The Open Data Ottawa License:

A Review and Recommendations

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Introduction

The City of Ottawa's Open Data License represents a laudable effort to improve access to government information. Open licenses empower Ottawa's taxpayers, academics, technology workers and even government itself to innovate with data, making new, useful, and unanticipated applications that

In this Report, CIPPIC critically examines the Ottawa Open Data License with a view to recommending options for improving the ability of the license to meet the needs of the user community who will benefit from the license.

I. Issues

1. What alternatives exist to the City of Ottawa's current open data license?

2. What are the problematic terms in the existing license, and how could any alternatives address these problems?

II. Facts

Background on the City of Ottawa Open Data License

- In May 2010, the City of Ottawa Corporate Services and Economic Development Committee tabled a report to recommend that City of Ottawa data be declared "open".

- The City of Ottawa created an online service called Open Data Ottawa, which makes available geographic datasets. These datasets include information such as the locations of museums, park pathways, and tennis courts.

- The license for Open Data Ottawa is identical to the license written and in use by the City of Vancouver.

- The City of Toronto and City of Edmonton licenses are nearly identical, differing only by a few minor wording changes and the addition of a "No Waiver" clause which emphasizes that the city does not waive any rights by not exercising them.

- Some dataset users and potential dataset users have expressed concerns about these licenses. They consider some of the terms too onerous and restrictive.

Background on Open Data Principles

- The 2010 City of Ottawa report recommends the City abide by the following *8 Principles of Open Government Data,* established by a meeting of open data organizations in 2007:

    - **Complete:** All public data is made available. Public data is data that is not subject to legal or otherwise valid privacy, security or privilege limitations.

    - **Primary:** Data is as collected at the source, with the highest possible level of granularity, not in aggregate or modified forms.

    - **Timely:** Data is made available as quickly as necessary to preserve the value of the data.

    - **Accessible:** Data is available to the widest range of users for the widest range of purposes.

    - **Machine processable:** Data is reasonably structured to allow automated processing.

- ○ **Non-discriminatory:** Data is available to anyone, with no requirement of registration.

- ○ **Non-proprietary:** Data is available in a format over which no entity has exclusive control.

- ○ **License-free:** Data is not subject to any copyright, patent, trademark or trade secret regulation. Reasonable privacy, security and privilege restrictions may be allowed."

Key Features of the City of Ottawa Open Data License

- Grants a non-exclusive license to use, modify, and distribute the datasets

- Requires the licensee to ensure anyone accessing or using the datasets is bound by the same terms

- Does not require attribution (though it is encouraged)

- Disclaims any warranty, excludes liability, and mandates indemnification for any injury related to use of the datasets

- Allows revocation of the license without notice, for any reason

- Allows unilateral changes to the license, which become effective immediately

- Establishes choice of law and choice of forum in favour of Ontario

III. Discussion

Issue 1: Alternative Licensing Options

To address the concerns with the existing license, the City could update and try to improve upon the existing terms. Alternatively, the City could release its datasets under a standard third-party open data license, several of which are available. Foremost, the Open Data Commons Attribution License, the Open Data Commons Open Database License, and the Open Data Commons Public Domain License offer viable options.

The Open Data Commons licenses are drafted in consultation with both data users and providers, attempting to strike a fair balance between the interests of both. Use of one of these licenses could provide several advantages:

- The licenses are drafted and maintained by a team of legal experts on open data issues, at no internal cost to the City.

- The licenses are drafted with an international scope in mind, which is important considering the data can be imported into larger datasets internationally.

- Use of a standard license helps avoid license incompatibilities between different datasets, allowing users to more easily combine different datasets.

The primary disadvantage to the City would be that, because these licenses try to balance the interests of all parties, the terms would not be as favourable to it. However, these licenses do not, in fact, differ greatly from the existing Ottawa license in their overall objectives. The terms still aim to exclude any liability for the licensor.

As well, a third-party license could not be customized to the particular interests of the City's open data initiative. However, considering that the City's goal (to increase public access to the data) is similar to the those of the larger open data movement, and that the type of datasets being released is exactly that

contemplated by the Open Data Commons licenses, this lack of customization would not likely prove become a major problem.

Open Data Commons Attribution License (ODC-By)

The Open Data Commons Attribution license was recently published on June 25, 2010. Of all the available third party licenses, it is most similar to the existing Ottawa Open Data license. However, although similar, it addresses many of the problems identified with the existing one. The specific similarities and differences are discussed throughout a term-by-term analysis in the next section of this memorandum.

Open Data Commons Open Database License (ODC-ODbL)

The Open Database License is similar to the Open Data Commons Attribution License, except it also contains a "share-alike" requirement. Any user that creates an adapted version of the the database and wishes to distribute it must freely share the adapted version under the same license terms. The advantage of this license is that it ensures database users benefiting from the datasets give back to the community. However, it does restrict the ways in which the datasets can be used commercially.

Public Domain Dedication & License (PDDL)

The Open Data Common Public Domain Dedication & License, or any other public domain attribution license such as the Creative Commons CC0, attempts to waive all rights in the datasets to the fullest extent possible. This option is the least restrictive to dataset users, allowing maximum reuse of datasets.

Issue 2: Problems and Possible Solutions to the Ottawa Open Data License Terms

License Propagation & Attribution

Your open license to the datasets

The City of Ottawa (City) now grants you a world-wide, royalty-free, non-exclusive licence to use, modify, and distribute the datasets in all current and future media and formats for any lawful purpose. You now acknowledge that this licence does not give you a copyright or other proprietary interest in the datasets. If you distribute or provide access to these datasets to any other person, whether in original or modified form, you agree to include a copy of, or this Uniform Resource Locator (URL) for, these Terms of Use and to ensure they agree to and are bound by them but without introducing any further restrictions of any kind.

Giving City credit

Although you are not required to credit the City for each use or reproduction of the datasets, you are entitled to do so and encouraged to conspicuously announce that these datasets are publicly available from the City under these Terms of Use. Upon the request of the City, you may be required to remove a credit from future uses or reproductions should the City decide that such credit is not in the public

This stipulation that the licensee must ensure anyone accessing the data agrees to and is bound by the Terms of Use is an extremely onerous provision for a dataset user. For example, it appears to require barring access to any minors that are incapable of consenting to the terms. This could entail a lengthy sign-up process for anyone accessing the data, which would likely have to include some form of age verification such as verifying a credit card number.

As an alternative, simply requiring clear notice of the terms to be included in all distributions of the datasets would, in most cases, achieve the same effect without being overly onerous to dataset users. The Supreme Court of Canada held that "browser-wrap" agreements, where a website includes an URL to agreement terms, are sufficient to bind a user to the terms as long as the hyperlink is "functional and clearly visible".

Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34 at para. 237.

The ODC-By Attribution license takes this latter approach. Although labeled as an attribution license, the required attribution is, in fact, a notice of the dataset source and URI of the license. The notice must be included both in the database itself and any documentation. It must be "reasonably calculated" to make a user of the dataset aware of the license. Thus, the license is "browser-wrapped" for online use and "shrink-wrapped" for offline use, making it enforceable against users who are legally able to consent.

Changes to License Terms

This term creates a high degree of uncertainty for any dataset user. Consider the case where a user combines a dataset from the city with other datasets that contain compatible licensing terms. A unilateral change to the City of Ottawa terms could potentially make the licenses incompatible, potentially wasting all of the user's work.

The solution proposed by the ODC-By license is for changes to license terms to only apply to future releases of the datasets. It permits the licensor to stop making the database available under existing terms, and to start distributing the database under different terms. Datasets already distributed under existing terms continue to operate under previous existing terms. This affords some degree of protection for users doing research or development in reliance on existing terms, while still allowing the licensor flexibility to change the license.

Compliance with the Law

A requirement for users to ensure compliance with the law should not be problematic to dataset users. However, the vague reference to "industry standards" could pose problems. This term is not clear, and

it is not apparent why all users should need to comply with industry standards. This term could be read, for example, to require all users to ensure their geographic metadata is compliant with ISO/TC 211 standards – a time-consuming and burdensome task.

Exclusion of liability

No warranty with datasets

You get NO WARRANTIES, none of any kind. By this, we mean, for example (but without limiting the total intended scope of the preceding sentence), (1) that while reasonable efforts have been made in preparing these datasets for use by you, the City cannot give any promises as to the completeness, currency, or accuracy of the datasets nor that access will be continuous, (2) the City cannot make any promise that the datasets are free and clear of any possible third party copyright, moral rights, or other claim, (3) the datasets have been modified from their original source, as data initially generated by the City for its internal uses, and (4) all data visualizations on maps are approximate and include only records that can be mapped.

You accept these datasets on an "as-is, where is" basis and agree to use them at your own risk.

Exclusion of liability

You agree that you will not and cannot sue the City for anything, which the City does or does not do (even if intentional or negligent) in connection with the datasets and your use or inability to use them. Without limiting the general scope of the preceding sentence, this means that the City and its agents are not liable on any legal theory or basis for any direct, incidental, indirect, special, punitive, exemplary, or consequential damages or losses, including without limitation, loss of revenue or anticipated profits, loss of goodwill, loss of business, loss of data, computer failure or malfunction, or any other damages or losses.

Liability for not complying with Terms of Use

If, as a result of your breach of these Terms of Use, the City gets sued or is required to pay someone money, you agree to protect the City and reimburse the City for everything which you cause the City to suffer. This means that you agree to defend, indemnify, and hold harmless the City and all of its agents from any and all liabilities incurred in connection with any claim arising from any breach by you of these Terms of Use, including reasonable legal fees and costs. You agree to cooperate fully in the defence of any such claim. The City reserves the right to assume, at its own expense, the exclusive defence and control of any matter otherwise subject to indemnification by you. You agree not to settle any matter without the written consent of the City.

Similar warranty disclaimer and exclusion of liability terms are included in nearly all data licensing agreements. However, at least one individual has identified the one-sided liability as problematic. Likely, it is the indemnification clause that is of particular concern. Given the existence of the warranty and exclusion of liability terms, a licensor is only likely to be found liable through a finding of gross negligence – in which case, shifting the burden entirely to the dataset user through indemnity could be seen as unfair.

Again here, the ODC-By licence may achieve a fairer balance. It contains strong disclaimer of warranty and exclusion of liability clauses, similar to the existing terms in the City of Ottawa License, but contains no indemnity clause. However, the chance of legal liability that is not covered by the

strong warranty disclaimer of warranty or exclusion of liability still appears to be remote.

License Revocation

Cancellation for non-compliance

The City may, in its sole discretion, cancel or suspend your access to the datasets without notice and for any reason, including anything which the City, in its sole discretion, believes is a breach of these Terms of Use or is otherwise unlawful or harmful to others. In the event of cancellation or suspension, you will no longer be authorized to use or reproduce these datasets, and the City may use any means possible to enforce its decision. Such cancellation or suspension will not affect any person who has received the datasets from you and who is otherwise in compliance with these Terms of Use.

Cancellation "without notice and for any reason" may be unreasonably excessive.   The licensor could revoke authorization to use or reproduce the datasets even when a dataset user diligently complies with all license terms.

Dataset users are likely to expend considerable effort developing applications, or performing research, using the datasets. The ability of the licensor to unilaterally revoke access to the data provides no certainty that a dataset user's efforts will be fruitful.

As an alternative, access to the datasets could be revoked only where a dataset users breaches the terms of the license.

The ODC-By License allows termination of the license, but only for breach of the terms. It also sets out a fair process for the license to be restored upon correction of innocuous breaches. Specifically, it reinstates a user's rights to use the datasets for any first time violation that is fixed within 30 days of receiving notice of the violation.

Protection of Licensor Trade-marks

No endorsement

You may not publicly represent or imply that the City is participating in, or has sponsored, approved, or endorsed the manner or purpose of, your use or reproduction of these datasets.

No association

You may not use any trade-mark, official mark, official emblem or logo, of the City, or any of its other references or means of promotion or publicity without the City's prior written consent nor in any event to represent or imply an association or affiliation with the City.

These terms should not be too problematic for any dataset user.

Similar terms are not present in the ODC-By license; however, the ODC-By license may achieve a similar aim by limiting the license to the database itself. The license does not even extend to any "contents" of the database. No right is granted for a dataset user to use any endorsement or mark of the licensor; licensor marks continue to be protected by trade-mark law.

Choice of Law and Choice of Forum

Governing law and jurisdiction from which datasets are published

> *These datasets are published from within the Province of Ontario, Canada. These Terms of Use are governed by Ontario law and the City and you now irrevocably submit to the exclusive jurisdiction of Ontario courts with respect to any and all matters arising under these Terms of Use or these datasets.*

As discussed, the Ottawa license terms require anyone redistributing the datasets, whether in their original or a derivative form, to distribute them under the same license terms. The result is that a dataset licensee can effectively become a licensor bound by the same agreement. In this case, the Choice of Forum and Choice of Law clauses in favour of Ontario could apply to a third party licensor and licensee, even where neither party is resident to Ontario.

The ODC-By license attempts to solve this problem by stipulating a choice of law in favour of the jurisdiction where the dispute is being heard. It does not stipulate a choice of forum, so standard private international law rules apply. Under these terms, if the City of Ottawa was party to a dispute, in most cases the law and forum would still be Ontario. This arises from the fact that the data was created in Ontario, and there is strong connection to the dispute because the data is distributed from Ontario.

Conclusion

The Ottawa Open Data License is an innovative first step towards empowering Ottawa taxpayers, academics, businesses and government agents to innovate with Ottawa's wealth of public data. The city is to be applauded for its initiative. The next step is to critically examine the current license's ability to achieve the City's objectives.

Existing licenses may achieve the City's aims without the need to revamp the current license. The Open Data Commons Attribution License (ODC-By) may best achieve the aims of the City of Ottawa in opening access to their datasets and avoiding liability, while avoiding onerous obligations and uncertainty for dataset users.

The notice requirements of the ODC-By license ensure that nearly all downstream users will be bound by the license terms, but do not require rigourous user verification processes. The license allows the licensor flexibility to change license terms, but ensures some certainly to users by allowing previous datasets to continue under existing terms. The license enforces compliance through license revocation upon breach, but provides some certainty to users by not permitting arbitrary revocation for any reason. The license attempts to prevent liability of the licensor through strong warranty disclaimer and exclusion of liability clauses, but does not open dataset users to unfair risk burdens through indemnification requirements.