

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 20 July 2022

**Public Authority:** Devon County Council  
**Address:** County Hall  
Topsham Road  
Exeter  
Devon EX2 4QD

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the Devon sand and gravel landbank. Devon County Council (the "council") refused the request, citing the exception for commercial confidentiality – regulation 12(5)(e). During the Commissioner's investigation the council disclosed some of the previously withheld information but redacted other information under regulation 12(5)(e).
2. The Commissioner's decision is that the council has failed to demonstrate that the exception in regulation 12(5)(e) is engaged.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information to the complainant.
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

## **Background**

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5. Devon County Council (the "council") explained to the Commissioner that the Government's National Planning Policy Framework (NPPF) requires Mineral Planning Authorities (MPAs) to plan for a steady and adequate supply of aggregates by preparing a Local Aggregates Assessment (LAA). The LAA is required to:
  - forecast the demand for aggregates based on average 10-year sales data and other relevant local information;
  - analyse all aggregate supply options; and
  - assess the balance between demand and supply.
6. The council confirmed that it produces the Devon LAA on behalf of the five Mineral Planning Authorities in Devon (Devon County Council, Torbay Council, Plymouth City Council, Dartmoor National Park and Exmoor National Park). It explained that to obtain the information to inform the LAA, DCC issues a survey to the quarry companies requesting their sales and reserves figures.
7. The complainant requested information relating to these matters.

## **Request and response**

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8. On 6 January 2022 the complainant requested the following information from the council:

"Please provide copies of all correspondence between Devon County Council and aggregate companies between 1 January 2020 and 31 December 2021 concerning the Devon sand and gravel landbank, and concerning Devon reserves of sand and gravel. The records of these communications to include copies of all letters, faxes and emails exchanged, and the notes taken at any face to face meetings , as well as during or after all audio and audio video conversations either by telephone or via the Internet, both between aggregate companies and Devon County Council officers, and between Devon County Council officers."
9. The council responded on 31 January 2022 and confirmed that it was withholding the information under the exception for commercial confidentiality - regulation 12(5)(e).
10. Following an internal review the council wrote to the complainant on 21 March 2022. It stated that it was maintaining its position.

## Scope of the case

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11. The complainant initially contacted the Commissioner on 10 February 2022 to complain about the way their request for information had been handled. Subsequent to the completion of the internal review on 21 March 2022 the complainant reiterated their complaint.
12. During the Commissioner's investigation the council disclosed some of the requested information to the complainant but maintained its reliance on regulation 12(5)(e) in relation to the outstanding information.
13. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the outstanding information under regulation 12(5)(e).

## Reasons for decision

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### Regulation 12(5)(e) – commercial confidentiality

14. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
15. The Commissioner considers that in order for this exception to be applicable, the following conditions must be met:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
16. The withheld information consists of sales and reserves figures which the council redacted from the information disclosed to the complainant.
17. In its submissions to the Commissioner the council stated:

"We are withholding the sales and reserves figures provided by the aggregate companies as we believe they meet the exception granted under regulation 12.5(e) of the Environmental Information Regulations."

18. In its response to the complainant the council stated:

“...figures provided by the aggregate companies which relate to sales and reserves have been redacted (removed) as these have been provided in confidence by the companies and are therefore subject to an exception under Regulation 12.5(e) of the Environmental Information Regulations.
19. The council explained to the Commissioner that, in handling the request, it consulted with the aggregate companies who had provided the information in question. It confirmed that one of the companies had objected to the information being disclosed.
20. The Commissioner has had sight of the correspondence between the council and the aggregate company and can see no reference to any specific adverse effects which disclosure would cause.
21. The Commissioner considers that the council has failed to demonstrate that the exception is engaged.
22. Having considered the above, the Commissioner notes that the council has failed to identify any specific harm to a legitimate economic interest which disclosure would cause. He notes that reference is made to information being provided in confidence and being subject to commercial confidentiality, however, this is but one element of regulation 12(5)(e) that needs to be present in order for the exception to be engaged.
23. The public interest arguments provided by the council are, technically, redundant because they relate to the application of an exception that has not been shown to be engaged. However, the Commissioner has also considered whether the arguments have any application to the engagement of regulation 12(5)(e).
24. The public interest arguments provided by the council in favour of maintaining the exception can be broadly characterised as taking the form of the “chilling effect”, namely, that disclosing the information would make third parties reluctant to provide the information to the council going forward.
25. Whilst the Commissioner recognises that the chilling effect can be a real outcome of disclosure it is up to public authorities to explain why it would occur in a given context. The arguments provided by the council do not provide any detail in this regard and are, therefore, essentially generic in nature. The Commissioner considers that, even if the council’s public interest arguments were to be deployed as arguments for engaging the exception, they would still fall short of what is required.

26. The Commissioner is left with the impression that the council has applied the exception on a general basis. Whilst he is mindful that arguments could be made for withholding the information, the council has failed to make them and it is not the Commissioner's role to generate arguments on the council's behalf.
27. Having considered the council's submissions and the withheld information, the Commissioner has concluded that the council has failed to show that the exception is engaged. He considers that the council should disclose the information withheld under regulation 12(5)(e).

## Right of appeal

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28. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Christopher Williams**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**