



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref ATISN 12782

26 February 2019

Dear ,

### Request for Information – ATISN 12782

I wrote to you on 22 November regarding your request for information. Please accept our apologies for the lateness of this response.

You asked for the following information

1. Conditions, obligations, penalties etc. have been put in place to ensure that BT and your own contract managers actually perform.
2. The contract terms (redacted to protect commercial sensitivities)
3. The planned programme for the roll-out across North Wales.

My understanding in relation to points 1 and 2 above is that you require the conditions, obligations and penalties contained and contract terms set out in the same grant agreement to provide fast broadband in relation to Lot 1 (North Wales) recently awarded to BT.

I have released some information contained in schedule 3.1 namely the speed and coverage template. This provides information about the location and timing of the roll-out and covers point 3 above. It is important to note that this information will be subject to further surveying and planning work and is therefore subject to change.

I can confirm that we hold the information requested, however, I have concluded that some of the information is exempt from disclosure under Sections 40(Personal Data), 41(Information provided in confidence and 43 (commercial interests) of the Freedom of Information Act 2000 (FoIA). Full reasoning for applying the exemptions can be seen at Annex A. Given the high volume of the information that is being released to you, please could you send me a relevant postal address so that I can post it to you. The information I am releasing to you will be sent, minus the information subject to the aforementioned exemptions.



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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding .

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of this response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit, Welsh Government, Cathays Park, Cardiff, CF10 3NQ or [FreedomOfInformationOfficer@wales.gsi.gov.uk](mailto:FreedomOfInformationOfficer@wales.gsi.gov.uk).

Please remember to quote the ATISN reference number.

You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at: Information Commissioner's Office,

Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF  
Telephone: 01625 545 745 or 0303 123 1113  
Website: [www.ico.gov.uk](http://www.ico.gov.uk)

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

The request you sent me contains personal information about you - for example, your name and address. The Welsh Government will be the data processor for this information and, in accordance with the General Data Protection Regulation, it will be processed in order to fulfil our public task and meet our legal obligations under the Act to provide you with a response. We will only use this personal information to deal with your request and any matters which arise as a result of it. We will keep your personal information and all other information relating to your request for three years from the date on which your request is finally closed. Your personal information will then be disposed of securely.

Under data protection legislation, you have the right:

- to be informed of the personal data we hold about you and to access it
- require us to rectify inaccuracies in that data
- to (in certain circumstances) object to or restrict processing
- for (in certain circumstances) your data to be 'erased'
- to (in certain circumstances) data portability
- to lodge a complaint with the Information Commissioner's Office (ICO) who is our independent regulator for data protection

For further information about the information which the Welsh Government holds and its use, or if you wish to exercise your rights under the GDPR, please see contact details below:

Data Protection Officer, Welsh Government, Cathays Park, CARDIFF, CF10 3NQ  
Email: [DataProtectionOfficer@gov.wales](mailto:DataProtectionOfficer@gov.wales)

The contact details for the Information Commissioner's Office are as outlined above.

Any information released under the Freedom of Information Act 2000 or Environmental Information Regulations 2004 will be listed in the Welsh Government's Disclosure Log (at <http://wales.gov.uk/about/foi/responses/?lang=en>).

Yours sincerely

## ANNEX A

### ATISN 12782 – Consideration For and Against Disclosure of Information

#### Section 40 – Personal Data

Clause 74.1 and Schedule 3.4 contain names and names within email addresses. Kim Mears is identified in clause 74.1 as the MD Strategic Infrastructure Development at Openreach. Her role is to an extent public facing and she can be publicly identified from her role so I believe her name can be released. I believe other personal information should be withheld and my reasons as set out below.

Section 40 of the Freedom of Information Act sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 (DPA).

Personal data is defined in Section 1(1) of the DPA as:

*“personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”.*

We have concluded that, in this instance, the withheld information amounts to third party personal data.

Under Section 40(2) of the FOI Act, personal data is exempt from release if disclosure would breach one of the data protection principles. We consider the principle being most relevant in this instance as being the first.

#### **The first data protection principle.**

This states:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -*

*(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

We consider that the information highlighted falls within the description of personal data as defined by the DPA and that its disclosure would breach the first data protection principle. The first data protection principle has two components:

1. Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met

Guidance from the Information Commissioner’s Office (Personal information (section 40 and regulation 13) v 1.4) states:

*The starting point is to consider whether it would be fair to the data subject to disclose their personal data.*

*If disclosure would not be fair, then the information is exempt from disclosure.*

This approach was endorsed by the Court of Appeal in the case of Deborah Clark v the Information Commissioner and East Hertfordshire District Council where it was held:

*“The first data protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA” (paragraph 63).*

The information captured by this request amounts to the personal data of individuals including representatives of Openreach. I believe that other than Kim Mears these individuals do not have any public facing roles and would have the reasonable expectation that their personal data would be kept confidential and not released into the public domain in this context. I believe that Kim Mears email address is not publicly available and should be withheld.

Thus, I believe release of this information would be unfair and so breach the first data protection principle. For that reason, the information is being withheld under section 40(2) of the Freedom of Information Act. This is an absolute exemption and not subject to the public interest tests.

### **Section 41 – Information Provided in Confidence**

This applies to all of the information identified as commercially sensitive as set out in schedule 3.2. In relation to the information I am considering releasing this applies to:

- Schedule 3.1: Clause 2 Grantee Solution
- Schedule 4.1: Appendix 2 - Project Plan and Appendix 4 – Survey Assumptions
- Schedule 5.3: Appendix 1 – Project Model

Section 41 sets out an exemption from the right to know where the information requested was provided to the public authority in confidence and disclosure of the information would give rise to an actionable breach of confidence.

Section 41 states that:

*(1) Information is exempt information if—*

*(a) 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.*

Some information contained in the grant agreement was originally provided to the Welsh Government in confidence.

This information was identified as commercially sensitive at the time of the grant agreement award and therefore that it can be considered to have been provided in confidence.

### **Section 43(2) – Commercial Interests**

This applies to:

- Part of clause 57.2.2
- Parts of schedule 3.1: The Grantee Solution Design, Compliance Matrix, Test Strategy and parts of the Speed and Coverage Template.
- Parts of schedule 4.1: Appendix 2 - The Project Plan and Appendix 4 - Survey Assumptions
- Parts of schedule 4.3: Relief events
- Parts of schedule 5.3: Appendix 1 – The Project Model and Appendix 2 the financial memorandum
- Parts of Schedule 8: Community Benefit and Sustainability - BT Employee Privacy Notice

This exemption states that:

*(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

Section 43 is a qualified (public interest tested) exemption. This means that in order to engage it, I must show that the public interest in withholding the information is greater than the public interest in releasing it. I have therefore given consideration to the effects of disclosure of the information to the world at large as the information is made available to anybody and everybody, not just the requestor. As such, when considering your request I have considered the wider effects of disclosure rather than any personal interest you may have in being provided with the information.

#### *Prejudice test*

The information redacted is commercially sensitive and the release is likely to be prejudicial. I have considered whether releasing the information set out above will be prejudicial.

I consider the information to be commercially sensitive for a number of reasons:

- Releasing the project plan, compliance matrix, test strategy, survey assumptions and grantee design solution could give a commercial advantage to the competitors of the BT.
- Releasing the project model could be damaging to the BT's business interests.
- Releasing project plan could also create unintended expectation or reliance by third parties.

- Releasing part of clause 57.2.2 would reveal BT's total aggregate liability for all loss of or damage to the WM Premises or any real property, real assets, equipment or infrastructure of the Welsh Ministers or any third party (including any Other Beneficiary where applicable) caused by the Grantee's Default in respect of any one event.
- The speed and coverage template contains information about BT's Bid Response scoring. Releasing this information could prejudice BT's commercial interests.
- The financial memorandum contains information about BT's costs, strategy, business and affairs and its network deployment. Releasing this information could prejudice BT's commercial interests.
- Schedule 8 contains information about how BT's uses the personal information collected about employees. Releasing this information could prejudice BT's commercial interests.
- The relief event information contains commercially sensitive information. releasing this information could prejudice BT's commercial interests.

*Public interest arguments in favour of release*

Public funding was invested in the Superfast Cymru project. I acknowledge there is a public interest in openness and transparency within government, particularly in terms of ensuring transparent and accountable government by disclosing how the Welsh Government spends public money. It is also recognised that the public have a right to know that the Welsh Government is investing public money wisely and that the awarding of public sector contracts is done fairly and within the rules. Further the Openreach network funded through Superfast Cymru is used to provide services to the public and businesses across Wales and therefore there is a public interest in the project.

*Public interest arguments in favour of withholding*

There is a public interest in ensuring that any private sector body can continue to enter into arrangements with the public sector and that they can compete fairly when offering services to the public sector or partnering with them. Disclosure of some information in the grant agreement would affect a private body's ability to tender for other projects on a level playing field. A fair tender process will help to ensure that the public sector and end users get best possible value.

There is a strong public interest in sensitive information being protected throughout the lifetime of a contract. Suppliers could be reluctant to provide sensitive information as part of large government projects in the knowledge that they could be disclosed.

Therefore, I consider that the public interest in maintaining the exemption outweighs the public interest in disclosure.