



21 December 2020

MG

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Our Ref: FOI-2021/28.11

Dear MG

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 area in which **nbn** does not intend to switch off DPBO.

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-2021/28.11

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 1 October 2020, **nbn** received an FOI request from MG (**the Applicant**), in the following terms:

"On 17 Feb 2020 (in an email with "Charlick Rd" in the title), NBNC Co stated the following:

"Mr Wilkinson lives in one of 15 premises on Charlick Rd, Crafers West, which have been allocated Sky Muster™ (satellite) as their nbn™ access technology.

These 15 premises have the option of maintaining an ADSL service beyond the completion of the NBN-ADSL co-existence period for this area. Typically, when co-existence concludes in an area, the Downstream Power Back-Off (DPBO) is switched off.

Mr Wilkinson's observation that this change can result in interference to ADSL services within an area is valid. However, in the case of Charlick Rd, NBN Co has investigated options and found that there will not be a need to turn-off the DPBO, and therefore does not intend to do so.

This will ensure no interference to ADSL services in the area and will not affect the nbn™ access network's ability to deliver stable broadband service which meet our mandated speed targets to fixed line services in the area."



I am requesting the following information:

1. Identification of the "area" where NBN Co does not intend to turn-off DPBO. (Suburb name(s) are sufficient)

2. The total number of "fixed line services in the area" affected by NBN Co's intention to not turn-off DPBO.

("Total number" means any premises that is already connected or can potentially connect to a NBNCo fixed line service in "the area".)

8. On 27 October 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 \$38.75, based on a fee estimate of \$155.00;
- e. the materials within the scope of this FOI request could potentially fall within the **nbn** Commercial Activities Carve-out 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** Commercial Activities Carve-out, together with relevant links containing background information and OAIC reviews; and

9. 26 days of the processing period had transpired as at the date of that correspondence.

10. On 29 October 2020, the Applicant requested a waiver of the processing charges and at the same time narrowed the scope of his request to:

"Identification of the "area" where NBN Co does not intend to turn-off DPBO. (Suburb name(s) are sufficient)."

11. On 27 November 2020, I made a processing charges decision, determining that the Applicant was liable to pay a fee for the processing of his request, in accordance with the provisions of the FOI Act.

12. On 30 November 2020, the Applicant corresponded by email and supplemented his reasons for requesting an exemption from processing charges.

13. On 16 December 2020, I wrote to the Applicant indicating that, due to his supplemental submissions in relation to his fee waiver request, that I would withdraw my processing charges decision and waive **nbn's** processing fees.

14. On the date set out above, I made my access decision, as outlined below.



Summary of decision

15. As an FOI decision maker, I am obliged to consider whether the information requested by the Applicant falls within the terms of section 7(3A) of the FOI Act, being **nbn**'s commercial activities carve-out (**CAC**) and is therefore not subject to the FOI Act. It is my decision that the information requested by the Applicant falls within the CAC and is therefore exempt from release.

Findings on material questions of fact

16. 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**).
17. I undertook discussions with subject matter experts within **nbn** regarding the Relevant Information and made the following findings:
- The Relevant Information is the suburb name(s) comprising the "area" where **nbn** does not intend to turn off downstream power back off (**DPBO**) as per the email quoted in the Applicant's correspondence dated 1 October 2020.
 - DPBO is a technique used to facilitate "co-existence" of communications systems. Co-existence is the term used to indicate that two (or more) communications systems operate on the same cable at the same time. Newer systems can co-exist on the same cables as older "legacy" systems; however the new system may disturb the legacy system if the power to the new system is not appropriately reduced. This reduction in power to a new system sharing a cable with a legacy system is known as downstream power back off, or DPBO.
 - If DPBO is in effect on part of a network, optimal network speeds may not be possible for premises in the relevant area. End users in the relevant area may be affected by DPBO, depending on several factors including network demand in that location and the maximum speed of each end user's plan with their retail service provider (**RSP**). **nbn** keeps the areas where DPBO is in effect confidential so that this information is not used by competitors to their advantage/**nbn**'s detriment.
 - nbn** employs DPBO in where its network co-exists with a legacy network. The period of co-existence is generally the subject of commercial arrangements between **nbn** and the owner/operator of the legacy system. **nbn** may or may not have the option to terminate co-existence and DPBO, and such termination can in certain circumstances be blocked by the owner of the legacy system.
 - When the co-existence period ends, **nbn** generally switches off DPBO in the relevant location as permitted by such commercial arrangements. Switching off DPBO can have the effect of improving the potential performance of **nbn**'s network in the relevant location.
 - The Relevant Information essentially describes the area where, according to the letter quoted by the Applicant, co-existence is in effect and accordingly could indicate properties connected to the **nbn**[™] network that may not be able to achieve optimal network speeds. It may also indicate



where third party legacy services are being provided or could be available and where third parties have required co-existence to continue under their commercial arrangements with **nbn**.

g. Accordingly, I find that the Relevant Information:

- i. contains material which is confidential to nbn;
- ii. includes detail and characterisation of the performance (or potential performance) of **nbn**'s commercial offering of services;
- iii. could be used by nbn's competitors or other commercial entities to target end users for rectification, repair, maintenance works, or other related services (including services using different technologies or the same or similar technologies in parallel, i.e. 'overbuilding' in areas in which **nbn** already offers its services, or may choose to do so in the future);
- iv. could be used by competitors or other commercial entities to target sales campaigns or other commercial engagement with end users or retail service providers;
- v. could be used by competitors in the telecommunications industry to gain advantage in respect of dealings, either with **nbn**, or as between each other;
- vi. if released, and because of the foregoing, may impact upon **nbn**'s operations or value as an enterprise, by adversely impacting **nbn**'s:
 1. negotiations with third parties in relation to the product offerings of, and communications about the product offerings of, RSPs;
 2. negotiations with third parties in relation to the pricing of current and future **nbn** broadband internet services, in respect of both RSPs and end users; and
 3. reputation, whether in respect of the quality, capability, performance, or other related characteristics of the services it offers.

Access Decision

18. 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.
19. 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.
20. Information relating to **nbn**'s commercial activities is exempt, or carved out, from the application of the FOI Act, per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act. The following link summarises and provides [General Background Information](#) concerning **nbn**'s commercial activities carve-out (the **CAC**) or carve-out from the application of the FOI Act. That background document references two Office of the Australian Information Commissioner (**OAIC**) reviews that considered **nbn**'s CAC in January 2012 (the [Internode Decision](#)) and again in July 2013 (the [Battersby Decision](#)).



21. I rely upon the General Background Information, noted above. In addition, it is my decision that the Relevant Information falls within the meaning of section 7(3A) of the FOI Act, for the reasons outlined below. Therefore, the Requested Documents are not subject to the operation of the Act.
22. At issue in this FOI decision is whether the Relevant Information falls within the definition of “commercial activities”, as provided under the FOI Act. In my view, the Relevant Information falls within the definition “commercial activities” because it is comprised of information used in relation to activities carried on by **nbn** on a commercial basis, as outlined below, per the findings of fact above:
23. The Relevant information:
- a. was determined at least in part due to the way in which **nbn** designed its network based on both technical and commercial considerations;
 - b. is confidential to **nbn** because of its inherently close relationship to the commercial activities conducted by the company, and is treated as confidential in its dealings with third parties;
 - c. could be used by third parties to engage in their own commercial activities, which could potentially impact the profit made by **nbn**, or otherwise generate profit at the expense of **nbn**, whether by offering the same or similar services, or services offering different, competing technology; and
 - d. could if released have an impact upon future commercial activities to be carried on by **nbn**, including the prospect of further participating in co-existence using DPBO.
24. I am of the view that the features of the Relevant Information, together with each of the scenarios outlined above, relate to activities carried on by **nbn** on a commercial basis, or activities carried on by **nbn** that may reasonably be expected (in the foreseeable future) to be carried on by **nbn**, on a commercial basis.
25. Considering the points above, I find that the Relevant Information is exempt from release under the FOI Act, per section 7(3A) of the FOI Act.
26. It is unnecessary to consider any further exemptions considering my determination that the Requested Documents fall within the meaning of the commercial activities carve-out. Without limiting the foregoing, there are other grounds upon which access to the Requested Documents could potentially be refused. In my opinion, the Requested Documents would also be exempt from release based on the following sections of the FOI Act:
- a. s47 (documents disclosing commercially valuable information) of the FOI Act;
 - b. s47G (business, commercial or financial affairs).
27. However, I have determined not to provide reasons in relation to those general and conditional exemptions.

Decision-making Time and Fees

28. In my charges decision of 27 November 2020, I articulated arguments as to the grounds upon which I decided that the Applicant’s request for a waiver of fees in respect of this application ought not to succeed. However, the Applicant made supplemental submissions with respect to financial hardship. In



the circumstances, I have withdrawn that decision and determined to waive processing fees in relation to this FOI application. This 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.

29. 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.
