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Case No: C1/2008/0938

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
Lord Justice Laws
[2008] EWHC 1445 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2009

Before :

LORD JUSTICE WALLER
(Vice President of the Court of Appeal Civil Division)
LORD JUSTICE THOMAS
and
LORD JUSTICE RICHARDS

- -

Between :

THE OFFICE OF COMMUNICATIONS	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	**Respondent**

- -
- -

Dinah Rose QC and Jane Collier (instructed by **The Office of Communications**) for the **Appellant**
Akhlaq Choudhury (instructed by **The Information Commissioner's Office**) for the **Respondent**

Hearing dates : 17 December 2008

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Approved Judgment

Lord Justice Richards :

1. This is the first occasion on which this court has had to rule on issues arising under the Environmental Information Regulations 2004 ("the EIR"). One of the issues raised concerns the correct general approach to balancing the public interest in maintaining exceptions from disclosure against the public interest in disclosure. Another issue is whether a decision-maker is entitled to take a matter into account as a public interest benefit if that benefit arises from use of the disclosed information in breach of the intellectual property rights of third parties.

2. The issues arise in the context of an appeal, first to the Information Tribunal and from there by way of further appeal to the Administrative Court and now to this court, against a decision of the Information Commissioner ordering the Office of Communications ("Ofcom") to disclose information relating to the location and other details of mobile phone masts.

The regulatory framework

3. The Freedom of Information Act 2000 ("the 2000 Act") creates a general right of access to information upon written request made to a public authority. The EIR contain a specific code for environmental information. Information that is environmental information under the EIR is exempt from disclosure under the 2000 Act.

4. The EIR give effect to Directive 2003/4/EC on public access to environmental information ("the Directive"). The recitals to the Directive include the following:

> "(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.
>
> .....
>
> (14) Public authorities should make environmental information available in the form or format requested by an applicant unless it is already publicly available in another form or format or it is reasonable to make it available in another form or format. In addition, public authorities should be required to make all reasonable efforts to maintain the environmental information held by or for them in forms or formats that are readily reproducible and accessible by electronic means.
>
> .....
>
> (16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive

> way whereby the public interest served by disclosure should be weighed against the public interest served by the refusal."

5. Article 1 of the Directive states that the objectives of the Directive are (a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and (b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information.

6. Article 3 makes provision for Member States to ensure that public authorities are required, in accordance with the provisions of the Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest. Article 4 deals with exceptions, setting out in paras (1) and (2) various grounds on which Member States may provide for a disclosure request to be refused. Article 4(2) continues:

> "The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal ...."

7. The approach required by the Directive is reflected in the EIR. By regulation 5(1) of the EIR, a public authority that holds environmental information shall make it available on request, subject to various exceptions (and by regulation 5(6), any enactment or rule of law that would prevent the disclosure of information in accordance with the EIR shall not apply). Regulation 6(1) provides that 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.

8. The relevant exceptions are contained in regulation 12, which reads in material part:

> "12.(1) Subject to paragraphs (2), (3) and (9), a public authority 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 purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

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

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure;

(g) the protection of the environment to which the information relates."

9. Regulation 16 empowers the Secretary of State to issue a code of practice providing guidance to public authorities as to the practice which it would, in the Secretary of State's opinion, be desirable for them to follow in connection with the discharge of their functions under the EIR. A Code of Practice was issued under that provision in February 2005.

10. By regulation 18 the enforcement and appeals provisions of the 2000 Act apply for the purposes of the EIR, with specified modifications.

The facts

11. The relevant facts are conveniently summarised in the judgment of Laws LJ, from which the following is largely taken.

12. Public concern as to potential risks to health which might be occasioned by electro-magnetic radiation emitted from mobile phones led to action in 1999 by the Department of Health which in that year commissioned a group of experts, under the chairmanship of Sir William Stewart, to consider the risks. The Stewart Report was produced the following year. Sir William and his colleagues concluded that radiation from mobile phones did not create an adverse health risk, but until much more detailed and scientifically robust information became available a precautionary approach was called for. They noted that the location of base stations and the processes by which their erection was authorised was the aspect of mobile phone technology which generated the most public concern. They made these observations:

> "6.47. 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.
>
> 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."

13. Further consideration was given to this whole matter, and at length the Stewart Report's recommendations led to the establishment by Ofcom, which itself came into existence after publication of the Stewart Report, of the Sitefinder website. This allows an individual who desires to know whether there is a mobile phone base station in a particular area to search for that information by inputting a postcode, town name or street name. A map square of the area then appears on screen.

14. The map shows base stations of five mobile network operators ("MNOs") and of 02-Airwave and Network Rail, as blue triangles. The five MNOs are 02, Vodaphone, T-Mobile, Orange and H3G. The 02-Airwave stations are used by the emergency services. Each blue triangle has a box which displays the following information: (a) operator site reference, (b) antenna height, (c) transmission height, (d) frequency range, (e) antenna transmitter power, (f) the station type, (g) maximum licensed power, and (h) name of the operator.

15. The website does not, however, give the address of the base station or its postcode, national grid reference or latitude/longitude co-ordinate; nor does it indicate whether the base station is mounted on a particular building or structure. The location of the

triangle on the map is not sufficiently precise to enable the grid reference data to be extrapolated from it.

16. On 11 January 2005 Mr Ian Henton, the Information Manager for Health Protection Scotland (an arm of the National Health Service), sent an email to Ofcom in these terms:

> "I wish to request the following information for each mobile phone base station held in 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."

17. Although the purpose of the request was not, and did not need to be, stated, it appears that the information was requested for the purposes of epidemiological research.

18. After consulting the MNOs Ofcom replied on 27 January 2005. It accepted that the information sought was environmental information so that the request fell to be considered under the EIR. Its substantive reply was that the information was already available on the Sitefinder website and so there was no requirement pursuant to regulation 6(1)(b) of the EIR to provide it in any other format.

19. On 25 February 2005 Mr Henton sought an internal review. He stated:

> "I do not believe that EIR Regulation 6(1)(b) applies in this case as the information on the Sitefinder website is not in a suitable format for my needs. I wish to obtain a complete dataset of the information you hold on the base stations including grid references. The grid references will allow me to map the base stations using my own mapping 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."

20. The review decision dated 15 April 2005 upheld the refusal of disclosure but did so on the ground that the exceptions provided for in regulation 12(5)(a) and (c) applied.

It was accepted that the national dataset sought by Mr Henton was not in the public domain because of the logistical and practical difficulties of constructing it from downloads from Sitefinder. The decision did not elaborate the material points under regulation 12(5)(a) and (c), but the evidence showed that Ofcom was concerned that disclosure of the national dataset in a readily comprehensible and searchable form would compromise the security of what are called TETRA sites (that is sites which provide the police and emergency service radio network) and also would adversely affect the intellectual property rights of the MNOs.

21. On 22 April 2005 Mr Henton applied to the Commissioner under s.50 of the 2000 Act, as applied by regulation 18 of the EIR, for an assessment of Ofcom's decision. At length detailed submissions were made to the Commissioner by Ofcom as to why the exceptions applied and why the public interest in maintaining the exceptions outweighed the public interest in disclosure.

22. The Commissioner issued his decision notice on 11 September 2006. He ordered Ofcom to make the disclosure sought. His reasons were summarised by the tribunal at paragraph 13 of its determination as follows:

> "..... 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."

23. Ofcom exercised its right of appeal to the tribunal under s.57(1) of the 2000 Act. The tribunal acceded to an application by one of the MNOs, T-Mobile, to be joined as a party. In a decision promulgated on 4 September 2007, the tribunal upheld the Commissioner's decision to order disclosure, albeit on different grounds.

The tribunal's decision

24. In summary, the tribunal found that the exceptions under regulation 12(5)(a) (public safety) and regulation 12(5)(c) (intellectual property rights) were engaged but that in each case the public interest in maintaining the exception did not outweigh the public interest in disclosing the information.

25. In relation to the exception under regulation 12(5)(a), the tribunal found that the release of the whole database would provide some assistance to criminals, as regards the planning of attacks on the network, beyond the assistance that could be obtained from interrogating the Sitefinder database through the website: the disclosure of the requested information would to some degree increase the risk of attacks and in that way might adversely affect public safety. The tribunal continued:

> "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 ... 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 .... 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 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."

26. The tribunal then considered the exception under regulation 12(5)(c) in respect of intellectual property rights. The tribunal's focus was on the protection by "database right" of the datasets contributed to the Sitefinder database by each of the MNOs. The tribunal doubted the correctness of concessions made by the Commissioner that the Sitefinder database as a whole was separately protected by database right and that there was also copyright protection for the individual datasets and the Sitefinder database, but no decision on those matters was necessary for the purposes of the tribunal's decision.

27. Database right is a *sui generis* right created by the Copyright and Rights in Databases Regulations 1997, amending the Copyright, Designs and Patents Act 1988. By regulation 6, a database is defined as "a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means". By regulation 13(1), a property right known as a "database right" subsists in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database.

28. Regulation 16 deals with infringing acts:

> "16.(1) Subject to the provisions of this Part, a person infringes a 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 contents of the database.
>
> (2) For the purposes of this Part, 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."

By regulation 19(1), a lawful user of a database which has been made available to the public in any manner is entitled to extract or re-utilise insubstantial parts of the contents of the database for any purpose: a "lawful user" is defined by regulation 12(1) as "any person who (whether under a licence to do any of the acts restricted by any database right in the database or otherwise) has a right to use the database". By regulation 20(1), database right in a database which has been made available to the public in any manner is not infringed by fair dealing with a substantial part of its contents if (a) that part is extracted from the database by a person who is apart from that paragraph a lawful user of the database, (b) it is extracted for the purpose of illustration for teaching or research and not for any commercial purpose, and (c) the source is indicated. By regulation 20(2) and schedule 1 there are further exceptions, but none of them is relevant to the present case.

29. The tribunal concluded that each MNO had a database right in its own dataset and that the release by Ofcom of the information requested would constitute an infringement of those database rights. The notional licence granted by each MNO to Ofcom in respect of the provision of datasets for use on the Sitefinder website did not extend to permitting the whole of the data to be copied and released in text format or to the disclosure of that part of the MNO's dataset that could not be accessed through the Sitefinder website; and the unlicensed release of information that was either not accessible through the Sitefinder website or was only accessible with great difficulty would involve the copying of a substantial part of the protected work. The tribunal

further concluded that release of the information would give rise to more than a technical infringement and would have an adverse effect, within regulation 12(5)(c), on the intellectual property rights of the MNOs. Two of the matters relied on in that connection were the loss of the ability to exploit the relevant intellectual property through licensing and the difficulty of policing the rights. As to the latter, the tribunal stated in para 51:

> "51. ... 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."

30. Having decided that the exception in regulation 12(1)(c) applied, the tribunal turned to the balancing exercise. It rejected an argument advanced by Ms Rose on behalf of Ofcom that all the elements of public interest in favour of maintaining the exception should be put into the balance, including (i) the public interest in respecting the commercial interests of intellectual property owners, (ii) the risk to public safety if criminal activity is facilitated by disclosure, and (iii) the disadvantages the public would suffer if the MNOs decided permanently to withdraw their co-operation over Sitefinder and refuse to disclose any further information to Ofcom. In relation to that argument the tribunal stated:

> "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 that 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."

31. The tribunal therefore limited the balancing exercise in respect of intellectual property rights to whether the public interest in maintaining that particular exception outweighed the public interest in disclosing the information. As to the public interest in disclosure, it referred back to what it had said in para 41 of its decision. The conclusion it reached was 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" (para 62).

The judgment of Laws LJ

32. Ofcom's further appeal to the Administrative Court was brought under s.59 of the 2000 Act. Laws LJ, sitting as a judge of the Administrative Court, dismissed the appeal in an *ex tempore* judgment on 8 April 2008. I shall deal with the relevant parts of his reasoning when considering the individual issues raised on the appeal to this court.

The issues

33. The following issues are raised:

(1) Did the tribunal fall into error when carrying out the public interest balancing exercise under regulation 12(1)(b), by looking at each applicable exception separately and declining to consider whether the aggregate public interest in maintaining the exceptions outweighed the public interest in favour of disclosure?

(2) Did the tribunal fall into error by taking into account, as an aspect of the public interest in disclosure, the "benefit" arising from use of the information for epidemiological research even though such use would be in breach of the intellectual property rights of the MNOs?

(3) Was the tribunal entitled to find that the public interest in maintaining the exception in regulation 12(5)(c) did not outweigh the public interest in

disclosing the *names* of the MNOs (as distinct from the disclosure of the remainder of the requested information)?

First issue: the correct approach to the public interest balancing exercise

34. The tribunal held that each exception had to be considered separately for the purposes of the public interest balancing exercise and that it was not permissible to weigh the aggregate public interest in maintaining the exceptions against the public interest in disclosure. Its reasons for rejecting the aggregate approach were contained in para 58 of its decision, quoted at [30] above. In upholding that approach, Laws LJ stated:

> "47. Here, as it seems to me, the tribunal's view set out at paragraph 58 was indeed reasonable; but more than that, as Mr Choudhury submits, it accords with the statutory scheme. Regulation 12(1)(b), as I have shown, has the words 'the public interest in maintaining the exception'. The EIR must be construed conformably with the Directive, Article 4(2) of which refers to the 'interest served by refusal' (see also paragraph 16). The general requirement of the Directive is that grounds for refusal be interpreted restrictively. The EIR by Regulation 12(2) prescribes a presumption in favour of disclosure.
>
> 48. So the focus of the legislation is on the particular interests which the particular exceptions serve. It requires such interests, in effect, to be specifically justified in a context where the presumption is in favour of disclosure.
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> ...
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> 50. ... I have concluded that the scheme is that each exception must carry its own justification. The approach that takes each exception separately is, I think, promoted by the words of Regulation 12(1)(b) which, as Mr Choudhury pointed out this morning, are in contrast with the words in Regulation 13(2)(a)(ii) of the EIR dealing with personal data.
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> 51. The approach adopted by the tribunal is promoted also, as I see it, by Article 4(2) of the Directive. This is consistent with what is said in Coppel on Information Rights, relating to the 2000 Act, at paragraph 15-001 ....
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> 52. At paragraph 15-005 the author says this:
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> > 'Where information is rendered exempt information by more than one qualified exemption, it would seem that the public interest in maintaining the exemption must be balanced one exemption at a time against the public interest in disclosure.'
>
> ...

> 53. The reason I think that the approach taken in that text book is correct is essentially grounded in the policy balance that one finds in the Directive and in the Regulations. There is a general duty to disclose. It is, as Mr Choudhury put it, purpose-blind. No justification has to be shown for the disclosure in the first instance. The exceptions are drawn tightly. The wording suggests at least that they must be considered exception by exception, and that includes the public interest that attaches to each exception. The scheme is a striking one. But it seems to me that the words, both of the Directive and of the EIR, promote the result that was arrived at by the tribunal" (original emphasis).

35. The case for Ofcom is that the aggregate (or cumulative) approach is the correct one and that Laws LJ should therefore have found that the tribunal fell into error in rejecting it. Ms Rose made clear in the course of her submissions that Ofcom relies only on the public interest in maintaining the particular exceptions found to apply: it does not suggest that any wider considerations of public interest are relevant. But the submission is that where more than one exception is found to apply, they must at some point be considered together for the purpose of the public interest balancing exercise; that is to say, the aggregate public interest in maintaining the exceptions must be weighed against the public interest in disclosure.

36. For the following reasons, which substantially adopt those put forward by Ms Rose, I have been persuaded to differ, with respect, from the conclusion reached by Laws LJ and to accept Ofcom's case on this issue.

37. In accordance with the general principle of statutory construction as expressed in s.6 of the Interpretation Act 1978 (and as applied to subordinate legislation by s.23 of that Act), words in the singular include the plural unless the contrary intention appears. In the case of regulation 12(1) it is clear that "an exception to disclosure" in para (a) is to be read as meaning "one or more exceptions to disclosure". Indeed, it is common ground that an authority may rely on any number of exceptions in justifying a refusal to disclose. Similarly, "the public interest in maintaining the exception" in para (b) is to be read as "the public interest in maintaining the exception or exceptions", i.e. the public interest in maintaining whatever exceptions are found to apply. That in itself suggests that the exceptions are to be considered together, not separately, when balancing the public interests against and for disclosure. The aggregate approach is also favoured by the reference in para (b) to "all the circumstances of the case".

38. That construction is reinforced by the number and nature of possible exceptions. For example, it is common ground that para (5)(a) of regulation 12 is to be read not as a single exception but as containing four separate exceptions ("international relations", "defence", "national security" and "public safety"). Yet there is an obvious potential overlap in the content of those exceptions. Similarly there is a potential overlap between, for example, "intellectual property rights" in para 5(c) and "the confidentiality of commercial or industrial information" in para 5(e). To my mind it would be wholly artificial to have to look at each exception separately for the purpose of the public interest balancing exercise.

39. The different wording of regulation 13 does not in my view take matters any further. That regulation restricts disclosure of personal data and includes a balancing test in terms of whether "in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it". The difference in wording can be attributed to the difference in the structure of the regulation (which, unlike regulation 12, does not contain a list of exceptions) rather than to any intended difference of substantive approach.

40. Article 4(2) of the Directive, read together with recital (16), is also consistent with my preferred construction of regulation 12. In stating that the grounds of refusal "shall be interpreted in a restrictive way", article 4(2) requires that the individual grounds themselves are to be narrowly construed, not that each is to be looked at separately for the purpose of the public interest balancing exercise. Similarly, the need to take into account "for the particular case" the public interest served by disclosure, and "[i]n every particular case" to weigh the public interest served by disclosure against the interest served by the refusal, does not mean that the balancing exercise has to be carried out for each *ground of refusal* separately. The "particular case" is the particular request for disclosure, not the particular ground; and what is required is that the public interest in favour of the *refusal* to disclose (whatever the ground or grounds of that refusal) must be weighed against the public interest in favour of disclosure, which is properly achieved by looking at the aggregate public interest in maintaining the applicable exceptions.

41. Coppel's textbook asserts that the public interest in maintaining the exemption must be balanced one exemption at a time against the public interest in disclosure, but it does not provide any additional reasoning in support of that assertion. In my view it does not help.

42. I do not accept the tribunal's concern that the aggregate approach makes the applications of the exceptions unworkable or that it is capable of producing a nonsensical outcome. I see no greater difficulty in principle in looking at the aggregate public interest in maintaining the applicable exceptions than in looking at the public interest in maintaining a particular exception. In each case a broad judgment is required. Of course, it may be convenient in a particular case to proceed in the first place exception by exception, considering whether each exception applies and, if it does, whether the public interest in maintaining it outweighs the public interest in disclosing the information. There is no objection to that course *provided that* the matter is also looked at in the round at the end of the process by considering whether the aggregate public interest in maintaining the applicable exceptions outweighs the public interest in disclosure. Nor do I see anything nonsensical or unacceptable in the possibility of the aggregate approach resulting in non-disclosure in a case where looking at each exception individually would have resulted in disclosure. On the contrary, I would consider it surprising if the Directive or the EIR required disclosure in a case where the *overall* public interest favoured non-disclosure.

43. It follows that in my view the tribunal did fall into legal error in its approach to the public interest balancing exercise and that Ofcom should succeed on this ground of appeal.

Second issue: whether a benefit arising from unlawful use of the disclosed information can be taken into account

44. Ofcom contends that the tribunal erred in its substantive finding that disclosure of the Sitefinder database would be of value in epidemiological investigations *because* it could be "searched, sorted or otherwise manipulated for statistical and illustrative purposes" (para 41 of the tribunal's decision, quoted at [24] above). The argument, in short, is that the information could not be used in that way without breaching the intellectual property rights of the MNOs and that it was not open to the tribunal to rely on such unlawful use as giving rise to a public interest benefit.

45. As I have explained, the tribunal held that the MNOs have, in particular, a database right under the Copyright and Rights in Databases Regulations 1997 in the datasets provided by them to Ofcom and included within the Sitefinder database. Any person to whom the information was released would be under an obligation to respect that right and the MNOs would retain an interest in the effective enforcement of the right, but in practice it would become very difficult to discover instances of infringement, to trace those responsible and to enforce against them. This was the main reason why the tribunal found that disclosure of the information would have an adverse effect on the intellectual property rights of the MNOs and that regulation 12(5)(c) therefore applied.

46. Ms Rose, however, turns the point around and submits that since, in the absence of a licence, use of the information for the purposes of epidemiological research would be in breach of the rights of the MNOs, any "benefit" arising from such use would be the result of unlawful conduct. It was an error of law, and/or was to have regard to an irrelevant consideration, for the tribunal to take into account as a benefit something that could only arise from unlawful conduct. It cannot be in the public interest that recipients of information act unlawfully and that third parties' intellectual property rights are infringed. It is against public policy for a public authority to facilitate a breach of the rights of third parties. It was therefore simply not open to the tribunal to treat such use of the information as giving rise to a relevant public interest benefit. In her reply Ms Rose also made brief reference to s.6 of the Human Rights Act 1998 and article 1 of protocol 1 to the European Convention on Human Rights, but I did not understand her thereby to be advancing a discrete submission founded on the Convention.

47. Ofcom's case is advanced in relation to the tribunal's reliance on the benefit arising out of use of the information for epidemiological research. On my reading of the tribunal's decision, in particular para 41, that was not the only benefit relied on by the tribunal. But it was undoubtedly an important element in the tribunal's reasoning. Ofcom goes so far as to contend that the decision could not rationally have favoured disclosure without taking that benefit into account, since the wider public interest in disclosure of the information is substantially met by the availability of the information on the Sitefinder website. I do not need to reach a conclusion on that contention. It suffices to say that on any view the issue is a material one. Moreover, although arising in this case in a relatively narrow context, the issue would appear to have potentially wide implications for disclosure decisions, given the increasing extent to which information is stored in databases and the possibility that third parties may enjoy database rights in such databases or in datasets contained within them.

48. It was common ground before the tribunal, and a necessary step in the tribunal's finding that regulation 12(5)(c) applied, that use of the information for the purposes of epidemiological research would indeed be in breach of the MNO's database rights. Since, however, the point is an essential premise to Ms Rose's submissions, I think it right to examine it more closely. The existence of the rights themselves is not in issue and it seems clear that the contemplated use of the information would constitute a *prima facie* infringement of them. It would involve the extraction or re-utilisation of all or a substantial part of the contents of the database, within regulation 16(1) of the Copyright and Rights in Databases Regulations 1997, and it would not fall within any of the exceptions set out in regulations 19 and 20 of those Regulations. Further, on the tribunal's reasoning it is not possible to rely on an assumption that licences would be granted for the purpose. The tribunal observed at para 41 of its decision that until now MNOs had demonstrated a willingness to license the use of their individual datasets to researchers at no cost (though subject, we are told, to non-disclosure agreements); but it went on to state that 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. That was the basis on which the tribunal concluded that the research issue was a factor in favour of disclosure and that its weight was not significantly reduced by the voluntary disclosure of the information in the past. The benefit from disclosure was plainly not regarded as dependent upon voluntary licensing by the MNOs in the future.

49. There is nothing in the EIR that would preclude reliance by the MNOs on their rights to prevent or restrict post-disclosure use of the information disclosed. The basic duty in regulation 5(1) "to make [environmental information] available on request" cannot be read as authorising subsequent use of the information in breach of third party rights. The actual disclosure of information pursuant to that duty is covered by regulation 5(6), which provides that "[a]ny enactment or rule of law that would prevent disclosure of information in accordance with these Regulations shall not apply". But that relates only to the *disclosure* of the information, not to subsequent *use* of the information disclosed, and there is nothing else in the EIR that disapplies enactments or rules of law relating to such subsequent use.

50. That view is in accordance with paras 17-18 of the Secretary of State's Code of Practice (see [8] above), under the heading "Copyright":

> "17. Public authorities should be aware that information that is disclosed under the EIR might be subject to copyright protection. If an applicant wishes to use any such information in a way that would infringe copyright, for example by making multiple copies, or issuing copies to the public, he or she would require a licence from the copyright holder. HMSO have issued guidance, which is available at [website reference and contact details].
>
> 18. [The HMSO website] explains more fully the distinction between the supply of information held by public authorities under the Freedom of Information legislation and the re-use of that information and those circumstances where formal licensing is required."

51. Nor is there anything in the Directive to suggest that the EIR are deficient in this respect. The objectives of the Directive include guaranteeing the right of access to environmental information held by public authorities and ensuring that such information is progressively made available and disseminated (see recital (1) and article 1); but I do not see how, in the absence of more specific provision, that could justify reading the Directive as requiring Member States to authorise post-disclosure use of the information in breach of the rights of third parties. As to the basic obligation in article 3(1) to ensure that public authorities "make available" environmental information, I have already said in relation to the corresponding regulation 5(1) of the EIR that it cannot be read as allowing use in breach of third party rights. Nothing else in the Directive appears to bear on this issue.

52. So the premise to Ms Rose's submissions must in my view be accepted. This was also the basis on which Laws LJ proceeded. In rejecting Ofcom's case he said this (at para 42):

> "So it may be that MNOs will retain rights of action in relation to uses of the material made after disclosure. But it does not seem to me that that undercuts the thrust of Mr Choudhury's submission that the material, once disclosed pursuant to the Regulation 5 duty, is free in the public's hands, free that is subject to the private law rights that the intellectual property owners enjoy."

53. That, however, does not really meet the thrust of Ofcom's case and in particular does not address the submissions to the effect that the tribunal could not properly rely on unlawful use of the information as giving rise to a public interest benefit.

54. Those submissions have been advanced by Ms Rose with characteristic skill and vigour; and, drawing support as they do from generalised references to the rule of law, they have a considerable attraction to them. In the end, however, I am not persuaded by them. I do not think that the point can be dealt with on the sweeping basis that, because something involves an "unlawful" act, in the sense of being in breach of third party rights, it is necessarily excluded from being taken into account as an aspect of the public interest in disclosure. What can and cannot be taken into account by a decision-maker acting under a statutory power depends in the first place on the governing statute. The statute may expressly or impliedly require or permit certain matters to be taken into account, or it may expressly or impliedly require certain matters not to be taken into account. To the extent that the matter is left open by the statute, the choice of matters to be taken into account is for the judgment of the decision-maker, subject to *Wednesbury* review. The same principles apply to powers conferred by secondary legislation, save that in the present context it is of course necessary to look not only at the EIR but also at the Directive for the light that it casts on the legislative scheme and what can and cannot be taken into account.

55. In the case of the EIR, since an adverse effect on intellectual property rights is the subject of a specific exception under regulation 12(5)(c), it is obvious that breaches of intellectual property rights can and must be taken into account both in determining the application of the exception and in assessing under regulation 12(1)(b) the public interest in maintaining the exception. It is plain, too, that regard can and must be had not just to the immediate effect of disclosure but also to its wider consequences,

including subsequent use of the information disclosed: it was the adverse effect of subsequent use for epidemiological research that was at the heart of the tribunal's finding that the intellectual property rights exception applied in this case. But if such use also has beneficial consequences, furthering the policy of the disclosure regime (as was also the case on the tribunal's findings here), in my view it is implicit in the EIR that such consequences can be taken into account on the other side of the balance as an aspect of the public interest in disclosure.

56. It is true that the EIR do not spell out what can and cannot be taken into account by way of the public interest in disclosure, though some relevant considerations can readily be derived from the Directive: for example, a greater awareness of environmental matters, free exchange of views and more effective participation by the public in environmental decision-making, all of which are referred to in recital (1). But there can be no doubt in this case that the value of the information for epidemiological research would contribute to the public interest in disclosure if such use did not involve a breach of the rights of the MNOs; and it would be surprising and unsatisfactory if the fact that the use was in breach of third party rights meant that it could no longer be regarded as contributing to the public interest in disclosure. The legislative scheme involves a weighing of pros and cons, with a presumption in favour of disclosure and in the context of a strong legislative policy of promoting access to, and dissemination of, information. Where use of information in breach of intellectual property rights has beneficial as well as adverse consequences, the proposition that only the adverse consequences can be taken into account seems to me to run wholly counter to that scheme.

57. Where information is stored in a database, then it is possible in principle for the realisation of the benefits of disclosure of that information to depend entirely on the post-disclosure manipulation of that database. If third parties enjoy relevant database rights which would be infringed by such manipulation of the database, then on Ofcom's case the benefits would have to be excluded from consideration altogether and there would be nothing left in the public interest side of the balance to weigh against the public interest in maintaining the exception. It would follow that there could be no order for disclosure. Yet that outcome would be wholly at odds with the legislative policy. This may be an extreme example (though I suspect that it may become an increasingly real one in practice), but it provides an illustration of why in my view the case put forward by Ofcom cannot be right.

58. It is also interesting to consider, by way of comparison, the case of confidential information falling within regulation 12(5)(e). In that case the very act of disclosure is likely to destroy the confidentiality of the information and to prevent the bringing of a claim for breach of confidence to prevent or restrict post-disclosure use of the information, so that any benefit arising from such post-disclosure use can unquestionably be taken into account as part of the public interest in favour of disclosure. It would be surprising if the position were fundamentally different in relation to information protected by intellectual property rights within regulation 12(1)(c) just because in their case the rights happen to remain enforceable after the information has been disclosed. Again I do not think that such a difference of outcome can be the legislative intention.

59. I am therefore satisfied that the tribunal was entitled to take into account, when carrying out the public interest balancing exercise, the benefit arising from use of the

information in epidemiological research even if that use would be in breach of the database rights of the MNOs. Together with other public interest considerations, the beneficial consequences fell to be weighed in the balance against the adverse effect on the rights of the MNOs.

60. Accordingly, I agree with the conclusion reached by Laws LJ and would not allow Ofcom's appeal on this issue.

Third issue: disclosure of the names of the MNOs

61. This issue concerns a short separate point in the reasoning of the tribunal.

62. The information requested included, for each mobile phone base station, the *name* of the MNO operating it. Ofcom contended before the tribunal that the names of the MNOs did not constitute environmental information within the meaning of the EIR and that, even if they did, there was no public interest in their disclosure. The tribunal rejected both contentions. On appeal, Ofcom did not challenge the finding that the names were environmental information but it did challenge the finding that there was a public interest in disclosing them. In dismissing that challenge, Laws LJ referred to the passage in the tribunal's decision in which the names were held to be environmental information. He acknowledged that that was a different issue, but he drew on the tribunal's observation that, in a case relating to emissions, public participation in environmental debate would be hampered if the names of those creating the emissions were excluded. He inclined to accept a submission on behalf of the Commissioner that the same could be said in relation to debate arising out of epidemiological research.

63. Ofcom takes issue with that conclusion. Ms Rose submits that there was no evidence that the names of the MNOs would be necessary for, or would facilitate, epidemiological research, and therefore no basis on which the tribunal could find a public interest in disclosing the names.

64. I have no doubt that it was properly open to the tribunal to find that the public interest in disclosure of the environmental information extended to disclosure of the names of the MNOs. The public interest factors referred to in recital (1) of the Directive (a greater awareness of environmental matters, a free exchange of views, more effective participation in environmental decision-making and, eventually, a better environment) are all broad and intangible in nature and do not depend upon direct evidence linking disclosure of the information with specific benefits. Moreover the Stewart report, having referred to the various benefits of disclosure, including the possible value of the data in epidemiological investigations, specifically recommended that the names of the operators be included in the information disclosed (see the passages quoted at [12] above). Nor is it difficult to see how the names of the operators could be a relevant factor in public debate relating to, or arising out of, epidemiological research. To take a simple hypothetical example, if a particular type of base station were found to be associated with an increased incidence of illness, there would be an obvious public interest in knowing whether and to what extent a particular MNO used that type of base station.

65. Ms Rose relied on a letter from Health Protection Scotland to the Commissioner offering, in effect, not to pursue the complaint relating to the original information

request if the grid references of each base station were supplied: this was said to indicate that the names of the MNOs were not needed. For my part, however, I do not think that any significance is to be attached to a letter of this kind, directed as it was to achieving a compromise. It did not amount to an admission that disclosure of the names would be of no value. The tribunal was entitled to conclude that it would be of value.

66. On this issue, too, I therefore agree with Laws LJ and would dismiss Ofcom's appeal.

Conclusion

67. For the reasons given, I would dismiss Ofcom's appeal in respect of the second and third issues but would allow it on the first issue, concerning the correct approach to the public interest balancing exercise.

68. Although it seems very likely that the tribunal would have reached the same conclusion even if it had weighed the aggregate public interest in maintaining the two applicable exceptions against the public interest in disclosure, I do not think that this court can be sure that it would have done so. Accordingly, if the other members of the court agree with me on the substantive issues, I would favour remitting the case to the tribunal for it to reconsider the public interest balancing exercise in accordance with the approach laid down in this judgment.

Lord Justice Thomas :

69. I agree.

Lord Justice Waller :

70. I also agree.