



24 December 2019

Mr Timothy Nothdurft

Sent via email: foi+request-5966-68ddf285@righttoknow.org.au

Our Ref: 1920/48.05

Dear Mr Nothdurft

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 information, being:

“How many Technical Choice applications (TCP) or conversions from FttN to FttP have been undertaken (completed only) in Fibre Serving Area (FSA) 9SCU with SAM identifier 20 and the date the service was active.”

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 (**OAIC**) website at the following [link](#), which provides details about your rights of review and other avenues of redress under the FOI Act.

I note that you have already requested a review of my preliminary fee estimate, which I have confirmed in the Charges Decision, below. As flagged previously, **nbn** will assign an Internal Reviewer in due course and provide you with an Internal Review of this fee decision.

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

Yours sincerely

David Mesman
General Counsel
FOI Privacy & Knowledge Management



FOI APPLICATION – FOI CHARGES DECISION

FOI1920/48

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. A summary of OAIC and Administrative Appeals Tribunals decisions concerning **nbn**'s commercial activities carve-out (**CAC**) may be found at the following link – [CAC Background Information](#).

Application, Chronology and Terms of Request

3. On 30 November 2019, **nbn**'s FOI Team received an email from Mr Timothy Nothdurft (**the Applicant**) via its FOIOfficer@nbnco.com.au account in the terms below.

"How many Technical Choice applications (TCP) or conversions from FttN to FttP have been undertaken (completed only) in Fibre Serving Area (FSA) 9SCU with SAM identifier 20 and the date the service was active."

4. On 6 December 2019, **nbn**'s FOI Team acknowledged the Applicant's current request and provided the Applicant with an advance deposit request of \$41.88. This was based upon a processing fee estimate of \$167.50, reflecting 13 hours of decision-making time and one half hour for search and retrieval.
5. On 7 December 2019, the Applicant reverted to **nbn**, indicating the following:

"The cost around retrieval and decision making is unreasonable. I would like it to be reviewed... This is a (sic) administrative lookup that requires very little effort or diversion of resources... It also does not compare reasonably to other FOI requests that have been carried out. It is also unreasonable to attempt to extract Money from a public that is trying to hold NBN to account... I would also like to request that you personally are no longer involved in any of the FOI requests and that it is diverted to another qualified individual within the organisation. If this cannot be actioned a suitable explanation will be required as to why?"

6. On 13 December 2019, **nbn**'s FOI Team reverted to the Applicant, indicating:

*"I note your request for a review of my FOI processing charges estimate (**nbn**'s reference FOI1920/48). I will complete an FOI Charges Decision in due course. If my initial estimate matches the final charges determination, I will consider your email, below, as a request for an Internal Review of that decision. In the interim, could you please provide further particulars regarding your contentions – that would be of assistance. I would also request that you email those contentions*



directly to FOIOfficer@nbngo.com.au. If I have not received any further contentions by 23 December 2019, I will proceed to a Charges Decision by 3 January 2020. If you require more time to provide your contentions, please inform me before 2 January 2020.

For reference, the appointment of **nbn**'s FOI Officer, the choice of FOI decision-makers and the processing of FOI applications are matters for **nbn**'s management. As outlined previously, I am **nbn**'s FOI Officer and I will continue to manage **nbn**'s FOI requests, including this and other FOI matters. **nbn** has informed you on at least six occasions of your right to make a complaint to the Office of the Australian Information Commissioner (OAIC) if you consider any complaints to be valid. My understanding is that you have not made a complaint to the OAIC to date. For your reference, I have copied the OAIC's enquiries email address. I would suggest that you direct your concerns to the OAIC.

*I again request that you refrain from posting any further personal commentary about **nbn** staff members and I will relay the same request to the moderators of this website."*

7. On 23 December 2019, I noted that the Applicant had not provided any further contentions regarding the public interest or other matters.
8. On 24 December 2019, I completed this FOI Charges Decision.

nbn's approach to FOI processing charges

9. 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.
10. 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 GBE.
11. Unlike Commonwealth Government agencies and departments, **nbn** is expected to operate as a business entity. Per paragraph 1.8 of the [GBE Governance and Oversight Guidelines \(the GBE Guidelines\)](#) 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.
12. 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.

13. FOI processing fees are set by regulation and, in particular, the *Freedom of Information (Fees and Charges) Regulations (the Charges Regulation)*. The two most common processing activities are decision-making (\$20/hour) and search-and-retrieval (\$15/hour), which are roughly equivalent to current Australian minimum wages. According to the [Fair Work Ombudsman's website](#), the national minimum wage is currently \$19.49 per hour. In that context, it would not be unreasonable to assume that commercial entities would charge significantly higher rates for performing similar tasks. It also follows that Government agencies and GBEs would 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 OAIC's [Review of Charges under the FOI Act \(the Charges Report\)](#). In the Charges Report, the OAIC indicated that FOI charges only represented 2% of the actual costs incurred by agencies and similar bodies since the Act's commencement in 1982.
14. In light of the above points, it seems clear that FOI processing fees are set 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. 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 OAIC](#) for the Charges Report, **nbn** outlined its support of fees and charges and their importance to the FOI scheme and that:
 - 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.
 - 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 the resources of the agency 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 proceed with the application to a final 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 withdraws a request. This dovetails with the public interest in not wasting taxpayer-funded, public resources.
 - At page 5 of the OAIC Charges Review Report, 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.”

15. In light of the above points, it is **nbn**’s general policy to charge applicants for its FOI processing time. However, **nbn**’s charging policy also requires the company to examine every application on its individual merits. As such, there may be grounds to exempt or reduce processing fees for a given FOI request. Those grounds are explored below.

Calculation of processing time

16. Per section 29(4) of the FOI Act, I considered your contentions that the FOI processing fees were unreasonable. It is my finding that the fees are typical of **nbn**’s FOI processing charges in similar FOI requests.
17. In relation to the search and retrieval time, I confirmed that these fees reflected the work required to collect the information requested (30 minutes). The majority of the (estimated) chargeable processing time would involve decision-making (13 hours). In reviewing the processing charges, I considered relevant (and similar) **nbn** FOI decisions, as well as recent decision involving the Applicant, one of which was the subject of an Internal Review. That Internal Review confirmed that the processing fees were appropriately assessed and the processing fees were similar to those assessed in the current matter.
18. It is important to note that **nbn**’s FOI decision-making processes involve a preliminary assessment of the relevant documents or data sets to determine whether they relate to **nbn**’s commercial activities. In addition, **nbn**’s FOI decision-makers must undertake discussions with relevant **nbn** staff regarding any commercial or other sensitivities relating to the potential disclosure of relevant information and any personal or business implications of release; review case law and the OAIC Guidelines; confirm findings of fact with **nbn** staff; and draft or write a comprehensive decision that considers all the relevant steps and issues. This is in addition to reviewing other potentially applicable exemption grounds, e.g. personal privacy, business affairs, etc. In my experience, an estimate of 13.5 hours to complete an FOI decision is an appropriate assessment of decision-making time for the current matter.

Public interest considerations

19. 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 the applicant is experiencing financial hardship. The Applicant has not provided evidence of financial hardship. As such, I have only considered the public interest grounds for a fee reduction.
20. 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.*”



21. 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 provides 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. In that context, **nbn**'s FOI Team generally recommends that FOI applicants support any public interest contentions with evidence of media, Parliamentary or related coverage concerning the subject matter of the requested documents. In that regard, the Applicant did not refer to media, Parliamentary or related consideration of these issues.
22. I undertook general internet searches and found a significant number of media articles regarding **nbn**'s Technology Choice Program (**TCP**), generally. However, I was not able to find any references to the specific issue of applications vs. conversions. This suggests that there may be some public interest in **nbn**'s TCP, broadly, but not in the issue of conversions. I also note that the Applicant has made a very narrow request, relating to specific FSAM or Fibre-Serving-Area, which a relatively small number of premises. It follows that this request is not likely to have a broad public interest.
23. On balance, I am not persuaded that there is a general public interest in the information requested by the Applicant. As such, I consider that a fee waiver would not be appropriate.
24. It should be noted that **nbn** has not yet made an access decision in relation to the current FOI matter or related information or documents. Completing an FOI Charges Decision is a discrete process from an FOI access determination. Subject to any review rights and/or if the Applicant agrees to pay the processing charges, **nbn**'s FOI decision-maker would need to complete an FOI access decision. In that scenario, it is a possibility that the decision-maker may conclude that relevant documents or information are exempt from the operation of the FOI Act per **nbn**'s CAC, as well as other general and conditional exemptions. In other words, the payment of FOI processing fees does not equate to disclosure. Rather, processing fees are levied to account for the time and effort required to complete an FOI determination.
25. The Applicant should be aware that five days (of 30) had passed at the point at which this application was suspended for the purpose of requesting an advance deposit.
26. 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.