



19 August 2014

Mr David Cooper
sent via email: foi+request-721-2a020f8c@righttoknow.org.au

Our Ref: FOI1415/06.07

Dear Mr Cooper

FOI Application – 1000 Node Trial

I am writing in relation to your request made under the *Freedom of Information Act, 1982* (**the FOI Act or the Act**).

Please see the attached Statement of Reasons detailing 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* may be found at the following [link](#).

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

Sincerely,

Yvette Deerness
Acting GM Legal Counsel - FOI

cc. Justin Forsell, Chief Legal Counsel, NBN Co

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FREEDOM OF INFORMATION REQUEST – 1415/06

David Cooper

IMPOSITION OF CHARGES DECISION STATEMENT OF REASONS

Background

1. NBN Co Limited (**NBN Co**) is a government business enterprise (**GBE**), 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 27 July 2014, NBN Co received an FOI request from Mr David Cooper (**Applicant**). In particular, the Applicant sought access to:

A document outlining each Exchange Service Area, Distribution Area and Number of Premises that will be participating in the FTTN 1000 Node Trial. This document would have been used as the basis for establishing the number of nodes in NBN's press release located here - <http://nbnco.com.au/content/dam/nbnco2/documents/nbn-co-and-telstra-expand-construction-of-fftn.pdf> and the published statement from the Federal Minister of Communications as reaching 206,000 premises.

8. On 7 August 2014, NBN Co's FOI Group acknowledged the Applicant's FOI application, which is required by section 15(5) of the FOI Act.
9. On 18 August 2014, NBN Co emailed the Applicant a processing fee deposit request in the sum of \$215.00.
10. On 20 August 2014, the Applicant requested that the fees be reduced in relation to his request. In support of this fee reduction request, the Applicant made the following comments:

I would like to contend the assessment on the FOI charges, in particular, the indicated 15 hours Decision Making Time on potential commercial issues.

The scope of the request has been structured specifically to avoid requesting any documentation that may be considered as impacting on NBNCo's commercial operations. It has taken into consideration

- That the overall scope of deployment of the National Broadband Network per its title, is national, and competition restricted.

- That there has already been an agreement signed between NBNCo and Telstra for this trial that has been publicly announced by NBNCo's CEO Bill Morrow

- That by defining 1,000 nodes across NSW and QLD, covering 200,000 premises, indicates that the scope of work has already been agreed to and initial design completed (Reference Mr Adcock in announcement - <https://www.youtube.com/watch?v=QTG4TBxVOZ4>)

- The scope of the request does not include details of infrastructure design or financial agreement with Telstra.

- The detailed listing Exchange Service Areas, Distribution Areas and Number of Premises across Australia are already publicly available from the Department of Communications myBroadband website

As the scope of FOI request was very specific already, I would consider that the request for the list of ESA's, DA's and Number of Premises as part of this already signed trial require minimal commercial consideration. As such I request that NBNCo reassess and reduce the Decision Making Time for this request.

11. On 19 September 2014, I made my processing charge decision, as outlined below.

Findings of Material Fact

12. As the decision maker, I made certain findings of fact in relation to the processing time required to respond to this FOI request. In particular, I calculated a total (estimated) application cost of \$215.00, which included 15 hours of processing time. The calculation of the processing time took into account the time estimated to:

- search & retrieve documents;
- liaise with relevant business units regarding any commercial issues;
- consider potential exemptions from the FOI Act; and
- make a formal decision.

The total processing time included a statutory discount for the first five hours of decision making.

13. I considered the Applicant's contentions made in his fee reduction request, including that he "...*would like to contend the assessment of the FOI charges, in particular, the indicated 15 hours Decision Making Time on potential commercial issues*".

14. In making my decision, I reviewed the relevant sections of the FOI Act, the *Freedom of Information (Charges) Regulations 1982 (the Charges Regulation)* and the Office of the Australian Information Commissioner (**OAIC**) [FOI Guidelines](#), case law and other relevant sources.

Formal Decision and Reasons

NBN Co's Charging Policy

15. As per Regulation 3 of the Charges Regulation, a decision-maker has the discretion to impose or not impose a charge, or impose a reduced charge for the processing of an FOI request. In addition, paragraph 4.5 of the FOI Guidelines indicate that:

... agencies are not expected to exercise the discretion conferred by the Charges Regulations to impose a charge, unless in the agency's view it is appropriate to do so. It is open to agencies to develop their own charging policy consistent with the legislation and these guidelines.

16. NBN Co has developed an FOI charging policy in line with the FOI Act, the Charges Regulation and the FOI Guidelines. In line with the FOI Guidelines at paragraph 4.3, NBN Co's FOI processing charges are not imposed in a manner that discourages applicants from exercising their rights to access. Rather, NBN Co seeks to ensure that its FOI charges fairly reflect the work involved in providing access to documents on request.
17. NBN Co has adopted its charging policy in light of the company's status as a GBE. Unlike Commonwealth Government agencies, NBN Co is expected to operate as a business entity. This is made clear at page 7 of the [Governance Arrangements for Commonwealth Government Business Enterprises](#) (October 2011) (**the GBE Guidelines**). In particular, The GBE Guidelines' "Mandate and Objectives" section indicates that the principal objective for GBEs is to add to shareholder value. To achieve this objective, GBEs are required to operate efficiently; at minimum cost for a given scale and quality of outputs; price efficiently; and earn, at least, a commercial rate of return.
18. Based on the above points, it is clear that NBN Co has an obligation to operate according to sound commercial and business practices. In that regard, good business practice dictates that NBN Co should put a value on the time spent by its staff and charge accordingly for its services. This reasoning applies equally to FOI applications, which require input from dedicated FOI staff, but also the expertise and efforts of other NBN Co staff members. As FOI processing takes staff time away from core commercial activities, it will have an impact on the company's bottom line and its ability to meet corporate objectives. In that context, NBN Co is obliged to account for and place a value on staff members' FOI processing efforts. To do otherwise would tend to undermine NBN Co's obligations to operate as a commercial entity.
19. In relation to regulated FOI processing fees, the two most expensive activities are decision-making (\$20/hour) and search and retrieval (\$15/hour), which are roughly equivalent to current Australian minimum wages. For reference, the national minimum wage is currently \$16.87 per hour. In that context, it would not be unreasonable to assume that commercial entities would charge significantly higher rates for similar functions and tasks. It also follows that Government agencies and GBEs would also have much higher processing costs than those outlined in the Charges Regulation. In fact, Commonwealth Government agencies and GBEs do incur significantly more costs than those captured by the Charges Regulation. This was made clear in the AIC's *Review of Charges under the Freedom of Information Act 1983* (February 2012) (**AIC Charges Review Report**), found at the following [link](#). In the AIC Charges Review Report, the AIC indicated the FOI charges only represented 2% of the actual costs incurred by agencies and similar bodies since the Act's commencement in 1982.
20. In light of the above points, it seems clear that FOI processing fees are offered at a discount to the actual costs incurred by agencies and GBEs, like NBN Co. In my opinion, Parliament has, in all likelihood, chosen these below-market rates, to reflect the public importance of FOI processes and particularly for its role in helping to inform public debate.
21. However, there are a number of key public interests served by Government agencies and authorities having the ability to charge 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, generally reflecting the points made below.

- Government agencies and authorities are able to recoup some of their costs associated with processing FOI requests, while providing a key public service. This is in line with user-pays principles.
- The ability to charge for FOI processing time reflects Parliament's and the community's recognition that public servants' time is a valuable resource. Moreover, such resources should only be spent in appropriate public undertakings. This argument could be applied with even greater force to GBEs, which are expected to operate as any other commercial player in the marketplace. Similar reasoning animates section 24AA of the FOI Act, which enables decision-makers to refuse requests that would substantially and unreasonably divert the resources of the agency from its operations.
- The ability to charge for the processing of FOI applications also ensures that applicants have a serious interest in the subject matter and are likely to see the application to a final determination. In addition, the requirement of a deposit tends to limit the scope of preliminary work "written off" by Government entities in the event that an applicant withdraws a request. This dovetails with the public interest in not wasting government and – taxpayer funded – public resources.
- At page 5 of the AIC Charges Review Report, the AIC reinforced the importance of fees and charges, outlining that:

Fees and charges play an important role in the FOI scheme. It is appropriate that applicants can be required in some instances to contribute to the substantial cost to government of meeting individual document requests. Charges also play a role in balancing demand, by focusing attention on the scope of requests and regulating those that are complex or voluminous and burdensome to process.

22. In light of the above, it is NBN Co's policy to charge applicants for its FOI processing time. However, NBN Co's charging policy also requires the company to examine every application on its individual merits. As such, there may be grounds to exempt or reduce the processing fees for a given FOI request. Those grounds are explored below.

Hardship, Public Interest Grounds and Other Relevant Matters for Fee Waiver or Reduction

23. Subsections 29(4) and (5) of the FOI Act detail the process that agencies must follow if an applicant contends that processing charges should not be imposed or reduced. Those sections read as follows:

(4) Where the applicant has notified the agency or Minister, in a manner mentioned in subparagraph (1)(f)(ii), that the applicant contends that the charge should be reduced or not imposed, the agency or Minister may decide that the charge is to be reduced or not to be imposed.

(5) Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:

(a) whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and

(b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.

24. As outlined above, I am required to consider whether the payment of the charge, or part of it, would cause financial hardship to the Applicant. I note that the Applicant has not advanced any argument in relation to financial hardship and I have not identified any material upon which I could base a finding that the imposition of the charge would cause the Applicant financial hardship.
25. I am also required to consider whether the giving of access to the documents you seek would be in the general public interest or in the interest of a substantial section of the public.
26. In a general sense, NBN Co's rollout plans are a matter of public interest. However, the documents the Applicant seeks relate to rollout activity in specific areas of Australia and so I have considered whether release of that specific

information would be in the public interest or in the interest of a substantial section of the public. Based on my enquiries, including those made via internet search engines, I have not been able to establish that there is a level of interest in the disclosure of documents containing the specific information requested by the Applicant, which would amount to a general public interest or a public interest of a substantial section of the public.

27. In considering the public interest test, I also note that the Applicant has not advanced any argument as to why the giving of access to the document would be in the general public interest or in the interest of a substantial section of the public.

28. In addition to the two matters set out in subsection 29(4) and (5) of the FOI Act, I have also taken into account paragraph 4.48 of the Information Commissioner's FOI Guidelines which states:

In addition to those two matters, an agency or minister may consider any other relevant matter, and in particular should give genuine consideration to any contention or submission made by an applicant as to why a charge should be reduced or waived.

29. In this regard I have considered in particular, the Applicant's contentions regarding the time estimated for the decision making and the apparent lack of impact of the requested documentation on NBN Co's "commercial operations", as further detailed below:

I would like to contend the assessment on the FOI charges, in particular, the indicated 15 hours Decision Making Time on potential commercial issues.

The scope of the request has been structured specifically to avoid requesting any documentation that may be considered as impacting on NBNCo's commercial operations.

As the scope of FOI request was very specific already, I would consider that the request for the list of ESA's, DA's and Number of Premises as part of this already signed trial require minimal commercial consideration. As such I request that NBNCo reassess and reduce the Decision Making Time for this request.

30. While I have not yet made an access decision I would draw the Applicant's attention to the principles underpinning NBN Co's commercial activities exemption (CAE) which may be found at the following [link](#). The analysis required for this exemption in particular is complex, with the exemption being broader in scope than the commercial activities exemption for such Commonwealth bodies as AusPost and CSIRO – whose commercial activities exemption excludes documents only relating to commercial activities in competition with private entities. NBN Co's CAE is not defined by reference to a competitive element. While the Applicant may have attempted to structure the scope of the request to "avoid requesting any documentation that may be considered impacting on NBN Co's commercial operations", the reality is that in order to make an access decision I will need to consider a broad range of factors when analysing the relevant documents, in order to assess whether the CAE, in addition to any other exemption, applies.

31. Furthermore, NBN Co's FOI Group recently reviewed its substantive FOI decisions and confirmed that most on average required more than 24 hours of decision-making time. The estimated decision making time incorporates liaison time with business experts regarding the relevant data and the commercial issues associated with the release of that data. It also takes into account the review of complex exemption arguments (including the CAE as outlined above). As such, I am of the opinion that the estimate is not an over-estimate and, in fact, it likely underestimates the time required to complete this decision.

32. Finally, I would like to ensure that the Applicant appreciates that they are not being charged for the full 15 hours of decision making time but rather is only being charged an amount comparable to 11 hours of decision making time, due to the regulatory requirement that the first 5 hours of decision making time is free and is therefore deducted from the final processing charges.

33. Based upon the above points and as per section 29 of the FOI Act, I am not persuaded payment of the charge or part of it would cause financial hardship to the applicant, nor that a substantial section of the public may benefit from the release of documents found within the scope of this FOI application nor have I found that any other matters exist so as to warrant the charges to be reduced or waived. As such, I have determined not to exercise my discretion and I am refusing this fee reduction/waiver request.
34. It should be noted that as stated above, I have not yet made – nor am I required to make – an access decision in relation to any documents falling within the scope of this FOI request. If the Applicant agrees to pay the processing charges, NBN Co's FOI decision-maker may still conclude that the documents are exempt from the operation of the Act, as per the "commercial activities" exemption found at section 7(3) of the FOI Act. Additionally, I may conclude that the documents should not be released, based upon both general and conditional exemptions, the latter of which requires NBN Co to apply the "Public Interest Test" (**PIT**) in section 11B of the FOI Act. In that regard, please note that the PIT found at section 11B is similar to, but different from the PIT employed for the purposes of deciding to reduce or not impose a charge.
35. The Applicant should be aware that **24** days, out of 30, had passed at the point at which this application was suspended for the purpose of requesting an advance deposit.
36. If you are dissatisfied with this decision, you have certain rights of review. Details regarding your rights of review and appeal are referred to in the covering letter, provided with this Statement of Reasons.