

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date 11 September 2006

Public Authority: The Office of Communications ('Ofcom')

Address: Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Summary Decision

The complainant requested data about each mobile phone base station held within the Sitefinder database together with the national grid references for each site. The complainant requested that the information be provided as a text file, csv file, access database or Excel spreadsheet. Ofcom initially refused the request citing Regulation 6 (1) (b) of the Environmental Information Regulations ('the EIR') which refers to information already publicly available. At the internal review stage Ofcom decided that in fact the complete database that had been requested was not all available in the public domain. Therefore it refused to provide the database relying upon EIR Regulations 12 (5) (a) (National Security and Public Safety exception) and (c) (Intellectual Property Rights exception).

The Commissioner found that the public authority did not comply with the Environmental Information Regulations in refusing to provide the information. The Commissioner did not consider that disclosure would adversely affect national security, public safety or intellectual property rights. Therefore he has ordered Ofcom to disclose the requested information to the complainant.

The Commissioner's Role

1. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). In this case the information sought by the complainant is exempt under section 39 of the Act. The effect of section 39 is that it exempts information relating to the environment from disclosure under the Act. Requests for such information should be processed in accordance with the Environmental Information Regulations 2004 ('EIR').
2. The EIR were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Act are imported into the EIR. In light of this, the Commissioner has considered whether Ofcom has replied to the complainant's request in accordance with the EIR. His decision is set out in this notice.

The Request

3. The Complainant has advised that on 11 January 2005 the following information was requested from Ofcom in accordance with section 1 of the Act,

"the following information for each mobile phone base station held within the Sitefinder database:

Name of Operator
Height of Antenna
Frequency Range
Transmitter Power
Maximum licensed power
Type of Transmission
Grid Reference East
Grid Reference North

as either a text file, csv file, Access database table or Excel spreadsheet". This will be referred to in this Decision Notice as 'the requested information'.

4. On 27 January 2005 Ofcom replied advising the complainant that the requested information constituted environmental information and that therefore, under section 39 of the Act, it was required to process the request in accordance with the EIR. Ofcom informed the complainant that it did not consider that it was required to supply the information in any of the requested formats, citing regulation 6 (1) (b). This states 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....

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

In the reply Ofcom stated that all of the information was available via the Sitefinder database with the exception of the grid references. It stated that “the location of each site is clearly displayed on the map and for additional clarity we will consider whether the grid reference can be included in future”.

5. On 25 February 2005 the complainant requested an internal review of the decision not to supply the information in any of the specified formats. They stated that the information on the Sitefinder database was not in a suitable format for their needs and clarified that they wanted a complete dataset of the information held on base stations, including the grid references.
6. On the 15 April 2005 Ofcom notified the complainant of the outcome of the internal review. The internal review upheld the application of regulation 6 (1) (b) in relation to information about individual mobile site data. However, Ofcom recognised that a national dataset could not be prepared from the Sitefinder database and therefore it did not consider the dataset to be in the public domain. It refused to supply a complete dataset to the complainant citing Regulations 12 (5) (a) and (c).
7. Ofcom explained that if the national dataset was made available in a comprehensive and searchable form this could compromise the security of the Terrestrial Enhanced Trunked Radio (TETRA) sites which provide the Police and Emergency Service radio network. People would be able to target and close down specific geographic areas by identifying key locations vital to the Police communication infrastructure. If this happened police officers in the field would not be able to respond to emergency calls which would adversely affect those in need of help.
8. Ofcom explained that the public interest favoured maintaining the exception because it is in the public interest to have an open Police communications infrastructure. It is essential to preserve the integrity of the Police radio communications network to ensure that officers in the field can respond to emergency calls and thereby protect public safety and national security.
9. In relation to Regulation 12 (5) (c) Ofcom explained that the source data for the Sitefinder database is supplied voluntarily by the owners, the mobile network operators (‘the mobile operators’), for publication in an agreed format. In Ofcom’s view each mobile operator owns the intellectual property rights and to disclose the requested information would adversely affect those rights. Ofcom explained that if the raw data were available this would provide sections of the public (such as competitors) with a ‘springboard’ from which to construct the original data, in this case the design of each operator’s 2G or 3G radio networks.

10. Ofcom explained that the public interest favours maintaining the exception because the data is compiled for the specific and limited purpose of populating the Sitefinder database. If the information were disclosed the mobile operators would be unlikely to supply the data and Ofcom would not be able to continue to provide the Sitefinder service.

The Investigation

Scope of the investigation

11. On the 22 April 2005 the complainant wrote to the Commissioner and asked him to assess the decision by Ofcom to refuse to supply information on each mobile phone base station held within the Sitefinder database.
12. In particular, the complainant suggested that Ofcom may have misinterpreted the request at the internal review stage. This is because it had referred to the adverse effect on public safety if details of the TETRA masts were disclosed. The complainant clarified that if TETRA masts were not held on the Sitefinder website then they were not within the scope of the request.
13. In assessing this case the Commissioner has not considered whether it was appropriate for Ofcom to apply regulation 6 (1) (b) in its initial refusal letter. This is in light of the fact that Ofcom recognised at the internal review stage that in fact the information requested by the complainant was the complete national dataset which was not considered to be available via the public Sitefinder database. The Commissioner contacted the complainant to clarify the scope of the request. The complainant confirmed that it was limited to all information held on the Sitefinder database as well as the grid references of each base station.
14. The Commissioner is satisfied that the requested information constitutes environmental information and that therefore Ofcom has appropriately dealt with the request in accordance with the EIR. In particular, he is satisfied that the information available via the Sitefinder website, which is the subject of the request, is information on emissions which are likely to affect the elements of the environment such as air, atmosphere and biological diversity. Therefore the information falls within Regulation 2 (b). The Commissioner's investigation has therefore focused on the application of the exceptions in Regulation 12 (5) (a) and (c).

Chronology

15. In the course of his investigation the Commissioner's staff met with Ofcom on 17 November 2005 to discuss the application of the different exceptions. Additional submissions to support the reliance upon Regulations 12 (5) (a) and (c) were also provided by Ofcom on 14 December 2005, 1 March 2006 and 9 June 2006.
16. The Commissioner's staff particularly sought clarification about what information is available from the public database as well as additional background about the voluntary agreements that the mobile operators have entered into to provide the

data. They also asked for further information about why the exceptions apply and the public interest arguments that were taken into account by Ofcom when it reached the decision to withhold the information.

17. In addition Ofcom provided a redacted copy of its submission to the Commissioner which was sent to the complainant on 30 January 2006. The complainant reviewed the more detailed explanation of why the exceptions applied and why the public interest favoured maintaining them. In a letter to the Commissioner dated 23 February 2006, in response to the submission, the complainant asserted that it did not accept the arguments put forward by Ofcom because the information requested is already available in the public domain.
18. When considering this case the Commissioner has also referred to a number other sources as follows:
 - a. The Stewart Report 2000 – Independent Expert Group on Mobile Phones ('IEGMP')
 - b. Mobile Operators Association ('MOA') – www.mobilemastinfo.com
 - c. Mobile Phone Masts – Report of an Inquiry by the All Party Mobile Group July 2004
 - d. Chapter 7 of the Department for Environment, Food and Rural Affairs (Defra) Environmental Information Regulations Guidance

Findings of the investigation

19. In March 1999 the Minister for Public Health established an independent expert group ('the Expert Group') to assess the state of research into possible health risks from mobile phones, under the chairmanship of Sir William Stewart, FRS, FRSE. The Expert Group report published in May 2000 contained a recommendation for a national database to be set up by the Government to provide the public with details of the siting of base stations and their emissions. The group recommended that the provision of information relating to base stations and their emissions should be an essential part of the licence for the site. Since Ofcom was established on 29th December 2003 it has provided the Sitefinder database. However the data that is uploaded to Sitefinder is provided by the mobile operators on an entirely voluntary basis.
20. Sitefinder displays the location of all cellular base stations operated by the five public cellular operators. The location is shown on a map showing an area approximately 800m by 800m. It is possible to undertake a search by inputting a postcode, town name or street name. Base stations are represented by a blue triangle on the map. The database also displays the TETRA base stations operated by O2-Airwave and used by the emergency services.
21. Ofcom explained how that the Sitefinder format was developed in an industry technical working group. The technical working group also determined the format and information required to support the map style presentation of the Sitefinder

database. The mobile operators agreed to supply Ofcom with updates of the data for all in-service and under construction base stations every three months. As previously mentioned the mobile operators supply the information voluntarily and Ofcom has no regulatory power to compel them to provide the data. Ofcom has explained that licences issued under The Wireless Telegraphy Act 1949 (WT Act) require mobile operators to supply data to it on request. This includes some, but not all, of the information required for Sitefinder. For example, Ofcom can only compel the mobile operators to supply location information to an accuracy of 100m resolution as opposed to 1m resolution data supplied for Sitefinder. Though Ofcom can require the provision of some higher level data for licences it cannot compel the mobile operators to supply the more detailed material required for Sitefinder. Ofcom has also explained that if grid references to less than 5 decimal places were used it could result in a mast being misplaced by up to 99m in both north-south and east-west directions, thus suggesting a totally inaccurate location on the map within the Sitefinder database. In addition the actual transmitter power and the site reference of each mast is not information required for the licences.

22. The Commissioner accepts that the dataset as a whole is not readily available in the public domain as the grid references are not included on the Sitefinder website. Ofcom has clarified that in addition some, though not all, of the mobile operators also provide it with the postcodes for each of the base stations. In this case the request is limited to the information that is publicly available and the grid references. Therefore the postcodes would be outside the scope of the request.

Analysis

Public safety / national security

23. The Commissioner has considered each of the exceptions that Ofcom has cited in turn. Regulation 12 (5) (a) states that 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”.

24. At the internal review stage Ofcom determined that disclosure of the requested information would adversely affect public safety. As previously mentioned, it explained that if the national dataset was made available in a comprehensive and searchable form it could compromise the security of the TETRA sites which provide the Police and Emergency Service radio network. If the national dataset was made public people would be able to target and close down specific geographical areas by identifying key locations vital to the police communication infrastructure. If this were to happen, police officers in the field would not be able to respond to emergency police calls which would adversely affect those in need of support.
25. In its submission to the Commissioner dated 14 December 2005 Ofcom stated that it considered that disclosure of the national dataset would adversely affect both public safety and national security. This was the first occasion that the issue of national security had been raised. Ofcom re-iterated that disclosing the national

- dataset would make it possible to filter a particular set of masts and to target them collectively. It conceded that the information which is already in the public domain to some extent compromises the security of each network. However though someone with criminal or terrorist intent could ascertain the type of mast at a particular location they would have to navigate through each individual screen to do so. Ofcom has suggested that it would take up to 30 minutes to examine one square.
26. Ofcom has asserted that there is a real risk of exposing the networks to threat and abuse and that the consequences are extremely serious. In particular it cited the example of the bombings in London on 7 July 2005. After the initial explosions some of the commercial networks' capacity in the worst affected areas was denied to customers and reserved for priority emergency service traffic dealing with public safety and national security.
 27. In addition to the above Ofcom has also highlighted that there is a real prospect of radio pirates (people who transmit radio programmes without an appropriate licence) targeting a particular infrastructure as efficient hosts for their illegal broadcast equipment. This in turn leads to damage to equipment as well as personal safety issues for staff who have to try to remove the equipment as well as site owners who risk exposing mobile operators to criminal liability for failing to secure the site. Ofcom has also asserted that liability could be an issue for it if, in the event of damage or injury, it were argued that the disclosure of the requested information increased the risk to security.
 28. The Commissioner has given careful consideration to the explanation provided by Ofcom in respect of public safety and national security. In doing so he has taken into account his published Awareness Guidance Number 20 which details the way that the adverse effect test under the EIR operates. This states that the adverse affect test, like the prejudice test under the Act, can be regarded as a harm test. However it clarifies that "whereas the Act provides exemptions not only in those cases where prejudice would occur but those where prejudice would be likely to occur, the adverse affect test provides exceptions only in those cases where an adverse affect would arise. In other words, so far as environmental information is concerned, in order to engage an exception, some harm must be certain rather than merely likely". Therefore, in this case, the Commissioner would need to be satisfied that there is a real prospect of mobile networks being the subject of criminal or terrorist activity and that disclosure would result in the adverse effects described.
 29. When considering whether Regulation 12 (5) (a) has been appropriately applied the Commissioner has taken into account what information is already available in the public domain.
 30. Ofcom has not presented any evidence to show that there have been attempts to disrupt the mobile networks or that this is likely. Though the example of the 7 July bombings illustrates that mobile communications are vital in dealing with the fall out of terrorist attacks, it does not in the Commissioner's view, demonstrate that there is a particular risk or threat to the security of base stations or that there would be if the requested information were released.

31. The Commissioner accepts that if the entire database were released it would be possible to filter it by type of base station. This would therefore make it easier to locate, for example, all the TETRA masts across England and Wales. Nevertheless, this information is in fact available from the Sitefinder website, albeit it is necessary to search manually for each base station to obtain the information. Therefore, although it would take longer, a determined terrorist or criminal could obtain this information from Sitefinder. The Commissioner also notes that unlike some databases available via the internet, there is no restriction on the number of times that an individual can conduct a search of this system, neither is there any requirement to register as a user so that access to the information may, to some degree, be monitored.
32. The Commissioner is also mindful of the fact that a criminal, terrorist or radio pirate intent on causing damage to the mobile networks could do so using the information that is already available in the public domain. Sitefinder would enable individuals motivated to carry out criminal activities to confirm the location of base stations in a particular geographical location. Though the Commissioner accepts that it may be easier to search a set of base stations such as TETRA sites via a searchable dataset, it would nevertheless still be possible to collate that information via the public website. The Commissioner is not persuaded that disclosure of the requested information would therefore have an adverse effect on public safety over and above any present risk.
33. In addition the Commissioner has considered the fact that grid references are not available via Sitefinder. In his view, an individual could nevertheless ascertain the location of many, if not all, of the base stations using the map provided on Sitefinder. In the course of the investigation the Commissioner asked Ofcom to clarify whether it would be possible to work out the grid reference of each base station using the pop-up maps on Sitefinder and other public information. Ofcom confirmed that to the best of its knowledge this would not be possible because there is no imbedded information in the pop-up map that quantifies a geographic reference point. However, Ofcom was also asked to explain why it is necessary to obtain data listing the location of base stations to 1m resolution. This is because for Sitefinder, the mapping engine uses the grid references to define where an object will be positioned on the map. A grid reference accurate to 5 decimal places should be sufficient to ensure that an object on the map appears in its true position. Ofcom went on to explain that if a less accurate grid reference were used this could lead to the location of a base station being misplaced by 99m in either a north-south or an east-west direction. A lesser accuracy might cause a site to be misplaced so that a base station on the street was shown in a person's garden.
34. In light of the above, the Commissioner considers that the information provided on the pop-up maps would be sufficiently precise to enable a person intent on locating base stations to do so. An individual would be able to search the location on Sitefinder and then go to the location shown on the map. Though the Commissioner accepts that some base stations are disguised in street furniture or are not visible because they are on rooftops, he is satisfied that a determined

terrorist or criminal would be able to locate sufficient numbers of base stations to disrupt the network using the publicly available information.

35. In addition the Commissioner has taken into account other information about base stations that is already placed in the public domain and the recommendations of both the Stewart Report and the All Party Parliamentary Mobile Group ('apMobile'). The Commissioner notes that neither group highlighted concerns about public safety or national security in their reports as possible reasons to restrict further information about base stations and their emissions being made available to the public. In fact, the apMobile report recommends that, "the mobile phone operators adopt common digital mapping techniques to enable a national map of the location of mobile phone masts and base stations to be produced on an ordnance survey base". The Commissioner has also established that, in the context of planning applications, some local authorities, such as the Borough of Basingstoke and Deane, publish detailed information about proposed masts which includes the grid references, the name of the operator applying and the planning decision without any apparent concern about public safety or national security. Having taken all of these factors into account the Commissioner is not persuaded that disclosure would adversely affect national security or public safety. Therefore Ofcom has, in his view, inappropriately applied the exception in Regulation 12 (5) (a).

Intellectual Property Rights

36. Regulation 12 (5) (c) states that,

"a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(c) intellectual property rights"

Ofcom has concluded that the mobile operators own a) database rights in the data they provide and b) the copyright in the database/table or compilation and that the information is provided to Ofcom in confidence. The data is licenced to Ofcom for the specific and limited purpose of compiling Sitefinder and for presentation in the agreed format. Therefore if the requested information were disclosed Ofcom is satisfied that it would result in an adverse effect on the mobile operators' intellectual property rights. The Commissioner has considered each of the aforementioned points in turn.

Database rights

37. Under section 3A of the Copyright, Designs and Patents Act 1998 ('CDPA') a database means:

"...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.

(2) For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation".

Regulation 13 of the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) ('CRDR') provides that,

" (1) A property right ("database right") subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database".

Regulation 12 (1) of the CRDR states the following,

"substantial" in relation to any investment, extraction or re-utilisation, means substantial in terms of quantity or quality or a combination of both".

38. According to Ofcom the mobile operators consider the raw data that they supply for Sitefinder constitutes a "database", in that it is a collection of data arranged in a systematic and methodical way and that the data are individually accessible by electronic or other means. The mobile operators claim that database rights exist on account of the substantial investment they have made in obtaining, verifying and presenting the contents of the database.
39. The Commissioner is satisfied that each dataset supplied to Ofcom by the individual mobile operators for Sitefinder constitutes a database. These datasets are collections of data arranged in a systematic and methodical way and the data are individually accessible by electronic means. In addition the Sitefinder database as a whole also meets this requirement. The Commissioner is therefore satisfied that in respect of the individual datasets supplied for Sitefinder the mobile operators are the makers of databases for the purposes of the CRDR. In addition the mobile operators and Ofcom may be joint makers of Sitefinder database itself.
40. To establish a database right, the maker must be able to show that they have made a substantial investment either in obtaining, verifying or presenting the contents of the database. Ofcom has explained that the data required to populate Sitefinder is held within the internal company datasets of each mobile operator. Collating that data into the agreed format for Sitefinder may take up to fifty man hours every 3 months as there is a substantial amount of information to compile. In addition, the mobile operators expend significant time and resources in order to present the Sitefinder database. This includes between three and five man-days per month, per operator attending and contributing to Sitefinder related policy and development groups. The Commissioner understands that the industry technical working group determines how Sitefinder is presented and decides what format the datasets supplied to Ofcom must take to support the database as mentioned in paragraph 21.
41. In the course of his investigation, the Commissioner asked Ofcom to comment on the relevance of the British Horseracing Board v. William Hill case law, which

dealt with a claim by the British Horseracing Board that it owned database rights in a computerised collection of information about horseracing events. In that case the Court of Appeal referred a number of issues relating to the interpretation of Council Directive 96/9/EC, which the CRDR seeks to implement, to the European Court of Justice ('ECJ'). The ECJ judgment on 9 November 2004 (Case C-203/02) ('the ECJ Judgment') found that when determining whether there has been substantial investment in obtaining, verifying or presenting the contents of a database, any investment in the creation of the data within the database is not to be taken into account. However, the Commissioner is satisfied that, in this instance, the mobile operators have demonstrated that there has been substantial investment in obtaining and presenting the datasets, distinct from the investment made in creating the data within them. Therefore he has concluded that each of the mobile operators owns a database right in the individual datasets provided for Sitefinder. Further, he takes the view that Ofcom has a database right over Sitefinder as a whole and that this may be shared with the mobile operators.

42. Regulation 16 of the CRDR states that –

“Subject to the provisions of this Part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database”.

The Commissioner understands that the mobile operators license the Sitefinder information to Ofcom for the specific and limited purpose of compiling that database and for presentation to the public in the agreed format. In view of this the Commissioner is satisfied that the mobile operators have not consented to the disclosure of the database as a whole as per the request. Therefore if the entire database were disclosed to the complainant it is arguable that this would constitute the extraction and re-utilisation of all of the contents of the database which would amount to an infringement of the mobile operators' database rights.

43. However, even if it were shown that disclosure in response to the complainant's request would constitute an infringement of the database rights, the Commissioner is not satisfied that this on its own would be sufficient to demonstrate an adverse effect to intellectual property rights as is required to engage Regulation 12 (5) (c). In this case he is not persuaded that Ofcom has supplied sufficient evidence to demonstrate that an adverse effect on intellectual property rights would arise as a result of disclosure of the requested information and as such considers that Ofcom has inappropriately applied the exception in Regulation 12 (5) (c).

44. In reaching the above conclusion, the Commissioner has particularly considered the meaning of 'adverse affect' and the purpose of the intellectual property rights exception. One view is that where an intellectual property right has been established, the disclosure under the EIR without the express permission of the right holder would infringe that right. Such technical infringement could be seen as impairing or undermining the right and therefore could be regarded as an 'adverse' effect on the right. However, in the Commissioner's view, such a broad interpretation of the exception would not be consistent with the European Directive on which the EIR are based. Recital 16 to the Directive provides that

disclosure of information should be the general rule and that the exceptions setting out “grounds for refusal should be interpreted in a restrictive way” so that “the public interest served by the disclosure should be weighed against the interest served by the refusal”. The implementation guide to the Aarhus Convention, upon which the Directive is based, takes a similar line stating that “adversely affect means that the disclosure would have a negative impact on the relevant interest”.

45. Arguably the purpose of intellectual property rights is to protect the commercial and other interests of a right holder. In the Commissioner’s view, the exception in the EIR is intended to protect the right holders’ interests rather than the principle of intellectual property rights. Therefore, in order to engage the exception, it is necessary for a public authority to demonstrate that actual harm to the commercial or other interests of the right holder would arise as a result of disclosure.
46. The Commissioner has also taken into account paragraphs 45 and 46 of the ECJ Judgment when considering adverse effect in this specific case. These stated that,

“The terms extraction and re-utilisation must be interpreted in the light of the objective pursued by the sui generis right. It is intended to protect the maker of the database against acts by the user(s) which go beyond the legitimate rights and thereby harm the investment of the maker, as indicated in the 42nd recital of the preamble to the directive.

According to the 48th recital of the preamble to the directive, the sui generis right has economic justification, which is to afford protection to the maker of the database and guarantee a return on his investment in the creation and maintenance of the database”.

47. In this case, though disclosure may constitute a technical infringement of an intellectual property right, the Commissioner does not consider this in itself satisfies the adverse effect test. Ofcom has not demonstrated that any actual harm to the mobile operators, such as a loss of return on their investment in creating the database, would arise because of the disclosure. Nor has Ofcom claimed or demonstrated any actual harm to its own interests.
48. The Commissioner’s understanding is that the mobile operators do not charge for the provision of data in order to achieve a return on their investment in creating the database. Data are supplied to Ofcom for Sitefinder in recognition of the fact that there is a public interest in making information about base stations available to the public, as recommended by the Stewart Report. The Commissioner does note however that there may be an indirect return if greater transparency encourages new customers or increased consumer loyalty. In addition he recognises that the mobile operators may wish to exploit the database for an economic return in the future and has taken this into account.
49. Notwithstanding the points considered in the aforementioned paragraph, the Commissioner is not satisfied that Ofcom has provided any evidence to show that

disclosure of the requested information would harm the mobile operators' investment in the creation of the database. He considers that such harm is relevant when determining whether Regulation 12 (5) (c) applies. Any indirect benefit derived as a result of data being provided for Sitefinder would not be lost as a result of disclosure. Further, if the information were disclosed Ofcom could make the complainant aware that it is subject to database right. In doing so Ofcom could explain that if the complainant wanted to use the information, in a way that would infringe the database rights, then this would require a licence from the mobile operators. In the event that the information was used in a way that infringed the database rights, there would be nothing to prevent the mobile operators from taking action against the complainant in pursuance of their rights.

50. It may be argued that in order to make an informed decision about whether disclosure of the requested information would adversely affect intellectual property rights it is necessary to consider why an applicant wants the information. This is because the CRDR provide for certain circumstances in which information in a database can be extracted and re-used without infringing database rights. However, where a public authority receives a request for environmental information under the EIR it cannot ask why the applicant requires the information to inform its decision on whether or not to release the material. Therefore it would be impossible to judge whether any of the provisions within the CRDR would apply. In light of this a public authority would simply have to determine whether the disclosure of information would itself adversely affect intellectual property rights, irrespective of how an applicant might use the requested information. In this case Ofcom formed the view that disclosure would result in an adverse effect on the intellectual property rights. However the Commissioner does not agree with this conclusion. As explained in the previous paragraph he considers that the requested information can be disclosed as this does not prevent the mobile operators from pursuing the applicant in the event that they use the information in a way that infringes their rights. Therefore, the fact that a public authority cannot ask why an applicant wants information should not force a wide interpretation of Regulation 12 (5) (c) such that it would routinely prevent the disclosure of information.

Copyright

51. Ofcom has also asserted that the mobile operators own the copyright in the data that they provide to Ofcom. Section 1 (1) of the Copyright Designs and Patents Act 1988 ('CDPA') states that –

“Copyright is a property right which subsists in accordance with this Part in the following descriptions of work –

(a) original literary, dramatic, musical or artistic works”.

52. Under section 3 (1) of the CDPA as amended, a literary work is defined as follows,

“...any work, other than a dramatic or musical work, which is written, spoken or sung and accordingly includes –

- a. *[a table or compilation [other than a database],*
 - b. *a computer program*
 - c. *preparatory design material for a computer program and*
 - d. *a database]*.
53. The Commissioner's understanding is that the originality required refers to the fact that a work must not be copied, as opposed to any inventive test. Therefore to satisfy the requirement of originality a copyright holder must demonstrate that some work or effort has gone into creating the work. In this case the authors would be the mobile operators.
54. Ofcom has claimed that the way that the mobile operators have selected and/or arranged the raw data (i.e. in terms of location, height and orientation of the antennae) constitutes their intellectual creation and thus allows them to claim copyright in the table/compilation. The information presented is unique to each of the operators.
55. The Commissioner is satisfied that copyright exists in the datasets or tables that are provided to Ofcom. This is because each database is an original work created by the mobile operators that only they are in a position to compile. In this case the Commissioner considers that the judgment and skill expended by the mobile operators in determining where a base station is located is helpful in demonstrating that copyright exists in the data within the datasets supplied to Ofcom. He is also aware that the datasets are resubmitted by each mobile operator every 3 months. He takes the view that significant changes will have occurred to that information to reflect developments across each of the networks. Therefore the mobile operators are likely to be able to demonstrate that new copyright attaches to each version of the datasets supplied to Ofcom.
56. Notwithstanding the conclusions in the above paragraph, the Commissioner is not persuaded that Ofcom has demonstrated that disclosure would adversely affect anyone's copyright, adopting the same approach to "adversely affect" as for database rights. He has therefore concluded that the exception in Regulation 12 (5) (c) is not engaged in respect of copyright. The Commissioner notes that section 7.5.4 of the Defra guidance on exceptions under the EIR states that, "copyright does not prevent authorities releasing information they hold. However, where such information is subject on copyright, it should be made clear to applicants that the copyright still exists". Further, "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". The Commissioner agrees with the approach set out in the guidance and takes the view that Ofcom could release the requested information and make the complainant aware that it is subject to copyright. The complainant would then need to contact the mobile operators, as copyright owners, if they planned to use the information in a way which would infringe copyright. This approach also accords with that set out above in respect of database rights.

Confidence

57. Ofcom has also argued that the information provided by the mobile operators is protected by an obligation of confidence. This is because information provided in confidence can create an intellectual property right. It has asserted that intellectual property law regulates the creation, use and exploitation of mental or creative labour. According to Article 2, paragraph viii of the WIPO Convention (1967), 'Intellectual Property' includes:

"[...] the rights relating to – literary, artistic and scientific works [...] protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields".

Therefore, as the mobile operators seek to protect the creation and use of the datasets they supply, Ofcom considers that the protection of confidentiality is an intellectual property right. In order to be confidential information must have the necessary quality of confidence and be communicated in circumstances entailing an obligation of confidence.

58. Ofcom has argued that the national dataset has the necessary quality of confidence because, if disclosed, it would provide competitors with a 'springboard' from which to construct the original data, for example to construct the design of a particular network. This in turn would allow competitors to enter the market more cheaply and quickly than others. Ofcom has also suggested that where mobile operators are rolling out their networks at different rates or in different locations at different times, material revealing who has or has not installed infrastructure could affect the costs of site rental.
59. The Commissioner is not satisfied that the arguments put forward by Ofcom illustrate that the information provided by the mobile operators has the necessary quality of confidence. In reaching this decision the Commissioner has given considerable weight to the fact that the majority of the information could be obtained from the publicly available database, provided that someone was willing to put in the time necessary to extract it. In his view if the information would provide a significant competitive advantage, someone intent on competing for business would expend resources conducting searches of the database.
60. In addition to the above, the apMobile report states that the mobile operators have made a commitment to provide local planning authorities with annual roll out plans. Some local authorities, such as the Borough of Basingstoke and Deane hold a joint annual meeting with all operators which results in a joint rollout map being produced which is available for the public to view. According to paragraph 4.4 of the report, the apMobile Group asked operators if this posed any issues over commercial confidentiality and they were informed by the MOA that it did not.
61. In any event, the Commissioner takes the view that it is not appropriate to apply Regulation 12 (5) (c) on the basis that information provided in confidence creates an intellectual property right. This is because there is a separate exception within the EIR for circumstances where disclosure would adversely affect the

confidentiality of commercial or industrial information where such confidentiality is provided in law to protect a legitimate economic interest. However, in this case Ofcom is prevented from relying upon the exception in 12 (5) (e) because of Regulation 12 (9) which states that,

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

Regulation 12 (9) reflects the fact that Parliament has taken a view on emissions information and has determined that where such material is requested the public interest will always favour disclosure over maintaining any of the exceptions in Regulations 12 (5) (d) to (g). The Commissioner's view is that it is inappropriate for Ofcom to rely upon Regulation 12 (5) (c) where 12 (5) (e) would be the more appropriate exception.

Other issues

62. As the Commissioner has decided that none of the exceptions cited by Ofcom have been appropriately applied it is not necessary to consider the public interest test. However, the Commissioner does wish to comment on the public interest arguments that Ofcom put forward to justify its decision to maintain the exceptions in Regulation 12 (5) (a) and (c). Ofcom claimed that the public interest favours maintaining the exceptions because if the requested information were disclosed the mobile operators would be likely to stop providing the information required for Sitefinder. This in turn would mean that Ofcom could not continue to provide an up-to-date version of the database, thus denying the public information about base stations.
63. The Commissioner does not consider that the argument set out above is relevant to the exceptions cited in this case. In reaching this view he has taken into account the Information Tribunal's decision in the case of Bellamy vs the Information Commissioner and the Secretary of State for Trade and Industry. In its decision the Tribunal clarified the relevant exercise that public authorities must undertake when conducting the public interest test under the Act. Paragraph 5 of the decision explained that it is necessary to *“weigh the interest in maintaining the exemption which is manifested by the relevant provisions against the public interest in disclosing the information”*. It went on to clarify that *“not all public interest considerations which might otherwise appear to be relevant to the subject matter of the disclosure should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied upon”*.
64. The same test is required under Regulation 12 (1) of the EIR. Therefore, if the exceptions were deemed to apply in this case, it would be necessary to weigh the public interest in protecting national security, public safety and intellectual property rights against the factors in favour of disclosure. The public interest inherent in these exceptions does not include protecting the voluntary supply of information to public authorities. However, there is an exception in Regulation 12

(5) (f) of the EIR which could apply where disclosure would result in an adverse effect on the supply of information. Regulation 12 (5) (f) states that,

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

(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”.*

65. In view of the above, the Commissioner considers that Regulation 12 (5) (f) would be the appropriate exception where disclosure would result in an adverse effect on the voluntary supply of data for Sitefinder. However in this case Ofcom is prevented from relying upon that exception, by virtue of Regulation 12 (9) because the requested information relates to emissions. In such circumstances, it is not appropriate to consider harm to the voluntary supply of information as a public interest argument in favour of maintaining other unrelated exceptions such as 12 (5) (a) or (c).

The Decision

66. The Commissioner’s decision is that the public authority did not deal with the request for information in accordance with the EIR.

Steps Required

67. The Commissioner requires the public authority to make the requested information, i.e. the Sitefinder national dataset together with the grid references, available to the applicant as a text file, csv file, Access database table or Excel spreadsheet”.
68. The public authority must take the steps required by this notice within 35 calendar days from the date of this notice.
69. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of Appeal

70. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 11th day of September 2006

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**