

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

### **Decision Notice**

**Date: 9 December 2009**

**Public Authority:** Staffordshire County Council  
Information Governance Unit  
**Address:** 1A Bailey Street  
Stafford  
ST17 4BG

### **Summary**

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The complainant requested copies of the Annual Mineral Returns filed in the last 10 years for Moneystone quarry comprising of the figures for the sales and reserves for each year. Staffordshire County Council (the council) initially refused to disclose this information under section 41 of the Freedom of Information Act 2000 (the Act) on the basis that it was provided to them in confidence. However, having been invited by the Commissioner to reconsider the request under the Environmental Information Regulations 2004 (EIR), the council concluded that the information was exempt from disclosure under Regulations 12(5)(e) and 12(5)(f) of the EIR. Subsequently, the council changed its position again and argued that the sales figures were exempt under section 41 of the Act and the reserves were exempt under Regulations 12(5)(e) and 12(5)(f) of the EIR. The Commissioner finds that both exceptions are engaged in respect of the sales and reserve figures with the public interest test favouring disclosure of the information.

### **The Commissioner's Role**

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1. The Environmental Information Regulations (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 Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## Background

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2. As the Mineral Planning Authority the council is required to undertake an Annual Mineral Survey. It has done this since 1993 and the scheme is voluntary. The purpose is to collect information on the production (output) and the total quantity of mineral reserves existing for each mineral type within the County. The information is collected by the council sending each quarry operator an annual survey form (for all of the sites it operates) requesting (on a voluntary basis) figures for its mineral sales and reserves (measured in tonnes). The information is important for monitoring the impact on the council's planning policies. Each form is marked 'strictly confidential' and is sent with a letter promising that any data provided will be 'treated with the strictest confidence'. Although the information collected from each quarry operator is confidential, the council does publish an aggregate figure on its website for the production and reserves of certain minerals where the number of operators for the particular mineral is more than two. In the present case the figures requested are for Moneystone quarry which is the significant of only two quarries in the County that produces silica sand. Accordingly, the aggregate figure is not published by the council as to do so would give an indication of Moneystone quarry's actual figures.

## The Request

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3. On 11 April 2007 the complainant requested;-  
  
*'Under the provisions of the Freedom of Information Act..... copies of the last ten years Annual Mineral Returns files in respect of the Moneystone Quarry'*
4. The council responded on 3 May 2007 stating that it was unable to provide the requested information as it was exempt under section 41 of the Act ('information provided in confidence').
5. On 4 May 2007 the complainant asked the council to reconsider its original decision.
6. On 10 May 2007 the council responded by providing the complainant with some background on the Annual Mineral Survey and referred him to the information published on its website for the 'production' of and 'reserves' for certain minerals (measured in millions of tonnes) where there were a number of quarries for the same mineral. It added that while information on individual sites was 'sensitive' and therefore 'confidential', collective figures were published. However, in the case of Moneystone Quarry it said that it could not publish a collective figure as it was the more significant of only two silica sand quarries and by implication this would identify the figures for that particular quarry. The council added that disclosure of the individual figures provided by the quarry operator against its wishes might possibly leave the council open to an action for breach of

confidence and furthermore might result in the quarry operators refusing to participate in future surveys.

7. The council subsequently clarified that while the response sent on the 10 May 2007 was intended to provide an explanation into the way in which it collected information on quarries the matter was also being dealt with as 'a complaint' and would be responded to following a formal investigation.
8. On 8 June 2007 the council wrote to the complainant explaining that it had completed its review of the case and was upholding its original decision to withhold the requested information under section 41 of the Act. The council explained that the information had only been provided on the basis that it would be treated with confidence and the quarry operator had confirmed that as the information was commercially sensitive it was strongly opposed to any release.

## The Investigation

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### Scope of the case

9. On 11 June 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled which he confirmed was for the annual mineral returns of Moneystone Quarry for the previous 10 years.
10. The complainant said that by refusing to disclose the annual mineral returns the council had breached his human right to check and challenge the information provided by the quarry operator in support of a recent planning permission application.

### Chronology

11. The Commissioner wrote to the council on 26 June 2007 advising that it had been approached by the complainant. He then wrote again on 4 February 2008 inviting it to reconsider its position in the light of any reduction in the sensitivity of the information due to the passage of time. He did this in an attempt to resolve the matter informally.
12. The council responded on 15 February 2008 stating that the qualities of confidence were still maintained and insufficient time had elapsed to prevent section 41 being engaged.
13. On 15 July 2008 the Commissioner wrote to the council requesting the withheld information and an explanation of its relationship with the operator of Moneystone quarry, WBB Minerals Limited. The purpose of this letter was to determine whether the information was covered by the Act and/or the EIR.
14. The council responded on 6 August 2008 with a copy of the 'sales' and 'reserves' for Moneystone Quarry and with copies of some of the survey forms (and accompanying letters) from which the figures had been extracted. The withheld

- information comprises of an electronic spreadsheet created by the council with the 'sales' and 'reserves' figures (in tonnes) for each of the ten years from 1998 to 2007. This information has been extracted from the confidential annual survey forms completed by the mineral operators for the various quarries. The council also provided some background information relating to the collection of the data, confirmed that the quarry was operated by WBB Minerals Limited and said that the quarry operators had specifically objected to the data being released to third parties. In relation to the latter point the council suggested that if it disclosed the requested information, the quarry operator (and others in the County) might refuse to participate in future surveys.
15. On the 15 August 2008 the Commissioner wrote to the council and suggested that the information provided in the Annual Mineral Return was covered by the EIR rather than the Act as it constituted a 'measure' affecting or likely to affect the elements namely the 'land' as defined by Regulations 2(1)(a) and 2(1)(c) of the EIR. Accordingly, the Commissioner invited the council to reconsider its position under the EIR. He also suggested that as there was already a certain amount of general information in the public domain regarding the current production and reserves of silica sand at Moneystone quarry (as evidenced in the recent planning application submitted by its operators) and bearing in mind the age of the data the council might like to reconsider its position and disclose the requested information.
  16. The council responded on 16 September 2008 stating that it had considered the matter with its planning department and would be seeking the expert views from a number of external organisations (including, the UK Minerals Forum and the Quarry Products Association). It also said that it would be taking legal advice as to whether the information should be included under the Act or the EIR or both. In relation to the general information in the public domain the council said that this was not the same as that which had been requested.
  17. On 29 September 2008 the operators of Moneystone quarry, WBB Minerals Limited wrote to the Commissioner direct stating that the information in the survey forms was provided to the council on a 'private and confidential basis' and any disclosure of this by the council would 'represent a serious breach of trust' and not something to which it would consent.
  18. The council wrote again on 20 October 2008 and stated that having reviewed the original request it was in agreement with the Commissioner that the information was covered by the EIR. Accordingly, it said it would reconsider the matter under the EIR with particular reference to Regulations 12(5)(e) and 12(5)(f) and at the same time arrange a public interest test panel in accordance with its procedures.
  19. On 25 November 2008 the council sent a further letter to the Commissioner in which it said that it had carried out a public interest test and was satisfied that the requested information could be withheld under Regulations 12(5)(e) and 12(5)(f) of the EIR. It said that the public interest lay in protecting the national planning process and the potential significant detrimental effect that releasing the information would have by the future non-cooperation of the quarrying companies. Furthermore, the council said that the disclosure of the information

would lead to the specific withdrawal of the quarry operator from the current survey process and may lead to an action against the council in the courts for breach of confidence.

20. On 27 January 2009 the Commissioner replied to the council and asked it to provide further information and arguments as to why it believed Regulations 12(5)(e) and 12(5)(f) were engaged and the public interest test favoured the withheld information being withheld.
21. The council responded on 27 February 2009 with some further information and arguments.
22. During March, April, June and July 2009 the council provided further information and arguments including submissions from the quarry operators Sibelco UK (previously known as WBB Minerals Limited).
23. On 30 July 2009 the council provided further submissions to the Commissioner and suggested that only the reserve figures were covered by the EIR and that the sales figures were in fact covered by the Act.

### **Findings of fact**

24. The Commissioner accepts from the evidence provided by the council that the completion of the confidential annual mineral survey forms by the County's quarry operators are voluntary.

### **Analysis**

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#### **Substantive Procedural Matters**

##### Freedom of Information Act 2000 or the Environmental Information Regulations

25. The first matter the Commissioner considered was whether the requested information was covered by the Act or the EIR or a combination of both.
26. The council originally dealt with the request in May and June 2007 under the Act. However, having been asked to reconsider the matter by the Commissioner in it agreed in October 2008 that the request was covered by the EIR. The council then changed its position again in July 2009 by concluding that the figures relating to the 'sales' of silica sand were covered by the Act but the figures relating to the 'reserves' were covered by the EIR. The council pointed out that the sales figures were not the same as the extraction figures as the former reflected the actual sales by the company which it said might not necessarily relate to the date when the sand was extracted (which might pre or post date the sales by a considerable margin). The council also pointed out in an earlier email to the Commissioner in April 2009 that sales figures would not include extracted mineral that was discarded as waste following processing.

27. The Commissioner has referred to his Guidance<sup>1</sup> on 'The Environmental Information Regulations' in which he notes that 'land' was described in 'the guidance for the 1992 EIR as: all land surfaces, buildings, land covered by water, and underground strata<sup>1</sup>. By including underground strata the implication is that land covers natural minerals and deposits such as salt, coal, limestone, slate, iron etc'. In relation to 'landscape' the Commissioner notes that it is 'defined by the European Landscape Convention 2000 as 'an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors'. A more technical definition may be of more use when attempting to ascertain what landscape will mean in terms of environmental information. A specialist environmental definition of landscape is 'the traits, patterns, and structure of a specific geographic area, including its biological composition, its physical environment, and its anthropogenic or social patterns. An area where interacting ecosystems are grouped and repeated in similar form' (from EPAGLO2)<sup>1</sup>.
28. Regulation 2(1)(c) provides that –
- “environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements’
29. The factors referred to in (a) include –
- ‘ the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements’
30. The Commissioner is satisfied that the sales and reserves information falls within the definition of environmental information as provided in Regulation 2(1)(c) (measures including administrative measures and activities affecting or likely to affect the elements and factors referred to in Regulation 2(1)(a)).
31. The sales figures (measured in tonnes) for a particular year are linked to the amount of silica sand already extracted from the ground in that or a previous year (or the amount to be extracted in the future). The amount of silica sand extracted (or to be extracted) clearly affects or is likely to affect the land from which it is taken. The Commissioner is therefore satisfied that sales figures are information on an activity that is likely to affect elements of the environment.

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<sup>1</sup> [http://www.ico.gov.uk/upload/documents/library/environmental\\_info\\_reg/introductory/what\\_is\\_environmental\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/introductory/what_is_environmental_information.pdf)



32. The reserve figures (measured in tonnes) for a particular year are linked to amount of silica sand which is economically and technically feasible to extract from the ground. The amount of silica sand remaining following extraction is also clearly information on the land in which it is located. The Commissioner is therefore satisfied that the information is linked to the elements of the environment.
33. The Commissioner has concluded that both the sales and the reserves figures are environmental information falling within Regulation 2(1) of the EIR. The sales figures fall with 2(1)(c) and the reserves 2(1)(a).

## Exemptions

### Presumption in favour of disclosure

34. Regulation 12(2) requires the public authority to assume a presumption in favour of disclosure. Public authorities should therefore consider information from the initial point of view that it should be disclosed.

### Regulation 12(5)(e) of the EIR

35. The council has refused the request for information on the basis that Regulation 12(5)(e) applies. This allows commercial or industrial information which is held under either a statutory or a common law duty of confidentiality to remain confidential if that duty is required in order to protect the legitimate economic interests of any party. The relevant parts of the Regulations are provided in the legal annex to this decision.
36. The matters to be considered in section 12(5)(e) are therefore:
  - i) Is the information commercial or industrial in nature?
  - ii) Is the information subject to a duty of confidence which is provided by law?
  - iii) Is confidentiality required to protect a legitimate economic interest?
  - iv) Would the confidentiality required to protect a legitimate economic interest be adversely affected by disclosure?

#### Is the information commercial or industrial in nature?

37. As the withheld information concerns the annual sales and reserves figures for a ten year period for a particular mineral (silica sand) from a specific quarry (Moneystone quarry), the Commissioner is satisfied that the information is commercial and industrial in nature.

#### Is the information subject to a duty of confidence which is provided by law?

38. The council has argued that the information it has collected from the quarry operator is commercial in nature and provided on a strictly confidential basis. It says that this is made clear on the survey forms and covering letters sent out and it is on this basis that the operator responds. The council has provided the Commissioner with copies of the survey forms which are headed 'Strictly

Confidential' and the covering letters which states that 'any data will be treated with the strictest confidence'. The council has added that if the information was disclosed it would possibly lead to a breach of confidence action being brought against it and furthermore the quarry operator concerned had opposed the release of the information and might refuse to participate in further surveys.

39. The council has pointed out that although certain information is published on its website for the collective total of the production and reserves for a variety of minerals in the county, this is not done for silica sand as there are only two quarries producing this, the most significant of which is Moneystone quarry. It therefore follows that if the information was published it would give a strong indication as to the figures produced by Moneystone quarry.
40. The quarry operator has specifically stated to the Commissioner that it does not consent to the release of the information which in its opinion would not only constitute a serious breach of confidence and but also compromise its involvement in future mineral surveys.
41. The operator has also indicated that disclosure of the requested information would compromise its contractual arrangements and might affect its ability to comply with strict regulations under UK competition law.
42. The Commissioner does not accept that that the words 'Strictly Confidential' in a survey form or a general sentence implying of a duty of confidence in a letter will, by itself, mean that all information in the survey form should be, or will be considered confidential. To accept such a proposition would essentially give public authorities the opportunity to contract out of their obligations under the Act and the EIR. The Commissioner will therefore look behind any specific stipulation or implied duty of confidence and consider the nature of the information concerned and consider whether the duty should stand for each particular item of information.
43. For a duty of confidence to be owed under the common law it is necessary for certain criteria to be met. The key elements for this are:
  - The information must have been imparted in circumstances which create an obligation of confidence.
  - The information must have the necessary 'quality' of confidence.

Was the information imparted in circumstances which created an obligation of confidence?

44. A duty of confidence may be provided by law through statutory or common law means. It is clear that at the time the information was imparted (by inclusion in a survey form marked 'Strictly Confidential') there was an expectation that it was confidential and would remain so. This expectation is reinforced by the statement in the council's letter which accompanied the blank survey form that the information 'would be treated with the strictest of confidence'. In view of this the



Commissioner's view is that the circumstances in which the information was imparted were sufficient to give rise to an obligation of confidence.

Does the information must have the necessary 'quality' of confidence

45. In order to ascertain whether the information has the necessary quality of confidence the Commissioner considers that it can be helpful to ask a number of questions. These include whether:
- The information is trivial and/or whether
  - The information has ceased to have commercial significance and/or whether
  - The information is available from other sources

Is the information trivial?

46. Information will not be considered confidential if it is trivial. In this case the information relates to the sales and reserves of silica sand at Moneystone quarry which is collected by the council on an annual basis to assist with the monitoring of and impact on its planning policies. It is generally accepted that silica sand is a scarce and valuable mineral of natural and strategic importance both at a national and local level. It is for this reason that national and local policies already exist to ensure an adequate and steady supply of it. See the Government's Minerals Planning Guidance 15: Provision of silica sand in England<sup>2</sup>.

Furthermore, it was mentioned at a meeting of the council's Planning Committee on 12 July 2007 (Item No. 4 on Agenda)<sup>3</sup> that Moneystone quarry currently supplies 9% of the national production of industrial silica sand (which was expected to rise to 11% in 2008). It is clear from the minutes of this meeting that the quarry owners believe that Moneystone is one of the most important sources of silica sand in the UK and is of significant national importance.

47. In view of the above facts, the Commissioner is satisfied that the information is not trivial.

Has the information ceased to have commercial significance?

48. In the Derry City Council case in 2006 (EA/2006/0014), the Information Tribunal dismissed the possibility that the confidentiality of information would wane over time as a matter of course. However, it indicated that the obligation of confidence would cease once the information had lost its commercial significance and/or passed into the public domain.
49. Having canvassed the views of the quarry operator the council has argued that the release of the specific sales data would have the potential to compromise contractual arrangements and commercial and sensitive information which could

<sup>2</sup> <http://www.communities.gov.uk/documents/planningandbuilding/pdf/155283.pdf>

<sup>3</sup> [http://moderngov.staffordshire.gov.uk/\(S\(2pqrq545mufy5r551vaf1vfh\)\)/Data/Planning%20Committee/20070712/Agenda/A1.pdf](http://moderngov.staffordshire.gov.uk/(S(2pqrq545mufy5r551vaf1vfh))/Data/Planning%20Committee/20070712/Agenda/A1.pdf)

affect the regulations under UK competition law within which the operator must operate. It said that the silica sand market was very concentrated with few suppliers and few customers. It therefore argued that the release of detailed volume information would increase transparency between customers in the market. This would have the potential to reduce competition and increase the likelihood of a co-ordinated effect within the silica sand market. This in turn could lead to price parallelism with competitors effectively co-ordinating through market information and the diminution of competition within the market. The council added that if the sales information was released it would be relatively straightforward for a competitor company to calculate/estimate the sand consumption and by extension determine production levels of the final product.

50. The council has also argued that the property value of a quarry to an operator is directly related to the level of reserves. Therefore it followed that anyone studying the historic data would be able to see the increase or decrease in the value of the quarry over time. The council said this was a compelling case that such information had commercial value.
51. The council has also made the point that as the quarry has been in constant use over the period for which the information has been requested (which is part of the present production cycle) there is a powerful case that the information remains commercially sensitive and valuable.
52. In the light of the above comments the Commissioner is satisfied that the information is commercially sensitive.

Is the information available by other means or has it been passed into the public domain?

53. If the information is already available by other means then confidentiality cannot apply. Similarly if the information is already available any arguments to the effect that disclosure would be detrimental to commercial or economic interests are negated as disclosure has already occurred.
54. It is apparent to the Commissioner that some information similar to that withheld by the council (albeit in a general format) is already in the public domain. For example, the quarry owners' planning application (SM.06/10/122M)<sup>4</sup> to extend silica sandstone extraction at Moneystone was discussed at a meeting of the council's Planning Committee on 12 July 2007<sup>5</sup>. (See above). At this meeting a figure was revealed for the annual output/production of silica sand at Moneystone Quarry. Similar information regarding is also available in Staffordshire and Stoke on Trent Minerals Local Plan 1994-2006<sup>6</sup> and the 'Non Technical Summary'<sup>7</sup>

<sup>4</sup> This was ultimately refused

<sup>5</sup> [http://moderngov.staffordshire.gov.uk/\(S\(2pqrq545mufy5r551vaf1vfh\)\)/Data/Planning%20Committee/20070712/Agenda/A1.pdf](http://moderngov.staffordshire.gov.uk/(S(2pqrq545mufy5r551vaf1vfh))/Data/Planning%20Committee/20070712/Agenda/A1.pdf)

<sup>6</sup> <http://www.staffordshire.gov.uk/NR/rdonlyres/593A1F71-B708-4FCB-B9EA-D8AB2839AA81/20674/chapter11.pdf>

<sup>7</sup> [http://www.wbbminerals.net/planning\\_uk/docs/Moneystone\\_Quarry\\_Non\\_Technical\\_Summary\\_Jun\\_06.pdf](http://www.wbbminerals.net/planning_uk/docs/Moneystone_Quarry_Non_Technical_Summary_Jun_06.pdf)

produced by the quarry operator on the proposed extension to silica sandstone extractions at Moneystone Quarry.

55. Although the council accept that there is data in the public domain concerning Moneystone quarry as indicated above it does not believe that any of it is specific enough to be the same or very similar to the information requested in the format recorded. Furthermore, it has argued that if such data had been available the council would have applied Regulation 6(1)(b) of the EIR.
56. The Commissioner notes the information already in the public domain but accepts that it is not the same or very similar to that requested in the form produced.

Is confidentiality required to protect a legitimate economic interest?

57. The Commissioner considers that, to satisfy this element of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. This will require a consideration of the sensitivity of the information and the nature of any harm that would be caused by disclosure.
58. The quarry operator (WBB Minerals now Sibelco) has indicated that disclosure of the requested information would compromise its contractual arrangements and might affect its ability to comply with strict regulations under UK competition law. See paragraph 49 above. The quarry operator has also pointed out that it has entered into a number of long term supply agreements with its key customers. These agreements include an obligation by the operator to keep sensitive commercial information confidential. The quarry operator has argued that as the silica sand market is so concentrated the release of volume information would enable third parties to extrapolate from the volume data the annual consumption of silica sand of its customers. This would put the quarry operator in breach of contract. The Commissioner accepts that disclosure may harm the quarry's relationship with its customers though he does not accept that a claim of breach of contract would clearly be the outcome from disclosure of the information.
59. In *Archer v The Information Commissioner and Salisbury District Council* EA/2006/0037 the Information Tribunal stated that the following issues should be considered in deciding adverse affect and that the threshold to justify non-disclosure is a high one:
  - a. It is not enough that disclosure should simply have an effect, the effect must be "adverse"
  - b. Refusal to disclose is only permitted to the extent of that adverse effect. (In this case the information request was for the whole of a particular report. The Tribunal found that the adverse effect only arose in respect of part of the report and that the cited refusal could not therefore be applied to the whole document.)
  - c. It is necessary to show that disclosure "would" have an adverse effect - not that it could or might have such an effect.

- d. Even if there would be an adverse effect, the information must still be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”
60. The Commissioner is satisfied that disclosure of the requested information would adversely affect the confidentiality to protect a legitimate economic interest. The Commissioner accepts that the exception is engaged on the basis of arguments supplied in paragraphs 51 and 59 above that disclosure of the information would impact on the Quarry’s relationship with customers and possible investors . The Commissioner has carefully considered the argument as to whether the impact of disclosure on EC competition regulations (paragraph 50) adds weight to the argument that exception is engaged. Disclosure might affect the silica sand market in general but this must be shown to have an impact on legitimate economic interests. The Commissioner accepts that this impact on the market may affect commercial customers for silica sand but would not accept that this argument alone would be enough to engage the exception alone on the basis it was presented by the council. He also notes that Regulation 5(6) of the EIR provides that any enactment or rule of law that prevents the disclosure of information cannot apply and therefore arguments related to EC competition regulations cannot be conclusive.
61. Accordingly he is satisfied that Regulation 12(5)(e) is engaged in respect of the sales and reserve figures.

#### The public interest test under Regulation 12(5)(e)

62. As stated in paragraph 35 above, even if regulation 12(5)(e) is engaged, the information must still be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.” Regulation 12(2) provides that a public authority must apply a presumption in favour of disclosure.
63. The council is of the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
64. In favour of withholding the information the council has argued that the public interest lies in protecting the national planning process and the potential significant detrimental effect that releasing the information would have by future non-cooperation of the quarrying companies. Also the council has argued that disclosure of the information would lead to the specific withdrawal of the quarry operator from the current survey process and may lead to an action against it for breach of confidence. It is clear that the council cannot compel the operator to participate in the survey process and provide figures regarding sales and reserves. Accordingly, the voluntary co-operation by the operator is essential if the council is to produce accurate data regarding minerals for future planning. It has a duty to do this as the Mineral Planning Authority. The council has made reference to the National Policy in Mineral Planning Statement 1<sup>8</sup> which requires that mineral planning authorities should ‘undertake regular assessments of the

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<sup>8</sup> <http://www.communities.gov.uk/documents/planningandbuilding/pdf/152993.pdf>

reserves for which planning permission has been granted for all mineral workings in their areas, taking into account the need for distribution, production and use of, each type of mineral, while maintaining mineral operators' reasonable need for commercial confidentiality'.

65. The Commissioner cannot accept that the general arguments above related to the "flow of information" to the council are relevant to the exception as under Article 4(2) of the Directive grounds for refusal must be interpreted in a restrictive way. The arguments presented above are not linked to the exception under consideration; the underlying purpose of the exception is to protect the legitimate economic interest that is being protected by commercial confidentiality. He has therefore not given them weight in the balancing exercise.
66. The council has also argued that there is a public interest in public bodies such as the council abiding by agreements that they have made in good faith in respect of information that has been voluntarily provided to them for background policy reasons and without a compulsion of law. It said that if it made promises to third parties (particularly if made prior to January 2005 when the EIR became effective) it would not be in the public interest to breach these by disclosing information provided in confidence. Arguments about undermining confidentiality will have more weight when they relate to the specific circumstances of the case. For example, if the authority can demonstrate that this disclosure would undermine its relationship with a particular company, or affect its ability to do business with others, then this should be given more weight than a general assertion that breaching confidentiality will have a harmful effect on trust. There will always be some inherent public interest in preserving confidentiality. However, in the context of section 41, the Tribunal has rejected comparisons with the strong inbuilt public interest in legal professional privilege. Taking into account that grounds for refusal must be interpreted restrictively the Commissioner has not placed any significant weight on this generic argument as it has not been linked clearly to interests identified in the exception.
67. The Commissioner has placed weight in protecting the quarry operators and its customers from the negative impacts of disclosure. Although the Commissioner has accepted there would be an adverse affect he is not been provided with convincing arguments in terms of severity. In particular he notes that although the requested information is different to the information provided in the planning application it clearly provides information about future production on site over time. The Commissioner is therefore not convinced that the affects of disclosure would be at very severe.
68. In favour of disclosing the information the council said that there was a public interest in understanding any activity that might have an impact on the environment such as mining. Also it is in the public interest for local authorities to be open and transparent in relation to all matters affecting the environment.
69. The complainant has argued that the public has a right to know about the production and reserves of minerals to enable informed checks and challenges to be made to mineral planning applications. The Commissioner has accorded this argument significant weight as disclosure would clearly fall within the areas the

European Directive on Access to Environmental Information sought to address. The first recital of the Directive states:

*'Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and , eventually, to a better environment.'*

70. At the time of the applicant's request planning considerations relating to the quarry were ongoing and the Commissioner has according significant weight to argument that disclosure would assist members of the public in participating in the planning process.
71. The complainant has also pointed out that there is a strong public interest in the public knowing the human and environmental consequences associated with the processing, handling, use and transportation of silica sand after it has been extracted and sold. The human impact is largely related to the known health risks associated with any silica dust generated by the processing, handling and transportation of silica sand. The environmental impact is not only related to the affect quarrying has on the landscape but also the mode of transportation used for silica sand. For example, the use of road as opposed to rail.
72. The council accept that silica sand is a geologically and geographically sparsely distributed scare and valuable national resource. See its Minerals Local Plan Policy 56<sup>9</sup>. There is therefore also a strong public interest in information relating to the location, production (extraction) and reserves of silica sand being widely known and published.
73. The Commissioner therefore finds that the public interest in maintaining the exception 12(5)(e) is outweighed by the public interest in disclosing the information.

### **Regulation 12(5)(f) of the EIR**

74. The council has also sought to rely on Regulation 12(5)(f) of the EIR which provides that a public authority may refuse to disclose information to the extent that it would adversely affect the interests of the person which provided that information:
  - i. Voluntarily
  - ii. In the expectation that it would not be disclosed to a third party and
  - iii. Had not consented to its disclosure
75. The Commissioner has considered the various elements of Regulation 12(5)(f) in respect of the reserves and sales figures.

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<sup>9</sup> <http://www.staffordshire.gov.uk/NR/rdonlyres/593A1F71-B708-4FCB-B9EA-D8AB2839AA81/20674/chapter11.pdf>



### Adverse effect on the interests of the quarry operator

76. The Commissioner is satisfied (from paragraphs 50 and 60 above) that disclosure of the information would adversely affect the interests of the quarry operator providing the three conditions in Regulation 12(5)(f) are satisfied. The Commissioner has dealt with each condition in turn.

### Was the information provided voluntarily?

77. Regulation 12(5)(f)(i) is engaged if the person providing the information was not under and could not have been put under any legal obligation to supply it to the council or any other public authority.
78. The council has stated that the information was provided by the quarry operator voluntarily on a 'Mineral Sales and Reserve Monitoring form' marked strictly confidential and sent out on an annual basis. The letter that accompanies the form makes it clear that any data provided will be treated with the strictest confidence and thanks the quarry operator in anticipation of its co-operation in providing the information by a certain date. The council has also stated that quarry operator was not and could not have been put under any legal obligation to supply the information to the council or any other public authority
79. The Commissioner is aware of at least one other public authority where the quarry operator is legally obliged to provide information on mineral sales and reserves by virtue of a condition attached to a planning permission. However, the council has pointed out that in this case there was no such condition attached to the planning permission granted to the quarry operator. Furthermore, the council has said that it did not believe that such an approach would be appropriate in every case and in any event might not be legally enforceable in view of the tests set out in Circular 11/95 - The use of conditions in planning permissions<sup>10</sup>. For full details see:
80. The Commissioner has noted the council's comments and is satisfied that the quarry operator gave the information voluntarily and was not or could not have been required to do so legally.

### Was the information provided in the expectation that it would not be disclosed to a third party?

81. Regulation 12(5)(f)(ii) is engaged if the person providing the information did so in the expectation that it would not be disclosed to a third party.
82. The council has stated (as has the quarry operator) that there was a clear expectation that the information provided in the annual survey forms would not be disclosed to a third party in view of the fact that the forms were marked 'Strictly Confidential' and the letters that accompanied them gave the assurance the information would be treated in the 'strictest confidence'.

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<sup>10</sup> <http://www.communities.gov.uk/publications/planningandbuilding/circularuse>

83. The Commissioner is satisfied from the information provided by the council and the quarry operator that the information was disclosed with the expectation that it would not be disclosed to a third party.

Did the quarry operator consent to the information being disclosed?

84. Regulation 12(5)(f)(iii) is engaged if the person providing it did not consent to it being disclosed.
85. The quarry operator has made it clear in correspondence to the Commissioner both directly and through the council that it did not and would not consent to the information being disclosed. The Commissioner accepts these comments.
86. The Commissioner is satisfied that Regulation 12(5)(f) is engaged.

The public interest test under Regulation 12(5)(f)

87. The Commissioner believes that the public interest arguments under Regulation 12(5)(e) can also be considered under Regulation 12(5)(f) which are detailed above in paragraphs 62 to 71.
88. The Commissioner accepts that arguments related to “flows of information” can be considered under 12(5)(f) as the aim of this exception is protect voluntary provision of information to public bodies. He has therefore accorded this argument weight under 12(5)(f) alongside arguments about protecting the interests of the quarry operator. The Commissioner accepts there is a significant public interest in the council having information to undertake its Mineral Planning duties, in activity which in itself assists in the protection of the environment.
89. The Commissioner accepts there is a possibility that if the information provided to the council by the quarry operator voluntarily and in strict confidence was disclosed this would lead to limited or no co-operation by the operator in the future. This could make it harder for the council to fully comply with its obligations under the National Policy in Mineral Planning Statement 1 referred to above.
90. However, it remains the responsibility of the council to use all its powers to ensure that the important and strategic information regarding mineral sales and reserves continues to be collected both now and in the future. Building annual returns into planning consent was an option for the planning process that was ongoing at the time of the request. He also believes that there would be an incentive for the quarry operators to continue to supply the information in the face of disclosure as they would be aware it may affect future planning applications if relevant data was not available or track record of non-cooperation existed. The Commissioner has therefore accorded this factor some weight but does not accept the information provision process would be irreparably damaged by disclosure.
91. The relevant factors under 12(5)(f) have been weighed against the significant factors in favour of disclosure listed above and the Commissioner finds that the

balance still favours disclosure. The Commissioner therefore finds the outcome of public interest under 12(5)(f) is that the public interest in maintaining the exception does not outweigh the public interest in disclosure.

#### Aggregated public interest test under Regulations 12(5)(e) and 12(5)(f)

92. In view of the recent Court of Appeal decision of *Office of Communications v Information Commissioner* [2009] EWCA Civ 90; [2009] WLR (D) 71 the Commissioner is obliged to take the following approach: “*where more than one exception is found to apply, they must at some point be considered together for the purpose of the public interest balancing exercise; that is to say, the aggregate public interest in maintaining the exceptions must be weighed against the public interest in disclosure.*” The Commissioner has taken into account the public interest of the overall cumulative factors for maintaining the exemptions in Regulations 12(5)(e) and 12(5)(f) and has weighed them against the factors in favour of disclosure mentioned above and has concluded the outcome is still in favour of disclosure.

#### **Procedural Requirements**

93. Any public authority wishing to refuse a request for information must do so in compliance with the requirements of section 17 of the Act. Section 17(1) states that an authority must state the exemption (or exemptions) it is seeking to rely upon and explain (if it would not otherwise be apparent) why the exemption applies. In this case the refusal notice did not specify the relevant subsection of section 41 and did not explain why the information if disclosed would constitute a breach of confidence although this was subsequently explained in more detail in subsequent correspondence.
94. The council initially failed to recognise and respond to the complaint's email dated 4 May 2007 as a request for an internal review.
95. The council failed to deal with the request under the correct regulations by responding with reference to the Act rather than the EIR. This is in breach of regulation 14.

#### **The Decision**

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96. The Commissioner's decision is that the public authority was not entitled to rely upon the exceptions in under Regulations 12(5)(e) and 12(5)(f) of the EIR in respect of the sales and reserves figures.
97. The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- (i) The council breached the requirements of regulation 14.

## Steps Required

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98. The Commissioner requires the council to disclose the information requested by the complainant within 35 calendar days of the date of this notice.

## Right of Appeal

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99. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 9<sup>th</sup> day of December 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal Annex

### Regulation 2 - Interpretation

#### Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);



“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

## **Regulation 5 - Duty to make available environmental information on request**

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 5(3)** To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

**Regulation 5(4)** For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

**Regulation 5(5)** Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

**Regulation 5(6)** Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

## **Regulation 12 - Exceptions to the duty to disclose environmental information**

**Regulation 12(1)** Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.

**Regulation 12(3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

**Regulation 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 –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
  - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

**Regulation 12 (6)** For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

**Regulation 12(7)** For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

**Regulation 12(8)** For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

**Regulation 12(9)** 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(10)** For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

**Regulation 12(11)** Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.