Intellectual property rights (regulation 12(5)(c))

Environmental Information Regulations

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Introduction

1. The Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.

2. An overview of the main provisions of the EIR can be found in The Guide to the Environmental Information Regulations.

3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and to promote good practice.

4. This guidance explains to public authorities how the exception provided by regulation 12(5)(c) works to protect intellectual property rights. It sets out what public authorities should consider if they are concerned that disclosing information in response to a request for environmental information will adversely affect intellectual property rights.

Overview

- Intellectual property (IP) rights arise when owners are granted exclusive rights to certain intangible assets.
- To establish that there would be an adverse effect on IP rights a public authority must demonstrate that:
  - the material is protected by IP rights;
  - the IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed;
  - the identified harm is a consequence of the infringement or loss of control over the use of the information; and
  - the potential harm or loss could not be prevented by enforcing the IP rights.
- When considering the public interest in maintaining the exception and the right holder is a third party, a public authority can take account of the harm caused to it due to the third party's reaction to having their rights threatened, eg they may no longer be prepared to provide information to the public authority.

- When looking at the public interest in favour of disclosure, a public authority should consider all benefits, even those which could only be realised by infringing the IP right.

What the EIR say

5. Regulation 12(5)(c) states:

> **12.**—(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—
>
> (c) intellectual property rights

6. As with all EIR exceptions, this is a qualified exception. Even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

7. Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.

What are IP rights?

8. The scope of intellectual property rights, often called IP rights, is wide. IP rights arise when owners are granted exclusive rights to certain intangible assets. Although there are many forms of IP rights, the main ones relevant to requests will be copyright, database rights, and copyright in databases. These main forms of IP rights relevant to requests made under the EIR are discussed in more detail in our freedom of information guidance: Intellectual property rights and disclosures under the Freedom of Information Act.

9. Copyright covers a wide range of recorded information, including original literary works (which includes computer programs and databases), and original musical or artistic works.

10. Databases contain existing information that has been collated and presented in a way that makes it more useful. As well as the actual contents of the database attracting copyright, databases are capable of attracting two additional forms of IP rights: database rights and copyright in databases. Database rights protect the significant work that goes into gathering the material to be included in a database, verifying and presenting that information in the database, and then maintaining the database. Copyright in databases protects the creative process of designing the database: selecting the best material to include in a database and deciding how to organise that material in order to make the best use of it.

11. There are two important pieces of legislation concerning IP rights. The Copyright Design and Patents Act 1988 (CDPA) deals with copyright, including copyright in databases, and defines what a database is. The Copyright and Rights in Databases Regulations 1997 (CRDR) establishes what database rights are.

12. As a general rule, IP rights belong to the author or creator of the asset, but will instead belong to an employer if the asset is created in the course of employment. Therefore a public authority is likely to own the IP rights to any information created by its staff. However, public authorities will not own the copyright for information they receive from third parties. For example, a local authority's planning department is likely to hold guidance on planning legislation produced by the Department for Communities and Local Government, planning files containing plans produced by a private practice architect, and letters from neighbours objecting to the plans. The copyright to these materials will belong to those third parties. In cases where the public authority has commissioned a report, for example from experts in wind turbine technology, the terms of the contract will determine who owns any IP rights.

13. In general, the owner of the IP rights has exclusive control over how the asset is used. However there are exemptions, where some uses of protected material are permitted. Importantly, the different pieces of legislation that collectively provide protection to these three IP rights contain provisions which mean that any act carried out under statutory authority will **not** infringe those IP rights. This is explained in more detail in our guidance on Intellectual property rights and disclosures under the Freedom of Information Act. Therefore a public authority will not infringe IP rights when it discloses information in response to an EIR request, because it is an act

authorised by statute. The issue when applying regulation 12(5)(c) is the infringement of IP rights by any user who may receive the information.

14. Furthermore regulation 5(6) of EIR expressly states that:

> Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

15. Therefore, even if the CDPA and the CRDR did not allow the disclosure of material when authorised by statute, regulation 5(6) would remove any barrier to the initial disclosure under the EIR that the existence of IP rights created.

16. Although public authorities are allowed to disclose information protected by IP rights, the rights continue to exist post disclosure. Therefore, the requester will be limited in what they can do with the information because it is still protected.

17. However, there are other permitted uses that the requester can take advantage of. These 'fair dealing provisions' allow information to be used for limited purposes so long as the holder of the IP right is credited. For example, copyright material can be used for non commercial research or private study. The permitted uses differ for different forms of IP rights. For example, in database rights, a database can only be used for non commercial research if the database has already been made public. Importantly however none of the three IP rights will be infringed where the information is used for criticism, review or news reporting. Therefore, once disclosed, such material can still be used to feed public debate and satisfy the public interest in transparency and holding public authorities to account.

18. Where IP rights are infringed, the owner of those rights can seek damages or an injunction to prevent further infringements.

Engaging the exception

19. To establish that there would be an adverse effect on IP rights, a public authority must demonstrate that:

- the material is protected by IP rights;
- the IP right holder would suffer harm. It is not sufficient to show that IP rights have merely been infringed;
- the identified harm is a consequence of the infringement or loss of control over the use of the information; and
- the potential harm or loss could not be prevented by enforcing the IP rights.

20. Each element of the test is discussed in more detail below.

Establishing the material is protected by IP rights

21. If the Commissioner receives a complaint that a public authority has misapplied regulation 12(5)(c), the onus will be on the public authority to identify the specific IP right that would be adversely affected, and its owner.

22. This guidance focuses on three main forms of IP rights: copyright, database rights, and copyright in databases. A fuller introduction to these rights can be gained from our guidance on Intellectual property rights and disclosures under the Freedom of Information Act, but IP rights is a complex area of law and public authorities should be prepared to seek their own legal advice on these issues where necessary. There are also many other forms of IP rights, including design rights, patents, trade marks and publication rights. These are briefly identified in the annexe to the freedom of information guidance.

23. Note that a trade secret is not an IP right as such. A trade secret is a form of confidential commercial or industrial information given additional protection under the common law. It may also be protected by IP rights, but its status as a trade secret is not relevant for the purposes of this exception. Public authorities will still have to establish that a particular IP right applies. However, trade secrets will engage the exception at regulation 12(5)(e) for confidentiality of commercial or industrial information, so public authorities may want to consider that exception instead. See our guidance on regulation 12(5)(e) for more information.

(1) Copyright

24. Establishing whether the material is protected by copyright should be straightforward. Much of the information held by a

public authority will be protected by copyright, owned either by the Crown, Parliament, the public authority itself, or a third party.

25. If a public authority has created the information itself, it will know whether it owns the copyright or whether the information attracts Crown copyright or Parliamentary copyright. However the position with universities may be less clear cut if the material has been produced as part of a research project or where a member of academic staff has produced an academic paper, materials for commercial publication or peer reviewed another's work.

(2) Database rights

26. Establishing database rights is potentially more complicated. A public authority will first have to consider whether the request relates to material held in a database. Section 3A of the CDPA 1998 defines a database. In broad terms it is a collection of independent works which are arranged in a systematic way and are individually accessible.

27. The public authority will then need to consider whether database rights exist in that database. As already discussed, database rights only exist when the creator of a database has invested substantial effort in obtaining, verifying, presenting and maintaining the information included in a database. This is judged both on the amount of work and how difficult the work is, so it can be evaluated both quantitatively and qualitatively.

28. When investigating a complaint concerning database rights, the Commissioner will take account of the size of the public authority or third party which created the database when he considers whether it is a substantial investment. A substantial investment by a small parish council may not be the same as a substantial investment for a large government department.

29. The substantial effort must be involved in obtaining and verifying the contents at the time the database is constructed. This is different from the effort involved in creating the information (the independent works) in the first place.

Example
Assume public authority A holds a database of wildflower records for the country, comprising records submitted by local authorities. The time taken by the local authorities to conduct

those surveys is not relevant. What is protected is the effort that public authority A exerted in using the records to produce the database, for example in obtaining the individual records from the different local authorities.

30. Database rights are only infringed when a substantial part of the database is used without the permission of the right holder. A substantial part can mean the volume of information or the importance or significance of the part extracted, in relation to the database as a whole.

(3) Copyright in databases

31. Copyright in databases exists to protect the intellectual and creative process of deciding what goes into a database and how it is arranged. For example, in the wildflower database, copyright in the database would recognise the decision to organise the records not just by county, but by say rarity or by habitat. This acknowledges the judgement required when making these decisions. However where no judgement is required because the arrangement is predetermined by the logic or the purpose of the database, there will be no copyright in the database.

32. This point is illustrated by the example below where the Commissioner rejected the application of regulation 12(5)(c) because he was not satisfied that the material had the necessary quality of originality.

Example
ICO decision notice FER0354510 considered a request to a local authority for 'property search information', which is the information that housebuyers obtain to clarify whether a property is affected by rights of way, highway schemes etc. A lot of the information was held on computer and the local authority claimed that it owned the copyright in the database.

The Commissioner first looked at whether the way in which the information was organised on computer satisfied the definition of a database. The local authority provided evidence of how the information was held and organised and the Commissioner was satisfied that the information was held in a database.

In this case the local authority did not claim database rights because the content of the database was material it already

held as part of its statutory functions and it therefore could not claim that it had invested any effort in obtaining or verifying the contents. For example, as a highways authority it already held information on any road widening schemes that affected a property.

However the local authority argued that it owned the copyright in the database. This right rewards the intellectual, creative process of selecting what should be included in the database and deciding how that information is arranged to maximise its usefulness. The local authority provided the Commissioner with explanations of how the system worked together with extracts from the system and a screenshot to support its claim.

The local authority had used a commercially available software package to produce the database. The database comprised of free text boxes which left council officers free to determine what comments and explanations would be helpful to a user of the database. The software also provided the local authority with the opportunity to create some of its own fields and search criteria. However the bulk of the content was determined by a combination of the software used to create the database and the statutory requirement to hold particular information. In light of this, the Commissioner found that the database lacked the necessary quality of originality to be protected by copyright in databases.

33. Copyright in a database is infringed when a substantial part of the database is reused without the permission of the right holder. As with database rights, a substantial part is evaluated both quantitatively and qualitatively. As a result, even a small amount of information can constitute a substantial part of the database, if it is significant enough.

34. In the example of the wildflower database, the same database can attract both database rights and copyright in a database. Furthermore, the individual local authorities that submitted their records could claim copyright in the individual records. It is important that public authorities are clear as to what IP right they are claiming and who is the owner of that right.

35. The different forms of IP right have different durations. Generally database rights exist for 15 years after completion, whereas copyright in a play lasts for 70 years from the author's death. Public authorities should make sure that any IP right still

exists and that they can confirm this if the Commissioner investigates a complaint.

The IP right holder would suffer harm

36. There are two issues to consider here. Firstly, a technical infringement of IP rights is not sufficient to engage the "would adversely affect" test in the exception. There must be some real loss suffered by the owner of the IP right, such as a monetary loss.

> **Example**
> In *Ofcom v Information Commissioner & T-Mobile (UK) Limited (EA/2006/0078, 4 September 2007)* ("the Ofcom case") the public authority argued that the exception would be engaged if IP rights were merely infringed. But the Information Tribunal took a harder line, stating at para 47 that:
>
> *"… we believe that, interpreting the exception restrictively requires us to conclude that it was intended that the exception would only apply if infringement was more than just a technical infringement, (which in other circumstances might have led to a court awarding nominal damages, or even exercising its discretion to refuse to grant the injunction that would normally follow a finding of infringement). It must be one that would result in some degree of loss or harm to the right holder."*
>
> The case was appealed as far as the Supreme Court on a general point of law relating to the public interest test, and was eventually remitted for a new Tribunal decision on the public interest test. However, the Information Tribunal's decision about the exception being dependent on there being loss or harm to the owner of the IP right remains intact and was endorsed by the Court of Appeal: *Ofcom v Information Commissioner* [2009] EWCA Civ 90.

37. This approach was later adopted in the following case:

> **Example**
> ICO decision notice FER0282488 concerned a request to the University of East Anglia for climate data over a given period for part of the world. The Commissioner accepted that a number of parties would hold intellectual property rights in the information, including the university itself.

The Commissioner found that the university's copyright and database rights might be infringed following disclosure. The university had argued that if this happened it would lose the ability to exploit the commercial value of the information. However the same or comparable information was already available in respect of 97% of the requested information. The Commissioner considered there was insufficient evidence that there was any potential to exploit the information commercially, and therefore he did not accept that there would be any real loss suffered by the university. Regulation 12(5)(c) was not found to be engaged.

38. Secondly, the harm in question has to be suffered by the holder of the IP right because the right holder can no longer rely on his IP rights to control the use of the information. So, if a third party holds the IP right, it will be the harm to them that is relevant, not any harm to the public authority.

39. However, the harm suffered by the public authority in these circumstances may have a bearing on the public interest test. But even under the public interest test it is only a consequential harm, one flowing from the right holder suffering loss to their IP rights, that is relevant. For example, a right holder might refuse to provide IP protected material to the public authority in the future because they anticipate that this would lead to their rights being infringed again. This is discussed in more detail later in the section on the public interest test.

40. In both the Ofcom case and the climate data case, the public authorities claimed the material had a commercial value. However, protecting the commercial value of the information will not always be the issue. There will be situations where an asset could be protected for research purposes and the right holder wishes to retain control over its use so that it can exploit the research value of that material, or to ensure any findings are properly credited to the originator of the research.

41. Similarly, a public authority may wish to control the use of the information it produces to prevent its authority being undermined.

As a consequence of the infringement of IP rights

42. IP rights exist to reward either the creativity or significant work or both that goes into producing the material. They give the right holder control over how the information is used, and by whom. It follows that the harm must result from the right holder losing that control.

> **Example**
> In the Ofcom case, Ofcom received a request for a database showing the location and characteristics of all base stations used by each mobile phone operator in the UK.
>
> The mobile network operators had database rights in the information they had supplied to Ofcom, which was then used to compile the complete Site Finder database.
>
> T-Mobile established that there was the opportunity for the mobile network operators to license information on the location of their sites. Companies could then develop navigational systems based on the ability to locate a mobile phone by its proximity to a base station. T-mobile argued that if it lost control over who could use the information to develop such systems, it would lose the licensing revenue.
>
> The Information Tribunal found at para 50 that: *"This category of harm involves a direct loss of the ability to exploit the relevant intellectual property through licensing and therefore goes to the heart of the right as an element of property."*
>
> (Note 1: The harm was to the interests of T-Mobile, one of the right holders)
>
> (Note 2: As discussed earlier database rights are only infringed where a substantial part of the database is reused. In this case the request was for the entire database held by Ofcom.)
>
> (Note 3: Later this guidance will consider the ability to enforce IP rights after information has been disclosed. This obviously has an impact on whether, in a case like this, control over the further use of the database would have been lost in practice and so whether it would have been possible to challenge whether the alleged harm would in fact have arisen.)

43. It is important to recognise that Ofcom was able to demonstrate that the information the mobile network operators had provided was a commercial asset. Where a public authority argues that disclosing information will result in the owner of IP

rights losing the opportunity to exploit the information commercially, the Commissioner will expect the public authority to provide evidence that there is a market for it.

44. When there is the potential that a third party would suffer a loss, the Commissioner will adopt a similar approach to when a public authority is claiming a third party would suffer a commercial loss under either regulation 12(5)(e) (commercial confidentiality), or section 43 (commercial prejudice) under the Freedom of Information Act. The public authority needs to provide arguments originating from the third party that the alleged harm will occur, rather than speculate that some potential harm may result from the disclosure. This principle was established by the Information Tribunal in *Derry City Council v Information Commissioner (EA/2006/0014, 11 December 2006)*.

45. Simply communicating potentially sensitive information to someone does not in itself engage the exemption.

Example
In this hypothetical example a local authority is about to retender its grounds maintenance contract for country parks. It has held numerous meetings with staff from the recreation department and has developed a procurement strategy which sets out the maximum price that the council is prepared to pay.

The council owns the copyright to the procurement strategy because it has created the original document.

This document is considered commercially sensitive, and if it was disclosed it would undermine the council's ability to obtain best value for money in the procurement exercise.

However, the harm is not dependent on the council's copyright being infringed. The harm is not caused by the council losing control over the future use of the information.

Instead the harm is caused by the maximum price payable becoming public knowledge. This is caused by the initial disclosure, which itself would not infringe copyright as the CDPA provides that acts authorised by statute, such as a disclosure under the EIR, are permitted.

46. Public authorities should not be concerned that this means commercially sensitive information is not protected under the EIR and that they will be forced to disclose this kind of information. In the example above the council could consider the application of regulation 12(4)(e) (internal communications), or regulation 12(5)(e) (commercial confidentiality) instead. But to engage regulation 12(5)(c), the public authority must be able to demonstrate that the harm flows from an infringement of the IP right.

The harm could not be prevented by enforcing IP rights

47. As discussed, disclosing information under the EIR does not extinguish any IP rights in the material. Therefore if the right holder became aware of further uses of the information that infringed those rights, either by the original requester or by anyone else who had received the information, the right holder could take action to prevent harm arising from that infringement. The Commissioner will take account of the ability of the right holder to enforce their IP rights when considering whether the alleged harm would actually arise.

Example
ICO decision notice FS50115636 dealt with a request to what is now the Ministry of Justice (MoJ) for a copy of the public authority's library of current statute law in a particular electronic format. The information was covered by Crown Copyright. The MoJ believed the information had a significant commercial value which it intended to exploit with a private partner.

The decision notice acknowledged the commercial value of the information but found that the copyright would effectively prevent anyone being able to exploit its commercial value in competition with the MoJ's own business plans.

The decision notice stated that: *"… the MoJ has a method for protecting its commercial interests in the requested information – either by refusing to issue a licence, or by realising a financial benefit through the provision of a Value Added Licence. In these circumstances, the Commissioner considers that the MoJ is able to take steps to eliminate any potential commercial prejudice from disclosure."*

In this case the information was not environmental and so was dealt with under the Freedom of Information Act 2000. The information was withheld under section 43, the exemption relating to commercial interests. However the principle is equally valid when considering requests under EIR.

48. However, even though the right holder is still able to enforce their rights after the material has been disclosed, the exception will apply if the public authority can demonstrate that the right holder will no longer be able to effectively enforce their IP rights.

49. In many cases, in order to exploit the material, it will be necessary to market whatever product or service has been developed using that information. Therefore the infringement will often be easy to detect.

Example
In the MoJ case, the Commissioner considered how difficult it would be for the MoJ to police its IP rights. He concluded that:

"For another person to derive value from the information by providing it as a service it would have to be highly visible via the Internet as a service. The complexity of reconfiguring the information from the database dump for public use would make it likely that the number of services that could potentially use the information would be low. The Commissioner therefore considers that it will be possible for the MoJ to effectively police its intellectual property rights."

50. So the second point to draw from this example is that the fewer people who are likely to breach IP rights, the easier it should be to detect the infringement. The number of potential infringements may be limited by the expertise required to exploit the information, as in the MoJ case, or it may be determined by a limited market for the end product or service, which therefore limits the number of potential suppliers.

51. Compare this to the situation as the Information Tribunal saw it in the Ofcom case.

Example
In the Ofcom case, the information on the base stations was requested electronically in the form of either a text file, csv file, Access database or Excel spreadsheet.

The Information Tribunal stated at para 51 that:

"… once material protected by an intellectual property right has been released to a third party it becomes more difficult to discover instances of infringement (either by that third party any person to whom it passes the material), to trace those responsible for it and to enforce the right against them. This is particularly the case with material in this case, which stored in a form in which it may be instantaneously transmitted to many third parties with limited scope to trace either the source or the destination and in a format that may be very easily reconfigured."

Recap

52. The test for engaging regulation 12(5)(c) is that the disclosure **would** adversely affect the identified IP rights. This means it has to be more probable than not that:

    - someone would wish to exploit the protected material;
    - they could successfully do so; and
    - these infringements would go undetected or could not be prevented.

The public interest test

Public interest in maintaining the exception

53. The public interest in maintaining regulation 12(5)(c) is determined by the severity of the loss suffered when the holder of the IP rights loses control over the use of the information, their asset. Where the information has a commercial value it may be possible to estimate the loss in monetary terms. In these circumstances the public interest arguments will be similar for those presented when weighing the public interest in favour of maintaining section 43 (commercial interests) under the Freedom of Information Act. If the right owner is the public authority itself, the loss of a revenue stream will have an

impact on public finances or the level of services that the public authority can deliver.

54. IP rights reward either the intellectual endeavour or hard work or both that goes into creating the asset, whether it is an official report, database, design of a housing development, or play. Adversely affecting IP rights will not mean a public authority stops creating material which is produced as part of its functions. However, to remove the protection afforded by IP rights could be a disincentive to continuing to produce information in other scenarios. For example, if a commercial company lost control over the use of material it intended to exploit. It is clearly against the public interest to undermine innovation and progress in this way.

55. Similarly, if an academic institute lost control over a database it had developed for research purposes, it could lose the potential to earn the credit for the research and impact on its ability to attract both funding and leading academics to the institute.

56. If the IP rights of a third party have been adversely affected by a disclosure, this may also affect the relationship with the public authority. For example, third parties may no longer be prepared to provide the public authority with their intellectual property on a voluntary basis, because they have suffered loss.

Example
In the Ofcom case, the mobile network operators supplied Ofcom with the details of their base stations under a voluntary agreement which allowed Ofcom to publish some of that information on its Site Finder internet site. Ofcom feared that if it disclosed those details from its database, the mobile network operators would no longer provide the information. The mobile network operators had already suspended their cooperation pending the outcome of the appeal.

The Information Tribunal made it clear (at para 59) that:

"… we do think we should consider the potential public interest detriment arising from the MNOs' refusing to continue licensing Ofcom to publish the information. … it seems to us that it arises naturally from the exercise of an intellectual property owner's right to control the use of protected material either by prohibition or licence".

57. It was hard to assess the weight that should be attached to the threat to discontinue the supply of base station information. Mobile network operators may not continue to withhold information in the long term; public pressure could force the operators to start supplying the information again or risk the threat of being compelled to do so by government.

58. In similar cases the Commissioner will consider the extent to which the supply of information is truly voluntary. But if he is satisfied the flow of information may cease, he will take account of the harm to the public interest this causes.

59. So, although the focus is on the harm to the right holder when assessing the public interest in maintaining the exception, the Commissioner will consider some of the wider consequences of the disclosure. But this will be limited to those effects which are a result of the harm to the IP rights and only those arguments that stem from the loss of control over that intellectual property.

Example
In this hypothetical example, a request is made to a university for a database of results from a survey of badgers. The university is able to establish that it owns database rights in the material and that its disclosure would frustrate the university's ability to exploit the database's research value.

Under the public interest test, the Commissioner would consider the validity of arguments about the public authority losing both its ability to take credit for the research and opportunities for funding.

However the possibility that disclosing the location of badger setts would make them vulnerable to badger digging is **not** a relevant public interest argument in favour of maintaining regulation 12(5)(c).

Depending on the circumstances, the university may also be able to claim regulation 12(5)(g) – the protection of the environment to which the information relates and this would take account of any increased risk to the badgers.

60. A public authority's motivation for enforcing its copyright could be to protect the integrity of the information it produces.

Example
A regulatory body has spent time and resources on publishing guidance on the legislation it regulates. Although the body wants this information to reach as wide an audience as possible, it also wants to ensure that no alterations are made to the guidance which may be misleading.

61. The Commissioner will consider the public interest in preventing this harm if a public authority can demonstrate that a disclosure will make it impossible to police its IP rights, resulting in its work being undermined.

62. However the Commissioner does not anticipate that this will be a frequent issue. In the previous example it would be unsustainable to try to apply the exception, as it is unlikely that disclosing information in response to an EIR request would increase the risk of the regulator's copyright being infringed, if the same information was already widely disseminated.

Public interest in disclosure

63. As with any exception, the public interest factors in favour of disclosure will include both general and specific arguments relating to transparency, accountability, participation in the democratic process and decision making on environmental issues.

64. There will always be some general public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.

65. The weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually inform public debate.

66. There may of course be other specific factors in favour of disclosure, depending on the particular circumstances of the case. For example, these could include accountability for spending public money, the number of people affected by a proposal, or any reasonable suspicion of wrongdoing.

Public interest resulting from a use that infringes IP rights

67. Benefits to society that will only be realised through a use of material that infringes an IP right are still relevant when weighing the public interest in disclosure.

Example
In the Ofcom case, all parties were satisfied that the requested information would assist research into whether there were any health risks associated with the radio frequency radiation emitted from base stations. Clearly there is a public interest in such research being conducted.

However Ofcom and T-Mobile argued before the Information Tribunal that no account should be taken of this benefit when assessing the public interest in disclosure, as the research would infringe IP rights and that the Tribunal should not take account of a benefit arising from an unlawful act. However the Tribunal **did** take account of this public interest and the issue was appealed to the High Court - [2008] EWHC 1445 (Admin) and then the Court of Appeal – [2009] EWCA Civ 90.

In the Court of Appeal, Lord Justice Richards found that the potential use of the data for epidemiological research was the very basis for deciding that the disclosure would have an adverse affect on the intellectual property rights of the mobile network operators. He went onto state (at para 55) that:

"But if such use also has beneficial consequences, …, in my view it is implicit in the EIR that such consequences can be taken into account on the other side of the balance as an aspect of public interest in disclosure."

He continued (para 56):

"Where use of information in breach of intellectual property rights has beneficial as well as adverse consequences, the proposition that only the adverse consequences can be taken into account seems to me to run wholly counter to that scheme."

Before concluding (at para 59) that:

"I am therefore satisfied that the Tribunal was entitled to take into account, when carrying out the public interest balancing exercise, the benefits arising from use of the information in

epidemiological research even if that use would be in breach of the rights of the NMOs."

The Ofcom case was appealed to the Supreme Court but on a different point of law. Therefore the Court of Appeal's decision on this particular matter continues to be the binding precedent on this point.

Other exceptions

68. Regulation 12(5)(c) provides grounds for withholding information in very limited circumstances. It will only be engaged if the right holder cannot effectively prevent infringements to his IP rights and will suffer harm as a result. However, regulation 12 does provide a range of other exceptions from the duty to make environmental information available. Public authorities might also want to consider:

    - regulation 12(4)(e) (internal communications) to protect its own sensitive information;
    - regulation 12(5)(e) (commercial confidentiality) to protect commercially sensitive information; or
    - regulation 12(5)(f) (interests of the person who provided the information) if the information was obtained from a third party, but the issue is not commercial sensitivity.

69. This guidance relates only to the EIR. If the information is not environmental information, the EIR are not relevant and public authorities will instead need to consider exemptions under the Freedom of Information Act (FOIA). The most relevant FOIA exemption is likely to be section 43 (commercial interests). See our separate guidance on Intellectual property rights and disclosures under the Freedom of Information Act.

70. Additional guidance is available on our guidance pages if you need further information on the public interest test, other EIR exceptions or FOIA exemptions.

More information

71. This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are

often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

72. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

73. If you need any more information about this or any other aspect of freedom of information, please Contact us: see our website www.ico.org.uk.