page 14.

**Fixed costs.** Those costs which do not vary with the level of activity in the short run.

**Full cost pricing.** Full cost pricing means that charges are set to recover the full resource costs of the activity. For government information, this would include the costs of collecting the information, assembling it, etc, as well as the costs of communicating the information (unless the costs of collecting and creating the information are attributable to a non-information service).

**Government bodies.** In the context of this report, this means those government bodies protected by Crown copyright.

**Guide.** Treasury's *Fees and Charges Guide*.

**HMSO. Her Majesty's Stationery Office.** See also box on page 14.

**Information Asset Register (IAR).** A list of information resources held by the UK Government. It can be accessed via the HMSO website <<http://www.inforoute.hmso.gov.uk>>

**Licences.** Copyright is infringed unless the copyright owner permits or licenses the use of any of the acts restricted by copyright. A licence is a permission by the copyright holder to reproduce or reuse the protected material. In the context of Crown copyright, licences may be used for the re-use of material which has been previously published in printed format or, for example, for access to data in electronic format (which may, or may not, also be published in printed format). It may apply to raw or value added information.

**Marginal costs.** For definition used in *the Act* and *the Review* see box on page 14. In economics, marginal costs are assumed to be the cost to society of supplying another unit. The long run marginal cost is the full extra cost (both fixed and variable) of providing a further unit of output. Long run marginal cost equals average cost where there are constant returns to scale. But when there are increasing returns as the scale of the operation increases long run marginal cost is less than average cost and to recover total costs it would be necessary to set prices to recover long run marginal cost plus the difference between that and average cost. Short run marginal cost measures how variable costs change when output alters.

**Official publication.** See box on page 14.

**Products and services.** See box on page 14.

**Published information.** Published information is material issued or distributed to the public in any format (even though in practice it may of interest to relatively few) whether free of charge or for payment. It can include both "raw data" and value added information.

**Raw Data.** See box on page 14.

**Review.** *Review of Government Information*.

**Statutory charging services.** See box on page 14.

**Supply.** See box on page 14.

**Trading funds.** A trading fund is a government department, or an executive agency or part of the department, which has been established as such by means of a Trading Fund Order made under the Government Trading Funds Act 1973. A trading fund can only be established with Treasury agreement. One may only be set up where more than 50 per cent of the trading fund's revenue will consist of receipts in respect of goods and services provided by the trading fund, and where the responsible Minister and the Treasury are satisfied that the setting up of the trading fund will lead to

“improved efficiency and effectiveness in management of operations”. (These are statutory conditions.) The significance of a trading fund is that it has standing authority under the 1973 Act to use its receipts to meet its outgoings. Some trading funds have, as their main function, the collection and supply of information to both public and private sectors; others have not.

**Value-added information (or data).** See box on page 14.

**Variable costs.** Those which vary with the level of activity in the short run (the period over which some factor such as capital is fixed).

**LIST OF CERTAIN GOVERNMENT PUBLICATIONS TO WHICH REFERENCE IS MADE**

Cross Cutting Review of the Knowledge Economy: Review of Government Information Final Report, December 2000 (HM Treasury, website <http://www.hm-treasury.gov.uk/sr2000/associated/index.html> )

The Fees and Charges Guide, 1992 (ISBN 0-11-560043-4, The Stationery Office Ltd).

The Freedom of Information Freedom of Information Act 2000 (ISBN 0-10-543600-3 The Stationery Office Ltd, or the website <http://www.hms.o.gov.uk/acts/acts2000/20000036.htm#aofs> )

Open Government Code of Practice on Access to Government Information, Second Edition, 1997 (Home Office website <http://www.homeoffice.gov.uk/foi/ogcode981.htm> )

“Selling Government Services Into Wider Markets: A Policy and Guidance Note”, July 1998 (HM Treasury, website <http://www.hm-treasury.gov.uk> )