

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 2 July 2024

Public Authority: South Kesteven District Council
Address: Council Offices
The Picture House
St Catherine's Road
Grantham
NG31 6TTX

Decision (including any steps ordered)

1. The complainant has requested information relating to public spaces protection orders ('PSPOs') from South Kesteven District Council ('the Council'). The Council provided some information but said that it did not hold the information requested in parts (1) and (3) of the request.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the remaining information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 27 December 2023, the complainant wrote to the Council and requested information in the following terms:

"Before making, amending or extending a Public Space Protection Order (PSPO), the Council is required under s72 of the Anti-social Behaviour, Crime and Policing Act 2014 to consult with the owner or occupier of land within the restricted area (s72 (4)(c))."

For any PSPO which applies to the whole of the district of South Kesteven, please provide a list of:

1. the owner or occupier of such land and a description of the area of land that is owned or occupied and whether the Council consulted with the owner or occupier of that land.
 2. If the owner or occupier was not consulted, please provide the reason why they were not consulted.
 3. Please include in your response any owner or occupier of restricted land who have received a grant from the council under the South Kesteven Prosperity Fund.”
5. The Council responded on 22 January 2024. It said it did not hold the information described in part (1).
 6. For part (2), it explained that it had conducted a public consultation and it referred the complainant to the resultant report considered by Cabinet¹. It explained the process it had followed.
 7. For part (3), it refused the request, citing section 12 (Cost of compliance exceeds appropriate limit) of FOIA.
 8. The complainant requested an internal review on 23 January 2024. He referred to online information which said the Council had issued grants to particular landholders, whose land, he had deduced, would fall under certain PSPOs. He argued that the Council must, therefore, hold information which fell within scope of the request. He again asked the Council to provide a list of the owners/occupiers of land affected by PSPOs and to reconsider the request.
 9. The Council provided the internal review on 16 February 2024, upholding its original decision. It said:

“Whilst there are articles online that may assist, South Kesteven District Council is not the owner of this information and we are not required to create information in order to provide a response to your request.

Your request was **for a list of the owners or occupiers of land that would be affected by the PSPO (and where the land is not**

¹<https://moderngov.southkesteven.gov.uk/documents/g4454/Public%20reports%20pack%2010th-Oct-2023%2014.00%20Cabinet.pdf?T=10>

owned by the Council). I can confirm that we do not hold a list of this information.”

Scope of the case

10. The complainant contacted the Commissioner on 29 February 2024 to complain about the way his request for information had been handled. He said:

“When proposing to make a PSPO there is a legal requirement for a Council to consult with the owner or occupier of land within the restricted area (s72(4) Anti-social Behaviour, Crime and Policing Act 2014).

The Council has information about private land within the restricted area (in some cases this is the whole of the Council District) but says it will not disclose this because it is not a list.”

11. Although the Council told the complainant it was relying on section 12 of FOIA to refuse part (3) of the request, its response to the Commissioner’s enquiries was that it does not hold that information.

12. Therefore, the analysis below considers whether, on the balance of probabilities, the Council holds information falling within the scope of parts (1) and (3) of the request. The Council has comprehensively addressed part (2) in its responses to the complainant, including confirming that landowners were not consulted with. The complainant has not specifically raised this as a point of complaint, and so the Commissioner has not considered the Council’s response to part (2) of the request.

Reasons for decision

Is the requested information environmental information?

13. Regulation 2(1) of the EIR defines environmental information as being information 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)...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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
14. PSPOs are powers given to local councils and were introduced as part of the Anti-Social Behaviour Act 2014. Designed to target a particular nuisance in a defined area, PSPOs work by prohibiting certain things or requiring that specific things should be done, by law.
15. The Council carried out a public consultation exercise on PSPOs in 2023. The consultation asked about dog fouling/off lead behaviour, public alcohol consumption and vehicle related nuisance. The activities described in the PSPO consultation are activities likely to affect the elements of the environment outlined in regulation 2(1)(a) of the EIR and some are factors falling within regulation 2(1)(b). They are also activities which could affect human health and safety, as outlined in regulation 2(1)(f). The Commissioner considers that a PSPO is a measure as described in regulation 2(1)(c) of the EIR, designed to positively affect the factors described in regulation 2(1)(a),(b) and (f) of the EIR.
16. For these reasons, the Commissioner is satisfied that the request should be considered under the EIR. He has gone on to consider the non-disclosure exception provided by regulation 12(4)(a) of the EIR.

Regulation 12(4)(a) – Information not held

17. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.

18. Regulation 12(4)(a) allows a public authority to refuse to provide the requested information if it does not hold it at the time the request was received.
19. In cases where a dispute arises over the extent of the information held by a public authority, the Commissioner will take account of a number of factors when considering whether the information is, or is not, held, including:
 - any evidence or arguments provided by the complainant;
 - any searches carried out by the authority to check whether the information is held;
 - any reasons offered by the public authority to explain why it knows the information is not held; and
 - any reason why it is inherently likely or unlikely that information is held.
20. The Commissioner is not expected to prove beyond reasonable doubt that a public authority does or does not hold information. When determining a complaint, the Commissioner makes a decision based on the civil standard of the 'balance of probabilities' – that is, more likely than not.
21. The Council's position is that it does not hold the information requested at parts (1) and (3) of the request. It is satisfied that this is the case because it knows there was not a list of landowners/occupiers formulated as part of the public consultation exercise on PSPOs. Rather, its approach was as follows:

“The consultation consisted of social media campaigns, information on the website, and posters were shared with Parish and Town Councils and posters were also erected across the District. However not every area had a poster as that would have been impractical. Landowners were not directly contacted, but due to the other consultation promotion and contact with Parish Councils and Town Councils who had local information and contacts, it was felt that this consultation was sufficient.”
22. The Council explained that key stakeholders were consulted, but they were not landowners/occupiers. It provided their details to the Commissioner. It said that its approach to consulting on the PSPO was compliant with Chapter 2, Section 72 (Para 5) of the Anti-social Behaviour Crime and Policing Act 2014, which states:

“(5) The requirement to consult with the owner or occupier of land within the restricted area—

- (a) does not apply to land that is owned and occupied by the local authority;
- (b) applies only if, or to the extent that, it is reasonably practicable to consult the owner or occupier of the land.

It was not reasonably practicable to consult owners and occupiers of land within the whole District of South Kesteven which [sic] 365 square miles.”

23. The Council reiterated that it did not hold a list of consultees:

“...other than the stakeholders listed. The information listed below is not relevant to [the complainant’s] original request as the stakeholders are not landowners.”

24. Nevertheless, the Council said that, for completeness, it checked with its consultation officer to confirm if any information was captured in the consultation that could be useful in the response to this request. They had confirmed that they hold no relevant information.

25. The complainant has suggested that, if not already held in the format requested, it should be possible to compile the requested information from various data sources in the Council’s possession.

26. The Commissioner has considered this suggestion. However, he is mindful that this would involve the creation of new information. On that point, his guidance² says:

“Do we need to create environmental information to satisfy an information request?”

No. The EIR only apply to information that a public authority already holds in recorded form at the time of a request.

If you don’t hold a particular piece of information that someone has asked for, you don’t have to create it. Nor are you required to ask a third party for the information, unless they hold it on your behalf. You must already hold the information when the request is made.”

27. The Council has explained that in order to comply with the request it would be necessary to obtain some information from the Land Registry and cross match it against its own records. This would therefore involve

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-environmental-information/>

the creation of new information and the Council is not required by the EIR to do it.

28. The Commissioner finds the submissions provided by the Council, as set out above, sufficiently explain why it does not hold the requested information.
29. Based on the evidence available to him, the Commissioner finds that, on the civil standard of the balance of probabilities, the Council does not hold the requested information.
30. When considering the public interest test, the Commissioner can only find that the public interest in maintaining the exception at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because the information is not held.
31. The Commissioner is therefore satisfied that regulation 12(4)(a) applies and he does not require the Council to take any further steps in this case.

Right of appeal

32. 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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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