IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2006/0078

REMITTED BY THE SUPREME COURT [2010] UKSC3

BETWEEN:

THE OFFICE OF COMMUNICATIONS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

EVERYTHING EVERYWHERE LTD

1st Additional Party

and

NATIONAL POLICING IMPROVEMENT AGENCY

2nd Additional Party

DETERMINED ON THE PAPERS ALONE

BEFORE

DAVID MARKS QC
TRIBUNAL JUDGE

ROGER CREEDON
HENRY FITZHUGH

Subject Matter:

Environmental Information Regulations 2004: Regulations 12(5)(a)-(c)

Cases and authorities referred to:

Ofcom v IC EA/2006/0078
R on the application of Ofcom v IC [2008] EWHC 1445 (Admin)
Ofcom v IC [2008] EWCA Civ 90
Ofcom v IC [2010] UKSC 3
Ofcom v IC ECJ C-710

DECISION

Pursuant to the order of the Supreme Court made and dated 6 October 2011 under which the appeal of the Appellant against the Decision Notice of the Information Commissioner (the Commissioner) dated 11 September 2006, Reference No. FER0072933 was remitted to the present tribunal to consider the relevant public interest balancing exercise relating to the said Notice, having done so, this Tribunal upholds the said Notice.

Reasons

General

1. This appeal has been dealt with by agreement with the parties on the papers alone. Another differently constituted tribunal by a decision dated 4 September 2007 (see (2011) 1 Info LR 1238) gave judgment that information sought to be disclosed relating to the above named authority, namely Ofcom, should be disclosed. The equivalent regulations were and remain the Environmental Information Regulations 2004 (the EIR).

2. The two regulations which were then in issue and which are still in issue are regulations 12(5)(a) and 12(5)(c). The former deals with public safety, the latter deals with intellectual property rights. The Tribunal found that each was engaged but that in each case the public interest in maintaining the exception in question did not outweigh the public interest in disclosure.

3. In circumstances which will be more fully explained below, the Supreme Court in the context of a final domestic appeal against the original judgment of the Tribunal, ordered that the appeal be remitted to a differently constituted tribunal to reconsider the public interest balancing exercise.

4. This Tribunal pauses here to note that in the light of this direction it is neither entitled nor able to revisit the findings of the original Tribunal in any other material or substantive way. In particular, it cannot revisit any other parts of the said judgment especially any determination within the judgment that the information in question constituted or did not constitute information on "emissions" within the meaning of the EIR, in particular, Regulation 2(1)(b). That issue has been revisited by the 1st Additional Party. That Party has never sought permission to appeal the judgment out of time or in any other way to seek a review of the original judgment. However, the Commissioner in his most recent submissions with regard to this remittal has addressed this issue but without prejudice to his overall conclusion that the Tribunal cannot readdress it. A short observation will be made on this point at the conclusion of this judgment.

Factual background

5. The initial request was by Mr Henton of Health Protection Scotland. He made the request on 11 January 2005. He sought a list of each mobile phone base station held on what is known as the Sitefinder website (Sitefinder). This also included information that was not publically accessible through Sitefinder such as the East North Five figure grid reference for each base station. The basic facts and matters concerning the background to the request and the requested information are of course set out in the original Tribunal judgment as well as in subsequent High Court, Court of Appeal and Supreme Court reported decisions which will be referred to throughout this judgment.

6. Ofcom initially refused the request on or about 27 February 2005. There was an internal review as is customary in such cases and Ofcom upheld its earlier refusal in reliance on the two specific exceptions mentioned above. Under Regulation 12(5)(a), Ofcom stated that the public interest favoured withholding the information since public safety would be adversely affected by the precise disclosure of the base sites. In particular, it would reveal the locations of the relevant database and thereby assist possible criminal activity. Under Regulation 12(5) (c), Ofcom stated that the public interest favoured withholding the information because the intellectual property rights of the mobile network operators known as MNOs would thereby be adversely affected giving competitors an undue advantage.

7. The Commissioner issued his Decision Notice on 11 September 2006. It contained a determination that public safety would not be at risk by disclosure, i.e. Regulation 12(5)(a) would not be engaged. As a result the Notice did not go on to consider the balance of the public interests. To complete the picture the Commissioner did not find that Regulation 12(5)(c) was engaged.

8. It is enough, the Tribunal feels to refer to the original judgment of the earlier Tribunal, especially at paragraphs 1-9 inclusive for a detailed background to the Sitefinder website and to the database of information held by Ofcom. As at the date of Mr Henton's request, Ofcom had been supplied with the detail of each of the mobile phone cellular base stations which the MNOs used in order to assist in the transmission of electro-magnetic waves and the consequential mobile phone service.

9. Critically, Ofcom placed into the public domain much of the information provided by the MNOs. It did this by producing a publicly accessible map on the Sitefinder website. This allowed individuals to search for the locations of base stations in particular areas such as a town or pursuant to a post code. The MNOs provided Ofcom with five figure grid references. This information was not published or accessible, however, through Sitefinder. Nor did Sitefinder readily provide a single list or database of all the base

stations which it listed. That would entail searching through each map section. Ofcom had earlier estimated that, according to the evidence it presented to the original Tribunal, it would take around 1,029 hours to produce a full list of base stations at or about the time of the request.

10. As will be seen from the title of this remitted appeal, there are two Additional Parties. The 2nd Additional Party is the National Policing Improvement Agency (NPIA).The NPIA was joined as an Additional Party after the determination of the original appeals from the original Tribunal decision. The Sitefinder website, as well as Ofcom's own database also records the requested information relating to the base stations used by organisations other than the MNOs. This would include what is called the Airwave system used by the emergency services, referred to as TETRA. Something will be said about this later. The Airwave system is supplied by Airwave Solutions Ltd rather than by an MNO. Disclosure of the requested information would therefore be of all base stations not only used by MNOs but also by Airwave.

11. The original judgment of the Tribunal is perhaps most usefully summarised by the Court of Appeal in its judgment reported at [2009] EWCA Civ 90, especially at paragraphs 24-31. The leading judgment in the Court of Appeal is that given by Richards LJ. Again the Tribunal feels there is no need to set this out since the same is otherwise publically available.

12. Particular attention however was drawn by the learned Lord Justice to a number of features in the original judgment. The original Tribunal had stressed that the Sitefinder site had been set up in the wake of a report called the Stewart Report. This Tribunal draws particular attention to paragraph 3 of the original Tribunal's judgment in which it quotes a highly relevant section from the Stewart Report about the type of information that would be publically available. The Tribunal, especially at paragraphs 41 and 42 of its judgment had pointed out that the original parameters proposed by the Stewart Report were in the event slightly reduced. The Tribunal had stressed that what it called the research issues regarded as being of particular value with regard to an epidemiological investigation were in fact in favour of disclosure. As against this, the adverse effect on public safety was not large and did not outweigh the public interest in favour of having the whole of the data disclosed.

13. As for intellectual property rights, the Tribunal had doubted the correctness of the concessions made by the Commissioner that the Sitefinder database as a whole was separately protected by database rights and that there was also copyright protection for the individual datasets and the Sitefinder data base itself, but the Tribunal had gone on to say that no decision on these matters was necessary for the purposes of its decision.

14. 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 Tribunal also found that release of the information gave rise to more than a technical infringement and would have an adverse effect within the context of 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. See generally the Tribunal's own judgment at paragraph 51.

15. However, the Tribunal also specifically noted, especially in the said paragraph 51, that any person to whom the information was released would be bound by an obligation to respect any intellectual property rights already subsisted. On the other hand, once material protected by an intellectual property right had been released to a third party it thereby became more difficult to discover instances of infringement either by a third party or any person to whom it passed or to trace those responsible for it and to enforce the right against them.

16. The exception in Regulation 12(5)(c)(as well as that in Regulation 12(5)(a)) therefore applied and the Tribunal turned to the balancing exercise. However, it rejected Ofcom's claims that such factors as the public interest in respect of commercial interests were relevant as well as the risk to public safety if criminal activity was facilitated by disclosure, together with the disadvantages the public might suffer if the MNOs decided permanently to withdraw their cooperation over Sitefinder. To do so, the Tribunal said, would make the application of the exception "unworkable": see in particular paragraph 58 of the Tribunal's judgment.

17. As indicated above, Ofcom appealed to the Administrative Court: see [2008] EWHC 1445 (Admin). The appeal was on the question of aggregating the public interests. The appeal was also on whether there could be a public interest in disclosure where the benefit to research would be in breach of intellectual property rights and it also related to whether the public interest was in favour of disclosing the names of the MNOs responsible for each base station. A single Lord Justice, namely, Laws LJ, upheld the Tribunal on all three issues.

18. As also indicated above, Ofcom appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the appeal as to the intellectual property right and the MNO names issue. However, it allowed the appeal on the aggregation issue. At paragraph 68, Richards LJ stated as follows:

"Although it seems very likely that the tribunal would have reached the same conclusion even it had weighed the aggregate public interest in maintaining that 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."

19. In the Supreme Court at [2010] UKSC 3; [2011] 1 Info L.R. 1288, on the Commissioner's appeal there was no agreement as to the aggregation issue. There had been no cross-appeal by Ofcom on the other issues. The Supreme Court therefore referred the question to the European Court of Justice.

20. At paragraph 10, Lord Mance said that:

"It is unclear whether the Information Tribunal would have arrived at any different conclusion had it thought it feasible and appropriate to combine all the adverse factors under the two relevant exceptions and to weigh them against the public interest in disclosure. The adverse factors identified by the Tribunal were on their face scattered and limited, in comparison with a general presumption and other specific factors favouring disclosure of the relevant environmental information."

21. The European Court of Justice agreed with the position taken by Ofcom on aggregation of the public interest factors: see case C-71/10 [2011] 2 Info L.R. 1, particularly at paragraph 32, stating the following, namely:

"… where a public authority holds environmental information or such information as is held on its behalf, it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, take into account cumulatively a number of the grounds for refusal set out in that provision."

22. The Supreme Court therefore remitted the case to this Tribunal in order that this Tribunal could reconsider the balance of the public interest.

The relevant legal background

23. The genesis of the EIR is Directive 2003/4/EC 28 January 2003. The Directive deals with public access to environmental information. Given the lengthy reported history of this case, the Tribunal again feels that there is no need to do anything other than refer to the Directive's various Recitals in general terms, especially those at paragraphs (1), (8), (9), (14) and particularly at paragraph (16). This last paragraph expressly refers to the fact that the "right to information means that the disclosure of information should be the general rule …" and to the fact that any refusal "should be interpreted in a restrictive way …"; see also Article 1(b) of the same Directive which defines its objective in terms of making available and disseminating environmental information to the public "in order to

achieve the widest possible systematic availability and dissemination to the public of environmental information".

24. The EIR expressly reflect those objectives. By Regulation 12(2), it is expressly provided that a public authority "shall apply a presumption in favour of disclosure".

25. Regulation 12(5) provides as follows, namely:

> "(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;
>
> …
>
> (c) intellectual property rights".

26. An exception can only be invoked where "the public interest in maintaining the exception outweighs the public interest in disclosing the information": see generally Regulation 12(1)(b).

27. This Tribunal accepts the three general propositions which are put forward by the Commissioner in his written submissions in respect of the remitted appeal. First, the Tribunal may, but is not obliged to, consider the public interests in favour of disclosure generally as weighed against any and all public interests against disclosure which might arise under either of the above mentioned exceptions. Second, and by way of qualification to that proposition, the Tribunal accepts that the European Court of Justice, by virtue of paragraph 32 of its judgment as cited above, clearly required that the exercise regarding aggregation be treated and regarded as one to be exercised in a permissive fashion which in turn recognises the difficulty expressed by other Panels within this same Tribunal about aggregation with regard to very different interests.

28. Third, and as a consequence, this Tribunal will accept that it must necessarily follow that aggregation may not be engaged if a specific exception or exceptions otherwise being addressed and engaged are so fundamentally different that any viable aggregation is simply not appropriate or feasible.

29. In the circumstances, the Commissioner contends that the approach taken by Richards LJ in the Court of Appeal (see above with regard to paragraph 68 of the learned Lord Justice's judgment), should be embraced, namely, that disclosure of the requested information should be ordered and the Decision Notice upheld whether the public interest balance is weighed by reference to individual exceptions or in an aggregated fashion.

Ofcom's general submission

30. Ofcom also submitted detailed written submissions with regard to the remitted appeal which the Tribunal is duly grateful for. Ofcom points to the unusually long time that has passed since the original request was made in January 2005 and of course the Tribunal accepts this.

31. Those submissions correctly point out that what the Tribunal is concerned with is the position which obtained at the time of, or at most, during the period of time which could be said to be surrounding the time of the request. There can be no reliance therefore on any relevant facts which could be said to be in play as at the date of this judgment or any time since the time or period of the request and therefore, in principle, any current or recent public interest balancing exercise should not be conducted or addressed.

32. However, the Tribunal would accept that insofar as a factor relating to public interest was identified as being a relevant factor in relation to the relevant period concerning a particular request and thereafter could be regarded as still constituting such a factor, there could be said to be in effect a continuum which at least in this case could justifiably in principle be treated as relevant. However, the Tribunal also stresses that each case where such a continuum could be said to exist must be looked at on a specific and individual basis. The Tribunal also pauses here to note that in one witness statement considered by the original Tribunal, namely that of Doug Cook (see in particular paragraph 18), specific reference is made to the fact that "those engaged in major criminal activity … or terrorists could plan an attack on the [T-Mobile] network in a given area without ever having visited the area previously". The original Tribunal in its decision did not address the whole of this particular line of argument. However, insofar as the threat of terrorism to the extent that it does not also constitute criminal activity, albeit of the most serious kind, is analogous to the specific types of criminality, e.g. vandalism in fact addressed by the original Tribunal, this Tribunal will briefly set out its views and judgment in respect thereof further below.

33. With regard to the public interest balancing exercise now to be addressed in relation to the remitted appeal, Ofcom invites the present Tribunal to find that taking into account in a cumulative way, the two grounds for refusal at the relevant time or in the relevant period, the public interest in maintaining the two exceptions outweighs the public interest in disclosure. Ofcom entirely recognises that the Tribunal in its initial judgment conceded that the public interest in relation to each exception was, as it puts it, "limited", in part it is said because of the information that had already been made available by means of what could be called roll-out plans supplied to local authorities. This is a matter which is specifically referred to in the original Decision Notice, in particular, paragraphs 42 and 61.

34. However, Ofcom makes the following specific main contentions. First, under Regulation 12(5)(a), the Tribunal had found that the MNOs had a justified concern about the activities of criminals seeing the material from base station sites. At paragraph 37 of its judgment, the Tribunal had noted that there had by then been recent increases in the price of certain metals which in turn had increased the number of thefts and the level of organisation and sophistication in respect of such thefts. There was also reference to vandalism and in some instances, base stations being used to facilitate transmission of pirate radio content. The Tribunal had also noted that removal of or damage to materials forming part of a base station might create a danger to the public and to the relevant personnel attending at the base stations.

35. Second, the Tribunal had also found that release of the entire database would or could assist criminals generally. Manipulation of the database could help criminals detail patterns of development with regard to base station constructions. There was also the risk of enabling criminals to establish the precise location of, and in an urban setting, the resulting ease of access to base stations: see generally the original judgment at paragraph 40. Even though access might be difficult for criminals, disclosure could still increase the risk of attack.

36. Third, and with regard to Regulation 12(5)(c) the original Tribunal had also found that loss of potential revenue stream involved a direct loss of the ability to exploit the relevant intellectual property rights through licensing: see generally the original judgment at paragraph 50. This has been referred to briefly above. The Tribunal found that once the protected material had been released to a third party, it thereby became more difficult to uncover or find instances of infringement and therefore more difficult to take appropriate enforcement action. The Tribunal found that although much of the material had already been released into the public domain under licence this did not undermine each MNO's interest in the effective enforcement of its own intellectual property rights in order to protect unauthorised exploitation.

37. Fourth, although the Tribunal did not feel that the harm caused by disclosure of network design should be in any way overstated (again, partly because of the information already being available in the roll-out plans already mentioned), the original Tribunal nonetheless held that the release of the database not already published would give rise to some commercial disadvantage for MNOs: see generally paragraph 53 of the original judgment. The Tribunal had considered the harm likely to be suffered as minimal but, nonetheless considered that there was sufficient adverse effect from the various factors considered together to trigger the exception involved.

38. Fifth and finally, the Tribunal had said that it must obviously give weight to the fact that it might result in information ultimately being available in a reduced fashion to the public should any MNOs seek not to continue to supply the information in question.

39. Pausing here, the present Tribunal understands the above general categorisations as to the various public interests being addressed by Ofcom. However, in the Tribunal's view the five areas which have been highlighted and briefly described above do no more than revisit the essential elements of public interest which might be said to be in favour of disclosure reflected in the two exceptions which are here in issue.

40. Ofcom's submissions then go on as follows in an important passage at paragraph 44 of its written submissions, namely:

> "As regards the public interest in disclosure, the Sitefinder website already provided a great deal of information to the public about base stations. This was far from being a situation in which no information was available to the public. As regards the weight given to the public interest in the use of the disclosed information for research, the Mobile Operators had demonstrated a willingness to licence the use of their individual datasets to researchers at no cost, subject to a non-disclosure agreement (the Tribunal Decision, paragraph 41). While the Tribunal considered that freedom of information should not be dependent on the goodwill of companies, and that the weight of the research issues was not significantly reduced by the voluntary disclosure of the information in the past, it has submitted that this factor should be given some weight when carrying out the public interests balancing exercise. Moreover, this is an unusual case in that extensive consideration had already been given, before the establishment of the database, to the balance that should be struck between the interests of the public in access to information, and the interests of the Mobile Operators, and a careful solution had been reached. Overall, Ofcom submits that when these factors are taken into account, the cumulative public interest in maintaining the exceptions outweighed the public interest in disclosing the information."

41. With all due respect to Ofcom, this Tribunal finds this proposition again as doing no more than reflecting the basic reality in this case, namely, that there was already a considerable amount of information out in the public domain prior to the request being made and that for that reason, disclosure should not be ordered. There is little, if any, specific reasoning in the above passage which seeks to justify the contention that on an aggregated basis, the public interest in favour of non -disclosure inherent in each of the two exceptions should when put together justify maintenance of the exception as distinct to militating in favour of disclosure.

Ofcom's additional material

42. Reference has been made above to additional material submitted on the part of Ofcom with regard to this remitted appeal. Some of this additional material consists of documents that Ofcom supplied only to the Tribunal and not to the other parties to the appeal; and one document that was redacted in the copy supplied both to the Tribunal

and to the parties.. The Tribunal feels that it cannot risk trespassing on that degree of confidence where it is clearly apparent but nonetheless feels there are matters of general import which should be referred to in relation to this open judgment.

43. First, there are materials which emphasise the importance of public safety. It is claimed that although Sitefinder provides a degree of information already which has been disclosed, greater disclosure would mean that sites could be targeted with greater accuracy and with far more serious repercussions than ordinary criminal activity, e.g. a terrorist attack as mentioned earlier. It is sufficient at this point to say that this Tribunal must infer that these issues were in evidence and before and considered by the earlier Tribunal that resulted in its eventual determination in paragraph 42 that the relevant public interest militating against disclosure was “not large”.

44. The Tribunal is bound to say that the earlier decision also conceded that in urban areas, base stations tend to be smaller and under some degree of supervision or surveillance, e.g. by CCTV. The fact however that much of the relevant data in this respect might be said to be available elsewhere was not however regarded as lessening any attendant risk.

45. Second, although this Tribunal has been shown redacted material said to strengthen the contention that the threat to public safety remains if anything stronger at the time of this remitted appeal than at the time of the request in 2005, the Tribunal is firmly of the view that the attendant public interest militating in favour of non-disclosure is outweighed by arguments in favour of disclosure as reflected in the original judgment. This Tribunal has been reminded clearly by Ofcom and by the Commissioner that it can only have regard to factors in play at or at about the time of the original request. This has been mentioned above. This Tribunal accepts that as a general proposition . However, in the light of the effect of what has been called above the continuum with regard to this particular case, this Tribunal is also of the view that even if it did take into account post-2005 consideration, its conclusion would remain the same as that of the original Tribunal with regard to the first of the exceptions in issue.

46. With regard to the material which has been called on more than one occasion above part of the relevant continuum in this case, Ofcom refers to the arguments previously advanced by one MNO with regard to the original Tribunal decision, namely T-Mobile, but has since pointed out that the public safety exception may no longer be applicable given the factors which have already been mentioned even in this judgment, i.e. the fact of information already being displayed on a local basis or otherwise being available from other sources such as local planning authorities. It is however pointed out that one potential adverse effect on public safety concerns the access to emergency calls in the event of a site being disrupted. However, it is also conceded in respect of this last point that at least, as at the date of this judgment, networks are now more fully developed than

they were when the *Sitefinder* case was first considered. Moreover, the emergency roaming facility is now functioning which, again, it is accepted might mitigate the potential impact on public safety of the loss of one or of a few sites.

47. Ofcom's recent submissions confirm that by the time the appeal reached the original Tribunal in the autumn of 2007, all MNOs had ceased to provide information for the website. This was partly in view of the proceedings themselves and partly because of a business operating a mapping website having apparently incorporated base station data obtained from the Sitefinder website with its own interactive map search facility. Indeed, paragraph 9 of the decision in the original Tribunal judgment refers to the same.

48. At the time of the hearing, there was a notice on the Sitefinder website which referred to the fact that the MNOs had generally decided by then not to provide any further information to Ofcom. It stated that some of the information contained within Sitefinder was itself out of date.

49. As at the date of the remitted appeal however, the 1st Additional Party, which is the entity formed out of the merger of two previous MNOs and whose submissions will be dealt with in the subsequent section to this judgment, no longer provides the information, although the Tribunal has been informed that other MNOs have resumed doing so. There is now a formal declaration on the website which refers to the fact that MNOs, apart from the 1st Additional Party, continue to provide updates which are made every three months or so.

Airwave and the 2nd Additional Party

50. The 2nd Additional Party has made a number of specific representations which to some degree echo and reflect the matters which have been set out above in the preceding section, but more specifically address the particular concerns of the said Additional Party as well as related entities being largely emergency services relating to Ambulance, Fire and Police services.

51. The Airwave radio system is part of the national infrastructure. The 2nd Additional Party claims it could be seen as a target for illegal activity. The concern is over the release of the database as a whole . The 2nd Additional Party notes that neither the Commissioner nor the Centre for Protection of National Infrastructure have so far considered that there is a strong or viable case for exception based on national security. However, it is still claimed in effect that public safety should be a factor with regard to the balance of competing public interest.

52. The 2nd Additional Party was as already noted, not a party to the original proceeding and determination by the earlier Tribunal.

53. The material which the Tribunal has seen relating to the 2nd Additional Party's contention was provided in 2012 after the civic riots in 2011.

54. It is clear to this Tribunal that none of the matters which the 2nd Additional Party now raises can be said to have been considered substantively as part of the public safety issue in the original Tribunal judgment. Indeed, it appears conceded that any problems regarding the so-called Airwave site were not fully before the Tribunal on the previous occasion.

55. Admittedly, it is alleged that one potential adverse effect on public safety concerns the access to emergency calls in the event of a site being disrupted. However, it is also accepted by Ofcom it seems that networks are now more developed than they were when the case was first considered by the original Tribunal. Moreover, what is called the emergency roaming facility which allows a user to access any available network by dialling 999 or any appropriate emergency number, is now functioning. Ofcom accepts that in such circumstances this new functionality might mitigate the potential impact on public safety and in particular, on national security, if the same is alleged in a case of at least many of the sites in question.

56. Emphasis is again placed on the risk of vandalism. These elements were however addressed in the earlier judgment.

57. The Tribunal pauses here to note that in its view, on the basis of the above contentions, it could be argued with some justification that little, if any, of any additional proposition in favour of relying on the public safety exception attracts equally little, if any, additional weight.

58. Insofar as it still continues to be maintained by Ofcom and/or by either Additional Party that release of the database would facilitate those intent on carrying out actions that pose a risk to public safety, the Tribunal shares this same reaction and comes to the same view as that reached by the earlier Tribunal, particularly at paragraph 42 of its judgment to the effect that even with this additional factor, it does not impinge in any way on any harm that may flow from having the whole of the database exposed or disclosed.

Submissions of the 1st Additional Party

59. As part of the material given to the original Tribunal as is noted above, at least one MNO observed that the intellectual property rights exception applied on account of the resultant commercial disadvantage. This question has been revisited by the 1st Additional Party.

60. It has already been noted that the Tribunal, in relation to the remitted appeal cannot properly take into account or have regard to matters which have occurred since 2005. On the other hand, it would be unrealistic for this Tribunal to be utterly blind to what could be

called a continuing cause of conduct drawn from and reflecting in part the process already in train at the relevant time or during the relevant period.

61. Since 2005 it is clear that there has been a significant increase in the amount of data concerning the location of mobile base stations available through planning authorities. This Tribunal finds this development totally consistent with the approach taken to intellectual property rights generally and the exception in particular adopted in the original Tribunal.

62. The 1st Additional Party has submitted a lengthy set of written submissions. In it, it claims that two exceptions which were not considered by the original Tribunal should now be reconsidered afresh by the present Tribunal. These are, first, the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest in accordance with Regulation 12(5)(e) and/or the interests of the Mobile Network Operators, i.e. the MNOs who provided the information to Ofcom where they were either not under, or could not have been put under, any legal obligations to supply to Ofcom or any other public authority, and did not supply it in circumstances such that Ofcom or any other public authority is entitled apart from the EIR to disclose it, and thirdly, at least in the case of the 1st Additional Party itself, have not consented to its disclosure in accordance with Regulation 12(5)(f).

63. In addition, in relation to these last two exceptions, the 1st Additional Party contends that the application of such exceptions is not precluded by Regulation 12(9) because the disputed information does not relate to information on what are called “emissions”. This last particular sub-issue which has been mentioned already will be addressed in the conclusion of this judgment.

64. In relation to the two exceptions which were considered by the original Tribunal, and even though the 1st Additional Party accepts that this Tribunal is now concerned with facts pertaining at or at about the time of the request, it claims that the MNOs continue to be faced with attacks on network infrastructure and metal theft as described in the evidence before the original Tribunal.

65. Even if such be the case, in this Tribunal’s judgment that does not persuade the Tribunal that this would affect the finding as to the public safety exception made and already determined by the original Tribunal.

66. With regard to the intellectual property rights exception, the 1st Additional Party again maintains that the concerns entertained by the original Tribunal remain valid “indeed to some extent more so that in 2006/07”.

67. As for the two new exceptions which are now sought to be relied upon, the Tribunal repeats its view earlier stated that it feels bound by virtue of the Supreme Court's direction to limit its consideration of the possible aggregation of the exceptions to those which were the proper subject matter of the original Tribunal decision and, in particular, of that Tribunal's determination given the evidence it then considered.

Conclusions

68. The original Tribunal held in its judgment and in the absence of aggregating the public interest or interests in respect of both the exceptions before it, that the Commissioner's Decision Notice should be upheld.

69. This Tribunal would respectfully agree with the Commissioner that in addressing the question of aggregation, a Tribunal cannot simply apply a simplistic mathematical approach to the subject. It is simply not possible to ascribe what is called an artificial or numerical value to the public interest in disclosure and then ascribe the same or corresponding value to the different interests against disclosure and then adding the two to find some form of total value. As the Commissioner rightly says, the weighing process is of necessity "more impressionistic". It requires consideration of the degree of weight each individual interest should be accorded. However, it is also important to note the prescription afforded to the exercise in the reported case law and referred to above. There is no obligation on this Tribunal at least in this case to aggregate: this exercise is merely as it was put, permissive.

70. It therefore follows that in its view, this Tribunal should first revisit the elements inherent in each of the two exceptions in play separately.

71. Before doing so, the Tribunal will make some general observations about those public interest factors which it regards as being paramount in favour of disclosure. The Tribunal refers in particular to paragraph 3 of the original Decision Notice which stresses the importance of the information about the location and the operating characteristics of all base stations being available. This Tribunal is firmly of the view that it still regards those arguments as valid. The Tribunal will also refer to paragraph 7 of the original Decision Notice as to the availability of the data bases being used in particular, but not exclusively, as research tools.

72. With regard to public safety, the original Tribunal held that although a single detailed database "forum" would provide some "assistance" to criminals, it also held that any crime that might occur was more likely to occur "at a relatively localised level": see the original judgment at paragraph 44. In addition, the Tribunal also held that there was a greater risk which might result from the provision of grid reference numbers. Criminals could target base stations with greater specificity; however, the Tribunal also noted that

local authorities might already have released the specified information and, as indicated above in this judgment, in populated areas, a base station might be less vulnerable.

73. As echoed in the 1st Additional Party's most recent submission, evidence has been provided of existing criminal damage to and thefts from base stations. The thrust of such evidence is that grid reference information would provide a more detailed location to a potential criminal than was available on Sitefinder in its existing state. However, this Tribunal notes and accepts the contention made by the Commissioner that Ofcom's witness statements did not address the public safety exception. This was because Ofcom did not appeal against the Decision Notice's original conclusion with regard to Regulation 12(5)(a).

74. The submissions put in by and on behalf of the 2nd Additional Party have been noted above. These relate only to the Regulation 12(5)(a) exception. There is no doubt that the Airwave system represents a critical tool which is of enormous benefit to the emergency services. There is equally no doubt that there are incidents which could occur on their sites which should if at all possible be prevented. The argument then goes, as intimated above, that a full database would provide a national picture aiding planning and targeting. It is therefore said that the Tribunal's original conclusions that events were likely to be localised was, in the event, flawed, particularly in the light of the 2011 riots.

75. This Tribunal agrees that these adverse effects, such as they be, do not in fact engage a weighty public interest factor in favour of maintaining the exception. There can be no doubt that there is always a risk of criminal behaviour and that release of the database might aid the more effective planning of attacks. It might even be the case that such behaviour might include terrorist activity. To this Tribunal, it appears that the risk is present even in the absence of disclosure of the full database and therefore, to that extent, cannot be regarded as a weighty factor in itself. Sitefinder as it stands permits potential criminals or even terrorists to establish where base stations are located. In those circumstances, the Tribunal agrees with the Commissioner's contention that disclosure of the full database would not have any significant difference on the risk to public safety. This point is in fact addressed in as many words by the original Tribunal at paragraph 40 of its judgment.

76. Even if there were a related increase in crime on account of the greater amount of detail regarding location information, this must be weighed against the provision to local authorities on an annual basis of grid references of base stations in those authorities' area. That information is made public. Reference has been made above to urban sites. On the assumption that some rural sites could be more readily identifiable, the fact remains that in this Tribunal's judgment, base stations in populated areas would be likely to be much less at risk even with a grid reference on account of the type of protections

already mentioned, namely CCTV, surrounding property and in some cases no doubt some form of control or surveillance.

77. In all the circumstances, this Tribunal would concur with the original Tribunal's view that the weight to be given to the public interest in maintaining the Regulation 12 (5) (c) exception remains, at most, "not large": see paragraph 42 of the original judgment.

78. With regard to the exception in Regulation 12 (5) (c) based on intellectual property rights, the claim which is made both within the context of the original judgment and now is that the requested information would, if disclosed, have an adverse effect on such rights of the MNOs.

79. The original Tribunal dealt with at least four aspects of the claim relating to Regulation 12(5)(c). First, there was the potential loss of revenue stream. This Tribunal accepts, as did the original Tribunal, that there would be a commercial value within the database and that T-Mobile in the original decision and now the 1st Additional Party has provided evidence of harm to the ability to licence some of the information. Second, it was claimed that there would be difficulty in policing the infringement of intellectual property rights occurring following disclosure. This too has been mentioned above: this reflects problems in discovering the fact of infringement and seeking to reinforce intellectual property rights. This too was dealt with in the original judgment at paragraph 51. Third, the original Tribunal noted that the release of the whole of the MNOs dataset would, and probably did give rise to some adverse effect. Reference has been made to the 1029 hours said by an MNO to be needed to analyse the base station locations of competitors. However, the original Tribunal cast doubt on the evidence of T-Mobile to the effect that that company had ever thought of doing that analysis. Overall, the original Tribunal accepted that there would be some commercial disadvantage and this Tribunal would not dissent from that view.

80. Fourth and finally, reference was made in the original judgment at paragraph 55 to the fact that release of the full database might cause landowners to identify land on which a base station would be required and thereby demand a higher rent. This was regarded as having minimal weight and this Tribunal would respectfully agree.

81. It is also clear that the original Tribunal took the view that some weight should be afforded to the potential detriment to the public interest arising out of an MNO refusing to continue to participate in the Sitefinder scheme as a whole. However, it also took the view as can be seen from paragraphs 60-61 of the judgment, that reduction in the information available to the public was not so high as to require a great deal of weight to be placed on it.

82. However, what emerges from the above is that the above elements relating to the exception in question had more to do with private interest than public interest. The private interests were those of the MNOs themselves.

83. This Tribunal respectfully agrees with that analysis. This means that in general terms it is not prepared to afford anything other than minimal weight to potential interference with the intellectual property rights of the MNOs. There are at least four reasons for this which are set out in the Commissioner's submissions and which this Tribunal accepts.

84. First, the interests identified are either already at risk, or the enhanced risk is so small as to be given no significance. The particular suggestion that land owners would drive up rents seem at the very least unlikely, if not inherently implausible. Second, as indicated in the preceding paragraph, the interests which are at the core of this equation are those relating to the private commercial interests of the MNOs themselves. It is true that to some extent there is a general public interest, but the same has to be seen in the context of those overriding private interests. Third, although there may well be some commercial impact on the MNOs in relation to licencing, there was simply no evidence before the Tribunal, nor is there any evidence now as to the extent or significance of such impact.

85. Fourth and finally, as the Commissioner quite rightly points out, there is an element of circularity. If the unlicensed use of information is difficult to trace then it may well be because it is minimal. That would mean that it would have equally limited or minimal impact on the private commercial interests of the MNOs involved. Alternatively, if there was a significant impact, then the inference must be that the user and the damage could be readily identified and action taken.

86. The Tribunal pauses here to note that it would not be appropriate for it to ascribe weight to the non-participation of the MNOs in Sitefinder on an on-going basis. In Regulation 12(5)(f), there is a specific exception to reflect the voluntary provision of information. This does not however apply to information concerned with emissions in accordance with Regulation 12(9). The Tribunal is therefore satisfied and so finds that no or, at the very most, minimal weight, should be accorded to the matters which the EIR specifically includes in this context.

87. In any event, voluntary provision of information is just that: its purpose is to inform the public. The Tribunal agrees with the Commissioner that in essence, the stance of the MNOs and Ofcom amounts to saying that in effect no information should be provided in circumstances where they otherwise accept the public has a right to know.

88. Turning to aggregation, and mindful of the indication to the Tribunal that aggregation is in effect permissive, this Tribunal is not at all convinced that aggregation in the present case is anything other than artificial despite the direction that this Tribunal has received to

consider aggregation. The two exceptions which are at the centre of this appeal are, in this Tribunal's view, a good example of "apples and pears". To this Tribunal, there seems to be no sensible or logical link between the content of the two exceptions in issue such as to cause there to be in turn any sensible way of extracting or recognising, let alone applying, any common content as to public interest or interests.

89. It follows from the above that this Tribunal regards the two exceptions as being taken separately insufficient to claim that the exceptions should be maintained and disclosure refused. Even on an aggregated basis, the overall weight to be afforded to the interests in play are minimal, particularly when compared with the weight of the strong public interest in disclosure as identified by the original Tribunal. This Tribunal sees no reason for altering the overall balance which was struck by the original Tribunal.

90. Reverting to the question of impression, as mentioned above, that impression is justified in this case in this Tribunal's view by the fact that there is already a large amount of already accessible information with regard to the information sought in the request. Any additional harm is not only minimal but is perhaps more importantly difficult in fact to identify and characterise.

91. Reference has been made to the express presumption in favour of disclosure set out in the EIR. In this Tribunal's judgment, there is no reason not to apply that presumption. The Tribunal ends this section by noting that even if it were to consider that the submissions of the 2nd Additional Party added substantially to the public interest in not disclosing the grid references of the Airwave system, it would still be open to the Tribunal under Regulation 12(11) to overturn the Decision Notice in this respect alone. However, the public interest arising under Regulation 12(5)(c) simply do not apply to the Airwave system, or at least there is no evidence to that effect before this Tribunal or indeed before the initial Tribunal. In those circumstances, the Tribunal accepts the Commissioner's contention that all the information requested should be disclosed.

Emissions

92. For the sake of completeness, the Tribunal repeats the fact that it regards itself as having no jurisdiction whatsoever to reopen the judgment in the original Tribunal's findings on the emissions issue. If nothing else, as indicated above, this would involve further argument and possibly oral evidence and cross-examination.

Signed:

David Marks QC

Judge Dated: 12 December 2012