

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

Decision notice

Date: 16 January 2019

Public Authority: Welsh Government

Address: Freedom.ofinformation@gov.wales

Decision (including any steps ordered)

1. The complainant requested information about the siting of a particular communications cabinet. The Welsh Government stated it did not hold some of the information requested and withheld information about costs under section 43 of the FOIA. During the course of the Commissioner's investigation the Welsh Government agreed that the request was for environmental information and reconsidered the request under the EIR. The Welsh Government maintained that it did not hold information relating to the siting of the cabinet and confirmed that it considered information held relating to costs to be exempt under regulation 12(5)(e) of the EIR. The Commissioner's decision is that, on the balance of probabilities, the Welsh Government does not hold any further recorded information relevant to the request. The Commissioner is also satisfied that the Welsh Government has correctly applied regulation 12(5)(e) to the withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 17 October 2017, the complainant wrote to the Welsh Government and requested information in the following terms:

"I'm looking for information you hold regarding the FTTC cabinet #6 at the Ammanford exchange. This cabinet is located at Margaret Steet,

Ammanford, Carmarthenshire, SA18 2NP and was commissioned in July 2015 as part of the Superfast Cymru programme.

Please you provide details of the plans that you hold for the siting of this cabinet, including all correspondence with local and town councils.

Additionally please detail how much this development cost and identify which budget(s) the funds were allocated from (the cabinet's signage states that this was funded by Welsh Government as well as the European Regional Development Fund). If external partners contributed (labour, services in kind etc) then please identify the value of those fees too".

3. The Welsh Government responded on 14 November 2017 and advised that it was considering the application of section 43 of the FOIA to the information requested but it needed further time to consider the public interest test associated with the exemption.
4. The Welsh Government provided a further response on 7 December 2017 and stated that it did not hold any information about the siting of the cabinet, including any correspondence with local and town councils. The Welsh Government confirmed that it held information about costs and budgets but it was considered exempt under section 43 of the FOIA.
5. On 5 February 2018 the complainant requested an internal review of the Welsh Government's refusal to disclose information relevant to the request. He disputed the application of section 43 of the FOIA to information about costs and budgets. In addition, he suggested that information relating to the siting of the cabinet may be held by BT *on behalf of* the Welsh Government in accordance with the contract between the parties.
6. The Welsh Government provided the outcome of its internal review on 26 February 2018. It confirmed that information about the siting of the cabinet, and correspondence with parties, was not considered to be information held by BT on its behalf. In addition, the Welsh Government upheld its decision that section 43 applied to information held about costs and budgets.

Scope of the case

7. The complainant contacted the Commissioner on 23 April 2018 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the Welsh Government agreed that the request was for environmental information

and reconsidered the request under the EIR. The Welsh Government maintained that it did not hold information relating to the siting of the cabinet and confirmed that it considered information held relating to costs to be exempt under regulation 12(5)(e) of the EIR.

9. The scope of the Commissioner's investigation into this complaint is to determine whether the Welsh Government holds any further information relating to the siting of the cabinet and correspondence with third parties, and whether the Welsh Government correctly withheld information regarding the cost of the development.

Reasons for decision

Is the information environmental?

10. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

11. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
12. The information requested by the complainant relates to the re-positioning of a communications cabinet on a public road. The Commissioner considers that the repositioning of such a cabinet is a measure/activity that it is likely to affect the elements of the environment, and in particular land and landscape. The Commissioner

is therefore of the view that the request falls to be considered under the EIR.

Regulation 5 – Duty to make environmental information available on request

13. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
14. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner consider the actions taken by the authority to check that the information is not held and any other reasons offered by the authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held, along with any representations submitted by the complainant. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
15. Part of the request in this case included information about the budget from which the funds in respect of the development were allocated. The Welsh Government explained to the Commissioner that it interpreted this part of the request to refer to the budget and funding associated specifically with the work to site the cabinet referred to in the request as opposed to the overall budget for the Superfast Cymru scheme. The Welsh Government explained that it interpreted the request in this way in light of the reference to "*this development*", which it understood to mean the complainant only wanted information in relation to the siting of Cabinet 6 (referred to at the start of the request). Further, it interpreted the reference made in the request to Welsh Government and European Regional Development Funding (ERDF) as a request for the BT budget to be broken down by funding body.
16. In the overview to her guidance 'Interpreting and clarifying requests'¹, the Commissioner says that public authorities should interpret information requests objectively. They must, she explains, avoid reading into the request any meanings that are not clear from the wording. The Commissioner continues by stating that the authority must answer based on what the requester has actually asked for, and not on what it

¹ <https://ico.org.uk/media/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

thinks they would like, should have asked for or would be of most use to them.

17. Based on the fact that the complainant stated that he was "*looking for information you hold regarding the FTTC cabinet #6 at the Ammanford exchange*", the Commissioner considers that the Welsh Government's interpretation of the request to relate to costs and budgets associated with the work on this specific cabinet to be an objective one.

18. The Welsh Government provided the Commissioner with the following background information about the funding provided to BT/Openreach in respect of the scheme:

"In simple terms for the period of the deployment phase of the contract BT/Openreach submitted claim packs for premises that had been provided with access to fast broadband as a result of the project. The information contained in these packs was then subject to a testing and verification process. Once this process had been completed BT submitted financial claims to the Welsh Government for the premises that were identified in the packs as being capable of acceptance. BT/Openreach then received a standard payment for each premises. Following the completion of the deployment phase a defrayment exercise is being carried out to reconcile the payments made to BT/Openreach for tested and verified premises against the actual costs".

19. In its response to the Commissioner the Welsh Government indicated that it does not hold information about budgets for the cabinet in question because "*BT is not obliged to provide information about the siting of cabinets and this includes budgets. That information is beyond the strategic level of defrayment costs detail which the Welsh Government is responsible for and this should have been made clear to the requestor*".

20. The Welsh Government confirmed that it holds information about the funding and budget for the Superfast Cymru Scheme as a whole, including information about contributions from the UK Government and the ERDF. The funding provided to BT/Openreach for the scheme as a whole comes out of a budget held by the Economy, Skills and Natural Resources Group within the Welsh Government. However, the Welsh Government does not hold information about the BT/Openreach budget in respect of individual communications cabinets because it "*does not have access to information about the BT/Openreach budget, it follows that we would not have a breakdown of the budget by funder. This assumes that BT/Openreach themselves have that split*".

21. The Welsh Government advised the Commissioner that it would not ordinarily hold information on the siting of a particular cabinet including

related correspondence with local and town councils about the issue. However, it undertook relevant searches and consulted verbally with the officers concerned. Searches were undertaken within iShare (the Welsh Government's electronic document records management system) and no recorded information was found. The results of the searches confirmed that the Welsh Government holds information within a database relating to costs only and no information is held relating to decisions and correspondence around the actual siting of the cabinet.

22. In his complaint to the Commissioner, the complainant alleged that information relating to the siting of the cabinet and correspondence with town councils would be held by British Telecom (BT) on behalf of the Welsh Government, in accordance with the contract in place between the parties.
23. The Commissioner raised this point with the Welsh Government and a summary of their position on this matter is below.

"The Welsh Ministers entered into a Grant Agreement for the provision of a Next Generation Broadband Network with BT Plc on 19 July 2012 ("the Grant Agreement").

Under the Grant Agreement, BT has been engaged to build, run and maintain a network to deliver superfast broadband services to residential and business premises within a defined "Intervention Area". The "Intervention Area" identifies the geographic area to which the commercial market does not intend to deliver superfast broadband services (i.e. 30 Mbps+) and the purpose of the project is to fill this gap to make such services more widely available. The required State Aid approvals for the project are in place.

Grant funding is provided under the Grant Agreement to cover the costs incurred by BT of building the network. Under the Grant Agreement, BT has to achieve a minimum target of providing superfast broadband services to 90% of the premises within the "Intervention Area". Subject to meeting that target and within the confines of the "Intervention Area", BT has significant discretion to decide what to build, where and when. There is a verification process to ensure that the required broadband speeds are available to premises and BT also has to provide evidence to support the costs it incurs in building the Network (referred to in the Grant Agreement as Eligible Costs)".

24. The Welsh Government confirmed that there are a number of provisions within the Grant Agreement which require BT to provide specific categories of information to the Welsh Ministers, but none of the provisions cover the specific information requested in this case. The obligations around provision of information focus on BT establishing that

specific premises have access to superfast broadband services at required speeds and the costs BT has incurred. The Welsh Government confirmed that it is the responsibility of BT to determine the location of new cabinets and consult with third parties, as appropriate. These provisions are confirmed in various clauses within the Grant Agreement. There are no obligations that would require BT to provide information about the siting of specific cabinets, budgets for a specific cabinet or any correspondence it has exchanged with third parties about the siting of a cabinet. As such, the Welsh Ministers would not be entitled to require BT to provide such information under the terms of the Grant Agreement.

25. Based on the representations relating to the searches undertaken, and the other explanations, provided by the Welsh Government the Commissioner is satisfied that on the balance of probabilities, the Welsh Government does not hold information relating to budgets and funding specifically in respect of the cabinet in question or correspondence with third parties about the siting of the cabinet. Although BT might hold information relevant to these matters, based on the evidence available to her and having considered the provisions within the Grant Agreement relating to the responsibility for decisions around the siting of cabinets, the Commissioner is also satisfied that any information which BT might hold relating to the subject matter would not be held on behalf of the Welsh Government.
26. Based on the above the Commissioner is satisfied that on the balance of probabilities, the Welsh Government does not hold any further recorded information relating to the request, other than that which it has disclosed, or that which it has withheld under regulation 12(5)(e).

Regulation 12(5)(e) – confidentiality of commercial information

27. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
28. The Commissioner considers that in order for this exception to be applicable there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?

- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

29. For information to be commercial or industrial in nature, it will need to relate to a commercial activity of the third party concerned. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
30. The withheld information in this case comprises costing information about the siting of the communications cabinet referred to in the request. As part of the contract agreement in place between the parties, BT provides the Welsh Government with detailed financial breakdowns of costs. The information includes pricing and the typical costs incurred by BT for undertaking the work in question. The costs also demonstrate the margins made by BT on projects of this nature. The information forms the basis of a large scale defrayment exercise to ensure that only eligible expenditure is claimed and to reconcile funding provided to BT in respect of premises which have been enabled to receive the required fibre broadband speeds.
31. Having reviewed the withheld information and considered the Welsh Government's representations the Commissioner is satisfied that it is commercial in nature and therefore the first condition has been met.

Is the information subject to confidentiality provided by law?

32. In relation to this element of the exception, the Commissioner considers that 'provided by law' will include confidentiality imposed on any person under either the common law of confidence, contractual obligations or statute.
33. The Welsh Government considers that the confidentiality in this case is provided by virtue of the common law duty of confidence. The Welsh Government considers the withheld information to be sensitive commercial information that is neither trivial nor publicly accessible. The information was provided to the Welsh Government by BT solely for the purpose of undertaking the defrayment costs exercise referred to in paragraph 30 above. The information is marked as confidential and commercially sensitive and is provided by BT on the explicit understanding that access to the information is closely restricted.
34. In its dealings with the Welsh Government under the terms of the contract agreement, BT provides sensitive commercial information with

the expectations that its confidence will be respected. The Excel spreadsheet from which the withheld information has been extracted contains a legal notice outlining the confidential nature of the information. A confidentiality statement stating "*In Strictest Confidence – Commercially Sensitive Information*" is also given at the head of each worksheet.

35. The Commissioner notes that the information comprises financial information relating to how BT prices its services and the typical margins it makes on projects of this nature. As such she agrees that it is not trivial in nature. Furthermore she acknowledges that the information was provided to the Welsh Government with an expectation that it would be handled in confidence, and that it has not been shared widely. The Commissioner is satisfied that the information is subject to confidentiality provided by law and that the second condition has been met.

Is the confidentiality required to protect a legitimate economic interest?

36. In the Commissioner's view, in order to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
37. In her guidance on regulation 12(5)(e)², the Commissioner defines that legitimate economic interests "*could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income*".
38. The Welsh Government considers that disclosure of the withheld information would adversely affect the legitimate economic interests of BT. The Welsh Government confirmed that it had consulted with BT and provided the Commissioner with copies of exchanges it had had with BT about disclosure of the information in question. BT contends that disclosure of the withheld information:

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

"would provide our competitors – and in particular ISPs - with a significant amount of financial information relating to how we price our services, including, for example, the extent of margin BT typically makes on projects of this nature, right down to the margins made on and costs of individual component parts. This would reveal the assumptions and constraints that determine how BT carries out its commercial activities. Much of the financial information and assumptions they contain either replicate, or are directly derived from, the know-how and experience BT has developed as a result of the commercial roll out of the superfast broadband network. Their disclosure would therefore be prejudicial both to future public bids, as well as the continued commercial roll out of the network".

39. BT's position is that disclosure of the withheld information would provide its competitors with access to sensitive costs/pricing details which would significantly strengthen their negotiating position when seeking to access Openreach networks, or encourage them to lobby Ofcom to require Openreach to lower its prices. Any such reduction in its margins would reduce revenues and cause commercial detriment to BT. Disclosure would also weaken BT's position, relative to its competitors, when bidding to provide similar services to other public authorities in the future. The Welsh Government also pointed out that BT is still actively competing with other companies to win similar business.
40. The Welsh Government explained that if BT, the dominant player in the broadband market lost faith in the Welsh Government's ability to respect the confidence attached to commercial information it provides, it would have an impact on BT's readiness to bid for future contracts for the provision of similar services. The Welsh Government considers that mutual respect of such confidential information is important in light of the ongoing relationship between the two parties for the continued rollout of superfast broadband. If BT felt unable to bid for future broadband contracts it would severely restrict competition for tenders as only a few providers are able to deploy fibre broadband on the scale required in Wales. Any *"lack of competitive tension in the bidding process would have a detrimental impact on value for money for the public purse and the extent of the roll-out that could be achieved"*.
41. The complainant has argued that disclosure of costing information in respect of one specific communications cabinet is *"unlikely to damage BT's competitive standing"*. This is because *"there are many site-specific variables that the costs disclosed would give minimal insight into BT's operating practices, cost base or profit margins. A competitor would be extremely unwise to extrapolate this cost over a wider deployment, a competitor would have to replicate site surveys, and then second-guess if BT has treated this site as a loss-leader or technological beachhead"*.

42. In his complaint to the Commissioner, the complainant pointed out that he had made a similar request for costing information to a local authority and it had disclosed the information held. The Commissioner asked the Welsh Government to comment on this point, The Welsh Government explained that the information which another authority had disclosed was 'headline information' about the costs associated for a one-off re-siting of an existing telecommunications cabinet. The withheld information in this case is for the siting of a new fibre cabinet, the costs of which are not 'one off' and *"likely to be broadly replicable across off of the cabinets deployed under the Superfast Cymru project"*
43. The Commissioner has considered the representations submitted by the Welsh Government, BT and the complainant and the nature of the withheld information. She accepts that the withheld information consists of information of commercial value and a causal link between the possible and likely effects, and disclosure of the withheld information has been identified. The Commissioner therefore accepts that the confidentiality is required to protect the legitimate economic interest of BT.

Would confidentiality be adversely affected by disclosure?

44. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. She acknowledges that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified. The Commissioner has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the information

45. The Welsh Government acknowledges that there is a public interest in openness and transparency within government, particularly in relation to the expenditure of public money and ensuring that public money is invested widely.
46. The Welsh Government also recognises the strong public interest in the subject matter associated with the request ie public access to superfast fibre broadband. This is the reason why it entered into an agreement with BT to deliver the technology to enable the provision of fibre broadband to residential and business premises via the Superfast Cymru project. The Welsh Government pointed out that it regularly updates the

public on the progress of the project by publishing information on its website³. The Welsh Government explained that preparations are in hand for a successor scheme to extend the availability of superfast broadband to those premises not covered under either Superfast Cymru or other commercially driven roll-outs of telecommunications companies in the next three years. The Welsh Government confirmed that it would be publishing as much information as possible about the new scheme to enable the public to be kept up to date on which premises would be included in the scheme.

Public interest arguments in favour of maintaining the exception

47. The Welsh Government argues that there is a public interest in ensuring that companies such as BT can compete fairly and that there is competition for public sector contracts to achieve best value for money. The Welsh Government confirmed that BT is currently actively competing with other companies to win similar contracts. Disclosure would therefore be likely to prejudice BT's *"future bids for public funding and the continued rollout of their commercial network"*.
48. The Welsh Government is of the view that there is a public interest in ensuring that private companies such as BT that *"create a significant amount of jobs for the people of Wales, can so in the knowledge that its efforts will not be prejudiced by the untimely disclosure of commercially sensitive information"*. It acknowledges that the sensitivity of commercial information can reduce over time. However, in this case the information caught by the request was considered to be current.
49. The Welsh Government contends that disclosure of the costing information requested would constitute an actionable breach of confidence. This would not be in the public interest as it would be likely to deter other similar organisations from sharing confidential information with the Welsh Government in the future. It would also not be in the public interest for the Welsh Government to incur the costs of any ensuing legal action should one be brought for breach of confidence as a result of disclosure.
50. The Welsh Government is aware that some customers will unavoidably be disrupted as a result of work under the Superfast Cymru scheme to change over communications cabinets or other necessary infrastructure work required to provide superfast broadband. As such, arrangements

³ <https://gov.wales/topics/science-and-technology/digital/infrastructure/superfast-broadband/?skip=1&lang=en>

are made with local authorities to work with appointed contractors to minimise any disruption and advise affected parties. However, even when applying the presumption in favour of disclosure set out in regulation 12(2), the Welsh Government considers that:

"the public interest in this matter lies with the availability of superfast broadband rather than the costs associated with the siting of Cabinet #6. Given the subsequent prejudicial effect releasing this information would have on BT, the Welsh Government is of the view that releasing the information on costs for a single Cabinet would not improve the public's understanding of how this technology is being delivered within the Intervention Area, not [sic] would it provide an understanding of how some premises have not yet achieved superfast broadband. Rather, it would result in BT failing to compete in the market place and thus would prejudice its commercial interests. Whilst the information may be of interest to those working in direct competition with BT, the Welsh Government cannot see any wider public interest in releasing the withheld information".

Balance of the public interest

51. The Commissioner acknowledges that the subject matter associated with the request, ie the provision of superfast broadband connection to premises across Wales, is of significant interest to members of the public. Superfast broadband provision will allow people to browse the internet, access entertainment etc at faster speeds than a standard broadband connection. The Commissioner notes that a considerable amount of information has been made available to the public about various aspects of the Superfast Cymru scheme.
52. The Commissioner accepts the Welsh Government's view that that there is limited wider public interest in disclosure of information relating to the costs associated with the installation of one single communications cabinet under the Superfast Cymru scheme.
53. The Commissioner considers the timing of a request is an important factor when balancing the public interest arguments for and against disclosure. In this case she notes that, at the time of the request, BT was actively competing for similar business and would more than likely be entering into contract negotiations with other parties. The Commissioner has accepted that the withheld information would adversely affect BT's commercial interests in future negotiations, as disclosure would provide its competitors with information about pricing and the margins made on projects of this nature.
54. Having taken into account all of the public interest arguments for and against disclosure of the withheld information, the Commissioner has

concluded that the public interest in maintaining the exemption, and therefore protecting the commercial interests of BT and preserving its ability to compete fairly in a commercial market, outweighs the public interest in disclosure in all the circumstances of this case.

Right of appeal

55. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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

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