

EIR Reg 2 – Definitions: environmental information

EIR Reg 12(5)(a) – Exception: International relations

EIR Reg 12(5)(c) – Exception: intellectual property rights

EIR Reg 12(5)(e) – Exception: confidential information

EIR Reg 6(1)(b) – format and means of communication

The Office of Communications v IC & T-Mobile (UK) Limited

EA/2006/0078

4th September 2007

Cases:

Bellamy v IC and the Secretary of State for Trade and Industry [2006] UKIT EA_2005_0023

Facts

The Appellant published details of the location and characteristics of base stations used by mobile phone operators. The purpose was to enable the public to assess any health risks that might be associated with such equipment and carried into effect a recommendation from a government-appointed group of experts who had concluded that, while health risks seemed unlikely on the basis of current knowledge, there was sufficient doubt and concern on the issue that a national database should be set up containing various characteristics of all base stations. Publication took the form of an interactive map, accessible via a particular website. This enabled a member of the public to key in a postcode, town name or street name, which would generate a screen image of a map covering the selected location. The map displayed 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 caused a datasheet to appear setting out information about the base station. The database underpinning the system contained information provided to the Appellant by each mobile phone operator under a voluntary scheme. However, some of the information that was required to enable the interactive map to operate was not reproduced in the datasheets disclosed to those carrying out a search. This included the detailed grid reference for the location of each base station and some information about its signal strength. The fact that the database could only be accessed indirectly, through individual triangle enquiries, also meant that its whole content could not be accessed, searched, sorted or otherwise manipulated in order to provide either a complete record of the national network of a particular operator or an indication of patterns and trends within such a network

The Appellant had refused a request from a member of the public for disclosure of the complete database on the grounds that it fell within the exceptions under s.12(5) of the EIR and that the public interest in maintaining the exemption outweighed the public interest in disclosing it. The individual making the request had made it clear

that he wanted the whole database so that he could interrogate and manipulate the data and form a picture of the complete national structure of base stations.

The IC had decided that the Appellant had not been justified in its refusal.

Findings

Environmental Information

The Tribunal decided that the definition could be said to cover “factors, such as ... energy, ..., radiation ... emissions ... affecting or likely to affect ... the state of the elements of the environment, such as air and atmosphere”. Those words, when given their plain and natural meaning, included the radio wave emissions generated by a base station.

The Appellant argued that, even if the broader body of information in the database fell within EIR, the identity of the individual operators, by reference in each case to its ownership of a base station, did not. However, the Tribunal decided that it would create unacceptable artificiality to interpret the language of the definition as referring to the nature and effect of radiation, but not to its producer. It concluded that the name of a person or organisation responsible for an installation that emits electromagnetic waves fell comfortably within the meaning of the words "any information... on... radiation" for the purposes of the definition.

Regulation 12(5)(a)

With regard to public safety, the Tribunal found that the mobile operators had a justified concern about the activities of criminals stealing materials from base station sites and that the incidents of theft appeared to be increasing. It also found 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 mobile operators’ personnel, and that public safety might also be undermined if part of the mobile phone network failed as a result of criminal activity. It concluded that disclosure of the requested information would to some degree increase the risk of attacks and in that way might adversely affect public safety. However, it did not believe that the public interest in maintaining the exception outweighed the public interest in disclosure, given the original recommendation from the group of experts; the release of the information not already disclosed would simply have the effect of putting into the public domain elements of the information that the expert group recommended should have been placed there in the first instance. The Tribunal therefore concluded that the adverse effect on public safety of the release of the requested information, although sufficient to trigger the exception, was not large, particularly in view of the information that was already available through the website and other information made available by the mobile operators under arrangements with local planning authorities.

Regulation 12(5)(c)

It was conceded that the database right and copyright exceptions applied and the Tribunal found that the release by the Appellant of the information requested would constitute an infringement of both. However it concluded that the requirement that disclosure would have an “adverse effect” on the intellectual property right meant that the exception would not apply unless something more than just a purely technical infringement was established. There needed to be some degree of loss or harm to the

right holder. The threshold for establishing an adverse effect was not particularly high, however, and the Tribunal found that it had been exceeded in this case, particularly in relation to the fact that the data in question was of interest to commercial organisations and that a potential revenue stream would be lost if it were to be disclosed under EIR. Accordingly the release of that part of the database that had not already been published on the website (either at all or in a conveniently accessible form) would give rise to some commercial disadvantage for the mobile operators, which constituted an adverse effect on the intellectual property rights in that information. However the Tribunal did not think that the public interest in maintaining the exception outweighed the public interest in disclosing the information for the purposes of EIR regulation 12(1)(b). It rejected an argument that it should consider all elements of public interest in favour of maintaining the exception including those taken into account in relation to the public safety exception. The Tribunal preferred to follow *Bellamy* and concentrate on the particular public interest necessarily inherent in the particular exception under consideration. On that basis it considered the detriment to the public interest that was said to flow from the fact that the mobile operators had decided that, if the disputed information was ordered to be disclosed, they might well withdraw their cooperation with the Appellant and refuse to provide information for publication via the website. The Tribunal decided that it should give due weight to the fact that there was a risk that the amount of information available to the public might ultimately be reduced, but did not believe that the likelihood of that outcome was so high that it should place a great deal of weight on this particular element of public interest. It also considered the public interest in intellectual property rights generally being respected, but concluded that the combination of those factors did not outweigh those elements of public interest in favour of disclosure that had been examined in relation to the public safety exception.

Regulation 12(5)(e)

The Appellant argued that the information in dispute was confidential information and that the exception under EIR regulation 12(5)(e) applied. The Tribunal rejected the argument because it considered that, even though release of the information in the structured format of a database would have infringed database right and/or copyright, it no longer retained the required quality of confidence in view of the extent to which it had been disclosed to the public through the website (albeit that time and effort would be required to assemble it all through this source) and the arrangements with local planning authorities for the periodic release of each mobile operator's roll out plans. The Tribunal also pointed out that, even if the information had retained confidentiality for these purposes, the effect of EIR regulation 12(9) was that the exception may not be relied on if the information relates to "emissions". In light of its earlier decision that radio magnetic waves did constitute emissions, the exception did not therefore apply.

It was argued that if the information requested did not fall within the confidentiality exception, it must follow that it was already publicly available so that EIR regulation 6(1)(b) would apply. This provides that if information is requested in a particular form or format a public authority may refuse the request if it is already easily accessible in another form or format. The Tribunal decided that although the website was accessible the process of extracting the relevant information, triangle by triangle, and assembling it into a listing containing the whole of the network would be a time consuming task that could not be characterised as easily and would still not disclose

the detailed grid reference for each base station site. It therefore concluded that, on the particular facts of the case, the information in question fell outside both regulation 12(5)(e) and 6(1)(b).

Conclusion

The Tribunal concluded that the IC had been correct in ordering the release of the database and so dismissed the appeal.