



25 September 2020

Felix Friedlander
foi+request-6421-5372e331@righttoknow.org.au

Our Ref: FOI 1920/92.10

Dear Mr Friedlander

FOI Act Application – Access Decision

I am writing in relation to your application made under the *Freedom of Information Act, 1982 (FOI Act)* seeking access to the location of **nbn**'s FTTN node cabinets.

The Statement of Reasons (**attached**) outlines the specific terms of the FOI request, the decision-maker's findings and the access decision.

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.

Please feel free to contact me on (02) 9031 3022 if you have any questions, or if you would like to discuss your FOI application.

Yours sincerely

Rohan Singh
Senior Legal Counsel
FOI Privacy & Knowledge Management



FREEDOM OF INFORMATION REQUEST – FOI 1920/92.10

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ACCESS DECISION

STATEMENT OF REASONS

Background – nbn and the FOI Act

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 infrastructure.
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. To that end, **nbn** makes a large amount of information freely available to the public on our website: <http://nbnco.com.au/>.
3. **nbn** also manages its information assets within the terms and spirit of the *Freedom of Information Act* 1982 (the **FOI Act**). We 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, **nbn**'s Chief Executive Officer authorises me, to make decisions about access to documents and related matters under the FOI Act.
6. Under subsection 26(1) 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 my findings on any material questions of fact, referring to the material upon which those findings were based. Those findings are outlined below.

Application Chronology and Scope of Request

7. On 22 June 2020, **nbn** received an email from Felix Friedlander (the **Applicant**) making an application under the FOI Act requesting:

"a copy of an electronic document (spreadsheet, database extract, or similar) showing the location and distribution area (a string of the form [four letters]:[number]) of all existing FTTN cabinets."
8. On 8 July 2020, **nbn** asked for clarification so as to comply with the provisions of section 15(2) of the FOI Act.
9. On 12 July 2020, the Applicant clarified his definition of "distribution area".
10. On 29 July 2020, **nbn** asked for further clarification so as to comply with the provisions of section 15(2) of the FOI Act.
11. On 2 August 2020, the Applicant clarified his desired format of location data, thereby agreeing to amend the scope of the request to:



“a copy of an electronic document (spreadsheet, database extract, or similar) showing the location, expressed as a street address, and distribution area (a string of the form [four letters]:[number]) of all existing FTTN cabinets as at 22 June 2020”.

12. On 20 August 2020, I confirmed:
 - a. the scope of the Applicant’s request as required by section 15(5) of the FOI Act;
 - b. the processing period commenced the day after receipt of confirmation of the scope of the request;
 - c. a processing charge was payable;
 - d. an advance deposit request in the sum of \$45.62, based on a fee estimate of \$182.50;
 - e. the materials within the scope of this FOI request could potentially fall within the **nbn** Commercial Activities Carve-out (**CAC**) provided under section 7(3) of the FOI Act, placing subject materials outside the application of the FOI Act (among other exemptions from release). I also provided the Applicant with information relating to **nbn’s** CAC, together with relevant links containing background information and OAIC reviews; and
 - f. 16 days of the processing period had transpired as at the date of that correspondence.
13. On 19 September 2020, the Applicant paid an advance deposit, in the sum of \$45.62.
14. On the date set out above, I made my access decision, as outlined below.

Findings on material questions of fact

15. Under section 3(1)(b) of the FOI Act, the public has a right to seek access to “documents” rather than to discrete bits of information. However, section 17 of the FOI Act enables **nbn** to provide applicants with information where such information is not available in a discrete written form but it is “*ordinarily available to the agency for retrieving or collating stored information*”. In that regard, I received advice from **nbn** staff that it would be possible to create a document containing the information within the scope of the current request (**Relevant Information**).
16. I have consulted with **nbn’s** relevant subject matter experts (**SMEs**) in relation to the Relevant Information. **nbn’s** SMEs prepared a sample of the Relevant Information, comprising a dataset containing number of rows of the Relevant Information. I find that this sample is representative of the entire dataset, and sufficient for me to make this access decision as it contains all data attributes or fields for the rows given.

Access Decision

17. In undertaking my review of the Relevant Information, it is my view, having regard to the nature and subject matter of the request and the relevant provisions of the FOI Act, that one or more exemptions to release are applicable, as outlined below.
18. In making my decision, I took into account relevant parts of the FOI Act and related legislation, the Office of the Australian Information Commissioner (**OAIC**) [FOI Guidelines](#), relevant case law and other sources.



19. The Relevant Information relates to **nbn**'s commercial activities, being the siting, and installation, or potential installation of network infrastructure employed by **nbn** for the delivery of its services. Accordingly, **nbn**'s Commercial Activities Carve-out (**CAC**), enlivened under section 7(3A) of the FOI Act, is applicable in respect of this request.
20. From the terms of the request, it is apparent that the Applicant seeks information that identifies the location of a significant component part of **nbn**'s network infrastructure, being all of the nodes used in **nbn**'s FTTN technology network. I find that the Relevant Information sought by the Applicant has the potential to compromise the security of the **nbn**TM network and, therefore, the Commonwealth, if released.
21. There are legitimate security concerns and risks attendant to the release of document(s) depicting or identifying sites where **nbn** network equipment is, or may be, placed. For instance, the disclosure of such documents could potentially increase **nbn**'s vulnerability to physical and other attacks (whether from hackers, vandalism, criminal elements or terrorists), each of which would, or could reasonably be, expected to cause damage to the security of the Commonwealth.
22. Were such a document to be released, this precedent could oblige **nbn** to release the details of the location of network infrastructure, in future.
23. Additionally, were similar information to be disclosed to that requested by the Applicant, **nbn** may be required to increase the level of security associated with or applied to the network, as well as providing for increased security costs in its budget and commercial planning. This could conceivably lead to cost and time overruns, which could adversely impact **nbn**'s profitability. **For this reason, I find that the Relevant Information is subject to the CAC and accordingly I refuse access to the Relevant Information.**
24. It is unnecessary to consider any further exemptions in light of my determination that the Relevant Information fall within the meaning of the CAC. Without limiting the foregoing, there are other grounds upon which access to the Relevant Information could potentially be refused. In my opinion, the Relevant Information would also be exempt from release on the basis of the following sections of the FOI Act:
- a. s47 (documents disclosing commercially valuable information) of the FOI Act;
 - b. s47D (substantive adverse effect on the financial or property interests of the Commonwealth); and
 - c. s47G (business, commercial or financial affairs).
25. However, I have determined not to provide reasons in relation to those general and conditional exemptions.

Decision-making Time and Fees

26. **nbn** staff spent time searching for the Relevant Information in order to respond to the request, being approximately 2 hours. Additionally, I have spent approximately 8 hours in drafting and finalising this FOI decision, in addition to completing relevant correspondence in respect of the request.
27. No fees are levied for the first five hours of FOI decision-making time and accordingly no fees are payable in respect of the decision-making time in this instance.



28. As fees are not levied for the first five hours of FOI decision-making time, the fees payable would be \$90. This is based on 8 hours of decision-making time (8-5 hours = 3 hours x \$20 = \$60) and 2 hours (2 x \$15 = \$30) of search time.
29. It is **nbn**'s general policy to charge applicants 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.
30. Among other points, **nbn** highlighted the following issues:
- a. Government agencies and authorities 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 and that users should share in the cost of service provision;
 - b. The ability to charge for FOI processing time reflects the Commonwealth Parliament's and the community's recognition that public servants' time is a valuable resource and that such resources should only be spent in appropriate public undertakings. 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 or Government Business Entities (GBEs) from their operations;
 - c. The above contention, along with the need to utilise resources efficiently, may be applied with even greater force to GBEs, which are expected to operate as any other player in the commercial marketplace;
 - d. 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 see the application to a final determination. In that regard, processing fee payments and advanced deposits tend to limit the scope of preliminary and other similar work typically "written off" by Government entities in the event that an applicant withdraws a request. This dovetails with the public interest in not wasting government and – taxpayer funded – public resources; and
 - e. At page 5 of the Office of the Australian Information Commissioner's (the OAIC) [Review of Charges under the FOI Act 1983](#), 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"*.
31. Notwithstanding the above, given that I was able to base my decision on a sample of the dataset, rather than the entire dataset comprising the Relevant Information, together with **nbn**'s commitment to transparency, I have decided to now exercise my discretion to waive the remainder of the applicable fees. This equates to a reduction in the applicable fees payable by the Applicant of \$44.38, such that fee levied in respect of the request is the amount of the advance deposit only, being \$45.62. Accordingly, no further sum will be payable.
32. If you are dissatisfied with this decision, you have certain rights of review. Details regarding your rights of review and appeal are outlined in the covering letter, provided with this Statement of Reasons.
