



20 May 2021

ST
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Our Ref: FOI 2021/54.11

Dear ST

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 a list of the criteria used for selecting certain geographic areas for a network upgrade.

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

Where applicable, an FOI decision may be reviewed under Part VI and Part VII 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 2021/54.11

ACCESS DECISION STATEMENT OF REASONS 20 MAY 2021

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 and operation of Australia’s 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 its website: <http://nbngo.com.au/>.
3. **nbn** also manages its information assets within the terms and spirit of the *Freedom of Information Act* 1982 (the **FOI Act**). **nbn** endeavours to release information proactively, while considering its 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 12 February 2021, **nbn** received an email from “ST” (the **Applicant**) in the following terms:

“I refer to the following two media releases:

- <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-extends-fibre-to-additional-100k-premises>
- <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-announces-next-100k-premises-in-fttn-to-ftp-upgrade>

As the media statements appear to not provide any reasoning as to why these areas are selected, I am requesting the following information under the FOI act:

1. *Any statement, documentation, or internal correspondence that that would show the following:*



1.1: Explanations, reasons or rational as to why the areas mentioned in the media releases have been selected as locations where the fibre network is to be extended.

1.2: Any areas that were considered but ruled out, and the rational behind this.

2. The split in technology types within the areas for both 1.1 and 1.2

3. If any parties external to NBN have been consulted on the areas selected in both 1.1 and 1.2”

8. On 26 February 2021, **nbn** wrote to the Applicant to ask for clarification so as to comply with the provisions of section 15(2) of the FOI Act.
9. Following an exchange of correspondence with the Applicant, the Applicant agreed on 23 March 2021 to amend the scope of the request, to:

“a list of the criteria that nbn uses to take into account which has made them select all of these areas that ultimately ended up selected”.

As per the Applicant’s email sent 12 February 2021, the wording “these *areas*” in the above request means the two tranches of areas selected for fibre upgrade as referenced in **nbn**’s media statements dated 27 October 2020 and 10 February 2021, being:

Tranche 1:

- *Belmont North, Charlestown, Toronto, Carramar, Castle Hill, Holsworthy, Liverpool, and Wetherill Park in New South Wales;*
- *Lyndhurst and Narre Warren in Victoria;*
- *Acacia Ridge, Browns Plains, Eight Mile Plains and Oxenford in Queensland;*
- *Osborne in South Australia, and*
- *Cannington and Double View in Western Australia.*

Tranche 2:

- *Campbelltown, Elderslie, Narellan, Maitland, Singleton, Tarro, New Lambton, Bathurst and Orange in New South Wales;*
- *Deer Park, Sydenham, Berwick South, Cranbourne and additional areas of Narre Warren in Victoria;*
- *Albany Creek, Ashgrove, Bald Hills, Ferny Hills, Robina, Burleigh Heads and Townsville in Queensland;*
- *Elizabeth, Gepps Cross, Salisbury and Golden Grove in South Australia, and*
- *Girrawheen, Kingsley, Wanneroo, Canning Vale and Jandakot South in Western Australia.”*

10. On 12 April 2021, 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 \$48.75, based on a fee estimate of \$195.00;



- e. the materials within the scope of this FOI request could potentially fall within the **nbn** Commercial Activities Exemption 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 Exemption, together with relevant links containing background information and OAIC reviews; and
 - f. 19 days of the processing period had transpired as at the date of that correspondence.
- 11. On 15 April 2021, the Applicant corresponded by email requesting a waiver of **nbn's** FOI processing charges.
 - 12. On 14 May 2021, I made a processing charges decision, waiving all processing charges for this request.
 - 13. On the date set out above, I made my access decision, as outlined below.

Findings on material questions of fact

- 14. 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**).
- 15. In addition, I reviewed the Relevant Information and discussed it with relevant **nbn** staff.
- 16. I make the following findings in relation to the Relevant Information:
 - a. the Relevant Information was brought into existence in connection with plans for works undertaken by or for **nbn** in relation to upgrading the **nbn**TM network;
 - b. the Relevant Information is used by **nbn** for a number of commercial purposes, including to plan, construct, maintain and rollout upgrades to the **nbn**TM network;
 - c. the Relevant Information is not in the public domain and includes **nbn's** commercial-in-confidence information, including information in relation to:
 - i. **nbn's** current operations; namely the way that it selects parts of the **nbn**TM network using Fibre to the Node (**FTTN**) technology to be upgraded to Fibre to the Premises (**FTTP**) technology; and
 - ii. how **nbn** undertakes its business activities and involves its delivery partners in the relevant works.

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 the Relevant Information is exempt from release on the grounds specified below.
- 18. In making my decision, I took into account relevant parts of the FOI Act and related legislation, the OAIC [FOI Guidelines](#), relevant case law and other sources, including the [General Background Information](#)



regarding **nbn**'s CAC. 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](#)).

19. Part II of Schedule 2 to the FOI Act specifies that certain agencies are exempt from the operation of the FOI Act in respect of particular documents. **nbn** is exempt from the operation of the FOI Act "in relation to documents in respect of its commercial activities".
20. Per section 7(3A) of the FOI Act, "commercial activities" mean:
 - a. activities carried on by NBN Co on a commercial basis; or
 - b. activities, carried on by NBN Co, that may reasonably be expected in the foreseeable future to be carried on by NBN Co on a commercial basis.
21. As per section 7(4) of the FOI Act, in "subsection (2AA) and Part II of Schedule 2, a reference to documents in respect of particular activities shall be read as a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities."
22. Relevantly, **nbn**:
 - a. is a public company limited by shares incorporated under the Corporations Act 2001 (Cth) (Corporations Act);
 - b. is wholly owned by the Commonwealth and a prescribed GBE;
 - c. is subject to the same obligations as other public companies incorporated under the Corporations Act;
 - d. generates sales and profit; and
 - e. operates for a commercial purpose, with a mandate or objective to earn at least a commercial rate of return (see page 7, paragraph 1.8 (c) of the Commonwealth Government Business Enterprise – Governance and Oversight Guidelines at this [link](#)).
23. Accordingly, **nbn** operates as a commercial entity and, having regard to the foregoing, is bound to do so.
24. In the Internode Decision, the then Freedom of Information Commissioner, Dr James Pople, considered the meaning of "commercial activities" in relation to **nbn**'s CAC. Relevantly, he noted as follows:
 - a. in *Bell v Commonwealth Scientific and Industrial Research Organisation*, the Full Court of the Federal Court considered the meaning of "commercial activities" with reference to analogous provisions to sections 7(2) and 7(3A) of the FOI Act. In that case, the Court said that "activities are conducted on a commercial basis if they are related to, engaged in or used for commerce" and referred to "the importance of the whole of the circumstances including the commercial goal (profit making or the generation of income or return) in determining whether particular activities are sufficiently related to commerce to be characterised as commercial activities"; and
 - b. in *Johnston and Australian Postal Corporation*, the Administrative Appeals Tribunal concluded that commercial activity "can be regarded as a business venture with a profit-making objective and,



strictly speaking, will involve activity to generate trade and sales with a view to profit. This is particularly so when the volume of activity is on a large scale".

25. The subsequent Battersby Decision reinforced the aforementioned considerations and further noted:
- "... there is no doubt that the definition of 'commercial activities' is broader for NBN Co than it is for other government business enterprises listed in Part II of Schedule 2."*
26. As outlined above, there are various factors that may weigh in favour of an activity being categorised as commercial for the purposes of the FOI Act, such as (among other factors), if those activities:
- a. have a commercial goal or purpose;
 - b. are related to, engaged in, or used for commerce; and/or
 - c. are related to a profit-making motive, generating income or revenue, among other matters.
27. Furthermore, for the CAC to apply, the document or information under consideration need not meet a commercial value threshold or be commercially significant. All that is required is that the document or information is received by **nbn** or brought into existence in the course of, or for the purposes of, the carrying on of **nbn**'s commercial activities.
28. In looking at the whole of the circumstances, I consider that the Relevant Information is in respect of **nbn**'s commercial activities for the following reasons:
- a. The Relevant Information is comprised of commercial criteria used by **nbn** to select geographic areas for the **nbn**TM network to be upgraded from FTTN to FTTP technology for use by end customers of **nbn**'s direct and indirect retail service provider customers. The subject matter and content of the Relevant Information is therefore directly related to **nbn** upgrading its network and ultimately achieving a commercial outcome given that operation of the **nbn**TM generates revenue streams for **nbn**. The goal of generating profits, income or revenue is considered a key element in deciding that a document or information relates to **nbn**'s commercial activities.
 - b. The Relevant Information contains business information about **nbn**'s business processes, including information in relation to how and where **nbn** plans to upgrade its network. This information is commercially valuable to **nbn** and the broader telecommunications market. If **nbn** were to release the Relevant Information, it would potentially provide **nbn**'s competitors, including other telecommunications players in the market, with an unfair advantage. In effect, this would make **nbn**'s business methods and processes "open source", thereby undermining **nbn**'s investments in quality assurance and the potential commercial advantages associated with these methods and processes.
29. In my view, it would undermine the above commercial purposes and would have a significant impact on **nbn**'s commercial activities, if **nbn** was required to reveal the business and commercial information as described above.
30. For the above reasons, I am of the opinion that the Relevant Information is in respect of **nbn**'s commercial activities and are exempt from release under section 7(3A) of the FOI Act.



31. Considering my determination above, it is unnecessary to consider any further exemptions in light of my determination that the Relevant Information falls within the meaning of the commercial activities carve-out. There are other grounds upon which access to the Relevant Information could potentially be refused. In my opinion, the Relevant Information may also be exempt from release under 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).
32. However, I have determined not to provide reasons in relation to any general or conditional exemptions.

Decision-making Time and Fees

33. As set out in my charges decision dated 14 May 2021, all processing charges in respect of the Applicant's request are waived. Accordingly, no fees in respect of this application are payable.
34. 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.
