

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

**Decision notice**

**Date:** 9 June 2020

**Public Authority:** Wiltshire Council  
**Address:** County Hall  
Bythesea Road  
Trowbridge  
Wiltshire  
BA14 8JN

**Decision (including any steps ordered)**

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1. The complainant has asked Wiltshire Council for a copy of all Brexit planning risk and impact assessments held by the Council, which were not publicly available when he made his request. The Council initially relied on sections 21 and 22 of the FOIA on the grounds that the requested information is either already available on the Council's website or is intended for future publication. Following the Commissioner's intervention in this matter, the Council determined that parts of its Brexit Readiness Review document should be withheld in reliance on section 41(1) of the FOIA because that information had been provided to the Council by third parties with the expectation of confidence.
2. The Commissioner has decided that Wiltshire Council has correctly applied the exemption provided by section 21 of the FOIA to the information requested by the complainant which was already published on the Council's website at the time it received the request.
3. The Commissioner has decided that the Council was wrong to rely on the section 22 exemption regarding the publication of its Brexit Readiness Review because the Council did not have the settled intention to publish that document in full.
4. The Commissioner has also decided that the Council has correctly applied the exemption provided by section 41(1) of the FOIA to

information it received from third parties in their expectation that the information was given in confidence.

5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - The Council is required to disclose to the complainant its Brexit Readiness Review. It is entitled to withhold those pieces of information which are exempt under section 41(1) of the FOIA, which it has identified for the Commissioner.
6. The public authority 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 the Act and may be dealt with as a contempt of court.

## Request and response

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7. On 6 October 2019, the complainant wrote to the Council, asking to be given the following information:

“Please provide copy of all Brexit planning risk and impact assessments held internally by the Council but not yet made publicly available.”
8. The Council responded to the complainant’s request on 7 October, advising him that it holds ‘a full risk register as well as a Brexit readiness assessment which is in place to support policy and plan development’. The Council told the complainant that:

“The document will not be released ahead of Brexit as we rely on a frank assessment from our officers and to publicise it would cause prejudice to the effective conduct of public affairs. However, we intend to publish our assessments once Brexit has been completed, with appropriate redactions for commercially sensitive information about Wiltshire businesses contained within the document.”
9. The complainant replied to the Council’s refusal notice later the same day. The complainant said that he was dissatisfied with the way the information has been withheld and he asserted that, with the proximity of a Brexit ‘no deal’, there is a significant public interest in its disclosure.
10. In view of the Council’s presumed application of section 36 of the FOIA, the complainant asked the Council to tell him the name of the Council’s qualified person, to confirm its application of section 36 and to confirm

that the public interest test had been considered in the current circumstances.

11. On 24 October 2019, the Council wrote to the complainant to advise him of its internal review decision. The Council advised the complainant that it, "... should have confirmed that Wiltshire Council holds the information you have requested, however, Section 21 of the Act removes the obligation to provide you with the information as it is reasonably accessible to you by other means." The Council directed the complainant to the following website, where it said, "some of the information you requested is available...".

<http://wiltshire.gov.uk/data-protection-foi-log>

12. Additionally, the Council informed the complainant that some of the information he has asked for is exempt by virtue of section 22 of the FOIA, and it clarified that it was not relying on section 36 to withhold information.

### **Scope of the case**

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13. The complainant contacted the Commissioner 28 October 2019 to complain about the way his request for information had been handled.
14. The Commissioner informed the complainant that she would investigate the Council's reliance on sections 22 and 41 of the FOIA.
15. Following her receipt of the Council's representation in this matter, the Commissioner's decision concerns the Council's reliance on sections 21, 22 and 41(1) of the FOIA.

### **Reasons for decision**

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#### **Section 41 – Information provided in confidence**

16. The Council has informed the Commissioner that its original intention was to publish its Brexit Readiness Review, dated 21 October 2019, in full. This is confirmed in an email from the Council's Director of Legal, Electoral and Registration Services to its Freedom of Information and Records lead officer on 20 February 2020.
17. However, on 25 February 2020, concerns were raised about a small amount of information contained in the review document that was considered either 'commercially sensitive' or to had been provided to the

council on the understanding that the information would remain confidential. The Council therefore determined that should contact the providers of the identified information to ascertain their position in this matter.

18. Three of the providers of the information responded to the Council's enquiry: Their responses have been sent to the Commissioner for her examination.
19. Each of the emails makes clear the provider's belief that information had been provided to the Council in strict confidence and that it would not be shared outside the council under any circumstances.
20. The Council's position is now, that whilst the majority of the Brexit Readiness Review continues to be suitable for publication, a small amount of the information contained in the document should be withheld in reliance on section 41(1) of the FOIA. This is because the information was supplied to the Council in confidence and its disclosure would be an actionable breach of confidence.
21. To assist the Commissioner in making a decision in respect of this complaint, the Council has identified the information contained with its Brexit Readiness Review which is being withheld in reliance on section 41.
22. Section 41(1) provides that –
  - “(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority),
  - and,
  - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”
23. For section 41(1)(a) to be met, the withheld information must have been provided to the public authority by a third party.
24. For section 41(1)(b) to be met, disclosure of the withheld information must constitute an actionable breach of confidence. The Commissioner considers that the following characteristics are required for an actionable breach to exist:
  - The withheld information has importance to the confider which should not be considered trivial;

- The information was communicated in circumstances importing an obligation of confidence; and
  - Unauthorised disclosure of the information would cause a specific detriment to the party which provided it or any other party.
25. Having examined the withheld information contained in the review document, together with the representations made to the Council by the providers of that information, the Commissioner is satisfied that the foregoing criteria are met.
  26. The Commissioner acknowledges that the withheld information was provided to the Council by third parties; the information is evidently not trivial and the providers of that information certainly make clear their understanding that it was provided to the Council on the understanding that would be treated in confidence.
  27. The withheld information is comprised of assessments made by economic operators about the potential effect of Brexit on their businesses. The information identifies steps these operators were considering in order to mitigate the effects of Brexit on their individual businesses. This information is therefore not trivial and consequences of its disclosure would have a detrimental effect on each of the economic operators concerned.
  28. This information was provided to the Council on the expressed understanding that it was for use only by the Council, and that it would be kept confidential.
  29. One of the providers of the information told the Council that it operates, "...on a one-team basis when working with local partners such as Wiltshire Council". It obtains its information from in confidence from companies at meetings. That information is shared with other members of the one-team on the understanding that the information is shared on a confidential basis and may not be shared with third parties. This information provider makes clear to the Council that all information it has provided was shared on this confidential basis.
  30. Another of the information providers told the Council that the information was given on the strict understanding that it was highly confidential and should not have appeared in any written report to the level of detail contained in the Brexit Readiness Review. Indeed, this provider has asserted that elements of the text are incorrect and inflammatory.
  31. The providers of the information identified several adverse effects that would likely occur following disclosure of the highlighted information.

Such effects include loss of business, detrimental consequences for their employees and the potential for customers to contract with competitors.

32. Having considered the Council's representations, the Commissioner is satisfied that the exemption provided by section 41(1) of the FOIA is engaged.
33. Section 41 is an absolute exemption and is not subject to consideration of the public interest test under the FOIA. There is however a recognised defence to an actionable breach of confidence which requires the public interest to be considered. The Commissioner has therefore set out below those factors which she considers to be relevant to the potential disclosure of the withheld information.
34. The Commissioner will always give necessary weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities. In the Commissioner's opinion, this helps to maintain confidence and trust in those public authorities.
35. In this case the Commissioner considers that there is a clear public interest which favours the disclosure of information which would assist the public in their understanding of the risks considered by the Council in its planning for the United Kingdom's exit from the European Union.
36. The Commissioner accepts that the withheld information was provided to the Council as 'background intelligence' to allow it to identify the risks associated with the UK's withdrawal from the EU, and particularly in a 'no deal' scenario. The Commissioner acknowledges that the information was not provided for any other purpose.
37. Likewise, the Commissioner accepts that none of the providers of the information believe that their information would be made public at any time, and she cannot ignore that fact that one of the providers has made clear it would be reluctant to share information with the Council in the future.
38. In the Commissioner's opinion the disclosure of the withheld parts of the Brexit Readiness Review would have a negative impact on the services the Council provides to its local community and would have a significant negative economic impact on the interests of the providers.
39. Having considered the public interest defence available to the Council, the Commissioner has decided that there is insufficient public interest to warrant the disclosure of the withheld information under this Freedom of Information request. The Commissioner considers that the factors favouring the withholding of the information identified by the Council

outweighs the public interest factors which favour that information being disclosed.

40. The Commissioner's decision is that the Council has properly applied section 41(1) to the information it received from third parties in confidence and which are identified for the Commissioner in the copy of its Brexit Readiness Review which it provided for her examination.
41. The Council is therefore entitled to withhold that information but must now publish the rest of the Brexit Readiness Review.

### **Section 21 – information accessible to applicant by other means**

42. The provisions of section 21 of the FOIA allows a public authority to refuse a request for information where that information is reasonably accessible to the applicant by other means.
43. In this case, the Council says that the information available to the requestor, at the time of his request, was published on its website<sup>1</sup> in a document titled 'Information provided in response to original request'.
44. The Council argues that the information available on its website is reasonably available to him because he submitted his request by email, which indicated that he has access to the internet.
45. The Council has informed the Commissioner that the information which the complainant has asked for is available to him under the Council's publication scheme.<sup>2</sup> It is found under the FAQ's as questions relating to 'Brexit'. The Council points out that there is no charge to access to this information and it has been available to the public from August 2019.
46. The Commissioner has decided that the Council is able to rely on section 21 in respect of the information which was already available to the complainant by virtue of it being published on the Council's website.

### **Section 22 – information intended for future publication**

47. Under section 22 of the FOIA, a public authority may refuse to comply with a request for information where, at the time the request is

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<sup>1</sup> <http://www.wiltshire.gov.uk/data-protection-foi-log>

<sup>2</sup> <http://www.wiltshire.gov.uk/data-protection-foi-log>

received, there is a settled intention to publish the requested information.

48. The Commissioner notes that some of the information requested by the complainant was already available to the public on the Council's website from August 2019. Part of the text on the website stated, 'However, we intend to publish our assessments once Brexit has been completed'.
49. The Commissioner notes that, whilst the intention to publish the assessments was made clear on the Council's website, the publication date had not been set when the request was received.
50. The Commissioner also notes that the Council received the complainant's request on 7 October 2019 and that the Government had planned that Brexit would occur on 31 October 2019. She therefore questions why the settled date of publication was not the date of the planned the Government had legislated for.
51. That said, the Commissioner recognises that during the run up to the date set for Brexit, procedures in Parliament meant that the Government would likely not achieve its intended date for Brexit and ultimately a new date for Brexit – 31 January 2020, had to be legislated for.
52. On the face of these facts the Commissioner considers that it would have been reasonable for the Council to extend its publication of the Brexit Readiness Review to the new Brexit date of 31 January 2020. This would be especially reasonable given that the review document was live, was being updated regularly and was being used to allow the Council to consider its planning and policy options in a 'safe space' away from the public gaze.
53. The Commissioner accepts that to make an accurate assessment of the Council's readiness for Brexit, as well as that of its suppliers, the Council needed to rely on honest assessments by its officers. This process could have been jeopardised if the review document had been made public in the febrile political atmosphere at that time and disclosure might have resulted in a false impression of the council's readiness.
54. It is clear to the Commissioner that the Council did have an intention to publish its Brexit Readiness Review in full at the time it received the complainant.
55. It is also clear to the Commissioner that events beyond the Council's control made it prudent for it to reconsider its position during as the political situation evolved.



56. Nevertheless, the Council's position is not sustainable. The concerns raised by its executives on 25 February 2020 meant that the Council's position had materially changed: It was no longer the Council's intention to publish the Brexit Readiness document in full because it then made the decision to rely on section 41 to withhold parts of that document.
57. The Commissioner must therefore find that the Council was wrong to rely on section 22. It is not necessary for the Commissioner to consider the public interest in this case because the exemption has not been engaged.
58. The Commissioner considers that the Council should have been alerted to the inappropriateness of its application of section 22 when, on 7 October 2019, it told the complainant that it intended to publish its assessments once Brexit has been completed, "with appropriate redactions for commercially sensitive information about Wiltshire businesses contained within the document".

## Right of appeal

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59. 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: 0300 1234504

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)

60. 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.
61. 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 .....**

**Andrew White  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
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SK9 5AF**