

Using the Freedom of Information Act to keep things secret

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With the start date for fracking near the North Yorkshire village of Kirby Misperton almost upon us, there has been a marked increase in police activity in the area, with convoys of police vans driving around the narrow lanes surrounding the site. A nearby protest camp receives regular visits. CCTV cameras have been erected in several locations. This is all part of 'Operation Kingfisher', which North Yorkshire police (NYP) launched in 2016. A Freedom of Information request in 2016 sought to unearth some of the thinking behind Operation Kingfisher. NYP posted their response online on 27 January 2017.¹ The request asked:

- 1 – Please can you confirm what the aims and objectives are for NYP's Operation Kingfisher.
- 2 – Please can you provide a copy of any presentation information issued by NYP to local councils, schools and NYP officers related to fracking.

NYP refused to provide the information, mainly on the grounds that:

'Section 22 – Information Intended for Future Publication

Information is exempt pursuant to Section 22 if, at the time when the public authority receives a request for it: the public authority holds the requested information; the public authority intends the information to be published at some future date, whether that date is determined or not; and in all the circumstances it is reasonable to withhold the information until its planned publication.

Unfortunately, in this instance I am unable to provide you with a determined publication date at this time.

Section 22 is a qualified class based exemption, which means that consideration must be given to the public interest in disclosure or non-disclosure of the information, but there is no requirement to demonstrate any harm that may occur in the event of the information being disclosed. It is recognised that it must be reasonable in all the circumstances to withhold the information until the date of publication.'

and:

'Balancing Test

A decision has already been taken to publish this information prior to the

¹ <<http://tinyurl.com/y7zx3tf7>> or <<https://northyorkshire.police.uk/access-to-information/foi-disclosure-log/operation-kingfisher-925-2016-17/>>

request being received. This process is in accordance with a planned publication strategy. Requesting earlier disclosure of the already accessible information would duplicate workload, and there is public interest in the information being disclosed in its entirety. Therefore it is my decision to withhold the information at this time.'

This convoluted attempt at accountability is summed up by NYP's statement that 'The date for publication is in the distant future'. It would appear that having a 'planned publication intention' is sufficient reason to withhold information. This point is clarified on the Information Commissioner's Office (ICO) website:

'The intention to publish must pre-date the request. This means that a public authority cannot, when it receives a request, attempt to give itself more time to provide the information by deciding to publish it in the future rather than provide it within the statutory time limit for answering a request.'²

This loophole is big enough to sink practically any request for what official bodies wish to keep secret. Given that there is no need to provide any date for future publication, but only that there is 'an intention' to publish which predates any request, the author of any document merely has to say as much when the information is created. It would appear this option may be the choice in many cases where FoI requests are turned down, more often than not incorrectly. The website FOIwiki.com lists more Section 22 refusal appeals being upheld by the ICO than not, in a ratio of 14 to three³ How many more refusals simply go by the board?

² <<http://tinyurl.com/y8m6c6g9>> or <<https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>>

³ <https://foiwiki.com/foiwiki/index.php/FOIA_Section_22_Exemption>