IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/0015
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FER0166266
Dated: 9 December 2009

Appellant: **STAFFORDSHIRE COUNTY COUNCIL**

Respondent: **INFORMATION COMMISSIONER**

Additional Party: **SIBELCO (UK) LIMITED**

Determined following an oral hearing involving all the parties on 1 and 2 September 2010 at 45 Bedford Square, London, and further consideration by the Tribunal in respect of all the documentation on 14 October 2010 at 45 Bedford Square.

In the light of the subsequent Court of Appeal decision in *Veolia ES Nottinghamshire Limited v Nottinghamshire County Council [2010] EWCA Civ 1214* the Tribunal invited further short written submissions from all parties by 11 November 2010 before concluding its deliberations.

Before

Robin Callender Smith

Tribunal Judge

and

Anne Chafer
Dr Henry Fitzhugh

Tribunal Members

For the Appellant: David Lock, Counsel instructed by Staffordshire County Council
For the Additional Party: Jane Collier, Counsel instructed by Sibelco (UK) Limited
For the Respondent: Laura John, Counsel instructed by the Information Commissioner

Subject matter:

Freedom of Information Act 2000

Absolute exemptions

- Confidential information s.41

Qualified exemptions

- Commercial interests/trade secrets s.43

Environmental Information Regulations 2004

Definitions, Reg 2

- Environmental information

Public interest test, Reg 12 (1) (b)

Presumption in favour of disclosure, Reg 12 (2)

Exceptions, Reg 12 (5)

- Breach of confidence (5) (e
- Confidential information (5) (f)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal by Staffordshire County Council and Sibelco (UK) Limited in respect of the operation of Regulations 12 (5) (e) and 12 (5) (f) of the Environmental Information Regulations 2004.

REASONS FOR DECISION

Introduction

1. As a Mineral Planning Authority, Staffordshire County Council ("the Appellant") was required to undertake an Annual Mineral Survey. It had done this since 1993. The scheme was voluntary and has no statutory basis.

2. The purpose of the scheme was to collect information on the production (output) and the total quantity of mineral reserves existing for each mineral type within Staffordshire.

3. The information was collected when the Appellant sent each quarry operator in Staffordshire an annual survey form for all the sites it operated and requested – on a voluntary basis – figures for its mineral sales and permitted reserves which were measured in tonnes.

4. This information allowed the Appellant to monitor the impact of such activity on its planning policies.

5. Each form was marked "strictly confidential" and was sent with a letter promising that any data provided would be "treated with the strictest confidence".

6. Although the information collected from each quarry operator was treated as confidential the Appellant published 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.

7. The Requestor asked for copies of the Annual Mineral Returns filed in the last 10 years for Moneystone Quarry. He wanted all the figures for the sales and reserves for each year.

8. He lived close to Moneystone Quarry and – at the time of the request – the Appellant was considering a planning application (which was subsequently refused) from the Additional Party.

9. The Requestor believed that the Additional Party had been removing silica sand in excess of the amount it reported to the Appellant and in excess of the amount which the Appellant’s policy would permit it to

transport on the particular route past his home. He was concerned that loose silica sand was being dropped by lorries, transporting material from the quarry, which could create a health risk, because silica sand was carcinogenic and a cause of silicosis.

10. He believed that the Additional Party had been using an incorrect dust monitor design to check the levels of dust generated by extraction activities at the quarry. This created the potential for health risks to those living in the vicinity.

11. Moneystone Quarry was one of only two quarries in Staffordshire that produced silica sand and the aggregate figures were not published by the Appellant. To do so would have given an indication of Moneystone Quarry's actual figures and reserves.

12. The Appellant initially refused to disclose this information under section 41 of the Freedom of Information Act 2000 ("FOIA") on the basis that the information had been provided to it by Sibelco (UK) Limited ("the Additional Party") on a confidential basis.

13. The Appellant then concluded that the information was exempt from disclosure under Regulations 12 (5) (e) and 12 (5) (f) of the Environmental Information Regulations 2004 ("EIR") or that the sales figures were exempt under section 41 FOIA and the reserves were exempt under the Regulations.

14. The Information Commissioner ("IC") found that both exceptions were engaged in respect of sales and reserve figures but that the public interest test favoured disclosure of the information.

The request for information

15. On 11 April 2007 the original request to the Appellant was made. The Appellant responded on 3 May 2007 stating that it was unable to provide the requested information because it was exempt under section 41 FOIA, the section that deals with information provided in confidence.

16. On 4 May 2007 the Requestor asked the Appellant to reconsider its original decision. On 10 May 2007 the Appellant responded by providing the Requestor with some background on the Annual Mineral Survey. It referred him to the information published on its website for the

"production" and the "reserves" for certain minerals (measured in millions of tonnes) where there were a number of quarries for the same mineral. The Appellant added that while information on individual sites was "sensitive" and therefore "confidential", collective figures were published.

17. In the case of Moneystone Quarry it was not possible to do this as it was the more significant of only two silica sand quarries in the County and – by implication – this would identify the figures for that particular quarry.

18. The Appellant added that disclosure of the individual figures provided (in this case) by the Additional Party against the wishes of the quarry operator could leave the Appellant open to an action for breach of confidence.

19. It could also result in quarry operators refusing to participate in future surveys.

20. The Appellant wrote to the Requestor on 8 June 2007 explaining that it had completed its review and was maintaining its original decision to withhold the requested information.

21. The Appellant explained that the information had only been provided on the basis that it would be treated in confidence and the Additional Party had confirmed that – as the information was commercially sensitive – it was strongly opposed to any release.

The complaint to the Information Commissioner

22. On 11 June 2007 the Requestor contacted the IC to complain about the way his request for information had been handled and he confirmed that his request had been for the annual mineral returns for Moneystone Quarry for the previous 10 years.

23. The Requestor said that by refusing to disclose the Annual Mineral Returns the Appellant had breached his human right to check and challenge the information provided by the quarry operator in support of a recent planning permission application.

24. On 6 August 2008 the Appellant provided the IC with the withheld information in the form of an electronic spread-sheet created by the

Appellant with the "sales" and "reserves" figures for each of the 10 years from 1998 to 2007.

25. That information had been extracted from the confidential annual survey forms completed by the mineral operators for the various quarries. The Appellant also provided some background information relating to the collection of data and confirmed that the quarry operators had specifically objected to the data being released to third parties. The Appellant suggested that if it disclosed the requested information, the quarry operator and others in Staffordshire might refuse to participate in future surveys.

26. The IC invited the Appellant to reconsider its position under EIR. The IC also suggested that as there was already a certain amount of general information in the public domain about the current production and reserves of silica sand at Moneystone Quarry from a recent planning application submitted by its operators and, bearing in mind the age of the data, the Appellant might reconsider its position and disclose the requested information.

27. The Appellant responded on 16 September 2008 stating that it had considered the matter with its planning department and would be seeking expert views from a number of external organisations including the UK Minerals Forum and the Quarry Products Association.

28. On 29 September 2008 the quarry's operator wrote to the IC stating that the information in the survey forms was provided to the council on a "private and confidential basis" and any disclosure by the Appellant would "represent a serious breach of trust" and was not something to which it would consent.

29. On 25 November 2008 the Appellant sent a further letter to the IC stating that it had carried out a public interest test and was satisfied that the requested information could be withheld under Regulation 12 (5) (e) and 12 (5) (f) EIR. Its position was that the public interest lay in protecting the national planning process and the potential significant detrimental effect that releasing the information would have in terms of future non-cooperation by quarrying companies.

30. The Appellant stated that disclosure of the information would lead to the specific withdrawal of the quarry operator from the current survey process and could lead to an action against the Appellant in the courts for breach of confidence.

31. The IC accepted – from the evidence provided by the Appellant – that the completion of the confidential annual mineral survey forms by Staffordshire's quarry operators was a voluntary process.

The IC's Analysis

32. The IC referred to his guidance on "The Environmental Information Regulations". There he had noted that "land" was described in the guidance for the 1992 EIR as: "*all land surfaces, buildings, land covered by water, and underground strata"*.

33. By including underground strata the implication was that land covered natural minerals and deposits such as salt, coal, limestone, slate, iron etc.

34. In relation to "landscape" the IC noted that it was 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*".

35. In terms of what landscape meant in the context of environmental information, a specialist environmental definition of landscape was "*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"*. This definition came from EPAGL02.

36. 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."

The factors referred to in (a) included:

> "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."

37. The IC was satisfied that the sales and reserves information fell 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).

38. The sales figures (measured in tonnes) for a particular year were 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 IC took the view that the amount of silica sand extracted (or to be extracted) clearly affected or was likely to affect the land from which it was taken. The IC was satisfied that sales figures were information on an activity that was likely to affect the elements of the environment.

39. The reserve figures (measured in tonnes) for a particular year was linked to the amount of silica sand which was economically and technically feasible to extract from the ground. The amount of silica sand remaining following extraction was also clearly information on the land in which it was located. The IC was satisfied that the information was linked to the elements of the environment and on that basis concluded that both the sales and reserve figures were environmental information falling within Regulation 2 (1) EIR. The sales figures fell within 2 (1) (c) and the reserves within 2 (1) (a).

40. In terms of the presumption in favour of disclosure Regulation 12 (2) required the Appellant to assume a presumption in favour of disclosure. The Appellant had refused the request on the basis that Regulation 12 (5) (e) applied. That allowed commercial or industrial information which was held either under a statutory or a common law duty of confidentiality to remain confidential if that duty was required in order to protect the legitimate economic interests of any party.

41. The IC detailed the matters to be considered within 12 (5) (e) in terms of the following questions:

- Whether the information was commercial or industrial in nature?

- Whether the information was subject to a duty of confidence which was provided by the law?

- Whether that confidentiality was required to protect a legitimate economic interest?

- Whether the confidentiality required to protect the legitimate economic interest would be adversely affected by disclosure?

42. The IC was satisfied that the information was commercial and industrial in nature.

43. The IC noted the Appellant had argued that the information collected from the quarry operator was commercial in nature and provided on a strictly confidential basis. The Appellant had provided the IC with copies of the survey forms which were headed "strictly confidential" and the covering letters which stated that "any data will be treated with the strictest confidence". The Appellant added that if the information was disclosed it could lead to a breach of confidence action being brought against it and the quarry operator concerned opposed the release of the information and might refuse to participate in future surveys.

44. The IC did not accept that the words "strictly confidential" or general sentences implying a duty of confidence in a letter would – in itself – mean that all the information should be, or would be, considered confidential. For confidentiality to operate the information must have been imparted in circumstances which created an obligation of confidence and the information must have been necessary "quality of confidence".

45. The IC accepted the information was not trivial, because Moneystone Quarry accounted for 9 per cent of the UK's national production of silica sand which was a scare and valuable resource.

46. He also accepted it was commercially sensitive because its release could affect the operator's contractual obligations with its purchasers and compliance with competition law: the value of the quarry – which was linked to its reserves – could be calculated using historic information which related directly to its reserves.

47. On the issue of whether the information was available by other means and had been passed into the public domain, the IC noted that some information similar to that which was held by the Appellant – admittedly in a more general format – was already in the public domain.

48. The quarry owner's planning application to extend silica sand extraction at Moneystone had been discussed at a meeting of the Appellant's planning committee on 12 July 2007. At the meeting a figure was revealed for the annual output/production of silica sand at Moneystone Quarry.

49. Similar information was also available from the Staffordshire and Stoke on Trent Minerals Local Plan 1994 – 2006 and the Non-Technical Summary produced by the quarry operator on the proposed extension to silica sand stone extractions at Moneystone Quarry.

50. The IC accepted that the information in the public domain was not the same or very similar to the information requested.

51. In considering whether confidentiality was required to protect a legitimate economic interest the IC was satisfied that disclosure of the requested information would adversely affect the confidentiality to protect a legitimate economic interest. Disclosure might affect the silica sand market in general but that had to be shown to have an impact on legitimate economic interests. He was satisfied that Regulation 12 (5) (e) was engaged in respect of the sales and reserve figures.

52. The IC had examined the public interest test under that regulation and noted that the Appellant's position was that the public interest in maintaining the exception outweighed the public interest in disclosing the information.

53. In essence the Appellant argued that the public interest lay in protecting the national planning process and the potential significant detrimental effect release of the information would have by triggering future non-cooperation by quarrying companies in this kind of situation.

54. The current quarrying operator could bring an action against a breach of confidence. Because the Appellant could not compel the quarry operator to participate in the survey process and provide figures regarding sales and reserves, it meant that voluntary cooperation was essential for the Appellant to be able to produce accurate data regarding minerals for

future planning purposes. The Appellant had a duty to do that as a Mineral Planning Authority.

55. Appellant had argued that there was a public interest in public bodies abiding by agreements, made in good faith, in respect of information that had been voluntarily provided to them for background policy reasons and without the compulsion of law.

56. The IC placed weight on the principle of protecting quarry operators and customers from the negative impacts of disclosure. Although he accepted there would be an adverse effect, he had not been provided with convincing arguments in terms of severity. The IC was not convinced that the effects of disclosure would be very severe.

57. In favour of disclosing the information the Appellant had said there was a public interest in understanding any activity that might have an impact on the environment such as mining. It was also in the public interest for local authorities to be open and transparent in relation to all matters affecting the environment.

58. The Requestor's position was that the public had a right to know about the production and reserves of minerals to enable informed checks and challenges to be made to mineral mining applications. The IC case was that argument had significant weight as disclosure clearly fell within the areas which the European Directive on Access to Environmental Information sought to address.

59. At the time of the original request planning considerations relating to the quarry were on-going and the IC accorded significant weight to the argument that disclosures would assist members of the public in participating in the planning process.

60. The Requestor had also pointed out that there was a strong public interest in the public knowing the human and environmental consequences associated with processing, handling, use and transportation of silica sand after it had been extracted and sold.

61. The human impact largely related to health risks associated with any silica dust generated by the processing, handling and transportation of silica sand. The environmental impact was not only related to the effect quarrying had on the landscape but also that created by the mode of transporting the silica sand.

62. On this basis the IC concluded that the public interest in maintaining the exception was outweighed by the public interest in disclosing the information.

63. In terms of Regulation 12 (5) (f) EIR – which permitted the Appellant to refuse to disclose information to the extent that it would adversely affect the interests of a person who had provided that information voluntarily, in the expectation that it would not be disclosed to a third party and in a situation where he had not consented to disclosure – the IC was satisfied that the Regulation was engaged.

64. For reasons similar to those already given earlier, the IC concluded that the public interest in maintaining the exception did not outweigh the public interest in disclosure.

65. The IC had also considered the issues in the light of the "aggregated public interest test" in the case of the Court of Appeal decision in *Office of Communications v Information Commissioner [2009] EWCA Civ 90* [now, as the result of a Supreme Court decision, under consideration by the European Court of Justice].

66. The IC was required to approach this as follows: "*where more than one exception was 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 exception must be weighed against the public interest in disclosure.*"

67. The IC concluded the outcome of this cumulative assessment exercise still favoured disclosure of the information.

The appeal to the Tribunal

68. The Appellant appealed to the Tribunal and the Additional Party was joined at a later stage in the Appeal.

69. There was then a period of clarification about the particularised and extent of the appeal, something reflected in the volume of material (open and closed) eventually served on the Tribunal.

The questions for the Tribunal

70. The issues for consideration by the Tribunal:

    (i) Is the Appellant required to treat the request as a request under EIR when it was made under FOIA?

    (ii) Is the information discloseable under FOIA?

    (iii) Is the reserves data "environmental information" under Regulation 2 EIR?

    (iv) Is the sales data "environmental information" under Regulation 2 EIR?

    (v) If all or part of the data is environmental information within the EIR, does the information come within Regulations 12 (5) (e) and/or Regulation 12 (5) (f)?

    (vi) If the information comes within either or both of those regulations does the public interest favour disclosure?

    (vii) In considering the general public interest test, is the presumption in favour of disclosure in regulation 12 (2) a lawful presumption to apply where environmental information is held under a duty of confidence?

71. From the Additional Party's point of view its primary position was that the information was not environmental information. The reserves and sales figures fell under FOIA and primarily under section 41.

72. If section 41 – information provided in confidence – applied then the information was exempt information if it was obtained by the Appellant from any other person (the Additional Party in this case) and the disclosure of the information to the public (other than under FOIA) by the Appellant holding it would constitute a breach of confidence actionable by that or any other person. If section 41 applied then the duty to confirm or deny the existence of the information did not arise.

73. If this was the situation – because the exemption was an absolute exemption – there was no requirement for the Tribunal to go on to consider the public interest balancing exercise.

74. Alternatively, section 43 FOIA applied and this would require a balancing exercise in terms of the public interest to be applied, the result of which should conclude that the disclosure of the information would be likely to prejudice the commercial interests of the Additional Party.

75. The Additional Party's reserve position was that, if Regulations 12 (5) (e) and/or Regulation 12 (5) (f) applied and were engaged, then the result of public interest balancing tests favoured nondisclosure rather than disclosure.

Evidence

76. The Tribunal heard evidence from Paul Wilcox, Head of Development and Waste Management in the Development Services Directorate of Staffordshire County Council. He adopted his written witness statement dated 10 August 2010.

77. He confirmed that the information requested was for the last 10 years of the Annual Mineral Survey returns for 1997 – 2006. He believed that the issues raised by this request for information had significance that was much wider than the disclosure of the specific information related to the case in terms of his local authority and would impact upon other local authorities throughout the United Kingdom.

78. In terms of collecting information, the Appellant sent a letter each year to all mineral operators with a blank form requesting that they provided data on sales and permitted reserves for the previous calendar year.

79. Those enquiries were made because the Appellant County Council was under a statutory duty under the terms of section 14 (1) of the Planning and Compulsory Purchase Act 2004 to "*keep under review the matters which might be expected to affect the development of that area or the planning of its development in so far as the development relates to a county matter".*

80. The definition of 'county matter' was set out in section 1, Schedule 1 of the Town and Country Planning Act 1990 and included "*the winning and working of minerals".* Silica sand was a mineral and was one worked in the County.

81. Matters which the County Council was obliged to refer to within its plans included minerals and waste development. In order to plan for minerals development in the County, section 16 of the Planning and Compulsory Purchase Act 2004 require the Council to prepare and maintain a Scheme known as a Minerals and Waste Development Scheme (together with local development documents).

82. In preparing Local Development Documents, the Appellant Council was required to have regard to national policies and advice contained in guidance issued by the Secretary of State. The documents needed to be founded on robust and credible evidence and needed to be formally "sound".

83. The Mineral Policy Guidance no 15 (at Paragraph 89) explained the role of the industry in supplying information to the County Council for plan-making purposes.

84. It stated: "*The silica sand industry has an important role to play in cooperating with, and contributing to, the development plan process. For example, the successful application of land bank policies depends on the ready availability of information on reserves and production.*"

85. Silica sand could be used as an aggregate and for that there was a separate survey system operated by the Regional Aggregate Working Party (RAWP). In order for that data to be collected there were national rules which stated that the information was to be kept on a confidential basis so that only designated individuals could see it and it could not be copied. His County Council used those rules as the basis for operating surveys.

86. He commented: "*The legislation leaves the Council in a slightly difficult position. We have statutory duties to try to collect the requisite information and use it to construct our plans, but have no legal obligation to require companies to hand over the information. This has long been recognised by the Government and essentially works because the companies are prepared to hand over information, provided we agree to hold the data on a confidential basis. Thus we get the information needed to prepare the plans and the companies are not required to compromise the confidentiality of the commercially sensitive nature of the information they are required to provide. It's a system that has been built up on trust over a number of years and requires the companies to be assured that there are systems within the Council which will ensure that one company's commercially sensitive information is not disclosed to customers and competitors. We, for our part, operate stringent systems within the Council to ensure that the information is not provided to other Council officers.*"

87. He noted that the IC, at Paragraph 90 in his Decision Notice, had suggested that it would be possible for the Council to require all of the information on reserves and sales as conditions within planning permissions. That would ensure – the IC suggested – that this important information was passed on to the Council.

88. He felt there were some fairly fundamental problems with that suggestion. The first was that the Council had granted a large number of planning consents to operators in the past and these were being used by operators.

89. It would not be open to the Council simply to seek to impose a new condition on an existing permission. He could not see how it could be argued that the provision of the information on an annual basis was necessary. The Council could only take that stand if it could say that the permission would be refused if the information was not provided. It was impossible for the Council to say that and the condition (as part of a new permission) would not satisfy that test.

90. The Mineral Policy Guidance advised that conditions should be tailored to tackle specific problems rather than to impose unjustified controls. He was not aware of any other County Council which had sought to impose conditions of the type proposed by the IC.

91. If they had been imposed then he was confident that there would be legal challenges in respect of the conditions because they would be requiring companies to disclose confidential commercial data as a condition of planning consent.

92. Information submitted as part of a planning application was only based on a snapshot in time and was only sufficient to substantiate the applicant's long-term need for that particular development based on data that could be placed in the public domain.

93. Data submitted as part of a planning application was based on a proposal to be developed in the future which could be assessed to determine its potential impacts and its compliance with national, regional and local policies. Information collected by the Council on a year by year basis for the plan-making purposes was based on the actual commercial activity that had taken place at the site after the grant of planning permission and therefore was commercially sensitive.

94. The County Council had never asked for information required for plan-making purposes to be provided without a confidential agreement being established. If the reserves information was not provided then the development plan would not be based on a robust and credible evidence base. Without the right information the Council could not prepare sound plans and would not be able to assess properly whether the proposed development could be justified. That could lead to unnecessary and inappropriate environmental impacts.

95. The Planning System since 2004 had been based on the "plan, monitor and manage" approach. Monitoring was important to the deliverability of

policies. Sales and reserves data was important for monitoring local policies so that there were adequate supplies of minerals in accordance with national policies.

96. The public had access to all the information used to determine planning applications. That included information submitted by the applicant to substantiate the long-term need for a particular development proposal and the information which would be used for assessing its potential impacts and its compliance with national, regional and local policies.

97. It also included the information set out in the development plan on the site-based policies about the silica sand which the public would have seen during consultations on the plan and on which they were able to comment during those consultations.

98. The information collected on a year-by-year basis for the plan-making purposes was based on the actual commercial activity that had taken place at the site each year after the grant of planning permission and therefore was confidential.

99. If the confidential information had to be revealed – as a result of this appeal hearing – the Council believed that it would then need to examine all of the other minerals and other information that had been provided to the Council on a voluntary and confidential basis

100. He accepted that any information held by the Council under a duty of confidence could be overridden if there was an overwhelming issue of public importance leading to the need for disclosure. He gave as an example the Council social services department holding confidential records when, on occasion, there was a need for those records to be passed to the police.

101. If the Council knew that it could not retain commercial secrecy of information which had been provided in confidence it would have to inform all of the providers of information with a statement that it could no longer stand by the assurances of confidentiality that had already been given to them in respect of the provision of information.

102. The Additional Party had already made a formal request for return of all the information supplied to the County Council. He anticipated from initial discussions with other quarry operators that a large number would ask the Council to return the information which had been provided. That would have a significant adverse effect on the Council's planning functions.

103. He said: "*This case is being carefully watched by other local authorities and, given the importance of this potential decision, if the information is*

required to be disclosed it seems to me likely that other local authorities will have to adopt a similar approach."

104. By ending the voluntary disclosure model which had operated so far it could be that in future the government would have to legislate to require quarry operators to provide the type of material so that they could once again hold the data. To date – because the voluntary system had, by and large, been working well – successive governments had been reluctant to legislate.

105. "*The Council sits in the middle of the dispute. The confidentiality in the specific information belonging to Sibelco not to the Council…. At present as we do not have legal powers to require quarry operators to provide this information and we are confident that they will not voluntarily provide commercially sensitive data which is then available to be seen by their customers, their competitors and members of the public, we can obtain the information only if we give assurances of confidentiality,*" he said.

106. In cross-examination he emphasised that figures in respect of some of the requested information had been published on a global basis but were not specifically accurate figures. They only covered trends towards future output.

107. Mr Nicholas Horsley, the Environmental Planning Manager for Sibelco UK Limited, adopted his two written witness statements dated 7 May 2010 and 13 August 2010. In the latter, Mr Horsley helpfully clarified the nature of the information provided in the AM Survey returns as follows: 'A mineral "reserve" from a land planning use context is limited to those minerals for which a valid planning permission for mineral extraction exists. He referred to a more precise definition used in the British Geological Survey "*Permitted reserves – Estimated reserves of aggregate materials, including stockpiles, with planning permission that are saleable for aggregates and non-aggregate purposes… The figure should estimate net saleable reserves taking account of losses during extraction and processing."* Mr Horsley also explained that sales could exceed production due to the amount of stockpiled material.

108. In essence – as the witness for the Additional Party – he confirmed the points highlighted by the Appellant in terms of information provided by his company in confidence to the Appellant.

109. In terms of the comparison between information already available to the public from the planning application made by Sibelco in respect of Moneystone Quarry in the 2006 planning application, he stated: "*Sibelco provided information on the production tonnage from Moneystone Quarry together with the "raw" mineral reserve tonnage, i.e. the figure did not take into consideration losses arising from the extraction or processing of*

the mineral. The planning application also provided an indication of anticipated production tonnage going forward in order to meet the anticipated need for silica (industrial) sand. This figure was based upon known developments particularly in the glass manufacturing industry…..".

110. "*During the application consultation, Sibelco became aware that certain members of the public were monitoring vehicle movements to and from Moneystone Quarry. For a number of reasons, lorry movements in themselves would offer no indication of the precise tonnage of material sold into a particular industry. The lorries working out of the site varied in size and payload capacity. In addition, Moneystone Quarry has the ability to import materials for blending purposes. This would affect the total sales figure from the site whereas the survey forms specify sales of minerals which have actually been extracted from the site….*".

111. "*In response to representations made to SCC during the consultation process and to a request from SCC, Sibelco provided SCC with information about the tonnage from Moneystone Quarry sold to one particular industry. The information was provided in response to a specific request from SCC to enable SCC to make an informed determination of the submitted planning application. In hindsight, this letter should have been sent on the basis that the content would be kept confidential by SCC since it contains tonnage information which Sibelco would not have wanted to come into the public domain. Despite the proposals according with the local development plan, SCC chose to refuse the application against the recommendation of the County Planning Officer,*" he stated.

112. He pointed out that the market for silica sand was very concentrated and one in which there were few suppliers and few customers and that the release of detailed information about volumes would tend to increase transparency between the small number of customers in that market. The release of such data could lead to price parallelism issues and the diminution of competition within the market.

113. His company was the predominant supplier of silica sand to the glass industry in the United Kingdom. The number of glass container manufacturers in the United Kingdom was relatively small.

114. If information about annual sales of silica sand from Moneystone Quarry was made publicly available it would not be difficult for a customer – who knew what tonnage of silica sand was taken from Moneystone Quarry – to work out what tonnage their competitors might have bought.

115. In cross-examination he stated that best practice dust measures in relation to silica had been implemented at the site.

116. The Requestor lived over 600 m away from the closest boundary to the quarry operations. None of the Government or Planning guidance suggested that nuisance dust (10 µg sized particles or smaller) would travel more than 500 m from the source.

117. Information on environmental dust monitoring at three representative properties in the vicinity of the quarry had been submitted by Sibelco to the Appellant in 2006.

118. The data covered a period of two years from October 2003 to September 2005. The information was on the public record. On no occasion during the period was there any breach of the recommended guidelines. Two of the properties monitored were closer to the quarry operations then the Requestors home while the third was an equivalent distance away.

119. On that basis the Additional Party did not accept there was a substantial public interest on health grounds in knowing about either production or sales information at Moneystone Quarry – or about any reserve or resource information – as there was no link between those factors and the health of residents living next to, or within the vicinity of, the quarry.

120. Sibelco had for many years shared general information about its operations with the local community. That had included broad information on production tonnages and detailed environmental monitoring information in relation to water, noise and dust.

121. Staffordshire was one of only a limited number of locations in the United Kingdom for the production of silica sand, particularly for use in glass manufacture. Silica sand could only be extracted economically in a limited number of locations where it occurs.

122. The Tribunal heard closed evidence in relation to the market and its structure in relation to silica sand from Moneystone Quarry and also considered the un-redacted material.

The Tribunal's Conclusions

123. The Tribunal has set out the background facts and arguments in significant detail so that these can be as open and accessible as possible to anyone reading this decision.

124. The Tribunal has had the benefit of hearing argument in closed session and, as mentioned in the above, of being able to consider the un-redacted, closed material. That has given the Tribunal the greatest possible opportunity to consider all the issues that arise in this appeal.

125. The Tribunal also appreciates that its decision in respect of these matters could have a significant impact in respect of a broader range of mining industry interests in the United Kingdom – and County Council planning issues arising from such activities.

126. The Tribunal has, however, concentrated only on the issues and arguments raised in this specific appeal.

127. The Tribunal also understands the position in which the IC (and Counsel for the IC) found themselves, given the wealth of additional detail provided by the Appellant and the Additional Party in respect of the law of Breach of Confidence and the additional public interest arguments which were advanced after the Decision Notice was originally issued and right up to the edge of this appeal.

128. The Tribunal rejects the Additional Party's submissions that the request should properly fall to be considered under FOIA and – in particular – section 41, an absolute exemption (or under section 43, with its public interest balancing test).

129. The issues in this appeal fall under the EIR regime and not FOIA. We accept that the "reserves" are the quantity of the mineral for which planning permission had been granted and which took account of the losses experienced during production.

130. We find this is an activity which affects or is likely to affect the elements of the environment – air, atmosphere, water, landscape and factors like noise, waste and emissions – which reflects the level of mining that has or will take place at some point in time.

Similarly, in terms of the sales figures, these are indications of what has been or will now be extracted from the environment in question to fulfil the order and we find this is an activity which affects or is likely to affect the elements of the environment.

131. With those two findings, dismissing the operative regime as FOIA, we then considered the matter under Regulation 2 EIR the Environmental Information Regulations. Extracting and selling silica sand is, to us, clearly an environmental activity.

132. The more we listened to and considered the Breach of Confidence arguments in this appeal, the more compelling became the stance taken

by the Appellant and the Additional Party in terms of Regulations 12 (5) (e) and Regulation 12 (5) (f) EIR.

133. We have set out in some considerable detail exactly what we heard from Mr Wilcox (for the Appellant Council) and Mr Horsley (for the Additional Party).

134. These were not individuals tailoring their evidence to suit a particular position. They gave their evidence clearly, credibly and cogently and we had the benefit of listening to it being tested in cross-examination by experienced Counsel as well as having our own opportunities to ask questions on it.

135. We are satisfied to the required standard that what both of these witnesses told us is a correct and accurate assessment of the current, non-statutory confidential disclosure regime.

136. We are also satisfied that it is in the public interest that the information provided by Sibelco in terms of the arrangements at the time of the request to the County Council should continue.

137. We accept that the only way in which this will continue is on the basis of information provided in strict confidence from the quarry operator to the County Council.

138. The closed and narrow market in relation to silica sand at the production/selling end and the buying end– and information about sales and reserves of a particular quarry – is an ancillary feature but it is only part of the equation.

139. The general law of confidentially and breach of confidence would – in our view – operate to permit the Additional Party successfully to restrain the Appellant from revealing the requested information or recover substantial damages if such information was revealed in breach of confidence.

140. The public interest is not advanced by a decision which would – if enforced – mean that quarry operators then simply refused to supply information to local authorities (as they could) because there is not a statutory scheme to enforce the provision of such information.

141. It is not for this Tribunal to patch and fix the holes in a non-statutory scheme of voluntary, information-giving in confidence that might – perhaps – benefit from the kind of statutory structure that County Councils and quarry operators wish would be introduced. But the Tribunal can recognise the significant public interest benefit of the voluntary scheme on the basis of the current status quo.

142. In this particular case the Tribunal recognises that silica sand itself is a valuable and strategic resource and that the Additional Party's confidentiality clauses in its relationship with the Appellant are not generic, "boilerplate" clauses but have a valid, specific and substantial reason for being articulated.

143. The *Veolia* case – a judgement from the Court of Appeal which was delivered after the Tribunal had concluded hearing the oral evidence but on which it invited and received brief written submissions from all the parties before concluding this decision – deals with matters which do not bear directly on this appeal.

144. The *Veolia* case concerned commercially confidential information produced by a waste disposal company which an elector sought to inspect using the powers under section 15(1) of the Audit Commission Act 1998.

145. One issue in that case was whether the section gave rise to an absolute right of inspection or whether the section needed to be read subject to a requirement that it was not to apply in the case of legally confidential information either at common law or pursuant to the company's ECHR rights. Thus the company which held the confidentiality right asked the court to "read in" an exception to section 15 in respect of confidential information.

146. *Veolia* does have a relevance, however, because the IC's position at the appeal hearing was that, while the presumption under Regulation 12(2) of the EIR in favour of disclosure of environmental information was consistent with the Directive 2003/4/EC, the IC accepted that the presumption in Regulation 12(2) in favour of disclosure was not required by the Directive.

147. It follows that it would have been possible for the UK government to have produced a set of Regulations to bring the Directive into force in the UK without incorporating a presumption in favour of disclosure of all environmental information.

148. Accordingly it must also have been possible for the Regulations to have exempted confidential information from any general presumption in favour of disclosure without breaching the Directive.

149. The Appellant in the appeal before us submitted that a decision by a public body to disclose environmental information in a way that overrides an established legal duty of confidence to a third party (in this case Sibelco) engaged ECHR rights.

150. That submission has been supported by the Court of Appeal in the *Veolia* case (in Paragraph 121 of the judgement).

151. The effect of the *Veolia* case – in this appeal – is:

- The disclosure of confidential information by a public body such as the Appellant engages the ECHR rights of the holder of the confidence;
- A statutory right for the public to have access to any information must have an exception read into it to exempt the disclosure of confidential information in order to give effect to those ECHR rights;
- The presumption in favour of disclosure of all environmental information held by public bodies in Regulation 12(2) EIR 2004 must now be read subject to an exception in the case of any such information which is held by the public body subject to a legal duty of confidentiality;
- Where environmental information is held by a public body which is subject to a legal duty of confidentiality there is recognised to be a "strong public interest" in the maintenance of valuable commercial confidential information;
- Arguments can be advanced on the individual circumstances of the case to seek to justify overriding the duty of confidence for particular pieces of information.

152. Our decision is unanimous.

153. The Tribunal makes no order as to costs in relation to this appeal.

154. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the First – tier Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

(SIGNED ON THE ORIGINAL)

Robin Callender Smith

Judge

22 November 2010