

4 June 2014

Mr/Ms S McLaughlin
Sent via email: <mailto:foi+request-637-4864b23d@righttoknow.org.au>

Our Ref: FOI1314/62.03

Dear Mr/Ms McLaughlin,

FOI Application –

I am writing in relation to a request made under the *Freedom of Information Act, 1982* (**the FOI Act or the Act**) and received by the Commonwealth Department of Communications (**DoC**) on 29 May 2014. That request sought the following:

*"I wish to obtain a document containing the number of proposed FSAMs and an approximate "Construction Instruction" for FSAMs for Victoria, Australia a) a contract instruction to commence "detailed design and field inspection work" has been issued to NBN Co's delivery partners ** b) a contract instruction to commence "build work... consistent with the completed Detailed Design Document" has been issued to NBN Co's delivery partners ** between 1st January 2014 up until 31st December 2014 for the purposes of the NBN Co Brownfields Fibre build.*

*** as defined in Monthly Ready for Service plans"*

On 30 May 2014, the DoC made a request to transfer this application to NBN Co Limited (**NBN Co**) under [section 16 of the FOI Act](#). NBN Co accepted the transfer request on the same day. I note that your request is seeking general rollout information. In that regard, I would refer you to NBN Co's website and in particular the [when-do-I-get-it?](#) webpage, which contains detailed information concerning the progress of the rollout. You may also wish to speak with our [contact centre](#) by calling 1800 OUR NBN (1800 687 626).

Request to Clarify FOI Application

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. Drawing from the terms of the request above, it appears that your application is seeking information, rather than a document. Despite 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". As such, it may be possible to locate relevant information, presuming that it is in a readily extractable format, but subject to any relevant exemption claims, as outlined below. However, it is not clear what information you are seeking in relation to the phrase "proposed FSAMs", nor in relation to the phrase "approximate construction instruction" as you appear to be referencing prospective instructions that have not yet been issued.

As per [section 15\(2\)\(b\)](#) of the FOI Act, applicants are required to provide sufficient detail so as to enable an FOI officer to locate relevant documents. Based upon the above points, I would ask that you clarify the terms of this FOI request. Please feel free to contact me on the numbers below to discuss this application. In addition, I would ask that you consider the points made below in reformulating your FOI request. In addition, NBN Co recently released details of the coverage areas for 8 Victorian FSAMs in its Disclosure Log, found at the following [link](#). It may be of assistance to refer to the language in that request to assist you in clarifying this application. Please also note that the legislative time frames for completing this FOI request will not commence until such time as those details are clarified.

Background Information

NBN Co's approach to FOI matters is to liaise with applicants, so as to minimise processing fees incurred and to ensure that the company completes any search & retrieval, review and FOI decision-making as efficiently as possible. In that regard, I would refer you to NBN Co's FOI processing charges policy, which is outlined at the following hyperlink: [Submission to the Office of the Australian](#)

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[Information Commissioner Charges Review](#). In particular, NBN Co supports – and will generally apply – Recommendation 24 in the [Hawke Review into FOI Legislation](#), (**the Hawke Review**), which suggests a 40-hour ceiling for all FOI processing charges. In the event that an FOI request is likely to exceed that ceiling, NBN Co will generally initiate a request consultation process, as per [section 24AB of the FOI Act](#).

There is a possibility that documents within the scope of this request may relate to NBN Co's commercial activities and would not be subject to the operation of the Act. In that regard, I refer you to [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act, which outline the scope of NBN Co's commercial activities exemption (**the CAE**). For your reference, the Office of the Australian Information Commissioner (**the OAIC**) completed a review decision in January 2012 (**the Internode Decision**), which provides background and guidance as to the application of the CAE to NBN Co. The Internode Decision may be found by clicking on the following [link](#). The OAIC completed an additional review at the end of July 2013 – [the Battersby Decision](#), which further clarified the scope of NBN Co's CAE. While I am not making a formal decision nor have I begun a review of relevant documents, there is a possibility that documents falling within the terms of this FOI request may be subject to the CAE and other exemptions from release under the FOI Act.

Clarifying FOI Applications

It is generally recommend that FOI applicants limit their requests:

- for documents relating to or held by specific officers within NBN Co;
- to specific types of documents;
- to a specific time frame; and
- to exclude documents that are in draft form or are [deliberative materials](#), [legally privileged](#), [commercially sensitive](#) or contain [confidential materials](#) or could be subject to clear exemptions from release, etc. I would refer you to [section 31A](#) of the FOI Act and following, which outlines relevant exemptions to release of documents under the legislation.

As outlined above, some of the information requested may fall within various exemptions from release, including NBN Co's CAE. This fact would likely – and significantly – increase the complexity and breadth of any access decision, along with the time required to make such a decision and, thereby, FOI processing fees. Again, I would refer you to NBN Co's approach to processing charges, outlined above. In addition, your request may require NBN Co to review documents relating to NBN Co's commercial dealings with its business partners, suppliers and, by extension, individual staff members, past staff members, third parties, as well Government departments in relation to policy and other issues. As a result, NBN Co may be required to undertake formal third party consultations with these parties. Those consultations could significantly increase the review and decision-making time needed to make an access decision under the FOI Act.

Disclosure Log Notification

In accordance with the FOI Act, NBN Co 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 redactions as per section 11C of the FOI Act. For further information, visit our [Disclosure Log](#) on NBN Co's website at www.nbnco.com.au/about-us/media/freedom-of-information/disclosure-log.html.

If you have any questions or need to discuss your FOI application, please feel free to contact the writer on Tel. (02) 8918 8596 or via email on davidmesman@nbnco.com.au.

Sincerely,

David J Mesman

GM Legal - FOI and Knowledge Management