



3 January 2019

“BIFMA”, a pseudonym

Sent via email: foi+request-5894-dd2c7dac@righttoknow.org.au

Our Ref: 1920/41.06

To whom this may concern:

FOI Application – Processing fee determination

I am writing in relation to your request made under the *Freedom of Information Act 1982 (the FOI Act)* in which you sought certain data regarding the number of premises mapped to the Sky Muster™ satellite service.

As you are aware, **nbn** released the relevant documents in full. This FOI decision relates to your request for a reduction in FOI processing fees.

An FOI decision may be reviewed, subject to sections 53A and 54 of the FOI Act. Please refer to the Office of the Australian Information Commissioner’s website at the following [link](#), which provides details about your rights of review and other avenues of redress under the FOI Act.

If you have any questions or need to discuss your FOI application, please contact me via email on davidmesman@nbnco.com.au.

Yours sincerely

David Mesman
General Counsel
FOI Privacy & Knowledge Management



FOI APPLICATION – FOI CHARGES DECISION

FOI1920/41

Background Information

1. In making this decision, I took into account relevant parts of the *Freedom of Information Act 1982* (**FOI Act** or **Act**) and related legislation, the Office of the Australian Information Commissioner (**OAIC**) [FOI Guidelines](#), relevant case law and other sources.
2. **nbn** is treated differently from other agencies and Commonwealth agencies that are subject to the FOI Act. Per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the Act, documents relating to **nbn**'s commercial activities are carved-out from the application of the Act. The following link – [CAC Background Document](#) contains a summary of OAIC and Administrative Appeals Tribunal decisions concerning **nbn**'s and other Commonwealth entities' commercial activities carve-outs (**CAC**). The CAC Background Document should be considered as an integral part of this FOI Charges Decision.

Application, Chronology and Terms of Request

1. On 12 November 2019, "BIFMA" (a pseudonym, and **the Applicant**) made a request under the *Freedom of Information Act, 1982* (Cth) (**the FOI Act**), seeking the following:

"Can you please advise how many premises are mapped for a Skymuster connection (as at 12/11/2019) within a 25km radius of the GPO in each Capital City for each State? (NT & ACT are excluded from this request). Please breakdown the number of premises by each City. Eg; Sydney: ###, Melbourne: ###, Brisbane: ###, Perth: ###, Adelaide: ###, Hobart: ###."

2. On 22 November 2019, I acknowledged this request as required under by section 15(5) of the FOI Act.
3. On 5 December 2019, **nbn**'s FOI Team informed the Applicant of the processing charges payable in relation to this FOI request. In that same email, **nbn**'s FOI Team requested that the Applicant make payment and provided details in that regard, among other matters.
4. On 16 December 2019, **nbn**'s FOI Team confirmed that **nbn**'s Finance Group had received the final processing payment in relation to this matter and subsequently emailed the final decision, releasing the requested information in full.
5. Also on 16 December 2019, the Applicant emailed **nbn** and made a series of contentions in support of a request for **nbn** to waive processing fees in relation to this FOI application. Per the Applicant's contentions, he had paid the processing fees so as to expedite the processing of this FOI matter. In particular, the Applicant made the following contentions in support of the fee reduction request:
 - 1) *The scope of the request is for the number of premises mapped to Skymuster within a 25km radius of a Capital City's GPO.*
 - 2) *Any premises within 25km/h of a Capital City would not (by any reasonable definition) be considered Regional, Rural or Remote.*



- 3) *NBNco in all its (sic) published literature regarding Skymuster (websites and hard copies), including social media posts by NBNco hosted on 3rd party websites and blog posts hosted on NBNCo's websites refer to Skymuster as delivering "the nbn™ broadband access network to homes and businesses in regional and remote Australia"*
- 4) *NBNco's CTO in a blog post dated 5 July 2017 implies that "outer suburban areas cannot be shoved onto Skymuster - NBNco must preserve this capacity for Regional and Remote Australians"*
- 5) *If premises within a 25km radius of a Capital City's GPO (these could reasonably be defined as "outer suburban areas") are mapped for Skymuster, this demonstrates NBNCo are misinforming the public in regards to how Skymuster is being used to connect (sic) premises to NBN's network.*
- 6) *If NBNCo are misinforming the public, this is of public interest.*

6. On 3 January 2020, I completed this Charges Decision and subsequently emailed it to the Applicant.

nbn's approach to FOI processing charges

7. As outlined at section 3(4) of the FOI Act (Objects of the FOI Act), FOI agencies are expected to exercise their functions and powers, as far as possible, to facilitate and promote public access to information, promptly, and at the lowest reasonable cost.
8. Per paragraph 4.4 of the [FOI Guidelines](#), agencies should have regard to the "lowest reasonable cost to the applicant, to the agency or minister, and the Commonwealth as a whole", when exercising their discretion to impose processing charges. In that context, **nbn** has adopted an FOI processing fee policy, which seeks to balance the lowest reasonable cost to applicants, **nbn** and the Commonwealth, while taking into consideration **nbn's** status as a Government Business Entity (**GBE**).
9. Unlike Commonwealth Government agencies, **nbn** is expected to operate as a competitive, commercial business entity. The Shareholder Ministers' [Statement of Expectations](#) makes it clear that:

"nbn is a commercial entity operating in a market environment and can compete and innovate like other companies in this environment."
10. The commercial nature of **nbn's** operations is reinforced at paragraph 1.8 of the [GBE Governance and Oversight Guidelines \(the GBE Guidelines\)](#), which indicate that a GBE's principal objective is to add to shareholder value. To achieve this objective, GBEs are required to operate and price efficiently; at minimum cost for a given scale and quality of outputs; and earn, at least, a commercial rate of return.
11. 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 **nbn** 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** is obliged to 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 and per the GBE Guidelines.

12. In addition, FOI processing fees are set by regulation and, in particular, the *Freedom of Information (Charges) Regulations 2019* (Cth) (**the Charges Regulation**). The two most common processing activities are decision-making (\$20/hour) and search-and-retrieval (\$15/hour), which have not been increased since the FOI Act's inception in 1982. It is important to note that decision-making and search-and-retrieval charges are on par with the current Australian (national) minimum wage, which is set at \$19.49/hour – per the [Fair Work Ombudsman's website](#). It would not be unreasonable to assume that commercial entities would charge significantly higher rates than the national minimum wage for performing complex and specialised tasks, such as document discovery (i.e. search and retrieval) or for drafting an administrative law determination.
13. In my opinion, Parliament has, in all likelihood, chosen to retain (what are effectively) below-market rates, so as to reflect the public importance of FOI processes and their role in helping to inform public debate. This is also reflected in the fact that Parliament has not raised FOI processing costs in nearly 40 years, which effectively provides the Australian public with access to FOI processing services at a discount from market rates.
14. It is clear that FOI processing fees are set at a discount to the actual and overall costs incurred by agencies and GBEs, like **nbn**. This assertion is reinforced by the OAIC's [Review of Charges under the FOI Act \(the Charges Report\)](#) at page 23, where the then-Australian Information Commissioner, Professor John McMillian, flagged that the:

“...total amount of fees and charges collected since the commencement of the FOI Act represent 2.08% of the estimated total cost of administering the FOI Act during the same period.”
15. While not recommending a full cost-recovery model for processing fees, the OAIC reinforced the importance of FOI fees and charges at page 5 of the Charges Report, indicating 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.”
16. In **nbn**'s [Submission to OAIC](#) in relation to the Charges Report Review, **nbn** outlined its support of fees and charges. Among other points, **nbn**'s key contentions include the following:
 - a. Government entities should be 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.
 - b. The ability to charge for FOI processing time reflects Parliament's and the community's recognition that public servants' (and GBE staff members') 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 the resources of an agency from its operations.



- c. The ability to charge for the processing of FOI applications assists in ensuring that applicants have a serious interest in the subject matter and are likely to proceed with the application to a final determination. Additionally, the requirement of a 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 taxpayer-funded, public resources.

17. In light of the above points, it is **nbn**’s general policy to charge applicants for its FOI processing time, subject to financial hardship grounds or valid contentions regarding the general public interest in the specific subject matter of the FOI request. In that regard, **nbn** will examine every FOI application on its individual merits. As such, there may be grounds to exempt or reduce processing fees for a given FOI request. In relation to the current matter, those grounds are explored below.

Public interest considerations

- 18. The FOI Act allows applicants to request a reduction or waiver of FOI processing fees in circumstances where it can be shown that the release of the requested documents would be in the general public interest or if the applicant is experiencing financial hardship. The Applicant has not provided any evidence of financial hardship. As such, I have only considered the public interest grounds for a fee reduction.
- 19. Section 29(5)(b) of the FOI Act outlines the test for granting a fee reduction on the basis of public interest. In particular, FOI decision-makers must consider “*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.*”
- 20. Paragraph 4.83 of the OAIC Guidelines make it clear that the ‘public interest’ cannot be exhaustively defined. Applicants relying on section 29(5)(b) of the FOI Act are expected to identify the ‘general public interest’ or the ‘substantial section of the public’ that would benefit from this disclosure. Among other issues, the OAIC Guidelines provide examples where providing access may be in the public interest, including matters of public debate or a policy issue under discussion – and the currency of the topic of public interest.
- 21. **nbn**’s FOI Team generally recommends that FOI applicants support any public interest contentions with evidence of media, Parliamentary or related coverage concerning the specific subject matter of the requested documents or information. In that regard, the Applicant’s public interest contentions did not refer to media, Parliamentary or related consideration of these issues.
- 22. Following receipt of the Applicant’s request for a Charges Review, I undertook general internet searches and found no media or related reference to the data in the Relevant Document. At the same time, I did find media references to the **nbn**™ network connections via the Sky Muster™ satellite service in outer suburban areas. However, those limited media references date from April 2018 and September 2019. This suggests that there may be some public interest in the issue of deploying Sky Muster™ services in outer suburban areas. However, it is not clear that this FOI request (and the document created as a result of this application) would be of general public interest or add to public knowledge about that issue. I based this finding on the relatively small data set in question, being roughly 1000 premises – as compared to **nbn**’s overall network (or even satellite service) footprint.
- 23. In addition, the dataset in question is one based upon Sky Muster™ satellite services within a 25km radius of capital cities’ GPOs. I note the Applicant’s point that this “could reasonably be defined as “outer



suburban areas." However, it is not clear how or why "25km from a capital city's GPO" is an accurate measure to define what constitutes an "outer suburban area". For example, this may not be a relevant measure for smaller capital cities, such as Hobart or for capital cities with significant variations in topography, elevation and other natural obstacles, such as hills or valleys and bushland.

24. Furthermore, the distance from a capital city's GPO is not necessarily an indicative measure of whether a given premises can expect to be connected to the **nbn**TM network via satellite vs. fixed line services. It is my understanding that **nbn** deploys Sky MusterTM satellite services as sparingly as possible in outer metropolitan areas and only when premises are located too far from the fibre network or too far and/or not in line of sight of our fixed wireless towers. In fact, it is **nbn**'s practice to limit satellite access only to premises where other technologies are unworkable or unaffordable. These points were also noted in my substantive decision regarding this matter (**nbn** reference FOI1920/41.05).
25. It is my finding that **nbn** has made its Sky MusterTM deployment processes clear in media and other communications, which are summarised above and can be found at [this hyperlink](#). On balance, it is not clear how disclosure of the data set in the Relevant Document would be of general public interest or increase transparency and accountability regarding the deployment of **nbn**'s Sky MusterTM satellite connections.
26. In addition, I also considered the following points in making this Charges Decision:
 - a. It is **nbn**'s general policy to charge applicants for FOI processing time. This fact was made to the clear in **nbn**'s correspondence to the Applicant, along with **nbn**'s rationale for levying charges.
 - b. **nbn**'s subject matter experts were required to collate the information and take time away from their core commercial functions, so as to process this request. As flagged above, **nbn** is required to operate as a commercial entity and to ensure that its staff members are engaged in appropriate tasks that maximise corporate resources and add to shareholder value. It follows that **nbn** should be able to recover some of the reasonable costs associated with the processing of this request and, particularly, for the time taken away from core **nbn**TM network operations.
 - c. **nbn**'s FOI processing charges are already discounted as compared to market rates – and would not reflect the actual cost to **nbn**. In addition, the fees were not significant, totalling \$30. This does also does not account for the first five hours of decision-making time, which was waived.
 - d. The Applicant obtained the Relevant Document and the dataset requested.
27. On balance, I have determined not to waive or reduce processing fees in relation to this FOI application. If you are dissatisfied with this decision, you have certain rights of review. Those rights of review and appeal are outlined in the covering letter, provided with this Statement of Reasons.