

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 September 2024

Public Authority: Warwickshire County Council

Address: PO Box 9
Shire Hall
Warwick
CV34 4RR

Decision (including any steps ordered)

1. The complainant has requested information about a quarry and its operation. Warwickshire County Council ("the council") disclosed some information but withheld the remainder under the exceptions provided by regulation 12(5)(b) (course of justice, etc.) and regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR.
2. The Commissioner's decision is that the council is entitled to withhold the information under regulation 12(5)(b) and regulation 12(5)(e).
3. The Commissioner does not require further steps.

Request and response

4. On 9 June 2023, the complainant wrote to the council and made the following requests:

"Our request relates to Hartshill Quarry, Nuneaton Road, Nuneaton and comprises the following;

1. Copies of any written requests from Warwickshire County Council ("WCC") to the Quarry operator of Hartshill Quarry for information on mineral production and reserve figures for Hartshill Quarry for the period 1 January 2018 to 9 June 2023.

2. Copies of any responses from the Quarry operator to item (i).
 3. Any information that WCC may possess, as Mineral Planning Authority, in respect of mineral production and reserve figures or estimates thereof for Hartshill Quarry for the period 1 January 2018 to 9 June 2023.
 4. Copies of any monitoring site visit reports, for site visits undertaken by WCC to Hartshill Quarry for the period 1 January 2018 to 9 June 2023. Copies of any invoices or receipt of payments for monitoring site visits within this period.
 5. Copies of any written requests from WCC to the Quarry operator for information/records regarding blast events at Hartshill Quarry for the period 1 January 2018 to 9 June 2023.
 6. Copies of any responses from the Quarry operator to item (v).
 7. Any information that WCC may possess, as Mineral Planning Authority, in respect of blast events for Hartshill Quarry for the period 1 January 2018 to 9 June 2023. For example, dates of blast events; number of blasts per event; number of blast events per annum; size of blast events etc.
 8. Confirmation of number of complaints made to WCC regarding activities at Hartshill Quarry within the period of 1 January 2018 to 9 June 2023 and a summary of the reasons for complaint.
5. The council responded on 8 September 2023. It stated that:
- For requests 1 - 3 the information was withheld under regulation 12(5)(e).
 - For request 4 some of the information ("monitoring site visit reports") was withheld under regulations 12(5)(b) and 12(5)(e). The remainder of the sought information ("invoices or receipts") was not held.
 - For requests 5 - 6 the information was not held.
 - For request 7 the information was withheld under regulations 12(5)(b) and 12(5)(e).
 - For request 8 the information was held and disclosed it.
6. On 10 October 2023, the complainant requested an internal review in respect of requests 4 and 7, on the basis that they disputed the withholding of information under regulations 12(5)(b) and 12(5)(e).

7. Following an internal review the council wrote to the complainant on 4 December 2023, and further, on 30 January 2024. It stated that:
 - For request 4, it maintained the application of regulation 12(5)(b).
 - For request 7, it maintained the application of regulation 12(5)(e).
8. On 18 July 2024, and during the Commissioner's investigation, the council responded further to the complainant. It clarified that some of the information sought by request 4 ("invoices") was held and disclosed it.
9. On 6 August 2024, the council responded further to the complainant. In respect of request 7, it disclosed some of the information previously withheld under regulation 12(5)(e), on the basis that the council accepted that it represented information on emissions, and therefore could not be withheld under regulation 12(5)(e). However, the council maintained that the remainder did not relate to emissions and was therefore exempt under regulation 12(5)(e).

Scope of the case

10. The complainant originally contacted the Commissioner on 11 March 2024 to complain about the way their request for information had been handled, and specifically that the council was not entitled to withhold information for requests 4 and 7 (under regulation 12(5)(b) and regulation 12(5)(e), respectively).
11. The Commissioner considers that the scope of his investigation is:
 - Whether the council is entitled to withhold information for request 4 (under regulation 12(5)(b)).
 - Whether the council is entitled to withhold information for request 7 (under regulation 12(5)(e)).

Reasons for decision

Request 4 – Regulation 12(5)(b) (the course of justice, etc.)

12. This reasoning covers whether the council is entitled to rely on regulation 12(5)(b) to refuse to disclose some of the information sought by request 4.
13. Regulation 12(5)(b) allows a public authority to refuse to disclose information to the extent that its disclosure would adversely affect 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.
14. As explained in the Commissioner's guidance¹, the exception encompasses any adverse effect on the course of justice and is not limited to information only subject to legal professional privilege. As such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
15. In the decision of Archer v Information Commissioner and Salisbury District Council (EA/2006/0037) the First-tier Tribunal (Information Rights) highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with the Tribunal decision of Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".

Is regulation 12(5)(b) engaged?

16. The information withheld under this exception are the council's monitoring site visit reports for Hartshill Quarry.
 17. The council has stated that the information withheld under this exception relates to its enforcement of planning conditions.
 18. The council has explained:
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¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

"The Council has powers under section 172 and section 187A of the Town and Country Planning Act 1990 to issue enforcement notices for breaches of planning control and planning conditions, of which (under section 179 and section 187A of the same act) non-compliance is an offence.

The Monitoring Reports...operate as part of the Council's strategy for monitoring potential breaches and breaches of planning conditions. These reports are produced from inquiries made of the site operator regarding their compliance with planning conditions. This information may lead to enforcement investigations resulting in enforcement action. Disclosure of this information could affect the Council's ability to conduct such inquiries."

19. The Commissioner has considered the information and recognises that it relates to the council's monitoring of compliance with planning conditions, under the terms of the Town and Country Planning Act 1990, for which the council has a statutory responsibility to undertake inquiries and take planning enforcement action as required.
20. As noted in the Commissioner's guidance on regulation 12(5)(b), he accepts that this exception can be relevant to planning enforcement activities that a public authority carries out. This has been confirmed by the Tribunal in the decision of *Vaudry v Information Commissioner & Stratford-on-Avon District Council (EA/2018/0123)*, in which the requester had asked for information relating to an enforcement notice issued against a specific property. In that case, the Tribunal found that the information related to a "...potential offence under section 179 of the Town and Country Planning Act 1990. This information would clearly be relevant to inquiries made by the Council into whether there had been a breach, which would be an inquiry of a criminal nature. Disclosure would, therefore, potentially affect the Council's ability to conduct such an inquiry, and the course of justice more generally."
21. In this case, it is therefore reasonable for the Commissioner to conclude that disclosure of the information would reveal to the quarry operator how the council is undertaking its monitoring under the Town and Country Planning Act 1990.
22. The Commissioner accepts that such disclosure would therefore adversely affect the course of justice, and that regulation 12(5)(b) is engaged.

The public interest test

23. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the

regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

24. In this case the Commissioner understands that the request has been made by an adjoining landowner, whose land has been allocated for residential development by North Warwickshire Borough Council. A planning application for residential development was submitted to the borough council in 2018, shortly after Hartshill Quarry re-commenced operations following a period of dormancy.
25. As such, the complainant argues that there is a public interest that the information is disclosed so that the environmental impact of the quarry can be factored into the planning application, and appropriate proposals made, such as for the mitigation of noise and vibration emissions.
26. The complainant further argues that, should the information not be disclosed, this will impact upon the ability of the borough council, and the landowner, to bring forward development of housing in the area. There is a significant public interest, in the context of the Government's targets for new houses, for such development to be brought forward.
27. The complainant further argues that they believe that the quarry may not be subject to proper regulation. The complainant understands that, as a quarry operation, the site should be subject to a 15-year review of conditions (known as a 'Review of Old Mineral Permissions', or 'ROMP'). However, as the quarry was not in operation in 2016 when this was due, the complainant understands that this review did not take place and has instead been deferred by a further 15 years until 2031.
28. In respect of the public interest in maintaining the exception, the council has argued that, whilst it recognises the importance of openness and transparency as to how it conducts its investigations, and manages breaches of planning conditions, there is a stronger public interest in running an effective planning enforcement system.
29. The council argues that this system is dependent on a transparent relationship with the site operator in which information about compliance with planning conditions is shared. The council argues that disclosure of the monitoring reports would impact on the operator's willingness to share information with the council, which in turn would

make inquiries into breaches of planning conditions more arduous, less efficient, and the resolution of breaches more likely to be subject to delays.

30. The Commissioner has considered the arguments provided by both the complainant and the council.
31. It is relevant for the Commissioner to note that his role is limited to determining compliance with the EIR. He cannot make a decision on other matters, such as whether the council's planning application process has followed a correct process, or whether the council should have acted differently in deciding whether the council should have required a ROMP following the quarry resuming its operation. Whilst he understands that the complainant disagrees with the council's actions in respect of the above, this is not a sufficient basis for the Commissioner to conclude that the council is acting improperly or unlawfully.
32. It is also relevant for the Commissioner to consider that, if the complainant holds concerns about these matters, these should be referred to the council through the relevant processes, such as through its planning application process.
33. At the same time, it is evident to the Commissioner that the monitoring reports are held for the purposes of ensuring that planning conditions are complied with, and that this monitoring is what allows the council to discharge its duties under the Town and Country Planning Act 1990.
34. Should the monitoring reports be disclosed to the public under the EIR, the Commissioner accepts that this may negatively impact the willingness of the site operator to voluntarily provide information to the council, in the expectation that such information may be routinely disclosed. Disclosure of the information would also alert the operator to how the council is undertaking its monitoring, and the factors it is considering. The consequence of this would be that the integrity of the monitoring would be jeopardised. There is a significant public interest that the course of justice is not adversely affected in such a way.
35. Having considered the context of this matter, the Commissioner has therefore concluded that the council is entitled to rely on regulation 12(5)(b) of the EIR to withhold the requested information. The Commissioner also finds that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.

Request 7 – Regulation 12(9) (information on emissions) and regulation 12(5)(e) (confidentiality of commercial or industrial information)

36. This reasoning covers whether the council is entitled to rely on regulation 12(5)(e) to refuse to disclose the remaining information sought by request 7.

Does regulation 12(9) apply to the information?

37. Regulation 12(9) states that, “to the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 12(5)(d) to (g)”.

38. This means that where the information relates specifically to emissions, the exemption in regulation 12(5)(e) cannot be applied.

39. Before considering regulation 12(5)(e), the Commissioner must first address whether the remaining withheld information is directly linked to emissions.

40. The council has explained to the Commissioner that the information sought by request 7 relates to ‘blast events’. These events are where an explosive is detonated within a bore hole for the purpose of extracting material from the quarry.

41. During the course of investigation, the council disclosed some information that it accepted related to emissions. This information related to vibration levels produced, discussion of these results, and how this information is calculated. The council considers and accepts that this information falls within the definition of emissions provided by the Commissioner.

42. However, for the remainder of the withheld information, the council argues that this does not relate to emissions. This is because the information instead relates to planning of the ‘blasting’ rather than the emissions that were subsequently released. As such, the information represents such details as “information relating to the blast location; no. of holes; hole depth, burden; spacing; maximum instantaneous charge weight; total explosive charge weight, explosive type, initiation, blast plan; and map of blast location”.

43. The Commissioner has considered the information, in conjunction with his guidance on regulation 12(9)².
44. The Commissioner notes that the withheld information does not directly relate to the resultant emissions (caused by the blast events), but rather, the measures that were taken to prepare for, and facilitate the blast events.
45. As such, the Commissioner perceives that the information does not represent environmental information as defined by regulation 2(1)(b), but instead represents that as defined by regulation 2(1)(c). The Commissioner's guidance explains that regulation 12(9) will only be relevant if the information falls squarely within the definition of environmental information under 2(1)(b). This is in line with the Upper Tribunal's decision in *GW v Information Commissioner, the Local Government Ombudsman and Sandwell Borough Council (GIA/4279/2012)*.
46. Having considered the above, the Commissioner is satisfied that the information does not relate to emissions, and that regulation 12(9) does not apply to the information.
47. As such, the Commissioner will next consider whether the council is entitled to withhold the information under regulation 12(5)(e).

Is regulation 12(5)(e) engaged?

48. Information can be withheld under regulation 12(5)(e) of the EIR if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
49. The council has explained to the Commissioner that the disclosure the information would adversely affect the commercial interests of the quarry operator. The council has communicated with the operator to establish the basis of this. The operator has explained that the information can be used to extrapolate the mineral being blasted and worked at the site, the amount of product being generated and sold, and the specific locations within the quarry where mineral is being blasted. Disclosure of this information could enable competitors to deduce the amount of product being generated and sold.
50. The Commissioner has considered four tests. First, he is satisfied that the requested information is commercial in nature. Second, he is

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-9-information-on-emissions/>

satisfied that the information is subject to confidentiality by law because it is not trivial and is not otherwise accessible and so has the necessary quality of confidence.

51. Third, the Commissioner has considered whether the confidentiality is provided to provide a legitimate economic interest. In this case, the Commissioner recognises that the quarry operates in a competitive marketplace. The disclosure of the information about the type and quantity of mineral being extracted would allow competitors to identify ways by which they could seek a commercial advantage over the quarry operator. Having considered the above, the Commissioner is satisfied that the third test is met.
52. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the council disclosed this information.
53. Since the four tests have been satisfied the Commissioner finds that regulation 12(5)(e) of the EIR is engaged as disclosing the information would adversely affect the quarry operator's commercial interests.

The public interest test

54. In this case the Commissioner recognises that the information has been sought for the same reasons as that outlined under regulation 12(5)(e). That is, that the quarry operates near to a proposed housing development, and the complainant is concerned that the impact of the quarry has not been taken into account as part of the planning process, or wider monitoring. However, as identified by the Commissioner under that exception, it is not within the Commissioner's authority to consider matters outside of the EIR, and whilst the complainant disputes the council's handling of those matters, this is not sufficient for the Commissioner to conclude that the council is acting improperly or unlawfully.
55. In respect of the public interest in withholding the information, the council has argued that disclosure of the information would distort the commercial market in which the quarry operates, by revealing its productivity to its competitors. This would impart an unfair commercial advantage on the business's competitors. The council argues that not only will this be detrimental to the quarry as a business, it will also be detrimental to the council as the local planning authority, as it will damage its ability to maintain a positive and trusting relationship with the quarry whilst undertaking its monitoring of compliance with the associated planning conditions.
56. The Commissioner has considered the public interest arguments. Whilst the Commissioner accepts that there is a public interest in transparency

in this matter, he notes there is a competing public interest that the quarry is able to operate fairly in a commercially competitive field. The disclosure of the information would prevent this. The Commissioner also recognises that the council depends on the willingness of the operator to provide such information to it for the purposes of monitoring, and there is a significant public interest that this is not impacted.

57. Having considered the context of this matter, the Commissioner has therefore concluded that the council is entitled to rely on regulation 12(5)(e) of the EIR to withhold the requested information. The Commissioner also finds that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.

Right of appeal

58. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.
60. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF