



**3 December 2015**

Mr Cameron Watt

Sent via email: [foi+request-1193-ff3ed9e4@righttoknow.org.au](mailto:foi+request-1193-ff3ed9e4@righttoknow.org.au)

Our Ref: 1516/14.11

Dear Mr Watt,

**FOI Application – UNI-DSL Specification**

I am writing in relation to your request made under the *Freedom of Information Act, 1982* (the FOI Act or the Act). Please see the attached Statement of Reasons detailing the decision-maker's findings. This decision is subject to review under sections 53A and 54 of the FOI Act. The Office of the Australian Information Commissioner's FOI Fact Sheet 12 – Your review rights may be found at the following [link](#).

If you have any questions or need to discuss your FOI application, please contact the writer on Tel. +61 2 8918 8596 or via email on [davidmesman@nbnco.com.au](mailto:davidmesman@nbnco.com.au).

Sincerely,

**David Mesman**

General Counsel

FOI, Privacy & Knowledge Management



## FREEDOM OF INFORMATION REQUEST – 1516/14

### IMPOSITION OF CHARGES DECISION STATEMENT OF REASONS

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#### **Background**

1. **nbn** is a government business enterprise (GBE), which has the mandate of realising the Australian Government's vision for the development of a next generation national broadband network.
2. **nbn** recognises that information is a vital and an invaluable resource, both for the company and for the broader Australian community. That is why **nbn** fosters and promotes a pro-disclosure culture, with the goal of creating an organisation that is open, transparent and accountable. In that light, members of the public will be able to access a large amount of information freely available on our website, which may be found at the following link: <http://nbnco.com.au>.
3. In addition, **nbn** manages its information assets within the terms and spirit of the *Freedom of Information Act 1982* (**the FOI Act** or **the Act**). We also endeavour to release information proactively, while taking into account our commercial and other legal obligations.
4. Subject to relevant exemptions, the FOI Act gives the Australian community the right to access documents held by Commonwealth Government agencies, as well as "prescribed authorities", such as **nbn**.
5. Under subsection 23(1) of the FOI Act, the Chief Executive Officer of **nbn** has authorised me, David Mesman, to make decisions about access to documents and related determinations under the FOI Act.
6. Under section 29(8) of the FOI Act, I am required to provide a Statement of Reasons for my decisions in relation to FOI applications. I am also required to set out my findings on any material questions of fact, referring to the material upon which those findings are based.

#### **Application Chronology and Terms of Request**

7. On 31 August 2015 **nbn** received your request from Mr Cameron Watt (**the Applicant**) made under the *Freedom of Information Act, 1982* (**the FOI Act**), in the following terms:

*"I seek access to UNI-DSL Specification which defines the minimum performance and functionality for CPE to be used and registered on the **nbn** network. Specifically I request the specification as it exists or is expected to exist at the time of launch in the following **nbn** published documents. WBA Product Catalogue - Product Technical Specification – **nbn** Ethernet Bitstream Service - FTTB ([link](#)) dated 24-08-2015 and 7/08/2015 notification – WBA Product Catalogue - Product Description - **nbn** Ethernet Bitstream Service (clean) ([link](#)) FTTN Commercial Launch Date"*

8. On 4 September 2015, the **nbn** FOI team wrote to the Applicant requesting that he clarify this request.
9. On 24 September 2015, the Applicant sought to clarify his request in the following terms:

*"I am writing to provide clarification to my original application as requested and in light of the recent updates and/or changes to the WBA2 documents referenced. For simplicity's sake, I refer you to the "WBA Product Catalogue - Product Technical Specification – **nbn** Ethernet Bitstream Service - FTTB/FTTN" document that is available from the following [webpage](#) at the time of writing. I would like to amend my request for copies of or answers to the following:*

*1a) The number of current "VDSL2 Equipment" registrations as it relates to section "7.1 VDSL2 Registration";*



1b) The list of registered "VDSL2 Equipment" and their registration information, including VDSL2 Equipment Vendor ID, System ID, Version Number and clear-text name as it relates to section "7.1 VDSL2 Registration";

2) The current "UNI-DSL specification" maintained by **nbn** and referred to in section "7.2 UNI Specification".

10. On 2 October 2015, the **nbn** FOI team wrote to the Applicant further requesting that he clarify this request as part of it remained unclear.

11. On 2 October 2015, the Applicant sought to further clarify this request as follows:

*"I have reviewed the document you linked regarding the "specification of the UNI-DSL interface" as mentioned in Section 7.2 on page 43 of linked document. The document unambiguously states that the "specification" consists of three parts which are listed in Section 7.2 as:*

- \* a DSLAM chipset and firmware list;*
- \* a list of mandatory DSL and OAM Features that the VDSL2 Equipment must support; and*
- \* a minimum rate-reach performance specification that the VDSL2 Equipment must achieve.*

*The document does not list DSLAM chipset or firmware, as such I do not see how it could be considered the complete "specification" in its entirety. For further clarification, I am seeking the complete definitive specification as would be needed should I want to make available "VDSL2 Equipment" subject to registration for use with **nbn** UNI-DSL services. I trust part 1(a) and 1(b) required no further clarification and will be considered in addition to the above."*

12. Following receipt of the Applicant's email of 2 October 2015, the **nbn** FOI team undertook discussions with relevant business units and sought to identify any documents within the scope of the Applicant's request (**the Requested Information**). In addition, the FOI team sought to obtain a general understanding of any commercial sensitivities associated with the potential release of information within the scope of this FOI application. The FOI team also considered any potential decision-making time, required third party consultations and other relevant issues.

13. On 16 October 2015, the **nbn** FOI team emailed the Applicant a processing fee deposit request in the sum of \$92.50.

14. On 9 November 2015, the Applicant emailed **nbn's** FOI team and requested that the FOI processing fees be reduced or waived in relation to his request. In support of this fee reduction request, the Applicant made the following comments:

*"I have received your response indicating that my FOI request has been assessed and the fee determined to be \$370, the majority of which is decision making time. I am surprised it was determined that 22 hours decision making time was required, presumably for the purpose of consultation with third parties. I would contend that there would be no expectation of privacy of the registration data as requested in my application, the **nbn** documents make no mention of confidentiality of the information. Together with the fact that it is a registration database of equipment for use on a nominally government owned network, I ask that the consideration be given to reducing the decision making time and/or waiving the fee levied.*

*Whatever the fee, I would like to claim a public interest exemption. I have been following the **nbn's** rollout and I am aware that the lack of the information being available in the public domain is having a detrimental impact on end users, even at this early stage. I believe the public interest exemption is applicable as the **nbn** Corporate Plan 2016 indicates that 38% of premises will be serviced by UNI-DSL (FTTN/FTTB) by completion or 4.5 million premises. This could conservatively affect 10 million people, which I believe qualifies as public interest.*



*End users will find the information requested in this FOI helpful as end users will pay for the UNI-DSL modem directly or indirectly. So any opportunity for end users to reuse existing premium equipment they might have is in their own interest. Particularly given that there may be unanticipated ramifications of using unregistered "VDSL2 Equipment" for fault finding or debugging.*

*I have already seen issues relating to "VDSL2 Equipment" for use on the **nbn** for a number of reasons, not limited;*

- \* Some RSPs are not providing end users with the "VDSL2 Equipment" for use on the **nbn** (sic), leaving the end user to source it,*
- \* Some RSPs provide reduced/limited feature set "VDSL2 Equipment" but the end user wants additional features or control (e.g. different VOIP provider)*
- \* Some employer's require their employees (**nbn** end users) to use employer provided hardware for integration with their IT systems (e.g. managed VPNs etc)*
- \* Some end users have existing premium hardware that might have been (sic) tested and registered since the time of purchase or might in the future by firmware upgrade*
- \* End users may need to update the firmware of their registered "VDSL2 Equipment" for additional finality or bug fixes, knowing what newer firmware is registered is helpful.*

*Although the above is a brief and non-exhaustive list of issues, I think it is pretty clear that the information requested in this FOI will be of significant public interest. I will be making this information readily available for public access, but also **nbn** will be required to publish this information as well under the Disclosure Log requirements. I look forward to the release of the information requested".*

15. On 3 December 2015, I made my processing charge decision, as outlined below.

### **Findings of Material Fact**

16. As the decision maker, I made certain findings of fact in relation to the processing time required to respond to this FOI request. In particular, I calculated a total (estimated) application cost of \$370, which included 22 hours of processing time. The total (estimated) application cost included a statutory discount for the first five hours of decision making. The calculation of the processing time took into account time estimated to:
- search & retrieve documents;
  - liaise with relevant business units regarding any commercial issues;
  - consider potential exemptions from the FOI Act; and
  - undertake relevant third party consultations as well as make a formal decision.
17. I considered the Applicant's contentions made in his fee reduction request, as set out above. In making my decision, I also reviewed the relevant sections of the FOI Act, *the Freedom of Information (Charges) Regulations 1982* (the Charges Regulation) and the Office of the Australian Information Commissioner (OAIC) [FOI Guidelines](#), case law and other relevant sources.
18. Furthermore, I considered **nbn's** commercial activities' exemption (**CAE**) or carve out from the application of the FOI Act. As per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act, documents that relate to **nbn's** "commercial activities" are not subject to the operation of the FOI Act. The following link summarises and provides [general background information](#) concerning **nbn's** CAE. That background document references two Office of the Australian Information Commissioner reviews that considered **nbn's** CAE in January 2012 (the [Internode Decision](#)) and again in July 2013 (the [Battersby Decision](#)). While I am not making a formal decision, there is a possibility that documents falling within the terms of this FOI request may be subject to the CAE, among other exemptions from release.



### **Formal Decision and Reasons – nbn’s Charging Policy**

19. As per Regulation 3 of the Charges Regulation, a decision-maker has the discretion to impose or not impose a charge, or impose a reduced charge for the processing of an FOI request. In addition, paragraph 4.5 of the FOI Guidelines indicate that:

*Agencies are not expected to exercise the discretion conferred by the Charges Regulations to impose a charge, unless in the agency’s view it is appropriate to do so. It is open to agencies to develop their own charging policy consistent with the legislation and these guidelines.*

20. **nbn** has developed an FOI charging policy in line with the FOI Act, the Charges Regulation and the FOI Guidelines. In line with the FOI Guidelines at paragraph 4.3, **nbn’s** FOI processing charges are not imposed in a manner that discourages applicants from exercising their rights to access. Rather, **nbn** seeks to ensure that its FOI charges fairly reflect the work involved in providing access to documents on request.
21. **nbn** adopted its charging policy in light of the company’s status as a GBE. Unlike Commonwealth Government agencies, **nbn** is expected to operate as a business entity. This is made clear in the [Commonwealth GBE Governance and Oversight Guidelines \(August 2015\)](#). In particular, the Guidelines’ “Mandate and Objectives” section indicates that the principal objective for GBEs is to add to shareholder value. To achieve this objective, GBEs are required to operate efficiently, at minimum cost for a given scale and quality of outputs, price efficiently and earn a commercial rate of return, among other matters.
22. Based on the above points, it is clear that **nbn** has an obligation to operate according to sound commercial and business practices. In that regard, good business practice dictates that **nbn** should put a value on the time spent by its staff and charge accordingly for its services. This reasoning applies equally to FOI applications, which require input from dedicated FOI staff, but also the expertise and efforts of other **nbn** staff members. As FOI processing takes staff time away from core commercial activities, it will have an impact on the company’s bottom line and its ability to meet corporate objectives. In that context, **nbn** should account for and place a value on staff members’ FOI processing efforts. To do otherwise would tend to undermine **nbn’s** obligations to operate as a commercial entity.
23. In relation to regulated FOI processing fees, the two most expensive activities are decision-making (\$20/hour) and search and retrieval (\$15/hour), which are roughly equivalent to current Australian minimum wages. For reference, the [national minimum wage](#) is currently \$17.29 per hour. In that context, it would not be unreasonable to assume that commercial entities would charge significantly higher rates for similar functions and tasks. It also follows that Government agencies and GBEs would also have much higher processing costs than those outlined in the Charges Regulation. In fact, Commonwealth Government agencies and GBEs do incur significantly more costs than those captured by the Charges Regulation. This was made clear in the AIC’s *Review of Charges under the Freedom of Information Act 1983* (February 2012) (**AIC Charges Review Report**), found at the following [link](#). In the AIC Charges Review Report, the Australian Information Commissioner indicated the FOI charges only represented 2% of the actual costs incurred by agencies and similar bodies since the Act’s commencement in 1982.
24. In light of the above points, it seems clear that FOI processing fees are offered at a discount to the actual costs incurred by agencies and GBEs, like **nbn**. In my opinion, Parliament has, in all likelihood, chosen these below-market rates, to reflect the public importance of FOI processes and particularly for its role in helping to inform public debate.
25. However, there are a number of key public interests served by Government agencies and authorities having the ability to charge for FOI processing time. In its [Submission to the OAIC Charges Review](#), **nbn** outlined its support of fees and charges and their importance to the FOI scheme, generally reflecting the points made below.
- Government agencies and authorities should be able to recoup some of their costs associated with processing FOI requests, while - at the same time, providing a key public services. This is in line with user-pays principles.



- The ability to charge for FOI processing time reflects Parliament's and the community's recognition that public servants' time is a valuable resource. Moreover, such resources should only be spent in appropriate public undertakings. This argument could be applied with even greater force to GBEs, which are expected to operate as any other commercial player in the marketplace. Similar reasoning animates section 24AA of the FOI Act, which enables decision-makers to refuse requests that would substantially and unreasonably divert agencies' resources from their operations.
- The ability to charge for the processing of FOI applications also ensures that applicants have a serious interest in the subject matter and are likely to proceed with the application to a final access determination. In addition, the requirement of a deposit tends to limit the scope of preliminary work "written off" by Government entities in the event that an applicant were to withdraw an FOI request. This dovetails with the public interest in not wasting government public resources, which are funded by Australian taxpayers.
- At page 5 of the AIC Charges Review Report, the AIC reinforced the importance of fees and charges, outlining that:

*Fees and charges play an important role in the FOI scheme. It is appropriate that applicants can be required in some instances to contribute to the substantial cost to government of meeting individual document requests. Charges also play a role in balancing demand, by focusing attention on the scope of requests and regulating those that are complex or voluminous and burdensome to process.*

#### **Public Interest Grounds and Other Relevant Matters for Fee Waiver or Reduction**

26. Subsections 29(4) and (5) of the FOI Act detail the process that agencies must follow if an applicant contends that processing charges should not be imposed or reduced. Those sections read as follows:

*(4) Where the applicant has notified the agency or Minister, in a manner mentioned in subparagraph (1)(f)(ii), that the applicant contends that the charge should be reduced or not imposed, the agency or Minister may decide that the charge is to be reduced or not to be imposed.*

*(5) Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:*

*a) whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*

*b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*

27. In addition, paragraph 4.49 of the FOI Guidelines states that an "agency is entitled to consider matters that weigh against those relied upon by an applicant." Paragraph 4.49 of the FOI Guidelines lists a number of instances where it is appropriate to impose an FOI charge.
28. As outlined above, I am required to consider whether the payment of the charge, or part of it, would cause financial hardship to the Applicant. I note that the Applicant has not advanced contentions in relation to financial hardship. Additionally, I have not identified any material upon which I could base a finding that the imposition of the charge could cause the Applicant financial hardship.
29. I am also required to consider whether the provision of access to the Requested Information would be in the general public interest or be in the interest of a substantial section of the public. The decisive issue for the public interest test (**PIT**) is whether disclosure would be of general or identifiable public interest. While



the Applicant has provided contentions that the information may be helpful and of interest to the public, it isn't clear to me that there is a general public interest in the potential release of the Requested Information. In that regard, I note that the specific information requested appears to be technical in nature and this fact would tend to suggest that it would not be of public interest, generally. This was reinforced by a summary review of various media sources, which found no general coverage related to the Requested Information. While not determinative, the lack of recent or any significant media coverage by major news publication websites suggests that the provision of access to the Requested Information would not be in the general public interest or be in the interest of a substantial section of the public.

30. On balance, I am not persuaded that a fee waiver or reduction is appropriate in this instance. I make this decision in light of **nbn's** principal objective as a GBE to add to shareholder value by allocating its resources, including staff time and effort, in accordance with sound commercial and business practices.
31. It should be noted that I have not yet made – nor am I required to make – an access decision in relation to any documents falling within the scope of this FOI request. If the Applicant agrees to pay the processing charges, **nbn's** FOI decision-maker may still conclude that the documents are exempt from the operation of the Act, as per the "commercial activities" exemption found at section 7(3) of the FOI Act. Additionally, I may conclude that the documents should not be released, based upon both general and conditional exemptions, the latter of which requires **nbn** to apply the "public interest test" in section 11B of the FOI Act. In that regard, please note that the section 11B public interest test is similar to, but different from the PIT employed for the purposes of deciding to reduce or not impose an FOI processing charge.
32. It should also be noted that the key issue issues that would need to be tested in this FOI determination relate to commercial matters, rather than "privacy issues" as flagged by the Applicant. Those issues would require a review of **nbn's** commercial relationships and contractual obligations with its business partners. In that regard, I would again refer you to the [general background information](#) concerning **nbn's** CAE.
33. If you are dissatisfied with this decision, you have certain rights of review. Details regarding your rights of review and appeal are referred to in the covering letter, provided with this Statement of Reasons.