



24 August 2020

Henry

[foi+request-6384-f1cffd79@righttoknow.org.au](mailto:foi+request-6384-f1cffd79@righttoknow.org.au)

Our Ref: FOI-1920/81.10

Dear Henry

**FOI Application - processing charges decision**

This correspondence is in response to your request made on 14 July 2020 under the Freedom of Information Act 1982 (Cth) (**FOI Act**), particularly your email sent 28 July 2020, seeking a waiver of processing charges. Please see the **attached** Statement of Reasons outlining my decision in that regard.

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 feel free to contact me on (02) 9031 3022.

Yours sincerely

**Rohan Singh**

Senior Legal Counsel

FOI Privacy & Knowledge Management



## Freedom of Information Request – FOI-1920/81.10

### Processing Charges Decision – Statement of Reasons

---

#### **Background**

1. **nbn** is a government business enterprise (**GBE**), which has the mandate of realising the Australian Government’s vision for the development of Australia’s new broadband network.
2. **nbn** recognises that information is a vital and an invaluable resource, both for the company and for the broader Australian community. That is why **nbn** fosters and promotes a pro-disclosure culture, with the goal of creating an organisation that is open, transparent and accountable. In that light, members of the public will be able to find a large amount of information freely available on our website at the following link: <http://nbnco.com.au/>.
3. **nbn** manages its information assets within the terms and spirit of the *Freedom of Information Act* 1982 (Cth) (FOI Act). We also endeavour to release information proactively, while taking into account our commercial and other legal obligations.
4. Subject to relevant exemptions, the FOI Act gives the Australian community the right to access documents held by Commonwealth Government agencies, as well as “prescribed authorities”, such as **nbn**.
5. Under subsection 23(1) of the FOI Act, the Chief Executive Officer of **nbn** has authorised me to make decisions about access to documents and related determinations under the FOI Act.
6. Under section 29(8) of the FOI Act, I am required to provide a Statement of Reasons for my decisions in relation to FOI applications. I am also required to set out any findings on any material questions of fact, referring to the material upon which I based those findings.

#### **Application Chronology and Terms of Request**

7. On 14 July 2020, **nbn** received an FOI request from “Henry” (**the Applicant**), seeking:  
  
*“the most recent version (as at 14 July 2020) of the HFC release footprint documents for new HFC speed tiers provided to **nbn**’s retail service providers.”*
8. On 27 July 2020, acknowledged receipt of the Applicant’s request and requested a deposit for FOI processing fees, being 25% of \$345, or \$86.25.
9. On 28 July 2020, the Applicant requested that the FOI processing fees be waived on the basis of the request being in the general public interest. In support of his request for a fee waiver, the Applicant indicated as follows:

*At the time the NBN higher speed tiers were released, numerous news websites detailed tiers however there was limited information provided to the public about where these tiers can be obtained on the HFC network.*



*As a result, threads on Whirlpool (an online technology forum) have been viewed by over 47,000 unique users with many discussing the locations of the ultra-fast tiers on both the FTTP and HFC networks. Given this large interest online, it is clear that both users of Whirlpool and even the general public would be interested to see how fast their area is without having to search specific addresses, hence my request for the fee to be waived.*

10. I made this processing charges decision on the date set out above.

#### **Findings of Material Fact**

11. As the decision maker, I made certain findings of fact in relation to the processing time required to respond to this FOI request. In particular, I calculated a total (estimated) application cost of \$345. The calculation of the processing time took into account the time estimated to:
- a. search and retrieve the subject documents;
  - b. conduct a preliminary review/reading of the documents, identifying relevant **nbn** subject matter experts (**SMEs**), setting up meetings with SMEs, drafting initial considerations of potential exemptions, commercial considerations and other related questions before meetings with SMEs;
  - c. conduct SMEs' assessment and review, along with detailing commercial sensitivities and confirmation of findings of facts with each SME, as well as file noting this information; and
  - d. complete the decision.
12. The total processing time included a statutory discount for the first five hours of decision-making. In making the above estimate, I endeavoured to be as accurate as possible. In addition, I considered paragraph 4.24 of the Office of the Australian Information Commissioner (**OAIC**) [FOI Guidelines](#). I also took guidance from **nbn's** previous experience in responding to requests relating to **nbn's** commercial activities carve-out, noting that such matters tend to be complex and require substantial assessment time by SMEs as well as review and FOI decision-making time.
13. In making my decision, I considered the Applicant's contentions made in his fee waiver request. I also reviewed relevant sections of the FOI Act, the *Freedom of Information (Charges) Regulations 1982 (Cth)* (**the Charges Regulation**), the FOI Guidelines, case law and other relevant sources.

#### **Decision and Reasons – nbn's Charging Policy**

14. Per regulation 3 of the Charges Regulation, a decision maker has the discretion to impose or not impose a charge, or impose a reduced charge for the processing of an FOI request. **nbn** has developed an FOI charging policy in line with the FOI Act, the Charges Regulation and the FOI Guidelines. In accordance with the FOI Guidelines at paragraph 4.3, **nbn's** does not impose FOI processing charges in a manner that discourages applicants from exercising their rights to access. Rather, **nbn** seeks to ensure that its FOI charges fairly reflect the work involved in providing access to documents on request.
15. **nbn** adopted its charging policy in light of the company's status as a GBE. Unlike Commonwealth Government agencies, **nbn** is expected to operate as a competitive commercial entity. The [Commonwealth GBE Governance and Oversight Guidelines \(January 2018\)](#) make this clear. In particular, the Guidelines' "Mandate and Objectives" section indicates that the principal objective for GBEs is to add to shareholder value. To achieve this objective, GBEs are required to operate



efficiently, at minimum cost for a given scale and quality of outputs, price efficiently and earn a commercial rate of return, among other matters.

16. 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, together with the expertise and efforts of other **nbn** staff members such as SMEs. As such, FOI processing takes staff time away from core commercial activities, which by definition, impacts on **nbn**'s resourcing for those core commercial activities, and therefore its ability to meet corporate targets. In that context, **nbn** is obliged to account for and place a value on staff members' time in respect of FOI processing efforts - to do otherwise would undermine **nbn**'s obligations to operate as a commercial entity.
17. In relation to regulated FOI processing fees, the two most expensive activities are decision-making (\$20/hour), and search and retrieval (\$15/hour), which are roughly equivalent to current Australian minimum wages. For reference - [the national minimum wage is currently \\$19.84 per hour](#). In that context, it is reasonable to assume that commercial entities would charge significantly higher rates for similar functions and tasks. It also follows that Government agencies and GBEs also 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 Freedom of Information Act 1983](#) (Cth) (February 2012) (**OAIC Charges Review Report**). In the OAIC Charges Review Report, the OAIC indicated the FOI charges only represented 2% of the actual costs incurred by agencies and similar bodies since the Act's commencement in 1982.
18. In light of the above points, entities subject to the FOI Act charge FOI processing fees at a significant discount to the actual costs incurred. This appropriately reflects the importance of FOI processes, particularly in respect of their 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 the OAIC Charges Review](#), **nbn** outlined its support of fees and charges and their importance to the FOI scheme, generally reflecting the points made below.
  - Government agencies and authorities should be able to recoup some of their costs associated with processing FOI requests, while - at the same time, providing key public services, in accordance 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 greater weight to GBEs, which are expected to operate as any other commercial entity in the marketplace. Similar reasoning applies to section 24AA of the FOI Act, which enables decision makers to refuse requests that would substantially and unreasonably divert agencies' resources from their 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 access determination. In addition, the requirement for a deposit tends to limit the scope of preliminary work "written off" by government entities in the event that an



applicant were to withdraw an FOI request. This dovetails with the public interest in not wasting government public resources, funded by Australian taxpayers.

- 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.*

19. In light of the above points, it is **nbn's** policy to charge applicants for 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 the processing fees for a given FOI request. I explore those grounds further below.

#### **Public Interest Grounds and Other Relevant Matters for Fee Reduction or Waiver**

20. Subsections 29(4) and (5) of the FOI Act detail the process that agencies must follow if an applicant contends that processing charges should not be imposed or reduced. Those sections read as follows:

- (4) *Where the applicant has notified the agency or Minister, in a manner mentioned in subparagraph (1)(f)(ii), that the applicant contends that the charge should be reduced or not imposed, the agency or Minister may decide that the charge is to be reduced or not to be imposed.*
- (5) *Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:*
- a) *whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*
  - b) *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. In addition, paragraph 4.73 of the [FOI Guidelines](#) states that an “agency is entitled to consider matters that weigh against those relied upon by an applicant.” Paragraph 4.73 of the FOI Guidelines also lists a number of instances where it is appropriate to impose an FOI charge.
22. As outlined above, I am required to consider whether the payment of the FOI charge, or part of it, would cause financial hardship to the Applicant. I note that the Applicant neither advanced contentions in relation to financial hardship, nor provided evidence of financial hardship in support of his fee reduction request. Accordingly, I am not convinced that payment of the FOI charge would cause financial hardship to the Applicant.
23. In considering this fee waiver request, I noted that the Applicant has filed his FOI application through the Right To Know website, and that a release is likely to bring any documents released to the general public's attention, thereby fulfilling one of the key objectives of the FOI Act.



Notwithstanding that the Applicant may bring the information to the public's attention, the determining factor for a charges review is whether disclosure will be of general or identifiable public interest. This is known as the public interest test (**PIT**).

24. The Applicant alluded to there being general public interest in the subject matter of the request when requesting a waiver of the FOI charge in his email sent 28 July 2020. In particular, he asserted *"threads on Whirlpool (an online technology forum) have been viewed by over 47,000 unique users with many discussing the locations of the ultra-fast tiers on both the FTTP and HFC networks."*
25. Given the scope and breadth of **nbn's** mandate, I accept that there is general public interest the rollout of **nbn** services. There is also some public interest in the general subject of HFC speed tiers.
26. As to the question of whether there is general public interest in the specific information sought by the Applicant so as to satisfy the PIT, **nbn** staff reviewed various media sources. The objective was to determine whether there was media coverage relating to the particular subject matter of the request, being the HFC release footprint documents for new HFC speed tiers released in the first half of 2020, being documents that set out all relevant locations of new speed tiers.
27. Whilst not determinative, I find that media coverage during the calendar year 2020 to the date of the request did not suggest that the relevant documents would be in the general public interest, or in the interest of a substantial section of the public. Such media coverage focussed instead on overall uptake of services, and speeds. In particular, it is not apparent that there is interest amongst a substantial section of the public in knowing the available HFC speed tiers of premises other than their own place of residence/business.
28. In addition, it is my understanding that Whirlpool threads may run to many pages in length and may deal with numerous topics. It therefore does not follow that over 47,000 users have seen relevant posts, nor that they are interested in the documents the subject of the Applicant's FOI request.
29. On balance, I am not persuaded that a fee reduction is appropriate in respect of this request. Accordingly, an advance deposit of \$86.25 is payable as set out in my letter dated 27 July 2020.
30. The Applicant should note that an access decision has not yet made, nor is required to be made in relation to any documents falling within the scope of this FOI request. **In the event that the Applicant agrees to pay the requisite processing charges in the abovementioned amount, nbn's FOI decision maker may still conclude that the documents are exempt from the operation of the Act, per the commercial activities carve-out found at section 7(3) of the FOI Act.**
31. Additionally, **nbn's** FOI decision maker may conclude **nbn** will not release the documents, based upon both general and conditional exemptions, the latter of which requires **nbn** to apply the public interest test in section 11B of the FOI Act. In that regard, please note that the public interest test found at section 11B is similar to, but different from the PIT employed for the purposes of deciding to reduce or not impose an FOI processing charge.
32. The Applicant should be aware that 12 days out of 30, had passed at the point at which this application was suspended to request an advance deposit. If dissatisfied with this decision, the



Applicant has certain rights of review. I have included details regarding your rights of review and appeal in the covering letter provided with this Statement of Reasons.

\*\*\*\*\*