



**27 August 2013**

Mr Kenneth Tsang  
Sent via email: [foi+request-664-5d53eadb@righttoknow.org.au](mailto:foi+request-664-5d53eadb@righttoknow.org.au)

Our Ref: FOI1415/01.13

Dear Mr Tsang,

**FOI Application – FSAM Coverage – All States**

I am writing in relation to your request made under the *Freedom of Information Act 1982 (FOI Act)*, seeking access to NBN Co rollout information and a fee waiver.

The Statement of Reasons attached outlines the decision-maker's findings. This decision is subject to review under sections 53A and 54 of the FOI Act. The Office of the Australian Information Commissioner's *FOI Fact Sheet 12 – Your review rights* is attached for your information and may be found at the [following link](#).

If you have any questions or need to discuss your FOI application, please contact the writer on (02) 891 85670 or via email on [yvettedeerness@nbngo.com.au](mailto:yvettedeerness@nbngo.com.au).

Sincerely,

**Yvette Deerness**

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## FREEDOM OF INFORMATION REQUEST – 1415/01

Kenneth Tsang

### ACCESS DECISION STATEMENT OF REASONS

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#### Background

1. NBN Co Limited (**NBN Co**) is a government business enterprise, which has the mandate of realising the Australian Government's vision for the development of a next generation national broadband network.
2. NBN Co recognises that information is a vital and an invaluable resource, both for the company and for the broader Australian community. That is why NBN Co 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, which may be found at the following link: <http://nbnco.com.au/>.
3. In addition, NBN Co manages its information assets within the terms and spirit of the *Freedom of Information Act 1982* (**the FOI Act or the 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 Co.
5. Under subsection 23(1) of the FOI Act, the Chief Executive Officer of NBN Co has authorised me, Yvette Deerness, 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 my findings on any material questions of fact, referring to the material upon which those findings were based.

#### Application Chronology and Terms of Request

7. On 1 July 2014, NBN Co received an FOI request from Mr Kenneth Tsang, known as JXeeno per his application through the Right-to-Know website (**the Applicant**). In particular, the Applicant sought access to:

*A document containing the number of Fibre Serving Area Modules (FSAMs) broken down by states as well as the expected approximate coverage localities covered by the FSAMs in each state where a contract instruction to commence "detailed design and field inspection work" had been issued to NBN Co's delivery partners between 1st March 2014 - 30th June 2014.*

8. On 9 July 2014, NBN Co's FOI Group acknowledged this application, which is required by section 15(5) of the FOI Act. Based upon a 30 day determination period, NBN Co was required to provide an access decision by 31 July 2014, subject to any suspension of the processing period for third party consultations, advance deposit requests, etc.
9. On 25 July 2014, NBN Co emailed the Applicant with details of the estimated processing charges and set out an advance deposit fee request for the sum of \$20.00.

10. On 25 August 2015, the Applicant requested that the fees be waived in relation to his request. In support of this fee waiver request, the Applicant provided the following public interest grounds:

*... (5) Given the substantial public interest, access charge waivers for all previous 7 FOI requests and the extreme likelihood of having to process separate FOI requests for each state as per the previous quarter [FOI1314/47 (Initial request), FOI1314/51 (VIC), FOI1314/61 (NT), FOI1314/53 (WA), FOI 1314/60 (QLD), FOI 1314/54 (NSW/ACT), FOI 1314/58 (SA)], NBN Co could waive the current charges in this current FOI request to avoid having to process at least 7 Freedom of Information requests relating to the same matter.*

The Applicant also provided the following supporting statement in relation to financial hardship:

*... As a full time high school student (age 17), I do not currently have an income that would sufficiently assist in the payment of this Freedom of Information request. I note that NBN Co had contended in previous FOI requests that advertising revenue from my website [mynbn.info](http://mynbn.info) may be considered a source of income – however, as demonstrated in my request for an Internal Review in FOI1316/26, the revenue acquired from advertising is a fixed fee that goes directly into hosting costs associated with running the website. In fact, it was stated that increased traffic would adversely affect my financial state due to an increased traffic cost without an adjusting income flow from ad revenue.*

11. On 14 August 2014, the FOI Group sought evidence from the Applicant, in support of his “financial hardship” claim. The Applicant was contacted via his personal email address due to the sensitive nature of the request.
12. On 18 August 2014, the Applicant provided further evidence to support his “financial hardship” claim.
13. Between 22 and 25 August 2014, the Applicant and I communicated about the status of the Application and key dates.
14. On 27 August 2014, I made my access decision and commented on the fee waiver application as outlined below.

### Summary of Access Decision

15. Following NBN Co’s issue of the “advance deposit request” to the Applicant, I issued a decision in connection with an FOI application for documents containing information very similar to the information requested by the Applicant (extract of decision attached at Annexure A for reference (**Decision FOI1415/04**)). Coupled with this, I am dealing with a series of requests for documents of a similar nature to that requested by the Applicant. As a result, and factoring in the time already spent on Decision FOI1415/04, I exercised my discretion to waive the processing charges. As a result, it was not necessary for me to reach a decision on the merits of the Applicant’s fee waiver request.
16. 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. Notwithstanding 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”. Following receipt of the Applicant’s request, NBN Co staff undertook searches through the company’s hard copy, electronic and other files. In that regard, I received advice from NBN Co staff that it would be possible to create an appropriate document containing the information falling within the scope of the Applicant’s request (**Document**).
17. As an FOI decision maker, it is open to me to consider whether the information falls within the terms of section 7(3A) of the FOI Act – NBN Co’s commercial activities exemption (**CAE**) – and is, therefore, not subject to the operation of the Act. General background information regarding NBN Co’s FOI processes and the principles underpinning NBN Co’s commercial activities exemption may be found at the following [link](#). It is my decision that the information contained in the Document falls within the CAE. It is also my decision that the Document is exempt from release based on section 47 of the FOI Act (Commercially valuable information).

18. Other potential exemptions could apply to the Document either in whole or in part. In my opinion, it is unnecessary to consider these exemptions as the Document was already exempt from the operation of the FOI Act as per the CAE and section 47 of the Act.

### Reasons for FOI Decision – Commercial Activities Exemption

19. As outlined in paragraph 15 above, I recently issued Decision FOI1415/04 in response to an application for information similar to that requested by the Applicant – an extract of Decision FOI1415/04 is attached at Annexure A. While a decision maker has a responsibility to treat each application on its merits, I am of the opinion that the reasons given by me in Decision FOI1415/04 to exempt the “Category A Information” (as defined in Decision FOI1415/04) apply equally to the Document the subject of this Application.

20. Rather than restate the substance of the reasons provided in Decision 1415/04, and in the interests of reducing the processing time and the consequential impact on processing costs, I have summarised the key points that support my decision that the Document falls within with the CAE. They are as follows:

- a) NBN’s technology mix is subject to change during the rollout to a given region or locality, particularly during the period during which detailed design work is being undertaken; and
- b) Premature release of the information contained in the Document could send signals to the market, which could - in turn - have an adverse effect on our Retail Service Partners (**RSPs**) and their investment plans for marketing, hardware purchases and other matters. Such premature release could also have an adverse effect on end users’ expectations and, ultimately, the take-up of our products.

The above factors, as further detailed in Decision FOI1415/04, potentially undermine NBN Co’s ability to maximise returns for our Shareholder Ministers and, ultimately, the Australian taxpayer.

21. Furthermore, the release of the Document could provide construction companies with the ability to reverse engineer the volume of detailed design work being undertaken for NBN Co, along with the ability to identify the relevant commercial entities awarded this work. This could provide competitors of our business partners, and others in the market with competitive commercial intelligence. As further elaborated upon at paragraph 15 of Decision FOI1415/04, these factors could ultimately impact NBN Co’s ability to negotiate effectively with construction partners regarding current works and also impact the negotiation of future construction contracts.

### General Exemptions (Commercially Valuable Information)

22. Section 47 of the FOI Act exempts documents from release if they would disclose trade secrets or commercially valuable information. The relevant section of the FOI Act provides:

#### Trade Secrets or Commercially Valuable Information

*47(1) A document is an exempt document if its disclosure under this Act would disclose: (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*

23. Drawing from the points made in relation to the “commercial activities” exemption above and in Decision FOI1415/04, I am of the opinion that the Document falls within the meaning of commercially valuable information. If NBN Co were to release the Document, it could have adverse implications, including:

- signalling to the market what was required to gain an advantage in making a business proposal to NBN Co, thereby skewing the competitive nature of such processes – both in relation to current activities and other future contracts;
- being used by players within the telecommunications or finance industries to gain an advantage in their dealings with their own competitors or with NBN Co; and

- undermining NBN Co's role as a commercial player.

The cumulative effect of the points above could place an unfair and onerous burden upon NBN Co. This burden could translate into higher costs for the company and a consequential, negative impact to NBN Co's taxpayer funded budget. It could also have a negative impact on NBN Co's underlying value and, ultimately, the Commonwealth Government's ability to privatise our company.

24. Having considered the points above regarding NBN Co's CAE or commercial activities exemption, it is my opinion that the Document falls within the meaning of section 47(1) of the FOI Act. The Document is commercially valuable information, which could be diminished, if disclosed. As such, the Document is exempt from release.

## Processing Charges

25. It is NBN Co's general policy to charge applicants for FOI processing time. In its [Submission to the OAIC Charges Review](#), NBN Co outlined its support of fees and charges and their importance to the FOI scheme. My final payment request indicates that 5.5 hours was spent in search and retrieval time on this matter. However, I have decided to waive those charges as I had a series of applications of a similar nature, which sought detailed design information and data. I had also issued Decision FOI1415/04, which dealt with similar information. I thought it inappropriate to charge the Applicant for this time, noting that other (later) applicants would benefit from the time previously spent on this decision. This fee waiver is permitted by regulation 3 of the *Freedom of Information (Charges) Regulations 1982*, which provides decision-makers with a general discretion to impose or not impose a charge, or impose a reduced charge for the processing of an FOI request.
26. In light of my decision set out above to waive the processing charges under regulation 3 of the *Freedom of Information (Charges) Regulations 1982*, it is not necessary for me to make a decision as to the merits of the Applicant's fee waiver request.
27. 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.

## Annexure A

### Extract from Decision FOI1415/04

3. "On 18 July 2014, the Applicant clarified the terms of his request, limiting the terms to:

*A document that confirms that a contract instruction to "commence detailed design and field inspection work" has been (or is to be) issued for the areas of Belgian Gardens, Rowes Bay and Pallarenda in Townsville, Queensland (4TNS FSA) and (if possible) I wish to obtain a document that advises of all the areas covered by the 12 FSAM's [or Fibre Serving Area Module] included in the 4TNS Point of Interconnect, broken down to the areas specific to each FSAM.*

...

#### Summary of Access Decision

14. 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. Notwithstanding 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". Following receipt of the Applicant's request, NBN Co staff undertook searches through the company's hard copy, electronic and other files. In that regard, I received advice from NBN Co staff that it would be possible to create an appropriate document.
15. The results of the searches referred to in Paragraph 8 above, produced two categories of information namely:
- a) information falling within the scope of the Applicant's request and relating to the relevant areas where contract instructions had been issued to commence detailed design and field inspection work where build has not commenced (**Category A Information**); and
  - b) information falling within the scope of the Applicant's request and relating to the relevant areas where build has commenced (**Category B Information**).
16. As an FOI decision maker, it is open to me to consider whether the information falls within the terms of section 7(3A) of the FOI Act – NBN Co's commercial activities exemption (**CAE**) – and is, therefore, not subject to the operation of the Act. General background information regarding NBN Co's FOI processes and the principles underpinning NBN Co's commercial activities exemption may be found at the following [link](#). It is my decision that the Category A Information falls within the CAE. It is also my decision that the Category A Information is exempt from release based on section 47 of the FOI Act (Commercially valuable information).
17. Other potential exemptions could apply to the Category A Information either in whole or in part. In my opinion, it is unnecessary to consider these exemptions as the Category A Information were already exempt from the operation of the FOI Act as per the CAE and section 47 of the Act.
18. I also conferred with relevant subject matter experts in our business as to whether the Category B Information may fall within the above – or other relevant – exemptions. In that regard, no relevant contentions or objections to release were made and it is my decision that the Category B Information can be released.
19. As per section 22 of the FOI Act, I have determined to partially release a document containing the Category B Information, which may be found at **Attachment A**.

#### Reasons for FOI Decision – Commercial Activities Exemption

20. As outlined above, I refer you to a summary explanation regarding NBN Co's CAE, found at the following [link](#). It is my decision that the Category A Information falls within the CAE. I base this finding on the fact that NBN's technology mix is subject to change during the



rollout to a given region or locality particularly during the period in which detailed design work is being undertaken. Based upon rigorous business rules and analysis, NBN Co will make a decision as to the technology that most effectively and efficiently serves a given area, being – fibre to the premise, fibre to the node or basement, HFC, fixed wireless, satellite or a combination of these. In addition to the technology choice, NBN Co may determine that it is most efficient to delay the rollout of services to a given region or locality based upon its business rules.

If NBN Co were to release this information prematurely, it could send a signal to the market and our business partners. In particular, the premature announcement of the (awarding of) design work could impact upon retail service provider's (RSPs) plans to invest in marketing and providing hardware to a given locality, when – in fact, the build may not commence for some time. This could have clear and adverse impacts upon our relationship with RSPs and upon end-users' experience of NBN Co and its wholesale products and services. This could, in turn, adversely impact end users' expectations and, ultimately, the take-up of our products. It follows that the release of Category A Information could potentially undermine NBN Co's ability to maximise returns for our Shareholder Ministers and, ultimately, the Australian taxpayer.

21. In addition, the release of the Category A Information could provide construction companies with the ability to reverse engineer the volume of detailed design work being undertaken for NBN Co, along with the ability to identify the relevant commercial entities awarded this work. Presuming that this information were released, NBN Co would likely be obliged to release this information for all locations in the country – and on an ongoing basis. This would enable members of the public and others in the market place to reverse engineer the flow of work to our construction partners. By reverse engineering the Category A Information, our business partners' competitors or others in the market could gain competitive commercial intelligence. This could directly impact our business partners' ability to obtain further work from NBN Co and other players in the construction and telecommunications market. It could also impact upon NBN Co's ability to negotiate effectively with its construction partners regarding current works. It could also adversely impact the negotiation of future construction contracts, as the current work cycle is part of an ongoing rollout that will last into the next decade.

#### **General Exemptions (Commercially Valuable Information)**

22. Section 47 of the FOI Act exempts documents from release if they would disclose trade secrets or commercially valuable information. The relevant section of the FOI Act provides:

Trade Secrets or Commercially Valuable Information

47(1) A document is an exempt document if its disclosure under this Act would disclose: (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

23. Drawing from the points made in relation to the "commercial activities" exemption, i.e. section 7(3A) of the FOI Act, I am of the opinion that the Category A Information falls within the meaning of commercially valuable information. If NBN Co were to release the Category A Information, it could have adverse implications, including:
- signalling to the market what was required to gain an advantage in making a business proposal to NBN Co, thereby skewing the competitive nature of such processes – both in relation to current activities and other future contracts; and
  - be used by players within the telecommunications or finance industries to gain an advantage in their dealings with their own competitors or with NBN Co.
24. In relation to NBN Co itself, the release of the Category A Information could fundamentally undermine NBN Co's role as a commercial player. The net effect would be to place an unfair and onerous burden upon NBN Co. This burden would translate into higher costs for the company and a consequential, negative impact to NBN Co's taxpayer funded budget. It could also have a negative impact on NBN Co's underlying value and, ultimately, the Commonwealth Government's ability to privatise our company.
25. Having considered the points above regarding NBN Co's CAE or commercial activities exemption, it is my opinion that the Category A Information falls within the meaning of section 47(1) of the FOI Act. The Category A Information is commercially valuable information, which could be diminished, if disclosed. As such, the Category A Information is exempt from release. "