

## JISC NETWORKING

### Guest Access to JANET

#### Issue

1. The issue of under what circumstances an organisation with a connection to JANET may allow individuals other than its members to access JANET is causing confusion within the JANET community. The recent review of the JANET Acceptable Use Policy has highlighted this issue as one requiring clearer guidance.

#### Recommendation

2. Members are invited to **DISCUSS** the issues noted in this discussion paper. JANET(UK) will take into account any outcome of this discussion in providing the guidance requested.

#### Financial and Significant Risk Implications

3. There are no financial implications to JANET or JCN budgets arising from this paper.
4. In order to manage the legal risks to JANET(UK) as operator of JANET, it is essential that the network is operated in a manner that complies with existing and forthcoming legislation. Clear policy guidance is a component of that compliance.

#### Paper Classification

5. Strictly confidential. The area of JANET policy discussed by this paper is complex and cannot be fully understood outside its proper context. JANET(UK) proposes to update several pieces of JANET documentation to help provide greater clarity. Until these updates have been published, publication of this paper is likely only to increase uncertainty.
6. After publication of the relevant JANET documentation, full disclosure of this paper would be possible.

#### Further Information

7. Further information can be obtained from Bob Day (Bob.Day@ja.net) or Andrew Cormack ([Andrew.Cormack@ja.net](mailto:Andrew.Cormack@ja.net)).

#### Background

8. There are three policies which define who may have a connection to JANET, and how they may use it once connected:
  - the *Connection Policy* – defining which categories of organisation are eligible for connection to JANET, and for what (broad) purposes they may use it;
  - the *Acceptable Use Policy* – defining what behaviour is required of an organisation corporately, and of its members individually, once connected to JANET (a “**User Organisation**”);
  - the *Security Policy* – defining a User Organisation’s obligations in respect to maintaining the security of JANET, with respect to the IT systems it deploys and the behaviour it requires of its users.
9. The subject matter of this paper falls within the scope of connection policy. It covers the legal implications of providing access to JANET by a User Organisation to those it would not categorise as its members.

10. It is worth noting that the discussion necessarily needs to consider the activities of *all* organisations using JANET, and not just the HE/FE sector. In particular, it needs to recognise the increasing use of JANET by the local authority sector. Nearly all local authorities now connect to JANET for the purpose of delivering education services, either to schools networks for which they are responsible, or for lifelong learning – or both.
11. In addition, a growing number of local authorities are using JANET for delivery of other public services for which they are responsible. This often makes economic sense given that the connection has been installed for education – the largest demand on bandwidth of all local authority services. The last substantive revision of the JANET Connection Policy recognised precisely this development. It is also very much in line with the government's encouragement to the public sector to improve efficiency by sharing and re-utilising existing facilities, rather than installing parallel facilities and maintaining an unnecessary separation.

## Discussion

12. There are two areas of current law that impact upon the provision of JANET by a User Organisation to other than its members: that relating to JANET's status as a private network, and that relating to the application of state aid.

### *JANET's Status*

13. The *Regulation of Investigatory Powers Act 2000 (RIPA)* defines a public telecommunications service as follows:  
"any telecommunications service which is offered to, or provided to, or to a substantial section of, the public in any one or more parts of the United Kingdom."
14. There is clearly considerable room for interpretation of these words. JANET(UK) obtained OFCOM advice some years ago. This was that JANET would not be considered a public network, essentially because it does not offer services to the public. It offers services to that (significant) part of the UK population who are members of the User Organisations to which it connects. These individuals' membership is defined by their receipt of teaching and learning services from the User Organisation or their activities in support of this, or by virtue of their engagement in research activities sponsored by the User Organisation<sup>1</sup>.
15. If JANET were to be judged to be a public network, provisions within the *RIPA* that do not apply to private networks would come into force. The principal of these is that the Home Office would have the power to intercept traffic on JANET, via installation of its own equipment within the network. More generally, there would be an increased emphasis on the privacy of a user's transactions across the network.
16. The EU Data Retention Directive, due to come into UK law in 2009, requires all public network operators to implement systems of call and similar session logging, and to retain the logs for up to two years. At present the Home Office maintains with the public network operators concerned a voluntary code, and it expects that the implementation of the Directive will not materially affect this current practice – the provisions will be very similar. However, operating a private network, JANET(UK) does not implement this code, so there would be a significant change to its operations if the provisions were to apply to JANET.
17. There is also at present a stated commitment to meet the marginal costs incurred by an operator in implementing such systems, but this will not be an obligation on the Secretary of State, merely the power for him or her to provide such public funding.
18. By practice, but not presently included in the Directive<sup>2</sup>, transit networks have not been required to implement such logging, as it is not generally technically feasible. Instead, the

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<sup>1</sup> It is worth noting that the OFCOM advice applies equally to the User Organisation's own network.

<sup>2</sup> The European Commission is being lobbied by ISPs to include this provision.

obligation may be passed onto the organisations which use the transit network. JANET is a transit network, so in this case the obligation would be passed by JANET(UK) to individual User Organisations. In any event the User Organisation would acquire the obligation, as the entity that could identify the individual user. It is not a matter of whether JANET(UK) or the User Organisation was responsible, but whether both were.

19. The other applicable piece of UK legislation is the *Communications Act 2003*. The implications of public network status in this context are relatively minor for a data network – there are more onerous provisions if JANET were to offer public telephony services. The most significant impact upon JANET at present would be that access to JANET network data by those engaged in network research would be curtailed. On a private network this is permissible where there is a value to JANET(UK), and there will normally be an identifiable benefit from in such research. On a public network access could only be granted to those researchers who were employed by, or contracted to JANET(UK) for the purpose of the research. Even then, there would be greater limits on the aims of the research.
20. The consequences, as summarised above, of JANET being judged a public network are not so onerous that this status could never be contemplated, but such a step should clearly only be taken after due consideration, and in a properly managed manner. JANET(UK) believes that at present the advantages to the JANET community of private network status are significant enough to be worth retaining. This clearly has implications as to the degree to which a User Organisation can be permitted to offer, on a substantial scale, JANET access to an individual who could reasonably be regarded as a member of the public.

#### *State Aid*

21. Any use of public (state) funding which distorts, or threatens to distort, the market in any member state of the EU is *prima facie* unlawful state aid. In some circumstances such state aid is lawful (“compatible” state aid); otherwise if it is found to be unlawful penalties can be applied to unwind it and restore the market to its previous state.
22. There are a small number of generally applicable derogations, but in practice, guidance has to be sought from the European Commission as to whether any particular proposal to use state aid in a particular situation would be compatible.
23. Recent guidance has confirmed that public funding used in the aggregated procurement and operation of broadband networks within the public sector is compatible state aid, provided that the goods and services required to operate the network are procured in accordance with public procurement regulations, and that the resulting network serves the public sector only. If it were to serve the private sector, or the individual consumer, the compatibility may no longer apply<sup>3</sup>.
24. JANET is maintained using public funds, so must comply with state aid legislation. If it were ever proposed that it became available to any significant degree outside the public sector, JANET(UK) would seek advice from DBERR, which would probably in turn seek Commission guidance. At a minimum, JANET would have to offer such services at the market rate, but this in itself would not be a sufficient justification for the state aid involved.

#### *Application to a User Organisation’s Guests and Visitors*

25. Where a public-sector User Organisation has permitted a non-member to use its JANET connection for reasons associated with the remit for which it receives public funding, this appears to be consistent both with JANET’s status as a private network, and with state aid guidance. For the purpose of this discussion, such an individual will be termed a “**guest**” of the User Organisation.

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<sup>3</sup> This guidance was obtained by the Welsh Assembly Government as part of the PSBA procurement, and was subsequently used by the DTI to advise JANET(UK) and Becta on the provision of Internet access to local authorities under DfES funding.

26. The remit of an educational User Organisation encompasses teaching and research, and could also reasonably be assumed to include its outreach activities in connection with those activities. As noted above, the remit of a local authority would not be limited to education; but would include those other services the authority provides to the public.
27. In either case, where a User Organisation invites a guest to use JANET, this seems unlikely to breach state aid rules; nor does it seem likely to call into question JANET's status as a private network. Examples might include a university providing JANET access to delegates at an academic conference it is hosting, or a local authority providing in a public building facilities for a resident to access a public-service website or the Internet. In this latter case, the local authority may well be using its JANET connection to provide the wide-area connectivity required<sup>4</sup>.
28. However, if a link between this remit and the individual's use of JANET cannot reasonably be established, either or both of these may be breached. For the purpose of this discussion, such an individual will be termed a "**visitor**" to the User Organisation.
29. It is possible to argue that a User Organisation's remit today extends beyond its core public-service aims, and that it is encouraged to "sweat its assets" by simply generating revenue by their use for other purposes. If the User Organisation were to provide JANET access in such circumstances (for example, as part of a holiday accommodation package available to the public), it would be difficult to argue that this was compatible state aid within the present marketplace for ISP services. Similarly, it would be difficult to argue why this was other than JANET operating to some degree as a public network<sup>5</sup>.

#### *Consequences for a User Organisation*

30. JANET(UK) believes therefore that it is necessary to distinguish between these types of use of JANET – i.e. between guests of and visitors to a User Organisation. As a consequence it needs each User Organisation to consider its policies in this respect, and to act accordingly. In particular, where a non-member requires Internet access and it is not reasonably possible to assert that the individual is a guest of the User Organisation using the definition above, JANET should not be used, and a commercial ISP connection should be procured.
31. In practice, there are two common categories of use of JANET by guests and visitors. One is use from a hall of residence, or similar accommodation which the individual is occupying. The other is "walk-in" access, for example to a library or Internet café facility. In each case there are technical or administrative steps that the User Organisation might take to distinguish between guest and visitor. For example, on a campus wireless network different SSIDs might be advertised, and only those identified as *bona fide* guests placed on a VLAN connected to JANET. Alternatively, if access is via a portal, the process of user authentication could trigger different onward connectivity.
32. Failing technical solutions, an administrative approach might be taken. For example, the date might be used – access from a student bedroom might be to JANET in term-time and whilst the room is being used by a conference delegate, but to a commercial ISP's network outside these times. Such methods need not be 100% perfect. A marginal amount of JANET use by other than a *bona fide* guest is unlikely to present a problem, provided that it could be shown if necessary that reasonable care is being taken by individual User Organisations.

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<sup>4</sup> In practice, if a local authority is using public funds lawfully to engage in any such activity, doing so over JANET is unlikely to pose an additional state aid risk. However, such programmes, if extended to a substantial part of the population served by the authority, could take JANET closer to the *RIPA* definition of a public telecommunications service.

<sup>5</sup> In this latter case, there could be an argument of scale – to meet the *RIPA* definition of a public telecommunications service the services would need to be offered to a "substantial section of the public".

33. These considerations seem likely to impact more upon an educational institution with its more quite specific remit, than a local authority with its wider public-service remit. Nevertheless, it is worth this analysis being undertaken by each User Organisation, if for no other reason than that the considerations that apply to the status and funding of JANET will apply equally to the User Organisation's own network and its funding.

*Clarifications to JANET Policy Documents*

34. To aid in this area, JANET(UK) proposes to make the following updates to JANET policy documents.
35. Before publication, the recently revised AUP will be amended to use the terms "guest" and "visitor" in accordance with their definitions within this paper. It will be clarified that all such access is controlled by the Connection Policy and associated Sponsored and Proxy Connection licences. The text (Note 7) as presently drafted can be read to imply that the AUP controls this aspect of JANET policy. This is not the case.
36. The Sponsored Proxy Connection licences will be updated to make it clear that the hosting organisation's outreach activities are legitimate aims of the organisation. This is to facilitate a User Organisation's Business & Community Engagement activities.
37. The JANET Factsheet on guest access will be reviewed and updated. Following on from this and for publication later in 2008, case studies will be documented to show how a number of individual User Organisations have to date dealt with the issue of distinguishing between guest and visitor, and providing different types of Internet access as a consequence.
38. The Connection Policy itself will be reviewed to ensure alignment with the above. There is also a case for a wider review of the Connection Policy, as it is some time since this was last visited. The results of this review will be brought to a future meeting of the JCN.

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