



20 March 2014

Jxeeno

Sent via email: foi+request-519-431e7ebb@righttoknow.org.au

Our Ref: FOI1314/43.12

Dear Jxeeno,

FOI Application – Build Commencement Data

I am writing in relation to your request made under the *Freedom of Information Act, 1982* (**the FOI Act**).

The Statement of Reasons (**Attached**) outlines the specific terms of this FOI request, the decision-maker's findings and the access decision. For your reference, 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)* is attached for your information and may be found at the following [link](#).

If you have any questions or require any other information relating to this FOI application, please feel free to contact the writer on Tel. (02) 8918 8596 or via davidmesman@nbnco.com.au.

Sincerely,

David Mesman
FOI Officer

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FREEDOM OF INFORMATION REQUEST – 1314A/43

Jxeeno – Right to Know

ACCESS DECISION STATEMENT OF REASONS

Application Chronology and Terms of Request

1. On 14 February 2014, NBN Co received an application under the *Freedom of Information Act, 1982* (the **FOI Act** or the **Act**) from “Jxeeno” (the **Applicant**). In particular, the Applicant sought access to the following:

“A document containing the Build Commencement date for all FSAMs which are: a) classified as Ready for Service; and b) classified as Build Commenced. This is generally provided in the form of a month, rather than a precise date where the Build Contract Instructions were issued to NBN Co's delivery partners. I note that this information is not commercially sensitive and is readily available for public viewing on the official NBN Co rollout map for FSAMs where build is currently under way”.

2. On 26 February 2014, NBN Co staff wrote to the Applicant, formally acknowledging this application and requesting an advance deposit payment of \$30.63. This was based on a total fee estimate of \$122.50. NBN Co's processing fee estimate included 1.5 hours of search and retrieval time, as well as 11 hours for decision-making. At the time of the advance deposit request, 11 days had passed in the processing time limit. The Applicant was informed that the processing period would recommence, pending the payment of the deposit; or a charges review decision; or the withdrawal of this application.
3. On 27 February 2014, the Applicant emailed NBN Co and sought to clarify the scope of his request to the following:

A list of build commencement dates for FSAMs which are currently marked as Ready for Service.

The Applicant also indicated that the information requested should exclude areas where the build was “in progress”. In addition, the Applicant made a series of contentions regarding the processing fees and, in particular, that they had been incorrectly assessed. Those contentions became irrelevant in light of the fact that I subsequently determined to waive all processing fees.

4. During March 2014, I undertook consultations with relevant business units in the company to ascertain whether they could accommodate the request. I also sought guidance as to whether the information may be of a commercial nature or if there were any other relevant objections to the potential release of the information. In that regard, NBN Co received no objections to the release of the information, outlined in the re-scoped FOI application.
5. On 20 March 2014, I finalised my access decision, as outlined below, and emailed the same to the Applicant.

Access Decision

6. Under section 3(1)(b) of the FOI Act, the public has a right to seek access to “documents”, rather than discrete bits of information. Notwithstanding this point, section 17 of the FOI Act enables Government authorities to provide applicants with information, where such information is not available in a discrete written form and where the information is “ordinarily available to the agency for retrieving or collating stored information”. In that regard, I received advice from NBN Co staff that it was possible to create such a document, which would contain the relevant information requested by the Applicant.

7. As an FOI decision maker, it is open to me to consider whether the requested information falls within the terms of section 7(3A) of the FOI Act – NBN Co's commercial activities exemption – and is, therefore, not subject to the operation of the Act. General background information regarding NBN Co's FOI processes and the principles animating NBN Co's commercial activities exemption may be found at the following [link](#). It was also open to me to consider whether other exemptions may apply, such as section 47 (Commercially valuable information), among other exemptions.
8. In making my FOI decision, I endeavoured to be guided by both the spirit and terms of the FOI Act. I also made reference to the objects of the Act, which provide for agencies to exercise their functions and powers, as far as possible, to facilitate and promote public access to information.
9. In light of the above points, I have determined to grant access to the relevant information under sections 11 and 11A of the FOI Act. This information may be found at Attachment A, appended to this Statement of Reasons.
10. For reference, NBN Co staff spent approximately one hour in creating the dataset requested by the Applicant and undertaking administrative tasks related to this FOI request. In addition, NBN Co staff spent approximately 3.5 hours in drafting and finalising this FOI decision. This included time to seek guidance from the business in relation to the creation of the released dataset, its commerciality, etc. For reference, no fees are levied for the first five hours of FOI decision-making time. As such, the only fees payable would be approximately \$15.
11. It is important to note that a number of key public interests are served by Government agencies and authorities having the ability to charge for FOI processing time. In its [Submission to the OAIC Charges Review](#), NBN Co outlined its support of fees and charges and their importance to the FOI scheme, generally reflecting the points made below.
 - Government agencies and authorities are able to recoup some of their costs associated with processing FOI requests, while providing a key public service. 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 Government Business Entities (GBEs), which are expected to operate as any other 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 the resources of an agency or GBE from its 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 see the application to a final determination.
 - The requirement of a processing fee deposit tends to limit the scope of preliminary work "written off" by Government entities in the event that an applicant withdraws a request. This dovetails with the public interest in not wasting government and – taxpayer funded – public resources.
 - At page 5 of the Office of the Australian Information Commissioner's (the OAIC) [Review of Charges under the FOI Act 1983](#), the OAIC 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.

12. NBN Co's general policy is to charge applicants for FOI processing time, while ensuring that the company evaluates every application on its individual merits. In that regard, I noted that NBN Co does not normally produce the specific dataset requested by the Applicant, which would militate in favour of levying charges. However, I noted that the Applicant clarified the terms of this request to exclude "in progress" matters, which assisted in limiting the required decision-making time. I also took into account the small amount of processing charges. In that context, I have determined to waive all outstanding processing fees in relation to this FOI application. This is permitted by Regulation 3 of the *Freedom of Information (Charges) Regulations 1982*, which provides decision-makers with a general discretion to impose or not impose a charge, or impose a reduced charge for the processing of an FOI request.
13. If you are dissatisfied with this decision, you have certain rights of review. Details regarding your rights of review and appeal are outlined in the covering letter, provided with this Statement of Reasons.