



18 September 2017

Dear ,

Request for Information – ATISN 11330

I wrote to you on 12 June regarding your request for information. Please accept my apologies for the delay in providing you with this response.

In relation to our BT Openreach Superfast contract, you asked for the:

1. BT Openreach Superfast broadband original tender.
2. Welsh Government response to tender.
3. BT Openreach Superfast contract with the Welsh Government.
4. Costs to the public sector.
5. Deliverables including any clause that limits or focuses delivery to specific demographic / geographic groups, particularly the scope of the contract (deliverables) and clauses that might relate to limitations or distinction between the roll-out and what might be considered 'network up grade'.
6. Milestones including payment milestones.
7. Performance metrics / parameters and how measured / audited.
8. Payments and deliverable evaluation and approval for payment.
9. Tender evaluation documentation including names of all respondents, criteria and scoring.
10. Names and details of individuals, including their technical and business / contractual credentials, who were involved in the evaluation and decision making process that ultimately awarded the contract to BT Openreach, including any declared interests in BT / Openreach or any of the respondents.

I confirm we hold information captured by your request but have concluded that some of the information you have requested is withheld from disclosure either in full or in part. Please see Annex A for details of what is being released and what is being withheld.



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Given the volume of the information I am releasing, I am unable to send it to you electronically. Please could you let me have your postal address so that I can send you the information through the post.

For question 4, information in relation to costs can be found throughout the Contract. Details of the actual total costs can be found at Clause 21.

For question 5, information is covered in Clause 7 of the Contract (detail is given in schedule 2).

For question 6, information about the milestones is contained in Clause 9 of the Contract (detail is given in schedule 8).

For question 7, information about performance is highlighted throughout the Contract but Clause 14 and Schedule 9 are most pertinent to your request.

For question 8, the information is covered in various clauses some of which is contained within Clause 18 and Schedule 6 of the Contract.

Full reasoning for the application of the exemptions referred to in Annex A is given at Annex B.

You may wish to be aware that since our contract with BT was signed, changes have been made. The key changes which may be relevant to your request are provided at Annex C.

Lastly, Schedule 4 contains a list of over 50,000 postcodes that make up the Superfast Cymru intervention area. Given the scale of the information I have not provided this to you as a matter of course. However, if you would like to receive this list please let me know and I will be happy to provide it.

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. Please remember to quote the ATISN reference number above.

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

Yours sincerely

SUMMARY OF INFORMATION BEING RELEASED AND WITHHELD

Exemptions applied relevant to the Freedom of Information Act 2000:

Section 40 (personal data)

Section 41 (information provided in confidence)

Section 43 (commercial interests)

Section 44 (prohibitions on disclosure)

		Released / Withheld
1.	BT Openreach Superfast broadband original tender.	Withheld in full under s41 and s43
2.	Welsh Government response to tender.	Withheld in full under s41 and s43
3.	BT Openreach Superfast contract with the Welsh Government.	Withheld in part under s41, s43 and s44
4.	Costs to the public sector.	Released in full
5.	Deliverables including any clause that limits or focuses delivery to specific demographic / geographic groups, particularly the scope of the contract (deliverables) and clauses that might relate to limitations or distinction between the roll-out and what might be considered 'network up grade'.	Withheld in part under s41 and s43
6.	Milestones including payment milestones.	Withheld in part under s41 and s43
7.	Performance metrics / parameters and how measured / audited.	Released in full
8.	Payments and deliverable evaluation and approval for payment.	Withheld in part under s41 and s43
9.	Tender evaluation documentation including names of all respondents, criteria and scoring.	Withheld in full under s41, s43 and s40
10.	Names and details of individuals, including their technical and business / contractual credentials, who were involved in the evaluation and decision making process that ultimately awarded the contract to BT Openreach, including any declared interests in BT / Openreach or any of the respondents.	Withheld in full under s40

ATISN 11330 – APPLICATION OF EXEMPTIONS

Section 40 – Personal Data

This exemption applies to questions 9 and 10 of the request as outlined in Annex A.

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 any of their declared interests, in BT / Openreach or any of the respondents. We believe that 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.

Thus, we 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 questions 1, 2, 3, 5, 6, 8 and 9 of the request as outlined in Annex A, either in full or in part, as outlined below. Schedule 2, annex 1, schedule 6 and schedule 8 of the contract are pertinent.

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.*

The information contained in the tender documents, schedules and annexes highlighted contains detailed financial and technical project information. As such the information is neither trivial nor is it, at this point in time, publicly accessible. Some information contained in the contract was originally provided to the Welsh Government in confidence as part of the procurement process. Similarly information contained in the tender documents submitted by BT was provided to the Welsh Government on the

explicit understanding that access to that information would be closely restricted. BT has not provided consent for us to make this information available to any party who asks for it. .

Consequently I believe that the information is owed a legal duty of confidence and that disclosure without consent would result in an actionable breach of that confidence.

Section 41 is an absolute exemption and is not, therefore, subject to the public interest test.

Section 43(2) – Commercial Interests

This applies to questions 1, 2, 3, 5, 6, 8 and 9 of the request as outlined in Annex A, either in full or in part. Terms and Conditions 18.4-18.8, 18.10, 20.1, 24.1; Schedule 2; Schedule 2, Annex1; Schedule 5; Schedule 6; Schedule 8 and Schedule 12 and appendix 1 of the contract are pertinent.

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).*

As identified above, much of the information relates to the financial and technical aspects of the project. If this information was to be placed into the public arena, at this time, I believe that it would be likely to prejudice BT's ability to fairly engage in future tender exercises to roll out superfast broadband to other areas in the UK.

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.

In relation to question 3, 5, 6 and 8, where information is withheld in part:

Prejudice Test

Information that has been redacted is commercially sensitive information which would be likely used to the advantage of BT's competitors. BT is still actively competing with other companies to win similar business. There is a pipeline of opportunities currently available for BT to bid for in order to provide similar services to other public authorities.

Disclosure of detailed financial information about the costs of the project and detailed information about BT's network would likely provide BT's competitors with valuable commercial information that would provide them with a competitive advantage over BT and which would be likely prejudicial to future bids for public funding and the continued commercial roll-out of BT's network.

Public interest arguments in favour of release

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.

Public interest arguments in favour of withholding

The information is commercially sensitive which, if released, would be likely to be prejudicial to the commercial interests of BT as it is likely it would be used to the advantage of BT's competitors. As stated above, BT is still actively competing with other companies to win similar business. There is a pipeline of opportunities currently available for BT to bid for in order to provide similar services to other public authorities.

Disclosure of detailed financial information about the costs of the project detailed information about BT's network would be likely to provide BT's competitors with valuable commercial information that would provide them with a competitive advantage over BT and which would be prejudicial to future bids for public funding and the continued commercial roll-out of BT's network.

I am satisfied that disclosure of the redacted information would be likely to result in BT failing to compete in the market place and thus would be likely to prejudice its commercial interests. Whilst the information may be of interest to those working in direct competition with BT, I cannot see any wider public interest in releasing the redacted information. As such, I have concluded that the public interest in withholding the redacted information outweighs that in releasing it and this exemption is therefore engaged.

KEY CHANGES

ATISN 11330 Changes to the contract agreement

Below is the new text for each clause.

Clause 5.3.2

that Broadband Coverage is achieved throughout the Contract Intervention Area by 30th June 2017 and in any event by the Drop Dead Date, as follows:

Clause 5.3.3

For the avoidance of doubt and notwithstanding any other term to the contrary the sole right and remedy for the Welsh Ministers if the Grantee fails to achieve Broadband Coverage at 30th June 2017 and the Drop Dead Date is set out in clause **Error! Reference source not found.** below.

Clause 7.5.2

The Grantee undertakes that it will carry out Implementation Works in Value Zones as follows:

In Financial Year 2013 / 2014, in two (2) Value Zones;

In Financial Year 2014 / 2015, in twenty per cent (20%) of the remaining Value Zones;

In Financial Year 2015 / 2016, in thirty per cent (30%) of the remaining Value Zones

During Financial Year 2016 / 2017 and up to 30 June 2017, in the remaining Value Zones.

Clause 7.6

Annual Implementation Targets:

The Annual Implementation Targets in respect of total Premises Passed for each of Financial Years 2013 / 2014, 2014 / 2015, 2015 / 2016, 2016 / 2017 and 2017 / 2018 are set out in Schedule 2 (Quarterly Targets).

The Annual Implementation Targets in respect of Priority Areas (excluding Value Zones) for Financial Year 2013 / 2014 are set out in Schedule 2 (Quarterly Targets).

The Annual Implementation Targets in respect of Priority Areas (excluding Value Zones) for Financial Years 2014 / 2015, 2015 / 2016, 2016 / 2017 and 2017 / 2018 will be set by the Grantee no later than 31st October 2013, 31st July 2014, 31st July 2015 and 1st August 2015 respectively (and they shall be recorded in Schedule 2 (Quarterly Targets)).

The Grantee must carry out the Broadband Works in order to meet each of the Annual Implementation Targets by the relevant Completion Target Date. Notwithstanding any other term to the contrary, the sole right and remedy for the Welsh Ministers if the Grantee fails to achieve any Annual Implementation Target is set out in clause **Error! Reference source not found.** below.

Clause 7.7

Quarterly PP Target: The Quarterly PP Targets for the Financial Year 2013 / 2014 are detailed in Schedule 2 (Quarterly Targets). The Grantee may, no later than 30th September 2013, review and amend those Quarterly PP Targets (and Schedule 2 (Quarterly Targets) shall be amended appropriately), provided that the aggregate of the Quarterly PP Targets shall be the same as the Annual Implementation Target for that Financial Year for total Premises Passed as specified by the Grantee under clause 0. Quarterly PP Targets for the Financial Years 2014 / 2015, 2015 / 2016, 2016 / 2017 and 2017 / 2018 will be set by the Grantee no later than 31st October 2013, 31st July 2014, 31st July 2015 and 1st August 2015 respectively (and they shall be recorded in Schedule 2 (Quarterly Targets)), provided that the aggregate of the Quarterly PP Targets in each such Financial Year shall be the same as the Annual Implementation Target for that Financial Year for total Premises Passed as specified by the Grantee under clause 0. Unless changed by agreement between the Parties pursuant to paragraphs 6 and 7 of Schedule 3 (Relationship Management), the Quarterly PP Targets set out in Schedule 2 (Quarterly Targets) are binding on the Grantee. Notwithstanding any other term to the contrary, the sole right and remedy for the Welsh Ministers if the Grantee fails to achieve any Quarterly PP Target is set out in clause **Error! Reference source not found.** below.

Clause 7.15

The Parties acknowledge that the Contract Intervention Area was increased by Change 16 however, the Grantee was not able to survey the new Premises and postcodes set out at tab 2 of Schedule 4 prior to their addition to the Contract Intervention Area. Accordingly, the Parties agree that the mechanism set out in this clause shall apply to a maximum of 2,289 Premises within tab 2 of Schedule 4 ("**New Premises**"):

the Grantee shall conduct field surveys and planning of the New Premises;

the Grantee shall be entitled to charge for the field surveys and planning of the New Premises. The Parties agree that the cost of the field surveys and planning are Eligible Costs (whether the New Premises remain within the Contract Intervention Area or not);

following the field surveys and planning the Grantee will report to the Welsh Ministers on the cost of deployment on a per New Premise basis. If the cost of deployment to any New Premise is above the Premises Cap then the Parties agree that they will complete a Change in accordance with the Change Control Procedure to remove such New Premises from the Contract Intervention Area by 30 December 2016. For the avoidance of doubt, the Premises Cap Maximum is not relevant to any New Premises removed in accordance with this clause; and

if any New Premises are removed from the Contract Intervention Area by this clause then the Maximum Grant will be reduced by the number of New Premises removed multiplied by the unit rate that is agreed by the Parties and set out in the Financial Model.

Clause 21.2

Maximum Financial Contribution for 90% Broadband Coverage: Under no circumstances will the maximum Financial Contribution (excluding the Financial Contribution for Marketing Activities) payable to the Grantee under this Agreement for achieving Broadband Coverage in not more than ninety per cent (90%) of Premises within the Contract Intervention Area exceed two hundred and fourteen million four hundred thousand pounds (£214,400,000), that figure of ninety per cent (90%) to consist of the following:

Clause 21.3.1 and 21.1.2

Where Broadband Coverage is achieved in less than ninety per cent (90%) of Premises within the Contract Intervention Area, using the formula

$$[(P / 90\% \text{ of the total number of Premises in the Contract Intervention Area}) \times £214.4m]$$

Where Broadband Coverage is achieved in more than ninety per cent (90%) but less than ninety five per cent (95%) of Premises within the Contract Intervention Area, using the formula

$$[£214.4m + (P - 90\% \text{ of the total number Premises in the Contract Intervention Area}) / 5\% \text{ of the total number of Premises in the Contract Intervention Area}) \times £8.3m]$$

Schedule 1

DEFINITIONS AND INTERPRETATION

Part 1. – DEFINITIONS

Additional Grantee Expenditure is made up of:

- (a) Qualifying Capital Expenditure ; and
- (b) Deployment Operating Expenditure, which has not attracted a Financial Contribution;

Contract Intervention Area means the entire dataset consisting of Premises and postcodes set out in Schedule 4 (Contract Intervention Area) in respect of which the Grantee is obliged to carry out Broadband Works pursuant to this Agreement. For the avoidance of doubt, the tabs of Schedule 4 (Contract Intervention Area) under the headings “Pre Change 16 Postcodes” and “Post Change 16 Postcodes” list the total Contract Intervention Area and

two tabs are used only for the Parties' ease of reference in distinguishing to which Premises and postcodes were included by Change 16;

**Deployment
Expenditure**

Operating the amount of Grantee incremental expenditure that cannot be capitalised that is incurred and directly attributable to bringing the wholesale access infrastructure to the location and working condition necessary for its intended use including the management of the programme during the Implementation Phase, capped at the amount set out in the standalone SEP Financial Model inserted into the Agreement by CN016 under 'FTTC/FTTP Deployment Opex' and reported in the Financial Model to the extent such Deployment Operating Expenditure is incurred in respect of Premises Passed in accordance with CN016;

Drop Dead Date

means 30th December 2017;

Maximum Grant

means two hundred and twenty four million four hundred thousand pounds (£224.4m);

New Premises

has the meaning set out in clause 7.15;