



16 January 2020

GPON

Sent via email: [foi+request-6063-5958cd1a@righttoknow.org.au](mailto:foi+request-6063-5958cd1a@righttoknow.org.au)

Our Ref: FOI1920/55.02

To whom this may concern:

### **FOI Application – New developments data**

Thank you for your request under the *Freedom of Information Act 1982* (Cth) (**the FOI Act**) sent via the Right-to-Know (**RTK**) website and which sought:

*“...the total number of new development applications that have been received since 2016.*

*Further to above, please provide the number of new developments\* since 2016 that received the following technologies? FttP, FttN, HFC, FttC, Fixed Wireless, Other.”*

### **Responses to Questions-on-Notice in Senate**

As flagged in the covering email, **nbn** has responded to requests for data in Senate Questions-on-Notice (**QONs**). In particular, I refer you to the points, below, where **nbn** declined to provide information and data concerning new developments due to commercial sensitivities.

- In response to QON No. 137 (Senate Standing Committee on Environment and Communications – Supplementary Budget Estimates Hearings October 2016) and regarding forecasted growth rates for new premises, **nbn** indicated that due to “...infrastructure competition faced by **nbn** in new developments, planning assumptions for green fields and new premises are considered commercially sensitive.”
- In response to QON No. 220 (Additional Estimates Spill-over April 2018), **nbn** indicated that the company operates in a competitive market for new developments and, as such, “take-up rates in greenfield areas are commercially sensitive.”

It is important to note that statements made by **nbn** in the Senate are not determinative of a finding under the FOI Act that data concerning new developments will be considered “commercially sensitive” or subject to **nbn**’s commercial activities and (therefore) not subject to the FOI Act. However, **nbn**’s FOI determination will consider the QONs, mentioned above, as well as input from **nbn** subject matter experts (**SMEs**) in making a finding concerning the commercial nature of the data requested. In addition, I would refer the applicant to the points made in the paragraph entitled “**nbn**’s commercial activities’ carve-out”.

### **FOI requests for data**

Under the FOI Act, applicants have a right to seek documents, rather than information or datasets. However, section 17 of the FOI Act permits FOI agencies to draw information from computers or other equipment and to collate that information into a document, which had previously not existed. This requirement is subject to a caveat, i.e. that an FOI agency is not required to collate the information if it would substantially and unreasonably divert the agency’s resources. Noting the above points, **nbn** SMEs identified relevant



information from **nbn**'s IT systems. Those SMEs were able to produce a document in the form requested, above, and without unreasonably and substantially diverting **nbn**'s resources.

### **Payment Request**

Per subsection 29(1) of the FOI Act, I have determined that a charge is payable in respect of the processing of this FOI request. The applicable charges are as follows:

Search and Retrieval Time	1.75 hours @ \$15.00 per hour	\$26.25
Decision Making Time	12 hours @ \$20.00 per hour	\$240
<b>Sub-total</b>		<b>\$266.25</b>
Less first 5 (or less) hours decision making time (*)		(\$100)
<b>TOTAL</b>		<b>\$166.25</b>

(\*) Per the *Freedom of Information (Charges) Regulations 1982*, **nbn** has not charged you for the first 5 hours of decision-making time. Please note that this waiver of fees applies only to decision-making time, but not to other FOI processing charges, such as search & retrieval.

As the total estimated processing charges exceeds \$100, a deposit of 25% (\$41.56) is required. Please note that the estimated processing time and related fees may increase (or decrease), depending on the nature of the work required. However, I will inform you if the fees increase beyond the estimate above. It is also important to note that a final payment is required prior to **nbn** issuing its FOI decision.

### **Next steps**

Within 30 days of this notice, you are required to:

- agree to pay the charge and make payment; or
- contend that the charge has been wrongly assessed, or should be reduced or not imposed (you should provide full reasons for your contentions); or
- withdraw your request.

If within 30 days of this notice, you fail to notify **nbn** in a manner mentioned above, then your request will be taken to have been withdrawn. If, however, you make contentions that the estimated processing charges have been wrongly assessed, or should be reduced or not imposed, you must notify **nbn** of your contentions, providing reasons and evidence (where relevant), to support those contentions.

In deciding whether to reduce or not to impose processing charges, the FOI decision-maker will consider all relevant factors, including:

- whether payment of the charge, or a part of it, would cause you financial hardship; and
- whether the giving of access is in the general public interest.

If FOI applicants wish to make general public interest contentions in support of a fee reduction, it is recommended that they provide **nbn** with media, Parliamentary or other relevant commentary referring to the specific subject matter of the FOI request. It is also recommended that applicants refer to paragraph 4.70 of the Australian Information Commissioner's (OAIC) [FOI Guidelines](#) when making such contentions. **If you choose to contend that the charge has been wrongly assessed or should be reduced or not imposed, this will not constitute a request for internal review.** You will be advised of your review rights under sections 53A and 54 of the FOI Act following consideration of your contentions and **nbn** issuing a Charges Decision.

Again, **nbn** will endeavour to inform FOI applicants whether FOI processing fees are likely to increase or decrease, as compared to initial estimates. In that scenario, **nbn** will generally confirm with FOI applicants whether they would like to revise or reduce the scope of their FOI requests, among other matters.



Once **nbn** has completed the processing of your request, the assessment of the FOI charges payable will be revised based on the actual amount of work involved in processing your request. This is permitted by Regulations 9 and 10 of the *Freedom of Information (Charges) Regulations 1982 (FOI Charges Regulations)*.

**Please note that payment of FOI processing fees does not guarantee access to documents.**

If you agree to pay the estimated charge set out above, or the deposit for that charge, you should arrange to pay **nbn**, using the following electronic banking details:

Bank name: CBA  
Name: nbn co limited FOI  
BSB: 062-438  
Account no: 10240782  
Reference: **CRM # FOI-0006**

**When making a payment, please ensure you include the reference noted above.**

Please note that if you provide a deposit and the processing of your request progresses to a point where a decision on access is made, a determination about the imposition of the actual charge will be made at that time. The balance of the actual charge will become a debt due to the Commonwealth, which **nbn** would be obliged to pursue, unless other arrangements are made, or if **nbn** agrees to waive the fees.

Per section 31 of the FOI Act, the time limit for processing your request is suspended from the day upon which you receive this notice, being today's date. Please also be advised that the charge notice day is not counted in calculating the processing time limit. For your reference, six days have passed, and the processing time limit will resume:

- On the day upon which **nbn** receives your payment; or
- Alternatively, if you decide to contest the charge, the processing time limit will resume on the day upon which **nbn** notifies you of its decision not to impose a charge – if **nbn** makes such a decision; or
- If **nbn** decides to reduce the charge and deposit is required, the processing time limit will recommence on the day upon which you pay the reduced deposit.

More information about charges under the FOI Act, rights of review and redress are available at the Office of the OAIC website and in part 4 of the OAIC [FOI Guidelines](#).

#### **nbn's Commercial Activities Carve-out**

**nbn's** commercial activities are carved-out from the application of the FOI Act per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the Act. Documents that relate to **nbn's** current or future commercial activities are not subject to the operation of the FOI Act and would be exempt from release. The following link provides [general background information \(GBI Document\)](#) concerning **nbn's** CAC. The GBI Document refers to two Australian Information Commissioner Reviews that considered **nbn's** commercial carve-out – [Internode Pty Ltd and NBN Co Ltd \[2012\] AICmr 4](#) and the [Battersby and NBN Co Ltd \[2013\] AICmr 61](#).

In practical terms, the CAC ensures that **nbn** is not exposed to disadvantage in the marketplace and similar commercial environments. The CAC also enables **nbn** to function as any other commercial player in Australia's highly competitive telecommunications industry. If **nbn** were required to release commercially-related information under the FOI regime, this would undermine **nbn's** ability to protect the company's valuable intellectual property, negotiate competitive contracts, develop products and services, grow market



share and manage its staff, among other adverse effects. Disclosure of commercially-related information would also undermine **nbn**'s capacity to generate revenues, while driving up rollout costs. Ultimately, Australian taxpayers would have to bear those cost increases and other potentially adverse consequences.

**Disclosure Log Notification**

In accordance with the FOI Act, **nbn** is required to publish documents provided to FOI applicants within 10 working days after release. The information you seek may be published in full (as released to you) or with some additional exceptions as per section 11C of the FOI Act. For further information, visit our [Disclosure Log](#) on **nbn**'s website.

Please feel free to contact me by email if you have any questions or would like to discuss your request.

Yours sincerely

**David Mesman**  
General Counsel  
FOI, Privacy & Knowledge Management