Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0078

The Environmental Information Regulations 2004

And

Freedom of Information Act 2000

Heard at St Dunstan's House, London

Decision Promulgated: 4 September 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Chris Ryan

And

LAY MEMBERS

Rosalind Tatam

Paul Taylor

Between

THE OFFICE OF COMMUNICATIONS

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

T-MOBILE (UK) LIMITED

Additional Party

Representation:

For the Appellant: Ms D Rose QC and Ms J Collier
For the Respondent: Name Mr A Choudhury
For the Additional Party: Name Mr G Facenna

Decision

The Tribunal Upholds the decision notice dated 11 September 2006 and dismisses the appeal.

Introduction

1 This Appeal has been brought by The Office of Communications ("Ofcom") the body established under the Office of Communications Act 2002 to act as the independent regulator for the UK communications industries. It appeals against a Decision Notice issued by the Information Commissioner on 11 September 2006, which required it to disclose certain information which it holds about the location, ownership and technical attributes of mobile phone cellular base stations. The information was originally provided to Ofcom by each of the companies operating a mobile phone service within the UK (each a "Mobile Network Operator" or "MNO") to enable Ofcom to provide information to the public about the location of all base stations in the country. The information is made available to the public by means of maps published on the "Sitefinder" website operated by Ofcom (www.sitefinder.radio.gov.uk). The Sitefinder website enables a member of the public to key in a postcode, town name or street name. This will generate a screen image of a map covering the selected location. The map displays a blue triangle to represent each base station installed in that area. Clicking on a triangle on the most detailed available version of the map causes a datasheet to appear setting out information about the base station. In this way anyone interested in a particular location may easily check whether there is a base station close by and, if so, which MNO owns or operates it and what its basic technical features are.

2 This method of publishing the specific information on each base station is made possible by the creation of a database of information which is interrogated each time a map's search facility is operated. However, the database underpinning the system contains some information that is required to enable it to operate but is not made available to those carrying out a search. The fact that the database may only be accessed indirectly, through individual triangle enquiries, also means that its whole content may not be accessed and searched, sorted or otherwise manipulated in order to provide either a complete record of the national network of a particular MNO or an indication of patterns and trends within such a network. The purpose of Ofcom's appeal is to prevent the disclosure of the complete database, which would reveal those two categories of information withheld from users of the Sitefinder website.

The origins and nature of the Sitefinder website

3 There has been concern over a number of years that radio frequency radiation, in the form of electro-magnetic waves emanating from a base

station, might create a health risk to those required to spend time near one. In 1999 the Department of Health asked a group of experts under the chairmanship of Sir William Stewart to consider these concerns in respect of both base stations and mobile phone handsets. The group reported in 2000 (Report of the Independent Expert Group on Mobile Phones). It reported that the levels of exposure of the general population from even the most powerful base station would typically be many hundreds of times lower than the guidelines on acceptable levels of exposure to radio frequency radiation published at the time by the National Radiological Protection Board and the International Commission on Non-Ionizing Radiation Protection. It concluded that they did not therefore cause an adverse health risk. However, it also stated that it was not possible to say that such exposure was totally without potential adverse health effects. It said that gaps in the knowledge available at the time, and the possibility that an adverse health effect might not be noticeable for many years or even decades, were sufficient to justify a precautionary approach until much more detailed and scientifically robust information on any health effects became available. It also accepted that the location of base stations and the processes by which their erection was authorised was the aspect of mobile phone technology which generated most public concern. At paragraph 6.47 of its report it wrote:

"A first requirement is for reliable and openly available information about the location and operating characteristics of all base stations. Easy access to such information would help to reduce mistrust among the public. Furthermore, the data would be useful when applications for new base stations were being considered, and might also be of value in epidemiological investigations."

It then said, at paragraph 6.48,:

"We recommend that a national database be set up by Government giving details of all base stations and their emissions. For each this should list: the name of the operating company; the grid reference; the height of the antenna above ground level; the date that transmission started; the frequency range and signal characteristics of transmission; the transmitter power; and the maximum power output under the Wireless Telegraphy Act. Moreover, this information should be readily accessible by the public, and held in such a form that it would be easy to identify, for example, all base stations within a defined geographical area, and all belonging to a specified operator"

4 The Stewart Report did not represent Government policy but was intended to provide advice and recommendations to government. It generated two initiatives that are relevant to this Appeal. First, in late 2000 the government set up the "Stewart Database Working Group" comprising representatives of the Radiocommunications Agency (RA) (then a part of the Department for Trade and Industry) and the MNOs to take forward the Stewart Report recommendations. Secondly, in 2001 the Mobile Operators Association, representing the MNOs, introduced 10 best practice commitments to help address concerns relating to the development of base stations. These "10 Commitments" were designed

to ensure transparency and to provide more information to the public and local planners than had previously been available. They included commitments to:

"Participate in the obligatory pre-roll out and pre-application consultation with local planning authorities"

“Publish clear, transparent and accountable criteria and cross-industry agreements on site sharing, against which progress will be published regularly"

"Deliver, with the Government, a database of information available to the public on radio base stations"

5 Although the 10 Commitments appear to have been published after the Working Group had started its deliberations we were told in evidence that they formed the basis for the MNOs’ participation in the Working Group's activities. One of the Working Group's early tasks was to consider the parameters identified in the extract from the Stewart Report set out in paragraph 3 above and decide whether the MNOs agreed that they should be included in the database. Initially the MNOs did not want the names of the operator responsible for a base station to be made public as it was thought that it could compromise business planning and for other competition reasons. However, they were for the most part content for the other information listed in the Stewart Report to be disclosed, including a five figure national grid reference. They subsequently dropped their objection to the disclosure of operator names.

6 The MNOs were also concerned that inappropriate commercial exploitation of the database should be prevented by ensuring that large-scale downloading of site data should not be permitted. The Working Group ultimately agreed a format for disseminating base station information to the public. Until the events disclosed in paragraph 19 below it operated as follows:

(a) each MNO disclosed to the RA (and, following its merger with other regulatory bodies in December 2003, to Ofcom) the following data on a quarterly basis:
  (i) operators site reference
  (ii) National grid reference, Northing and Easting each to five decimal places
  (iii) antenna height
  (iv) transmission type
  (v) frequency band
  (vi) antenna type; and
  (vii) transmitter power

(b) the information was provided in respect of each "in service" and "under construction" base station and in the form of comma separated value (csv) text files or Microsoft Excel spreadsheets.

(c) RA (and subsequently Ofcom) amalgamated the information into a single database which underpins the interactive maps published on the Sitefinder website.

(d) The area covered by each map at the lowest resolution is approximately 800m by 800m and the effect of selecting a particular triangle is to generate a pop-up data sheet listing:
  (i) operator name
  (ii) operator site reference
  (iii) station type
  (iv) antenna height
  (v) frequency range
  (vi) transmitter power
  (vii) maximum licensed power
  (viii) type of transmission

(e) The precise location of the base station is not disclosed to the user. The data sheet does not disclose either the grid reference or address, nor whether the base station is mounted on a particular building or structure. The location of the triangle on the map is stated not to be sufficiently precise to enable the grid reference data to be extrapolated from it.

7 The use of localised maps in this way met the MNO's wish to prevent large-scale downloading of data. A user wishing to assemble a body of data for a region or the whole country would need to access a large number of web pages and to capture the data shown for each base station located on each page. We were told in evidence that the method of presenting information through local maps satisfied a requirement, identified at an early stage of the Working Group's activities, that the database should constitute a "citizen access" resource, enabling a member of the general public to access details of base stations in an area in which he or she has a particular interest. We comment that the concomitant effect, that data may not be easily aggregated at a regional or national level, seems to reflect a modest dilution of the Stewart Report recommendations. However, it was said in evidence to have reflected the Stewart Report recommendation as far as consistent with what the industry was willing to accept as part of a voluntary scheme. This is consistent with a number of contemporaneous documents included in the evidence placed before us demonstrating the concerns expressed by the MNOs' representatives and the extent to which those sensitivities were accommodated by the RA in attempting to implement the Stewart recommendations without resorting to compulsion. For example, at an early stage of its work the RA circulated a draft Statement of Work which had evidently been prepared following discussions between Government and industry on the Stewart recommendations. It included the following passage:

"…the guiding principle of the Phase I database [i.e. the project then being planned] is to provide 'citizen access' that is, enabling a member of the general public access to details of cellular base station, or cellular base stations in an area, in which they have a particular interest. This approach should satisfy Stewart's call for 'openly available information about the location and operating characteristics of all base stations'. However, Stewart also identifies the benefits in terms of the database being used as a possible planning or research

resource. This is not a primary aim of Phase 1, and the utility of the Phase 1 database for that purpose may be limited …"

Later in the same document, it is recorded that the MNOs were keen to ensure that the data placed in the public domain was not used for purposes detrimental to their commercial interests (for example, to garner information about a competitor's business plan or as a property pricing aid) and expressed the view that this was *"not necessarily contradictory [to] the spirit of openness that underlies Stewart"* and that the citizen access approach *"might provide a means to enable public access whilst guarding against use of the data for commercial purposes outside Stewart's vision".*

8 The fact that the arrangements described above are voluntary appears to result from the preference of both government and industry to proceed on that basis. However, we also received evidence to the effect that it would, in any event, be difficult for Ofcom to operate a compulsory scheme. This was said to be because, first, the information that each MNO is required to provide as a condition of its licence to operate would not be sufficient, on its own, to enable the Sitefinder website to operate and, secondly, the process for altering the licence terms would be lengthy and capable of being delayed or halted by legal challenge. The evidence on those two issues did not go unchallenged and we will return to it later in this decision.

9 It is relevant at this stage to mention that much of the information available through the Sitefinder website is also made available to the public through another arrangement which the MNOs have entered into. This involves the disclosure to local planning authorities of the current and planned estate of base stations under annual roll out plans. The process operates by each MNO annually releasing to its representative body, the Mobile Operators Association (MOA), details of its existing network, together with information on the new base stations that it currently plans to install. The MOA then releases to each local authority the elements of that body of information which apply to its locality. Although the MOA has undertaken not to publish the overall body of information or to release it to competitors, the MNOs do not prohibit local authorities from publishing the information they receive and they accept that, once released, it falls into the public domain. Some local authorities publish the information they receive, others do not, but all of the plans are agreed by the MNOs to be public documents and not confidential.

The request for information

10 On 11 January 2005 a Mr Henton, the Information Manager for Health Protection Scotland, wrote to Ofcom in the following terms:

"I wish to request the following information for each mobile phone base held within the Sitefinder database:
Name of operator
Height of antenna

Frequency range
Transmitter power
Maximum licensed power
Type of transmission
Grid reference East
Grid reference North

Please provide the information requested as either a text file, csv file, Access database or Excel spreadsheet.

I have looked at the Sitefinder website but it does not provide grid references for each base station, also there is no facility to download information on all base stations."

11 On 27 January 2005 Ofcom replied to Mr Henton refusing to provide the information requested. It stated that it considered that the request was for information falling within the meaning of "environmental information" and that it therefore had to be considered under the Environmental Information Regulations 2004 (" EIR"). It relied on regulation 6(1)(b) of EIR (information already publicly available). Ofcom asserted that as all the information could easily be accessed from the Sitefinder website there was no requirement to provide it in another form or format. Mr Henton did not accept that decision. In requesting an internal review he made it clear that the information on the Sitefinder website was not in a suitable format for his needs and that he needed a complete dataset on all base stations. He wanted this to include the grid references which, as mentioned in paragraph 6(e) above, cannot be read off or otherwise determined from the website. He explained:

"the grid references will allow me to map the base stations using my own mapping and analysis software. If I were to obtain base station information from the website I would need to enter approximately 140,000 postcodes for Scotland alone and I still would not have the base station grid references. This would also be extremely time-consuming especially when you already hold the information I require."

12 On 15 April 2005 Ofcom wrote to Mr Henton maintaining its position in respect of individual base station data, but relying on a different ground in respect of the request for the complete dataset. It stated that the complete body of information was not in the public domain and that it therefore fell under the exceptions provided for by EIR regulation 12(5)(a) (international relations, defence, national security or public safety) and 12(5)(c) (intellectual property rights). It refused to disclose the information on the basis that, applying the test provided by EIR regulation 12(1) (b), the public interest in maintaining those exemptions outweighed the public interest in disclosing the information.

Complaint to the Information Commissioner

13 Mr Henton complained to the Information Commissioner on 22 April 2005 under section 50 of the Freedom of Information Act 2000 (FOIA), as applied to environmental information by EIR Regulation 18. On 11 September 2006, having concluded his investigation, the Information Commissioner issued a Decision Notice in which he ordered Ofcom to disclose the information requested. His reasons were, first, that he did not accept that the exception under EIR regulation 12 (5) (a) was engaged. With regard to the intellectual property exception under regulation 12(5)(c) he decided that two categories of intellectual property applied (database right and copyright) but did not accept that there was any adverse effect on either of them so as to trigger the exception. In respect of a possible third category of intellectual property right, confidentiality, the Information Commissioner decided that the information did not have the necessary quality of confidence.

Appeal to the Information Tribunal

14 On 10 October 2006 Ofcom appealed to this Tribunal. The basis for any such appeal is that the Decision Notice is not in accordance with the law (FOIA section 58). Ofcom's original Grounds of Appeal did not contest the Information Commissioner's conclusion in respect of regulation 12(5)(a). In respect of regulation 12(5)(c) it challenged the Information Commissioner's conclusion that the disclosure of the information requested would have no "adverse effect" on either Ofcom's database right or its copyright in the data obtained by Ofcom and assembled into the Sitefinder database. It asserted that any act of infringement would be sufficient to trigger the exception but that if, contrary to its primary case, some proof of actual harm was required, it was clear that the test would be met as a result of the loss and damage the disclosure would cause. Ofcom also challenged the Information Commissioner's conclusion that the data in question did not, in any event, have the necessary quality of confidence to be protected under the law of confidentiality. The Grounds of Appeal also relied on lines of argument that had not been considered during the Information Commissioner's investigation. The first of these was that some of the information requested, the names of the MNOs who operated individual base stations, was not, after all, "environmental information" as defined in regulation 2(1) of EIR, and that this part of the original request should therefore have been considered under FOIA. On that basis, it said, the Information Commissioner should have applied the exemption provided under FOIA section 43 (trade secrets and commercial interests). The second new line of argument was that Ofcom could, in the alternative, rely on the exception provided by EIR regulation 12(5) (e) (confidential information). Finally, Ofcom argued that if, it were wrong in contending that the information requested was confidential, then it must follow that it was already available to the applicant (through Sitefinder) with the result that the original reliance on EIR regulation 6 (1) could be revived.

15 On 29 November 2006 the Tribunal acceded to an application by one of the MNOs, T-Mobile (UK) Limited (" T-Mobile"), to be joined as a party to the Appeal. Although at least one other MNO expressed an interest in also being joined the MNOs, as a group, very sensibly left T-Mobile to represent their interests and we understand that T-Mobile consulted them throughout the preparations for the hearing of the Appeal.

16 T-Mobile's Joinder Notice set out its case for having the Decision Notice overturned. First, it went further than Ofcom and asserted that all of the information, and not just the names of the MNOs, fell outside the definition of "environmental information" and therefore fell within the exemption provided by FOIA section 43. However, if it were wrong on that it not only supported Ofcom's case on the application of the regulation 6 (1) (b), 12(5)(c) and 12(5)(e) exceptions but also relied on regulation 12(5)(a), the defence and national security exception on which Ofcom had relied in its submissions to the Information Commissioner, but had abandoned on this Appeal.

17 Shortly before the scheduled hearing date for the appeal Ofcom indicated that it wished to amend its Grounds of Appeal by adding a further FOIA exemption. It argued that it was precluded by section 393 of the Communications Act 2000 from disclosing information obtained in the exercise of its statutory powers and that the information requested by Mr Henton therefore fell within the exemption provided by FOIA section 44 (information whose disclosure is prohibited by law). The Grounds of Appeal, as proposed to be amended, were allowed to be included in the papers prepared for the hearing and we heard argument early in the hearing as to whether permission to amend should be allowed. Having considered those arguments we informed the parties that we did grant permission and said that we would set out our detailed reasons in this decision.

The Grant of Permission to Amend

18 Any attempt by a public authority to rely, on appeal to this Tribunal, on an exception that was not relied on in its submissions to the Information Commissioner may cause difficulty. The task of the Tribunal is to consider whether the Decision Notice is in accordance with the law (FOIA section 58(1)(a)). If an exception has been relied on by the public authority, but rejected by the Information Commissioner, the Tribunal must determine whether or not he was right to have done so. The introduction of an additional or substitute exception after the Decision Notice has been issued cannot comfortably be relied on to attack the correctness of the Information Commissioner's conclusion, which may clearly have been correct on its terms. In the case of *Bowbrick v Information Commissioner*, EA/2005/06 a differently constituted panel of this Tribunal expressed the view that in those circumstances an appeal would be bound to fail because there could be no basis for suggesting that the Information Commissioner had erred in law. We are, of course,

not obliged to follow other decisions of the Tribunal. We interpret this one as representing general guidance, issued in the early days of the new regime introduced by FOIA, and not forming a central part of the decision on whether or not to allow an exemption to be relied on for the first time at the appeal stage in that particular case. The difficulty of imposing such a rigid rule became apparent in the later case of *Archer v Information Commissioner and Salisbury District Council* EA/2006/0037 in which a different panel expressed the view that each case must be considered on its own facts and decided that it ought to consider matters that had not been considered by the Information Commissioner. In the case before us we were faced with the difficulty that, if Ofcom's case on the effect of section 44 was correct, and if we had refused to let it address us on the point, the result could have been that an order for disclosure might be issued in circumstances where compliance with it would put Ofcom at risk of a criminal prosecution for breaching the terms of the Communications Act. Against that is the element of illogicality that, as we have explained, results from a change in the public authority's position after the Decision Notice has been published. To this must be added the danger that the whole appeal procedure may become cumbersome and uncertain if public authorities feel that they need not give careful consideration to the reasons for non disclosure put before the Information Commissioner because they will be able to adjust their case at the subsequent appeal stage. We also gave due consideration to the fact that the application to amend was made quite late in the process. We were satisfied that, because the Information Commissioner's legal team adopted a sensible and co-operative attitude, he did not suffer any significant prejudice from the delay. We decided that, on balance, we ought to allow Ofcom to argue the point. The determining factor in our decision was the risk of criminal sanction to which Ofcom might otherwise have been exposed and the fact that the point was capable of being considered by the Tribunal without the need for any investigation of the facts underlying the exception. Our decision, based on these exceptional factors, should not be interpreted by any public authority as a general indication that it may freely change its position late in the appeal process and that it might be safe for it to adopt a casual attitude to the analysis of available lines of argument at the stage of the Information Commissioner's investigation. If it adopts that attitude then, particularly in cases where it is not possible to do justice to its case without the sort of factual investigation which the Information Commissioner is equipped to perform, (and the Information Tribunal is not), it may well find that the Tribunal does not permit it to introduce new grounds.

Withdrawal of co-operation by the MNOs

19 We should mention at this stage that the complaint to the Information Commissioner led to T-Mobile withdrawing its co-operation on Sitefinder and it has not provided information to Ofcom since August 2005. By the time the matter reached us the other four MNOs (O2, Vodafone, Orange and Hutchison 3G) had also ceased to provide any information updates.

This was said to be partly in view of the Decision Notice and this Appeal and partly because a business operating a mapping website for property buyers (www.ononemap.co.uk) had apparently incorporated base station data obtained from the Sitefinder website into its own interactive map search facility.

The Structure of this Decision

20 The development of the case, as summarised in paragraphs 14 to17 above, demonstrates that Ofcom, as Appellant, and T-Mobile, as Additional Party, have adopted different lines of argument, with some of those arguments being put forward as alternative to others. In addition Ofcom has changed its stance on a major part of the case that was put to the Information Commissioner. We have tried to minimise the resulting potential for confusion by structuring our decision as follows:

(a) We consider whether the information requested by Mr Henton, viewed as a whole, falls within the definition of "environmental information" (paragraphs 21 to 29 below). If none of it does then the Appeal must be determined under FOIA and not EIR. However, our conclusion is that it does fall within the definition.

(b) We next consider whether, even if the information as a whole falls within the EIR, we should nevertheless conclude that such part of it that relates to the names of the MNOs operating base stations nevertheless falls outside the definition. We have decided that it does not (paragraph 31).

(c) In the light of those two conclusions we have proceeded to consider only the exceptions raised under EIR and have ignored the FOIA exemptions that have been relied on. Accordingly, in paragraphs 33 to 35 below, we make some general comments on the EIR exceptions before considering each of those relied on in the following order:

(i) In respect of regulation 12(5)(a) we decide (paragraphs 36 to 42) that the disclosure of the information requested would increase the risk to public safety, but that the public interest in maintaining that exception does not outweigh the public interest in disclosure.

(ii) We decide, (in paragraphs 43 to 62), that disclosure will have an adverse effect on the intellectual property rights of the MNOs, but that the public interest in maintaining the regulation 12(5)(c) exception does not outweigh the public interest in disclosure.

(iii) In paragraph 63 we decide that the regulation 12(5)(e) exception may not be relied on because, having already decided that the information is about “emissions” the exception is disapplied under regulation 12(9). However, we go on to decide that, even if that were not the case, the information would still have to be disclosed because it lacks the necessary quality of confidence (paragraphs 64-66).

(iv) Finally, we decide (in paragraph 69) that the information requested does not fall within the exception provided under regulation 6(1)(b).

Does the information requested, viewed as a whole, fall within the definition of "environmental information"?

21 The definition of "environmental information" is set out in EIR regulation 2 (1). It is in the following terms:

" …any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)..."

22 We make two preliminary comments. First, although the definition refers to Council Directive 2003/4/EC on public access to environmental information ("the Directive") that does not in fact provide any direct assistance in interpreting the language of EIR as it simply sets out the definition in identical language. However, recital 10 of the Directive clarifies its purpose, stating that:

"the definition of environmental information should be clarified so as to encompass information in any form on the state of the environment, on factors, measures or activities affecting or likely to affect the environment or designed to protect it, on the cost-benefit and economic analyses used within the framework of such measures or activities and also information on the state of human health and safety, including the contamination of the food chain, conditions of human life, cultural sites

and built structures in as much as they are, or may be, affected by any of these matters".

Secondly, it will be seen that the various sub paragraphs of the definition do not simply list different categories of matter which must be included in the information if it is to fall within the definition. There is a degree of cross reference between them so that, for example, the inclusion of material in a body of information on the "factors" covered by subparagraph (b) will only bring that information within the definition if the factors affect or are likely to affect the elements of the environment listed in subparagraph (a). Similarly, the matters listed in subparagraph (f) will only fall within the definition if they might be "affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) or (c)".

23 The following possibilities were canvassed during argument as to the way in which the language of the definition applied, or might apply, to radio frequency waves emanating from base stations:

(a) it was information on energy, radiation or emissions (three of the factors within subparagraph (b)) affecting or likely to affect the air or the atmosphere (two of the elements of the environment within subparagraph (a));

(b) it was information on the state of human health (covered by subparagraph (f)) in as much as it might be affected by energy, radiation or emissions (subparagraph (b)) operating through the air or atmosphere (subparagraph (a));

(c) it was information on built structures (covered by subparagraph (f)) in as much as it might be affected by energy, radiation or emissions (subparagraph (b)) operating through the air or atmosphere (subparagraph of (a))

24 Mr Facenna, Counsel for T-Mobile, accepted that radio frequency waves may correctly be characterised as both "energy" and "radiation". He also accepted that it was a correct use of the English language to say that they were "emitted" from a base station. However, he argued that they nevertheless did not constitute "emissions" for the purposes of the EIR because the circumstances in which the EIR came into existence require the word to be given a particularly narrow meaning. Those circumstances were that EIR implemented the Directive which included, in its fifth recital, a statement that it was itself intended to be consistent with the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention "). No definition of "emissions" appears in either the EIR, the Directive or the Aarhus Convention. However, Mr Facenna drew our attention to an Implementation Guide to the Aarhus Convention published by the United Nations in 2000 which stated that the term had been defined in Council Directive 96/61/EC concerning integrated pollution prevention and control ("the IPPC Directive"). This definition made it clear that the term "emissions" was intended to apply to polluting substances such as chemical elements released into the atmosphere

from certain types of industrial plant listed in an annex. Mr Facenna invited us to conclude that the IPPC definitions should be treated as running down from the Aarhus Convention, through the Directive and into the EIR so that when the word "emissions" appears in the EIR it should be treated as referring to polluting substances of that kind and not to electro-magnetic waves. He suggested that if this was not the case then the extremely low levels of radio waves produced by items such as baby alarms would fall within the regime created by EIR, a result which he suggested was nonsensical and provided further support for adopting the narrower definition.

25 We should note at this stage that the term "emissions" appears in another provision of EIR on which T-Mobile relied. As will be seen later it argues that if, contrary to its primary case, EIR does apply then it is entitled to rely on the exceptions set out in EIR regulation 12(5)(e) (confidential information). However, regulation 12(9) provides that confidentiality is one of several exceptions which may not be relied on to protect from disclosure information regarding "emissions". It was suggested to us that this “exception to the exception” was intended to reflect concern that information on pollutants being released into the environment should not be kept secret and that it should not undermine the confidentiality exception on the facts of this case. It is conceivable that those drafting the Directive did intend the word "emissions" to have a narrower meaning for the purposes of regulation 12(5)(e) than would normally be applied to it. However, no guidance appears in the Directive to assist us in deciding whether it should be interpreted in that way. The 16th recital suggests that the grounds for refusal to disclose should be interpreted in a restrictive way. It follows that any exception to such a ground should be given a broad interpretation. Against that background we believe that we should only apply the more restrictive meaning if we are given clear guidance to that effect. We do not believe that we are provided with such guidance by the Implementation Guide. The Aarhus Convention itself does not cross refer to the definition in the IPPC directive. Even if it did it need not necessarily follow that the same definition should be adopted (again without any direct cross reference to it) for the purposes of interpretation of either the Directive or the EIR. Although recital 5 of the Directive states that it is intended that it be broadly consistent with the Aarhus Convention, there is no suggestion that the Directive is intended to implement the terms of the Convention in the same way that a national measure, such as the EIR, is intended to implement a Community Directive and thereafter to be interpreted in a manner that complies with it. Nor is there any provision within the Aarhus Convention itself, or among its recitals that indicates what meaning should be applied to the word. For all of these reasons we conclude that "emissions" in both subparagraph (b) of the definition of environmental information and regulation 12(9) should be given its plain and natural meaning and not the artificially narrow one set out in the IPPC Directive. As we have indicated it is accepted, on that basis, that radio wave radiation emanating from a base station is an emission.

26 We believe that, even if we were wrong in that conclusion in respect of regulation 12(9), it would not follow that the restrictive meaning of the word “emission” should be applied when the same word appears in the definition of environmental information in the EIR. The definition of environmental information in the Aarhus Convention is not identical to that appearing in the Directive and the EIR. In particular the equivalent definition of the factors covered by subparagraph (b) does not include the word “emissions”. The Implementation Guidance could not therefore have been considering the word in the context of a general definition but only in respect of the provision of the Aarhus Convention that is broadly equivalent to EIR regulation 12(9). It is understandable that, in that context, (and notwithstanding the conclusion we have reached in the previous paragraph) it might suggest a particularly narrow interpretation,. It need not follow that the same approach requires to be adopted when considering the same word used in the context of the definition, particularly as that context would not have been within the contemplation of those preparing the Implementation Guidance. Recital 10 of the Directive makes it clear that it was intended to clarify the definition of environmental information and it may be inferred, therefore, that any differences between it and the Aarhus Convention were deliberate and that any guidance on the interpretation of the earlier measures, in particular guidance outside the measures themselves and intended to apply in a totally different context, should not be applied. In these circumstances we do not shy away from the conclusion that, even if the IPPC convention definition did apply for the purposes of regulation 12(9), a different meaning (the plain and natural one that includes base station radiation) should nevertheless apply for the purposes of the definition in regulation 2.

27 Mr Facenna accepted that, even if we accepted that base station radiation should not be treated as "emissions", he was still faced with the presence of the words "energy" and "radiation" in subparagraph (b) of the definition. However, he argued that these two "factors" do not affect, and are not likely to affect, any of the elements of the environment referred to in subparagraph (a). At one stage this proposition seemed to be leading Mr Facenna and Mr Choudhury, Counsel for the Information Commissioner, into a debate on the scientific properties of radio waves. It was agreed that they are capable of having an effect on solid matter they come into contact with (for example, the agitation of the molecules of a piece of meat by microwaves for the purpose of cooking). However, it was debated whether or not they have any effect on the air through which they pass en route to such matter. We do not feel qualified to express any view on whether the less dense molecular structure of air results in all radio wave frequencies passing through it with no effect at all on individual molecules. We do not believe that it is necessary for us to do so. The definition is not intended to set out a scientific test and its words should be given their plain and natural meaning. On that basis we believe that radio wave emissions that pass through the atmosphere from a base station to any solid component of the natural world are likely to affect one or more of the elements listed in subparagraph (a) or the

interaction between some of them. Accordingly we conclude that the radiation from a base station falls within the meaning of the expression "environmental information".

28 Mr Facenna made the further point on this issue that there was, in any event, not even any impact on solid matter from base station emissions. He relied on the evidence we received from Mr Tony Wiener, the Head of Technology Strategy at T-Mobile. Mr Wiener has a degree in physics and expressed the view that the low-power radio waves transmitted to or from cellular base stations did not have any such effect. Mr Facenna also referred us to the conclusions of the Stewart Report, to the effect that radiation emitted by a base station did not appear to constitute a hazard to humans. However, we have to bear in mind that Stewart also concluded that it was not possible to say that exposure to such radiation was totally without potential adverse health effects (the very conclusion that led to the establishment of the Sitefinder database in the first place) and we are not prepared to conclude, in the light of Stewart's recommendation of a precautionary approach pending further investigations, that the test of "likely to affect" in subparagraph (b) has not been satisfied in the context of current knowledge of the issue. A broad definition of environmental information for these purposes may result in very low level emission sources also being included (such as the baby alarm referred to earlier or some remote control devices). However, there are several other elements of the definition which could cover both substantial and insubstantial factors. For example, "land" in subparagraph (a) may be capable of including a small garden and "waste" in sub paragraph (b) could include elements of domestic drainage. The result is not, in any event, as nonsensical as Mr Facenna suggested. Low level emissions from small scale domestic equipment will not affect any of the elements of the environment and will therefore fall out of the definition by virtue of subparagraph (a). Even if it could be argued that they were within the definition, the EIR is unlikely to have any impact on them. First, a public authority would not be likely to hold any information about them for the purposes of regulation 5. Secondly, even if it did hold any information, it would probably not be requested to disclose it, given the ability of the public authority to charge for supplying information. Thirdly, if it did receive such a request it might well be entitled to regard it as manifestly unreasonable under regulation 12(4)(b). Finally, there would be no public interest at all in disclosing information about trivial matters, so that any public interest test that came into play would almost certainly be resolved in favour of maintaining any exception that might be invoked by the public authority.

29 In view of our conclusion in the preceding paragraph it is not strictly necessary for us to consider the other two possibilities set out in paragraph 23 above. However, we do believe that if the further investigations mentioned by Stewart were to lead to the conclusion that base station radiation did have an adverse effect on the health of those coming into contact with it then subparagraph (f) would certainly apply. However, we agree with Mr Facenna that, even in those circumstances,

information on the location and technical characteristics of the base stations would not be "information… on… the state of human health" (our emphasis). It would be information on factors that are suspected of possibly creating a risk to it. While it is true that subparagraph (f) refers indirectly to the impact of factors such as radiation ("in as much as [the state of human health is] or may be affected by... any of the matters referred to in (b) or (c)") we accept that it is intended to apply to information on the result of those factors affecting human health and not the factors themselves. We also consider that the reference in subparagraph (f) to "built structures" would not, on its own, bring the Sitefinder data within the definition. Although a base station is in our view a built structure (certainly in the case of a free-standing mast) it would not be "affected by" radiation or any of the other factors in subparagraph (b). It would be the source of the radiation not its destination.

Do the names of the MNOs fall outside the definition of environmental information?

30 Ofcom has argued that, even if the broader body of information in the Sitefinder database falls within EIR, there is one aspect of it that does not. This is the identity of the individual MNOs, by reference in each case to its ownership of a base station. If Ofcom is right on this point it will be entitled to rely on the exemption set out in FOIA section 43. This covers information, the disclosure of which would be prejudicial to commercial interest and is therefore broadly equivalent to EIR regulation 12(5)(e). However, there is a potential advantage for Ofcom if FOIA, and not EIR, applies for this purpose. The advantage is that there is no equivalent in the FOIA to regulation 12(9), so that the FOIA exemption could not be dis-applied on the ground that the information relates to emissions (although it would still have to be demonstrated that the public interest in maintaining each of the exemptions outweighed the public interest in disclosure). Ofcom would also be able to argue that it would be prohibited from making disclosure under the FOIA section 44 exemption, which does not have any equivalent in the EIR.

31 Ofcom argues that the names of the MNOs do not constitute information about either the state of the elements of the environment (for the purposes of subparagraph (a) of the definition) or the factors (set out in subparagraph (b)) that may affect those elements. We disagree. The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words "any information… on… radiation". In our view it would create unacceptable artificiality to interpret those words as referring to the nature and effect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in its first recital, to achieve "… a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making…". It is difficult to see how, in particular, the public might

participate if information on those creating emissions does not fall within the environmental information regime.

32 It follows, therefore, that all of the information in the Sitefinder database which Mr Henton originally requested falls to be considered under EIR and that we are not required to consider further the various arguments presented to us in relation to FOIA exemptions.

Exceptions under EIR-General

33 As already indicated the provisions of EIR that are said by Ofcom and T-Mobile to justify nondisclosure are regulations 12(5)(a), 12(5)(c), 12(5)(e) and 6(1)(b). The relevant parts of regulation 12 reads:

"(1) Subject to paragraphs (2), (3) and (9), a public body may refuse to disclose environmental information requested if-

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) a public authority shall apply a presumption in favour of disclosure.

…

(5) For the purpose of paragraph (1) (a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

(a)… public safety

…

(c) intellectual property rights

…

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

…

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 5 (d) to (g)"

34 A helpful summary of the impact of these provisions appears in the decision of a differently constituted panel of this Tribunal in *Archer v the Information Commissioner and Salisbury DC (*EA/2006/0037). The Tribunal said:

"There are several points to note here. First, it is not enough that disclosure should simply affect the [the interest in question]; the effect must be "adverse". Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure "would" have an adverse effect - not that it could or might have such effect. Fourth, even if there would be an adverse effect, the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the

public interest in disclosing the information". All these issues must be assessed having regard to the overriding presumption in favour of disclosure. The result, in short, is that the threshold to justify non-disclosure is a high one."

35 We also have in mind, in considering regulation 12, that we must apply the civil standard of proof; we must be satisfied on the balance of probabilities that the relevant harm would be suffered. Finally, we must bear in mind that Article 4 of the Directive requires us to interpret grounds for refusal to disclose in a restrictive way.

Exceptions under EIR - regulation 12(5)(a) - public safety

36 As explained previously this exception had been relied on by Ofcom in its submissions to the Information Commissioner but was not relied on by it in this Appeal. However, T-Mobile resurrected the point in its Joinder Notice. If we find that public safety would indeed be adversely affected then we will be required to apply the balance of public interest test under regulation 12(1)(b) in order to decide whether or not the information should nevertheless be disclosed.

37 The Information Commissioner's Decision Notice rejected the case put forward by Ofcom on this point. At one stage there appeared to be disagreement between the Information Commissioner and the other parties to the Appeal as to the standard of proof that was applied in the Decision Notice, but the point evaporated in the course of argument. We have the power, in any event, to review any finding of fact by the Information Commissioner and do so, in this case, on the basis of a considerable body of additional evidence that was presented by T-Mobile. We are satisfied, on the basis of that evidence, that all the MNOs have a justified concern about the activities of criminals stealing materials from base station sites. Recent increases in the price of certain metals appears to have increased the number of thefts and the level of organisation and sophistication of those carrying them out. There appears also to be a level of vandalism and some instances of base stations being used to facilitate the transmission of pirate radio content. We also accept that the removal of, or damage to, materials forming part of a base station might make it a danger to the public and to the personnel of the MNOs, and that public safety may also be undermined if part of the mobile phone network fails as a result of criminal activity, so that either the Police and Emergency Services radio network or the UK Critical National Infrastructure were compromised. However, in order to succeed on this point T-Mobile must establish that the disclosure of those aspects of the Sitefinder database that are not already available to the public will contribute to those risks. If the problems which the MNOs face in this area result from the existing level of disclosure and would not be made worse if the whole of the Sitefinder database were to be disclosed, it could not be argued that disclosure of the information requested would have an "adverse effect" on public safety for the purposes of regulation 12(5)(a).

38 As explained above the data provided by the MNOs to Ofcom includes a five digit grid reference number for each base station. That level of precision would enable the site of a base station to be pinpointed to within 1 metre. When that data is used to position a triangle on the Sitefinder website map a degree of accuracy is lost. It is in the interests of both the MNOs and the public for the Sitefinder maps to be as accurate as possible but we received evidence to the effect that a base station might be some distance from the position suggested by the centre point of a triangle on the map. The evidence dealt with the degree of inaccuracy as well as its cause. It is not necessary for us to try to reconcile all that appeared in witness statements on this issue or that which was imparted to us during cross-examination. The simple point is that the Sitefinder map enables anyone accessing the Sitefinder website to establish the approximate location of a base station (sufficient to enable an assessment to be made as to the likely extent of significant levels of radiation from it) but not its precise location to within a metre (so as to assist a criminal to pinpoint his target). In the case of a sizeable freestanding mast located in open countryside this additional level of accuracy may not assist the criminal. But we were told that having the 5 figure national grid reference number would assist criminals to pinpoint base stations that may be located, for example, on the roof of a particular building in a dense urban environment, or hidden in street furniture.

39 It was also submitted by T-Mobile that it was not just disclosure of the precise grid reference location that would assist criminals. It was said that the disclosure of the complete database would enable them to plan and target their attacks by, for example, making it very easy for them to search the database for the most attractive targets across the whole country. These are generally the larger and more powerful base stations, which are likely to contain larger quantities of valuable metals than smaller ones. They are also more likely to form part of the main infrastructure for a particular MNO’s network and therefore to be of great importance to both the MNO and any criminal or terrorist group intending to disrupt the country's communication system. Against that it was said by the Information Commissioner that this information could be obtained by the simple, but undoubtedly painstaking, process of accessing each page of the Sitefinder website and capturing the data disclosed by clicking on each triangle.

40 We accept that the release of the whole database would provide some assistance to criminals. We think that use of the database for criminal purposes is more likely to be for the purpose of either increasing the efficiency of a trawl of the most valuable sites in an area, or disrupting the public or police communication network in order to hamper the coordination of the authority's reaction to a particular crime. It is therefore more likely to occur at a relatively localised level with the information being obtained by interrogating the Sitefinder database through the relevant website maps. However, it is conceivable that data

manipulation would enable sophisticated criminals to detect patterns of development in base station construction, which could assist their activities and we did receive some evidence suggesting that criminals working in this area are beginning to operate on a national basis. We believe that greater risks might result from the release of the five figure grid reference numbers. This would enable criminals to establish the precise location of, and (in an urban environment), the resulting ease of access to, base stations. However, the vulnerability of base stations in a populated area may be reduced by their location and, in some areas at least, the location may already be publicly available in the form of details published by local planning authorities of the current and proposed base stations in their area as part of the rollout plans mentioned in paragraph 9 above. Nevertheless the disclosure of the requested information will to some degree increase the risk of attacks and in that way may adversely affect public safety.

41 Although, therefore, the exception applies we do not believe that the public interest in maintaining it outweighs the public interest in disclosure. The public interest in disclosure arises out of the original recommendations of Stewart, which we have set out in paragraph 3 above, and the importance of environmental information being disseminated for the reasons set out in the first recital to the Directive. The discussions that led to the creation of the Sitefinder website slightly reduced the scope of the original parameters for the national database as proposed by Stewart. It may be that the MNOs believe that, in the light of increased criminal activity, they should have tried to persuade Ofcom's predecessor organisation to have restricted the parameters further than they did. However, it is not possible at this stage to recover the data that has been published and the release of the balance will simply have the effect of putting into the public domain elements of the information that Stewart proposed should have been placed there in the first instance. The release of the whole of the Sitefinder database, in a format that may be searched, sorted or otherwise manipulated for statistical and illustrative purposes, will also satisfy the recommendation of Stewart that a national database would be of value in epidemiological investigations. Mere access to the Sitefinder website would not be sufficient for researchers in this area. We heard evidence to the effect that up until now MNOs have demonstrated a willingness to licence the use of their individual datasets to researchers at no cost, although it was not entirely clear how much freedom a researcher would have to publish the information as part of his or her findings under the licence terms likely to be imposed. However, freedom of information should not be dependent on the goodwill of companies adopting a responsible attitude, or on the identification by those companies of the researchers whose work should be supported in this way. We have seen from the facts of this case, in which the MNOs have decided to withdraw their cooperation with Ofcom, that any voluntary scheme is vulnerable to a change in circumstances. It is conceivable that in other circumstances organisations which retain control over data in this way may become selective in the areas of research which they support and may refuse

disclosure to those who they suspect will draw conclusions from the data that is unhelpful to the company's commercial interests. The regime for freedom of information under EIR is designed in part to provide greater certainty for the public on the availability of relevant information than any voluntary scheme can provide. Accordingly the research issue remains in our view a factor in favour of disclosure and its weight is not significantly reduced by the voluntary disclosure of the information in the past.

42 Balanced against that is the increased risk to public safety, which we have already identified. Our conclusion is that the adverse effect on public safety of the release of the requested information, although sufficient to trigger the exception, is not large, particularly in view of the information that is already available through the Sitefinder website and the rollout plans. It may be supplemented, as a factor in favour of maintaining the exemption, by a general public interest in not facilitating criminal activity but, even with that additional factor, we do not believe that it outweighs the public interest in having the whole of the data disclosed in a form that the public, either as individuals or as members of groups having an interest in the subject, may search, analyse and reformat using basic data handling applications.

Exceptions under EIR -regulation 12(5)(c) - intellectual property

43 Ofcom and T-Mobile say that the information requested forms part of a body of information that is protected by two categories of intellectual property right, database right and copyright. Database right was created by the Copyright and Rights in Databases Regulations 1997, which implemented, at national level, the provisions of the Council Directive on the legal protection of databases 96/9/EC. The Database Regulations provide that database right "subsists.. In a database if there has been a substantial investment in obtaining, verifying or presenting the content of the database". Regulation 16 deals with infringement of the right and provides:

> *"(1) … a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the database.*
> *(2) … the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database may amount to the extraction or re-utilisation of a substantial part of those contents".*

Under section 3 of the Copyright Designs and Patents Act 1988 ("CDPA") a database is expressly included in the definition of "literary work", which is one of the categories of work protected by copyright under section 1 (1) (a). However, it is only original literary works that are capable of being protected and section 3A (2) provides that "a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the content of the database the database constitutes the author's own intellectual creation". Infringement of copyright is covered by section 16 which provides that the unauthorised copying of a copyright work infringes if the "whole or any substantial part"

of the work is copied. There is no equivalent provision to regulation 16 (2) of the Database Regulation so that the sporadic extraction of insubstantial parts of the work may well not infringe copyright.

44 The test of originality set out in CDPA section 3A (2) is higher than the one that generally applies to other categories of copyright work. It was introduced into the Act by the Database Regulations and was clearly intended to reduce the degree of overlap between database right and copyright by removing from copyright any database in which, for example, the data fields are predictable or imposed by external requirements and/or the structure of the database is straightforward or based on a standard format.

45 It was conceded by the Information Commissioner, both in his Decision Notice and on this Appeal, that the datasets contributed to the Sitefinder database by each MNO, as well as the Sitefinder database as a whole, were protected by both database right and copyright. That began to appear to have been a relatively generous concession, in respect of copyright, in the light of evidence which we heard from Mr Wiener to the effect that T-Mobile maintained an asset register of its base stations in database form and that the categories of data required for the Sitefinder database were simply extracted from the asset register and forwarded to Ofcom in a pre-agreed format. Similarly, it was conceded that the separate database maintained by Ofcom qualified for protection under database right although it appeared to be at least arguable that the resources applied in receiving data from the MNOs and preparing it for input into the Sitefinder database did not represent a relevant investment for the purposes of the Database Regulation, in the light of the conclusions of the European Court of Justice in *British Horse Racing Board v William Hill* Case C-203/02. We have no such doubts in respect of the claim, also conceded, that the datasets assembled by each MNO are capable of being protected by database right and in view of the conclusions we reach below on the application of this exception, nothing may turn on the concessions that were made.

46 The arrangement between the MNOs and Ofcom for the Sitefinder database may be interpreted as a licence to Ofcom under the relevant intellectual property right to make limited use of the data provided for the purpose of making available an insubstantial part of it, presented in a particular format, in response to each enquiry generated by a user clicking on one of the triangles on the Sitefinder website map. The notional licence does not extend to permitting the whole of the data to be copied and released in a text format. Nor does it permit the disclosure of that part of the MNOs' dataset that may not be accessed through the Sitefinder website, namely the five digit grid reference number for each base station. The unlicensed release of information that is either not accessible through the Sitefinder database at all or is only accessible with great difficulty would, in our view, involve the copying of a substantial part of the protected work. Quantitatively the grid reference numbers may be a relatively small part of the whole but qualitatively they

contribute a significant part of its usefulness and value. We conclude, therefore, that the release by Ofcom of the information requested would constitute an infringement of the relevant intellectual property right owned by each contributing MNO.

47 The Information Commissioner's case was that he had been right in his Decision Notice to say that infringement of an intellectual property right was not sufficient to trigger the exception. He considered that the expression "adverse effect" required something more in terms of actual harm to commercial or other interests. Ofcom and T-Mobile, on the other hand, argue that the question of loss or harm should be taken into account when carrying out the public interest balance required by EIR regulation 2(1)(b), but not at the stage of determining whether the exception has been engaged. Ofcom also say that we should not read anything into the fact that those drafting the EIR and the Directive appear to have deliberately avoided using the word "infringement", which would have put the issue beyond doubt. It points out that the expression "adverse effect on" has simply been used in the introductory sentence in regulation 12 (5) as a convenient general term capable of being applied to each of the factors set out in the following subparagraphs. Ofcom says that it is therefore appropriate to substitute the word “infringe” when applying the introductory words to sub paragraph (c). However we believe that, interpreting the exception restrictively requires us to conclude that it was intended that the exception would only apply if the infringement was more than just a purely technical infringement, (which in other circumstances might have led to a court awarding nominal damages, or even exercising its discretion to refuse to grant the injunction that would normally follow a finding of infringement). It must be one that would result in some degree of loss or harm to the right holder. We do not therefore accept that such harm should only be taken into consideration when carrying out the public interest balance. We find no difficulty in considering, first, whether there has been sufficient adverse effect to trigger the exception and then, if there has been, moving on to consider whether the harm (potential or actual) is sufficiently great to outweigh any countervailing public interest in the disclosure of information in question. Nor do we think that it is relevant to argue, as Ofcom does, that our decision on this point is inconsistent with the normal approach of a court considering an infringement issue. It is right that, subject to the discretion applying to all equitable remedies, an injunction may be expected to be granted even without proof of loss. However, the comparison is not a valid one in that we are required to consider a different issue to that facing a judge in an infringement trial, and must do so in the context of a specific form of words that does not appear in intellectual property legislation and against a background that requires us to interpret restrictively the provision protecting intellectual property rights.

48 The question that next arises is whether any actual harm will be suffered on the facts of this case. We do not think that the threshold for establishing an adverse effect is particularly high. Its purpose is simply

to filter out those cases where the infringement has been either purely technical or so minimal that the exception may be disregarded at the outset, without the public authority having to give consideration to the balance of public interest. For example, a body of information may include a short letter from a third party, which is not particularly significant in the context of the request for the disclosure of information as a whole. Copyright in the letter will normally be owned by its author, but the infringement involved in making a copy of it for release to the person who made the request would represent a technical infringement causing no loss to anyone. It would be pointless to require the public authority in those circumstances to go through the process of balancing the public interest for and against its disclosure; it should be able to disregard the issue of infringement on the simpler basis that disclosure will not have an adverse effect on the copyright of the letter writer.

49 On the facts of this case we believe that there will be an adverse effect, at least so far as the MNOs are concerned, in respect of their intellectual property rights in the datasets provided to Ofcom and incorporated by Ofcom into the Sitefinder database. We will deal in turn with each of the adverse effects relied on by Ofcom and T-Mobile.

50 Loss of potential revenue stream. It is evident that the information in question does have commercial value in the eyes of those wishing, for example, to market planning services or to develop navigation systems based on the ability to locate a mobile phone by reference to its proximity to a base station. T-Mobile provided evidence of possible licensing arrangements and of one organisation which it has threatened with infringement proceedings as a result of the recent publication of an online mapping service which replicates, without permission, some features of the Sitefinder database. It argued that the release of the whole of the Sitefinder database would destroy its ability to license the use of the information in this way, or in other ways that may arise from time to time. This category of harm involves a direct loss of the ability to exploit the relevant intellectual property through licensing and therefore goes to the heart of the right as an element of property.

51 The difficulty of policing intellectual property rights. It is accepted by all parties that the release of information under either EIR or FOIA does not involve an implied licence to exploit it commercially or to do any act which would constitute an infringement if not authorised. Any person to whom the information is released will therefore still be bound by an obligation to respect any intellectual property rights that already subsist in it. However, once the material protected by an intellectual property right has been released to a third party it becomes more difficult to discover instances of infringement (either by that third party or any person to whom it passes the material), to trace those responsible for it and to enforce the right against them. This is particularly the case with respect to the material in this case, which is stored in a form in which it may be instantaneously transmitted to many third parties with limited scope to trace either the source or the destination and in a format that

may be very easily reconfigured. Although it is the case that much of the material has already been licensed for public disclosure by Ofcom, and in fact released into the public domain under that licence, this does not undermine each MNO's interest in the effective enforcement of its intellectual property rights to protect unauthorised commercial exploitation of the so far unpublished elements, including, in particular, the whole database in a format that may be searched, sorted and manipulated.

52 Disclosure of network design. Access to the Sitefinder database will enable each MNO to obtain full details of the network coverage of each competitor's network, including any strategic developments that become apparent from the regular updates provided to Ofcom. This, it is said, provides much more detail than appears on the general coverage plans published by each MNO for publicity and will give competitive advantage to a rival. Although we see some adverse effect inherent in the release of the whole of an MNO's dataset in a format that makes it particularly easy to interrogate and manipulate the data, we do not think that the harm should be overstated. First, it became apparent to us in the course of hearing evidence that, although it would be a time-consuming process to map a competitor's entire network (by assembling all the available data accessible through each triangle on every page of the Sitefinder website), the cost in manpower terms would not be excessive when compared with the financial strength of each MNO and the commercial advantage it would derive from this perfectly legitimate means of intelligence gathering. It was estimated by one of Ofcom's witnesses, Mr Tarpey, that it would take approximately 1029 man hours to carry out the exercise. Mr Wiener told us in evidence that his colleagues on the commercial side within T-Mobile had made it clear to him that they would be very interested in using the Sitefinder data for this purpose. T-Mobile, he said, would love to have a full picture of each competitor's network. However, he was not able to provide an explanation that we found satisfactory as to why it had not committed the resources to reverse engineer each competitor's network architecture in this way. He said that he was not familiar with the reason for T-Mobile apparently having made a deliberate decision not to take this step and that he had not been party to any discussion on the subject. We find this surprising. He is T-Mobile's Head of Technology Strategy, who had represented the company on the working group that developed the Sitefinder system, and is evidently deeply involved in its decision-making on the MNOs' response to Mr Henton's request. We infer that if obtaining the information in this way is of so little concern to T-Mobile that it has not even been discussed at this level of its management structure, the prospect of a competitor performing the same process on T-Mobile's data may not be as serious a commercial risk as has been asserted. The risk is further reduced, we believe, because a detailed analysis of a competitor's network will be of greater value to a rival when targeted on a particular locality or region - a task that may be carried out using the Sitefinder database, with considerably less effort than would be involved in recreating the national network.

53 In addition, as explained in paragraph 9 above, a considerable body of information on both existing and planned base stations is made available to competitors as a result of the arrangement between the MNOs and local authorities to facilitate consultation on planning issues. We were shown examples of local authority publications from which we have observed that they do not include all the technical data about, for example transmitter power or antenna height but that:

(a) They include a description of the facility which, certainly in some instances, would have indicated whether a particular installation provided only very localised coverage or was a substantial installation likely to constitute a more significant element of an MNO's network infrastructure.

(b) They include a five figure grid reference number as well as precise address details in some cases.

(c) They are less up-to-date than the Sitefinder website in respect of operating base stations (which, until the MNOs reconsidered their willingness to contribute to Sitefinder, was updated quarterly) although they do include information about future plans.

54 It is true to say, therefore, that the release of that part of the Sitefinder database that has not already been published on the Sitefinder website (either at all or in a conveniently accessible form) would give rise to some commercial disadvantage for the MNOs which constitutes an adverse effect on the intellectual property rights in that information.

55 Increased site costs. Ofcom and T-Mobile argue that if network coverage were to be disclosed on a national basis, and incorporating the precise location of each base station, landowners would be able to identify land on which it was apparent that an MNO would require to place a base station and would consequently be able to demand a higher rent. For that scenario to apply a number of factors must coincide. The landowner must be aware of the MNO's need for a base station in a particular location (either as a result of his own investigations or, more probably those of an intermediary). That information must not have been apparent from the information already accessible from the Sitefinder website or from another source, such as the local authority roll out plans described above, read in conjunction with the MNO's own published maps of network coverage. The landowner must own substantially all of the land within the target location. The requirement of the MNO, in respect of the technical capabilities of the base station or the coverage desired over particular terrain must be very precise so that, for example, it is not possible to achieve the required service capacity by re-locating the base station on to another land owner’s property with appropriate adjustment of the mast height and/or transmitter power. We think that it is difficult to forge a link through these connections between any significant commercial loss or harm, at one end of the chain of causation, and, at the other, the disclosure of information in circumstances that would amount to an infringement of intellectual

property rights. We think that the harm likely to be suffered under this heading is minimal but that there is sufficient adverse effect from the various factors considered together to trigger the exception.

56 Having therefore decided that the exception applies we must now apply regulation 12(1)(b) and decide whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. On this issue Ms Rose, Counsel for Ofcom, argued that we should consider all elements of public interest in favour of maintaining the exception. She argued that this should include:

(i) the public interest in respecting the commercial interests of intellectual property right owners;

(ii) the risk to public safety if criminal activity is facilitated by disclosure (already dealt with in paragraph 40 above); and

(iii) the disadvantages the public will suffer if the MNOs decide that they should permanently withdraw their cooperation over Sitefinder and refuse to disclose any further information to Ofcom.

57 Ms Rose argued, in particular, that it would be contrary to basic provisions of administrative law if we did not consider all relevant aspects of the public interest and that we should not preclude ourselves from doing so in the absence of very clear language to that effect. She said that regulation 12(5)(c) did not contain such language. She acknowledged that a differently constituted panel of this Tribunal expressed the view in an FOIA case, *Bellamy v Information Commissioner and the Secretary of State for Trade and Industry* EA/2005/0023 that *"not all public considerations which might otherwise appear to be relevant to the subject matter of the disclosure should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied on."* We are, of course, not obliged to follow other decisions of this tribunal and Ms Rose urged us not to do so in this case, particularly if we interpreted *Bellamy* to mean that we should not take account of the public interest in ensuring that the MNOs continue to contribute to the Sitefinder database.

58 If Ms Rose's argument is correct on this point the effect could be that a factor in favour of one exception, having been found to be insufficient to justify the maintenance of that exception, could still be relied upon to add weight to public interest factors supporting the maintenance of another exception. We do not accept that the language or structure of EIR regulation 12 permits the public interest factors to be transferred and aggregated in this way. It seems to us that for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception. It is a factor in favour of maintaining <u>that</u> exception, not any matter that may generally be said to justify withholding information from release to the public, regardless of content. If that were not the case then we believe that the application of the exceptions would become unworkable. It could certainly produce a

strange result on the facts of this case. We have already found that the public interest in withholding information that might be of value to criminals, does not justify maintaining the public safety exception. On Ms Rose's argument it could be supplemented by the public interest in, for example, not undermining intellectual property rights, in order to try to tip the scales in favour of maintaining the exception. We think that this would produce a nonsensical outcome and it is not a procedure we propose to adopt.

59 For the purposes of EIR regulation 12(5)(c), therefore, we consider whether the public interest factors arising if the information in question is disclosed in breach of intellectual property rights, outweigh the public interest in disclosure. We do not take any account for this purpose of the public interest factor in respect of public safety. However, we do think we should consider the potential public interest detriment arising from the MNOs' refusing to continue licensing Ofcom to publish the information. Whether or not this is a factor that is "inherent" in the exception, in the terminology used in *Bellamy*, it seems to us that it arises naturally from the exercise of an intellectual property owner's right to control the use of protected material either by prohibition or licence.

60 The degradation of the Sitefinder website as a source of information for the public would not be the direct consequence of the disclosure of the information in question. It would result from the MNOs' withdrawal of cooperation, contrary to the 10 Commitments. Their justification for taking this step, (if that is what they ultimately decide to do) is that they are not prepared to see the five digit grid references and the overall network architecture disclosed to the public as a result of a direction to disclose the Sitefinder database. However, the original Stewart Report recommendations did not exclude those two elements from the national database that it proposed. It is clear from the passage quoted in paragraph 3 above that its main recommendation was simply that a national database be set up. It went on to specify that the database should include, among other things, the grid reference. Having set out the parameters of the database it then added that the information should be readily accessible to the public. It did not suggest that the means adopted to facilitate public access should result in the whole of the database not being available or any of the recommended data fields being excluded from public inspection. Nor did it appear to contemplate that the incorporation of "citizen access" features would lead to either of those outcomes. It was only in the course of formulating detailed plans for Sitefinder that the MNOs and the RA agreed to present the information in a way that did not disclose detailed grid references or enable the full national picture to be easily accessed.

61 For the detriment relied on to be suffered by the public the MNOs must first carry out their implied threat. It is not entirely clear whether or not they will do so. They have all discontinued the supply of information to Ofcom pending the outcome of this Appeal. Ofcom has said that it believes that there is a real risk that they will continue to decline to

provide the information if it is ordered to disclose the Sitefinder database. Mr Wiener has said in his evidence that T-Mobile "would give serious consideration as to whether to continue providing up to date data for Sitefinder again, at least in the format in which it has previously been provided". He expressed the view that other MNOs would feel the same but we have no direct evidence from them and must be cautious about speculating on the point. We have been shown correspondence passing between Ofcom and individual MNOs in the course of dealing with the original request and subsequently responding to the Information Commissioner. It is apparent from this correspondence that the MNOs have not always held identical opinions on the issues that have arisen and it is at least possible that some will ultimately decide to continue providing the information even if disclosure to Mr Henton is ordered. We are also cautious about speculating about what might transpire if the MNOs do take concerted action and withdraw their cooperation on a permanent basis. The Information Commissioner has suggested that in those circumstances Ofcom would be able to enforce disclosure by altering the terms of the disclosure requirements included in each MNO's licence. Ofcom and T-Mobile have countered that suggestion by explaining that the process for imposing a change to the licence terms is problematical and might be prevented by legal challenge. At the very least, they say, it could take a long time and the information on the Sitefinder website would become more and more out of date in the meantime. We do not think we should assume the worst outcome in this respect. We do not know what pressure may or may not be asserted on the MNOs by Ofcom, as regulator, or how resistant to it MNOs may be. Nor do we know whether or not pressure may be felt from other sources if the press, special interest groups or MPs (or any combination of them) take the view that the mobile phone industry ought not to undermine the Sitefinder information resource in this way. We must obviously give due weight to the fact that there is a risk that the interplay of all of these possibilities may ultimately result in the amount of information available to the public being reduced, but we do not believe that the likelihood of that outcome is so high that we should place a great deal of weight on this particular element of public interest.

62 Such weight as we therefore apply to the possible discontinuance of the MNOs' intellectual property licence in favour of Ofcom must be added to the public interest in intellectual property rights generally being respected. We have considered the private intellectual property interests of the MNOs in the course of considering the adverse effect on those rights under paragraphs 50 to 55 above. We do not believe that any of those elements of harm likely to be suffered has a direct impact on the public. However, each of them represents some degree of interference with a property right, which may only be permitted if it represents lawful control of the use of property in accordance with the general interest of the State and is effected in a proportionate manner. We have already dealt with the countervailing public interest in disclosure in paragraph 41 above and conclude that the consequences of the interference with property rights inherent in any order for

disclosure of the information, and of the possible withdrawal of cooperation by MNOs, do not outweigh those elements of public interest in favour of disclosure.

Exceptions under EIR – regulation 12 (5) (e) – confidentiality

63 We have already decided, in paragraph 26 above, that the information requested is information on emissions. The result is that, even if regulation 12 (5) (e) is engaged, the effect of regulation 12(9) is that the exception may not be relied on. However, in case it is subsequently decided that we were wrong on that issue, we will consider the application of the exception to the information requested.

64 We interpret the language of recital 12(5)(e) to mean that, in order for the exception to be engaged, a party relying on it must establish that it has a right to protect the information in question under the law of confidentiality. This requires it to establish that the information has the necessary quality of confidence, that it was communicated to a third party in circumstances that give rise to a reasonable expectation that confidentiality would be maintained and that unauthorised disclosure is either threatened or has occurred. The second and third of those requirements are clearly satisfied in this case but the Information Commissioner concluded in his Decision Notice that the information requested did not satisfy the first requirement because it was accessible from the Sitefinder website. He maintained that position before us. The five digit grid reference numbers for each base station owned or operated by an MNO certainly form a body of data that is capable of being protected by the law of confidence and, although the Sitefinder website enables the approximate position of each base station to be located, it does not enable those accessing it to extract from the underlying database, or extrapolate from the location of triangles on the maps, each five digit reference number. However, the local authority roll out plans include this information in respect of every one of the MNOs' base stations. The common data elements (map location, street location, name of operator, etc.) between the Sitefinder database fields and the roll out plans as supplied to the local planning authorities appear to provide sufficient information for the items in the two sets of data to be matched up. The information is made available to the local authorities without any obligation of confidentiality being imposed on them. The fact that many do not publish the information does not alter the fact that its confidentiality was destroyed when it was released to them without restriction and in full knowledge that each of them would be free to publish it and might do so. The fact that a small part of the information might have appeared in the datasets formerly delivered to Ofcom quarterly, which would not appear in the annual roll out plans until a few months later, does not in our view alter the position that the database as a whole has passed into the public domain.

65 The second element of relevant information, the complete national network structure, may be extracted from the Sitefinder website by

anyone willing to devote the time and effort to assemble all the information contained in each datasheet accessible through a triangle on the maps. This raises the question of whether information may properly be characterised as confidential if it forms part of a publicly available body of information, but may only be extracted from it with great difficulty or effort. The decision of Jacob J (then the trial judge) in *Mars v Teknowledge* [2000] FSR 138 at 149 suggests that information put into the public domain in encrypted form may still have lost the quality of confidence because it was accessible by anyone with the necessary skill to de-crypt. In the present case it is not the skill and knowledge of the de-crypter that stands in the way of anyone wishing to access the information, but simply the time and effort required to access the details for each base station on Sitefinder and to aggregate the information obtained. We were shown evidence that one organisation had already published an on line mapping service which, its proprietor claimed, had been developed by just this process. We conclude that, were we required to decide the point, the overall network architecture of each MNO's system has already entered the public domain and has thereby lost the necessary quality of confidence. We do not believe that, because this information would be significantly easier to access if the requested information were to be disclosed, the less easily accessed form of it retains confidentiality.

66 If, therefore, we are wrong in deciding that regulation 12(9) applies, we consider that the information would still have to be disclosed because it no longer retains the required quality of confidence, even though its release in the structured format of a database would have infringed database right and/or copyright.

Exceptions under EIR – regulation 6(1)(b) – information already publicly available

67 Ofcom argues that if, contrary to its primary submissions, the information requested does not fall within the confidentiality exception, it must follow that it is already publicly available. In that event, it says, the exception under regulation 6(1)(b) applies.

68 Regulation 6 reads:

Form and format of information

6 – (1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

69 We have already decided that both the five figure grid reference numbers and the overall national network architecture have ceased to be protected by the law of confidentiality. However, it does not necessarily follow that regulation 6 (1)(b) applies. In this case Mr Henton asked for the information to be supplied as either a text file, csv file, Access database or Excel spreadsheet. He therefore certainly asked for it in a particular form or format so as to bring regulation 6 into play. Faced with a request in that form one of the options available to Ofcom would have been to say that the information was already publicly available and that the published format was easily accessible to Mr Henton. We think that, whether or not it would have been justified in making that claim must be assessed by reference to the particular format that has been requested. It was obviously easy to access the Sitefinder website and it would have been possible, once on the website, to extract the relevant information, triangle by triangle, and to assemble it into a text listing of some form containing the whole of the network. However, the second of those steps would be time consuming. It could certainly not be described as an easy process and it would not have yielded the five digit grid reference number. We do not believe, therefore, that this part of the requested information may properly be described as being "easily accessible". It follows that, on the particular facts of the case, the information in question falls outside both regulation 12(5)(e) and 6(1)(b).

Conclusion

70 As a result of our conclusion on each of the arguments raised by Ofcom and/or T-Mobile we have decided that the Information Commissioner was correct in ordering the release to Mr Henton of the Sitefinder database although we have reached that decision on different grounds to those set out in the Decision Notice.

Chris Ryan

Deputy Chairman Date 4 September 2007