



21 August 2014

Mr Wayne Blacker

Sent via email: foi+request-679-47fe14bb@righttoknow.org.au

Our Ref: FOI1415/04.05

Dear Mr Blacker,

FOI Application – Belgian Gardens/Rowes Bay/Pallarenda Rollout Information

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

The Statement of Reasons (**Attached**) outlines the specific terms of the FOI request, the decision-maker's findings and the access decision. For your reference, the FOI 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, need to discuss your FOI application or require any other information relating to this matter, please feel free to contact the writer on Tel. (02) 89185670 or via email on yvettedeerness@nbnco.com.au.

Sincerely,

Yvette Deerness
FOI Officer

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 – 1415A/04

Mr Wayne Blacker

**ACCESS DECISION
STATEMENT OF REASONS**

Application Chronology and Terms of Request

1. On 15 July 2014, NBN Co received an email from Mr Wayne Blacker of the 'Right-To-Know' website (**the Applicant**), in which he made an application under the *Freedom of Information Act, 1982* (**the FOI Act or the Act**) for the following:

Any documentation relating to the NBN rollout for the areas of Belgian Gardens, Rowes Bay and Pallarenda in Townsville, Queensland (4TNS FSA). Specifically, whether a contract instruction to "commence" detailed design and field inspection work" has been/will be issued for these areas?

2. On 17 July 2014, NBN Co staff wrote to the Applicant and informed him that it was unclear as to the precise documents to which he was seeking access. In that same correspondence, NBN Co staff commenced a request consultation process under section 24 of the FOI Act, indicating that the Applicant's request for "any documentation" relating specific rollout areas would involve a significant amount of search time. In that regard, it was outlined to the Applicant that NBN Co would be required to undertake reviews of all staff members' email accounts, soft and hard copy files and other sources of documentation.
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.
4. On 31 July 2014, NBN Co acknowledged receipt of this application as required by section 15 of the FOI Act and informed the Applicant that a determination would be due on 18 August 2014, subject to any suspension of the processing period due to requests for charges or third party consultations.
5. On 18 August 2014, I completed my FOI decision and requested that the Applicant pay outstanding processing fees.
6. On 20 August 2014, I was provided with confirmation of the Applicant's payment of the FOI processing fees.,
7. On 21 August 2014, I forwarded this decision to the Applicant.

Summary of Access Decision

8. 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.

9. 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**).
10. 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).
11. 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.
12. 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.
13. 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

14. 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.

15. 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)

16. 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.

17. 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.

18. 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.

19. 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.

Partial Release

20. In making my FOI decision, I endeavoured to be guided by both the spirit and terms of the FOI Act. I also made reference to the objects of the Act, which provide for agencies to exercise their functions and powers, as far as possible, to facilitate and promote public access to information. In that context, and as outlined above, I have determined to grant access to the Category B Information and contained in Attachment A s permitted by section 22 of the FOI Act.

Processing Charges

21. NBN Co staff spent approximately one hour in sourcing the relevant information. In addition, I spent approximately eight hours in drafting and finalising this FOI decision, as well as completing relevant correspondence and undertaking discussions with experts in our business regarding the information and dataset, their commerciality, etc.
22. 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 I spent 2.5 hours in decision-making time on this matter however, I discounted 5.5 hours of my decision-making time as I had a series of applications of a similar nature, which sought detailed design information and data. 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.
23. 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.

Attachment A – NBN Co FOI Matter 1415/04 – Townsville, Queensland FSAM Coverage (Released in Full)

Section 17 of the *Freedom of Information Act, 1982 (the FOI Act or the 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”. As per sections 11 and 11A of the FOI Act, NBN Co FOI Officer determined that it was possible to release the following information in full:

All the areas covered by the FSAM's included in the 4TNS Point of Interconnect, broken down to the areas specific to each FSAM and where build has commenced and a contract instruction has been issued

FSAM Name	Suburbs
4TNS-01	Townsville City
4TNS-02	Townsville City, North Ward
4TNS-03	North Ward, Castle Hill
4TNS-04	South Townsville, Railway Estate
4TNS-05	West End, Townsville City
4TNS-06	Railway Estate, Hermit Park
4TNS-07	Hyde Park, Pimlico, Hermit Park
4TNS-08	Mundingburra, Rosslea, Hermit Park
4TNS-09	West End, Garbutt