

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

Date: 15 April 2025

Organisation: Openreach Ltd

Address: 6 Gracechurch Street
London
EC3V 0AT

Decision (including any steps ordered)

1. The complainant has requested information about connections. Openreach Ltd did not respond. It subsequently confirmed to the Commissioner that it did not consider itself to be subject to the EIR.
2. The Commissioner's decision is that the request was for environmental information. He also finds that Openreach Ltd is subject to the EIR and was therefore under a duty to respond to the request.
3. The Commissioner requires Openreach Ltd to take the following steps to ensure compliance with the legislation.
 - Issue a response to the request in accordance with the EIR.
4. Openreach Ltd must take these steps within 30 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

5. On 16 September 2024, the complainant wrote to Openreach Ltd and requested information in the following terms:

“I request all your documentation and correspondence appertaining to the provision of fibre-based Internet communication to the village of Nateby, Lancashire, between August 2014 and August 2024.”
6. No response or acknowledgement was ever received.

Reasons for decision

Would the requested information be environmental?

7. Connecting a property to a telecommunications network is a measure or activity that, in the short term at least, has an impact on the elements of the environment. Either a cable must be laid underground connecting the property – requiring the disturbance and removal of soil – or overhead wires must be linked to the property – altering the landscape permanently and requiring the disturbance and removal of soil in order to erect pylons to carry the wires. Soil and landscape are two of the elements of the environment listed in regulation 2(1)(a) of the EIR.
8. For the avoidance of doubt, the Commissioner expresses no view, in this decision notice, as to whether Openreach Ltd does in fact hold any records relating to the village in question. However, if Openreach Ltd were to hold such records, they would be information on a measure or activity affecting the elements of the environment and, as such, would be environmental information.
9. Whilst the complainant referenced the Freedom of Information Act in his request, because the information requested would have been environmental, the request fell under the EIR.
10. For completeness the Commissioner notes that Openreach Ltd is neither a publicly-owned company, nor a body listed in Schedule 1 of FOIA and, as such, could not be covered by FOIA. Therefore the fact that the request fell under the EIR does not disadvantage the complainant – if anything it gave him a marginal advantage, as the EIR applies to some bodies that are not subject to FOIA.

Is Openreach Ltd subject to the EIR?

11. The EIR cover any request made, to a public authority, for environmental information. The EIR define public authorities as bodies that are:
 - a) government departments; or
 - b) otherwise subject to FOIA; or
 - c) carry out functions of public administration; or
 - d) are under the control of a body falling within one of the above categories.
12. Openreach Ltd is not a government department and it is not subject to FOIA.
13. Openreach Ltd is owned by British Telecommunications Plc (BT). The Commissioner is issuing a decision in a separate complaint today in respect of BT, finding that that company **is** a public authority for the purposes of the EIR. The Commissioner has included a copy of that decision with this one for the interest of the complainant and because he intends to rely on some of the same analysis.
14. In order for Openreach Ltd to be covered by the EIR, it would either need to be carrying out functions of public administration or would need to be controlled by BT.

Does Openreach Ltd carry out functions of public administration?

15. In order to meet this part of the EIR definition, a body must meet four criteria:
 - It must be doing a task that the state normally does, or would otherwise do.
 - The state must have required it to do this task in law.
 - The task must have an environmental impact.
 - It must have special powers, beyond those available in private law, for the purpose of carrying out the task.

Openreach Ltd's position

16. Openreach Ltd's position is that it is a telecommunications company. It does not carry out state functions

17. Openreach Ltd accepts that the services it provides are important to everyday life. However, other, arguably more important, services (such as food) are provided by private companies, not public authorities. The importance of Openreach Ltd's services to society does not make them functions of the state.
18. Any person wishing to provide a telecommunications network can apply to be registered with Ofcom. That is not the same as Ofcom (or any other part of the state) requiring that person to carry out any particular task.
19. BT accepts that the government has imposed a Universal Service Obligation on it in law. However, Openreach Ltd is not subject to the Universal Service Obligation. Nor is there anything else that it is required to do by law.
20. Furthermore, Openreach Ltd argued that its services did not "relate to the environment." It argued that this part of the test required its services to have some form of benefit to the environment, rather than simply having an environmental impact.
21. Finally, even if it had been required to do something by law, Openreach Ltd argued that it had no special powers to carry out that task.
22. Openreach Ltd noted that, as a registered provider of a telecommunications network, it was entitled to exercise the powers set out in Schedule 3A of the Communications Act 2003 (known as the Communications Code or Code Powers). However it also noted that around 270 other registered providers were able to exercise the same Code Powers.
23. In summary Openreach Ltd argued it was merely carrying on a business for the benefit of its shareholders.

The Commissioner's view

24. In the Commissioner's view, Openreach Ltd has been entrusted with functions that the state would normally carry out.
25. Openreach Ltd began life as a division of BT – though since 2017 it has been a company in its own right. BT, in turn, was established as a public limited company in 1984. Prior to that, it was a publicly-owned company: British Telecom. British Telecom was, in turn, originally part of the Post Office.
26. The Post Office was, prior to 1969 (when it became a publicly-owned company) a government department, overseen by the Postmaster-General – a cabinet position. From 1912 onwards, the General Post

Office was the monopoly supplier of the telephone service in most parts of the UK.

27. However, the state's interest in communications goes back much further than the invention of the telephone in the mid-19th century. The Postal Act of 1635 required that only persons directly authorised by the Postmaster General could carry or deliver letters. That statute was based on an earlier decree of 1609.
28. The role of Postmaster General traces its roots even further back than that. Sir Brian Tuke was appointed "Master of the Posts" in 1512, then "Governor of the King's Post" in 1517, with that title being used regularly from this point onwards. However there are records of official couriers having delivered letters for the King in the 15th century.
29. Nor is the British state an exception amongst European countries for its involvement in telecommunications. Telefónica in Spain and Deutsche Telekom in Germany, which both control large shares of their respective country's market, are, or were, state-owned (or majority state-owned) companies. For almost 100 years, France's government ran the Société Générale du Telephones, a nationalised telecommunications network.
30. Therefore the Commissioner is satisfied that telecommunications and, prior to that, communications more generally, is something that the state, both in the United Kingdom and in Europe, has historically exercised considerable control over – albeit that the UK and most European states have now liberalised their markets.
31. The Commissioner does accept that there is no law requiring Openreach Ltd to provide a telecommunications network. However, there is also no law requiring any specific water company to be either a water or a sewerage undertaker (or both) and it is established law that water companies are bodies performing functions of public administration for the purposes of the EIR.
32. The Water Industry Act 1991, allows either the Secretary of State or the Water Services Regulation Authority (OFWAT) to appoint a company to be either the water or sewerage undertaker (or both) for a specific area.
33. Those companies appointed as undertakers are subject to certain statutory duties including the requirements to provide water to premises that require it and to maintain a public sewer within their designated areas.
34. Under section 33 of the Communications Act 2003, any person wishing to provide an electronic communications network must notify Ofcom that they wish to do so. Ofcom may then issue a designation specifying that that person may provide an electronic communications network. A

person in receipt of a designation must also notify Ofcom of any significant changes they intend to make to their network, or if they intend to cease making it available for use. Section 35 of the same Act makes it an offence for any person to contravene section 33.

35. Section 45 of the Communications Act then allows Ofcom to impose various requirements upon providers such as requiring them to provide social tariffs or requiring them to make their infrastructure available or interoperable with the needs of other providers. Providers of public electronic communications networks are also subject to certain statutory duties such as the duty to take appropriate measures to identify, prepare for and reduce the risk of, a security compromise (section 105A).
36. Providers can then also apply for a direction from Ofcom (section 106), making them subject to the Communications Code. If Ofcom issues a direction, the provider is then entitled to exercise Code Powers, but is also subject to the restrictions of the Code and of any further conditions Ofcom wishes to impose upon them.
37. Therefore, in order to construct networks to provide telephone and broadband services, a provider would need both a direction under Section 33 of the Communications Act and a designation under section 106 of the same Act. Both the direction and designation must be provided by Ofcom – an arm of the state.
38. BT has a “deemed direction” from Ofcom. It was not required to apply to join the register because it already held these powers and functions as the previous monopoly supplier of telecommunications. Openreach Ltd is not separately listed on the register of those who have received a section 106 direction – though it has confirmed to the Commissioner that it is entitled to exercise Code Powers. The Commissioner assumes that Openreach Ltd is thus covered by the direction deemed to have been made for BT.
39. Taking a purposive view, whilst the Commissioner accepts that there are differences of form between the way the Water Industry Act works and the way the Communications Act works, there are no significant differences of substance.
40. Under both regimes, a provider cannot carry out its intended activity without the permission of the state. The permission of the state does not have to be granted on request but, when it is, the provider is then subject to additional duties in law. In both cases, once the state’s permission has been obtained, along with additional responsibilities, the provider is also granted additional statutory powers to assist in carrying out its duties.

41. In the Commissioner's view, the fact that the Water Industry Act requires an "appointment" and the Communications Act requires a "direction" or "designation" is a difference only of form – or perhaps even semantics.
42. Nor does the Commissioner consider that the fact each undertaker of water or sewerage (or both) then becomes the sole undertaker for that area makes a difference. This is merely a reflection of the two different industry models. Water and sewerage pipes are much larger than fibreoptic cables and it would be impractical to have multiple sewer systems serving the same area. In allowing multiple providers to operate, Ofcom is merely diversifying the risk of relying on a single provider.
43. Finally, The Commissioner also notes, for completeness, that the fact that around 270 or so other companies also have a direction from Ofcom makes no difference.
44. The Commissioner is therefore satisfied that the state, acting via Ofcom, by virtue of issuing a direction to BT (or strictly speaking, deeming it to have already received such a direction) and, by extension, Openreach Ltd, thereby exercising its statutory powers under section 106 of the Communications Act, has entrusted both BT and Openreach Ltd with administrative functions. This entrustment has a clear basis in statute. He is satisfied that this is sufficiently similar to the process of appointment of undertakers under the Water Industry Act and that those undertakers are deemed to have been entrusted with the powers of the state.
45. The Commissioner considers that providing a telecommunications network is something that has an environmental impact.
46. Just because a particular task isn't being carried out for the benefit of the environment doesn't mean that it does not have an environmental impact.
47. In order to create and maintain a network, Openreach Ltd can use mobile broadband – which involves emission of radio waves. However, in practice, most connections are made by the laying of new cables – usually underground. This requires the disturbance and removal of soil – meaning it directly affects the elements of the environment.
48. The Commissioner is therefore satisfied that Openreach Ltd has been entrusted, by the state, with functions of the state, related to the environment and that these functions have a statutory basis. The entrustment test is thus satisfied.

Special powers

49. Next, the Commissioner turns to the question of special powers.
50. As well as having been required by the state to do something, in order to be a public authority, an organisation must also have special powers.
51. Special powers do not have to be exclusive to those carrying out tasks on behalf of the state, nor do they need to be used exclusively for the purpose of carrying out those tasks. However, they must allow the person to do something that an ordinary person could not.
52. In everyday life, people have certain rights. For example, rights of way exist across privately-owned land allowing people to enter onto that land if they wish – providing they stick to a particular route.
53. People might also give themselves additional rights when they enter into contracts with each other by granting specific rights to one or both parties to the contract. For example, a contract for the supply of goods by person A to person B will often include clauses that mean that any goods, supplied by person A, remain person A's property until person B has paid for them. Should person B fail to pay, person A could enter person B's premises to recover the goods – or they could seek a court order requiring person B to pay. Equally, person B could be able to seek a court order recovering monies it had paid to person A if the goods supplied were faulty or failed to arrive in time. The right to petition a court to enforce a contractual right is not special – it is available to anyone.
54. Special powers have to be powers that go beyond those available to ordinary people. The power to make byelaws determining what people can and cannot do within a given area, the power to search premises, or the right to compulsorily purchase land, are all powers that are not available to an ordinary person.
55. The fact that multiple organisations may also possess such a power does not prevent it from being a special power.
56. Openreach Ltd has accepted that, having a deemed direction from Ofcom under section 106 of the Communications Act (by virtue of its relationship with BT), it is entitled to exercise Code Powers. Those powers include the right to install equipment on, over or under land – including where this obstructs access – the right to maintain such equipment and the right to enter onto private land if necessary for such purposes. Code Powers also allow telecommunications providers to install some infrastructure without obtaining full planning permission.
57. Openreach Ltd has pointed out that it can only exercise these powers in agreement with the owner of the land, in that the Communications Code

specifies that a Code Power should be exercised with the consent of the land owner.

58. However, Paragraphs 20 and 21 of the Communications Code allow Openreach Ltd (and other holders of Code Powers) to apply for a court order in the event that the land owner does not provide their consent. The court is then required to make a judgement about whether the harm to the land owner outweighs the public benefit of allowing Openreach Ltd to exercise its Code Powers.
59. Therefore, whilst it is technically true to say that Code Powers are exercised with the consent of the relevant land owner, the land owner will be aware that their consent cannot be withheld unreasonably. This means that some land owners will feel required to provide their consent even though they would prefer not to. Because consent cannot be withheld unreasonably, Openreach Ltd would also be placed in a much stronger negotiating position when determining what financial compensation, if any, the land owner should receive.
60. The Commissioner is therefore satisfied that Openreach Ltd has special powers, beyond those available under private law, that it can use to carry out the tasks entrusted to it by the state.
61. Openreach Ltd therefore satisfies the tests required to be a public authority under the EIR.

Is Openreach Ltd under the control of BT?

62. For completeness, or in the alternative, the Commissioner has also considered whether Openreach Ltd is "under the control of" BT. He considers that it would be.
63. The Commissioner recognises that the relationship between BT and Openreach Ltd is subject to considerable regulatory scrutiny by Ofcom. Openreach Ltd is subject to Significant Market Power conditions restricting its freedom to operate as it might wish. This is to ensure that Openreach Ltd treats all its customers fairly and does not abuse its market position to favour BT.
64. It is not the Commissioner's role to assess Openreach Ltd's (or BT's) compliance with its conditions. That is the role of Ofcom. However adherence to those conditions makes it no more or less likely that Openreach Ltd is under the control of BT for the purposes of the EIR – which is a different test to the one Ofcom is required to consider.
65. In order to be considered to be "under the control" of another body for the purposes of the EIR, an organisation must have no genuine

autonomy over its decision-making – because decisions are made by the controlling body.

66. As noted above, Openreach Ltd became a company in its own right in 2017 – having previously been a part of BT. Openreach Ltd still sits within the wider BT Group and although Openreach Ltd is a distinct legal entity, BT is its sole shareholder.
67. Following the split, Ofcom set up a specific task force to monitor Openreach Ltd and has published regular progress reports.
68. However, the Commissioner notes that the very fact that Ofcom feels it requires a dedicated unit, focusing on the relationship between Openreach Ltd and BT, would suggest that, absent such intense regulatory scrutiny and statutory underpinning, Openreach Ltd would not necessarily have genuine autonomy over its day to day decisions.
69. BT's own guidance on this matter points out that Openreach Ltd must act within the BT Group Strategic Framework and that BT Group retains economic control of Openreach Ltd.
70. The Commissioner also notes that Openreach Ltd appears to exercise its Code Powers as a subsidiary as BT, rather than as a separate entity.
71. Furthermore, as Openreach Ltd's sole shareholder, BT would have rights under company law – including the right to dissolve the company and retain its assets.
72. Clearly there are political reasons why BT would not wish to do that – not least because there would probably be a regulatory or even legislative response – but the fact remains that BT's commitments to give Openreach Ltd a degree of independence are voluntary. The theoretical position (as opposed to the practical position – which is the concern of Ofcom) is that BT has made a business decision to operate Openreach Ltd in a particular way and it could change that if it wished to.
73. On the basis of the available evidence, the Commissioner is satisfied that Openreach Ltd is under the control of BT in the sense required by the EIR.

Disposal

74. Openreach Ltd has received a request for environmental information and, as a public authority, it is required to either provide the environmental information it holds or issue a refusal notice.

Right of appeal

75. 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

76. 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.
77. 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

Roger Cawthorne
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