



13 October 2014

Mr Kenneth Tsang
Sent via email: foi+request-664-5d53eadb@righttoknow.org.au

Our Ref: FOI1415/01.IR06

Dear Mr Tsang,

FOI Application – FSAM Coverage – All States

I am writing concerning your request for an Internal Review under the *Freedom of Information Act 1982, (Cth)* (**the FOI Act**).

Please see the attached Statement of Reasons detailing my 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* contains information about your review rights and may be found at the following [link](#).

If you have any questions or need to discuss your FOI application, please contact me on adrianfung@nbnco.com.au.

Yours sincerely,

Adrian Fung
General Manager Legal – Technology & Networks

cc. Justin Forsell, Chief Legal Counsel, NBN Co

PHONE (02) 9926 1900 FAX (02) 9926 1901
EMAIL info@nbnco.com.au WEB www.nbnco.com.au

LEVEL 11, 100 ARTHUR STREET, NORTH SYDNEY NSW 2060

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FREEDOM OF INFORMATION REQUEST – FOI1415/01.IR06

Mr Kenneth Tsang

INTERNAL REVIEW – STATEMENT OF REASONS

Decision-Making Authority

1. I am authorised for the purposes of section 23 of the *Freedom of Information Act 1982* (Cth) (the **FOI Act**) to make an internal review decision on the decision of Ms Deerness on behalf of NBN Co.

Background

2. On 1 July 2014, the Applicant applied for 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."
3. On 27 August 2014, Ms Deerness issued her access decision to the Applicant by email (**Access Refusal Decision**).
4. As part of the Access Refusal Decision, Ms Deerness noted, among other things, that:
 - a. the document sought fell 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 FOI Act; and
 - b. the document sought is exempt from release based on section 47 of the FOI Act (Commercially valuable information).
5. On 13 September 2014, the Applicant sought a review of the Access Refusal Decision. In support of his request, the Applicant made the following comments:
 - A. "This FOI request" refers to FOI1415/01.
 1. This FOI request relates to the release information regarding the issuance of design contract instructions which NBN Co issues to its construction partners on a regular basis and is part of the BAU (business as usual) operations of NBN Co.
 2. The information as requested in this FOI request was previously publicly available (prior to September 2013) in a more detailed form of the Monthly Ready for Service Plan and was also publicly released by subsequent FOI requests after September 2013.
 3. The scope of the information requested in this FOI request is identical (except for time frame) to that of the Freedom of Information requests: FOI1314/47 (contract instruction count), FOI1314/51 (VIC), FOI1314/61 (NT), FOI1314/53 (WA), FOI1314/60 (QLD), FOI1314/54 (NSW/ACT), FOI1314/58 (SA); which were made three months prior to this FOI request and were all released in full.
 4. As stated in Point 20 of Decision FOI1415/04 (which is referred to in the decision of this FOI request), an issuance of a design contract instruction does not necessarily result in the issuance of a build contract instruction. It does not indicate that build issuance is imminent, and nor does it indicate the final technology to be employed by NBN Co. As such, this makes the reason outlined in Point 20 self-contradicting and irrelevant as it neither implies the designation of a certain technology nor the timeframe of a build contract instruction to Retail Service Providers nor end-user's experience or take-up of NBN services.

5. *The risk that the volume of design contract instructions will be revealed (as explained in Point 21 of Decision FOI1415/04) is minimal to that compared to the voluntarily release of Telstra remediation notice and build contract instructions by NBN Co on its own rollout map on a monthly basis. Not only is the value of build contract instructions greater in monetary value than that of design contract instructions, but there is no publicly known monetary value for design contract instructions on a per-contract level or on a per-premises level.*

6. In light of the Applicant's request for internal review, I must make a fresh decision on behalf of NBN Co in relation to that access request under section 54C(3) of the FOI Act.
7. In making a fresh decision on behalf of NBN Co, I have considered the Information Commissioner's FOI Guidelines which provide that "an agency should be guided by the principles put forward by the Administrative Review Council in a Best Practice Guide on internal review, *Internal Review of Agency Decision Making*, Report No 44 (2000), Chapter 8." Those principles can be adapted to the FOI context and are set out at paragraph 9.33 of the FOI Guidelines. In particular, I note that:
 - a. I have endeavoured to bring a fresh, independent and impartial mind to the review and was not involved in or consulted in the making of the decision under review;
 - b. I have considered all of the issues raised by the Applicant in his original FOI request and in his request for internal review and have exercised all the powers available to Ms Deerness; and
 - c. All the materials available to Ms Deerness were made available to me as part of this review.

Internal Review Decision

8. I have carefully considered the nature and scope of the Applicant's request and all the materials made available to Ms Deerness by NBN Co employees as part of the original Access Refusal Decision issued by her. As part of this consideration, I am satisfied that an appropriate document can be created containing information of the kind sought by the Applicant in his FOI request as permitted under section 17 of the FOI Act.
9. Notwithstanding, I have decided that the document requested by the Applicant falls within the terms of section 7(3A) of the FOI Act – NBN Co's CAE - and is, therefore, not subject to the operation of the FOI Act for the reasons set out below under "Findings of material facts and reasons". Accordingly, I have decided that the document requested by the Applicant should not be released by NBN Co.
10. Other potential exemptions could also apply to the document sought, either in whole or in part which would also serve to exempt that document from release. However, it is not necessary to consider these other exemptions in this decision as the document sought, in my opinion, is already exempt from the operation of the FOI Act by virtue of section 7(3A) of the FOI Act – NBN Co's CAE.

Findings of material facts and reasons

11. NBN Co is a government business entity, which has the mandate of realising the Australian Government's vision to develop a National Broadband Network that is truly national in character in a cost-effective way.
12. In order to achieve its objectives, NBN Co has a number of commercial, arms-length arrangements with several service delivery partners and access seekers.
13. On 8 April 2014, NBN Co's shareholder ministers issued a statement of Government expectations of NBN Co (**Statement of Expectations**). Among other things, the Statement of Expectations confirmed a move to a 'multi-technology mix' under which "NBN Co will determine which technologies are utilised on an area-by-area basis so as to minimise peak funding, optimise economic returns and enhance [NBN Co Limited's] viability." This was one of several commercial issues noted by NBN Co's shareholder Ministers in the Statement of Expectations.

14. As set out above, I must consider afresh whether to release the document sought by the Applicant. In making my decision, I have had regard to the particular grounds of review included by the Applicant in his request for review in paragraph 5 above.

15. My views on the specific points raised by the Applicant (see paragraph 5 above) are:

- a. As to the first point, the fact that the information is generated as part of 'business as usual' operations of NBN Co, in my opinion, indicates that this information relates to NBN Co's commercial activities as those operations are ultimately carried out on a commercial basis with NBN Co's service delivery partners with the view of generating a return on investment either in the near term or in the reasonably foreseeable future for NBN Co's Shareholder Ministers and ultimately, the Australian taxpayer.
- b. As to the second point, I note that any documents that were previously released in connection with similar FOI requests and any documents containing the information presently sought by the Applicant which were previously made available to the public were released or made available during a period in which NBN Co was still consolidating its new commercial strategy around the significant move to a 'multi-technology mix', that was subsequently confirmed by the release of the Statement of Expectations. I note the following in particular:
 - i. the considerations that are relevant to be taken into account in this internal review decision are those facing NBN Co as at the date of this decision. Those considerations may not be the same as those previously faced by NBN Co when it responded to earlier FOI requests for documents;
 - ii. in any event, I am required to consider the merits of this particular application afresh (which I have done, based on reasons set out above).
- c. As to the third point, I repeat the analysis set out in paragraph 15(b) above.
- d. As to the fourth point, I am of the view that, regardless of whether a design contract instruction leads to a build contract instruction or not, the document sought by the applicant falls within the terms of section 7(3A) of the FOI Act – NBN Co's CAE - and is, therefore, not subject to the operation of the FOI Act, as it relates to commercial activities carried on by NBN Co on a commercial basis with its service delivery partners. The information sought concerns NBN Co's active operations and activities relating to the management of NBN Co's service delivery partners and was brought into existence for the purposes of carrying on the roll out of the National Broadband Network in a cost-effective way with the view of maximising returns for NBN Co's Shareholder Ministers and ultimately, the Australian taxpayer.

Moreover, if NBN Co were to release the document sought by the Applicant prematurely, it could send a signal to the market and NBN Co's business partners. In particular, the announcement of the awarding of design work, coupled with the release of FSAM identities and localities in connection with which design work was awarded 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 NBN Co's 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 NBN Co products. It follows that the release of the document could potentially undermine NBN Co's ability to maximise returns for NBN Co's Shareholder Ministers and, ultimately, the Australian taxpayer.

- e. As to the fifth point, I am satisfied that the document sought by the Applicant is a document 'in respect of [NBN Co's] commercial activities' for the purposes of Schedule 2, Part II, Division 1, and section 7(3A) of the FOI Act and is, therefore, not subject to the operation of the FOI Act despite the Applicant's perception that any commercial risks associated with the disclosure are minimal.

16. For the reasons set out above, I am satisfied that the document sought by the Applicant falls within the terms of section 7(3A) of the FOI Act – NBN Co's CAE - and is, therefore, not subject to the operation of the FOI Act.
17. As outlined above, the covering letter contains a link to The Office of the Australian Information Commissioner's "*FOI Fact Sheet 12 – Your review rights*" which contains more information about the Applicant's review rights.