



18 September 2014

Mr David Cooper
Sent via email: foi+request-722-9927b1e1@righttoknow.org.au

Our Ref: FOI1415/07.09

Dear Mr Cooper,

FOI Application – Program Summary Report

I am writing in relation to your request made under the *Freedom of Information Act 1982 (FOI 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 feel free to contact the writer on Tel. (02) 8918 85670 or via email on yvettedeerness@nbnco.com.au.

Sincerely,

Yvette Deerness
Acting GM Legal Counsel – FOI, Privacy and Knowledge Management

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 – 1415/07

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 24 July 2014, NBN Co received an FOI request from Mr David Cooper (**the Applicant**). In particular, the Applicant sought access to:

...a copy of the most recent Program Summary Report at the time of consideration of this FOI request. The Program Summary Report was referenced by Mr Morrow and Mr Simon during the National Broadband Network Select Committee on the 11th July, 2014, in providing answers on public record to the Senate Committee.

8. On 7 August 2014, NBN Co's FOI Group acknowledged this 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 \$380.00.
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:

As the report is reviewed each week by the NBNCO Executive & Management Team, assumedly prepared by their respective organization reporting to the executive team, gives the indication that NBNCo already have

knowledge of any commercial issues contained within this report. Given this well documented understanding of the report within NBNCo, and the regular reviews each week, it would strongly suggest to myself that the decision making time for reviewing any commercial issues should be significantly briefer than the estimated 24 hours.

11. On 18 September 2014, I made my processing charge decision, as outlined below.

Findings of Material Fact

12. As the decision-maker, I made certain findings in relation to the processing time required to respond to this FOI request. In particular, I calculated a total (estimated) application cost of \$380.00, based upon approximately 24 hours of processing time. These totals 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 also includes a statutory discount for the first five hours of decision-making.

13. As outlined above, in his fee reduction request, the Applicant claimed “*that the decision making time for reviewing any commercial issues should be significantly briefer than the estimated 24 hours*”.

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](#).

Formal Decision and Reasons

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. The OAIC provides guidance in relation to charge reductions at paragraph 4.5 of the FOI Guidelines. In particular, the Information Commissioner indicated 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, 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 consistent with page 7 of the [Governance Arrangements for Commonwealth Government Business Enterprises](#) (October 2011) (**GBE Guidelines**). In particular, The GBE Guidelines' "Mandate and Objectives" section indicates that a principal objective for GBEs is to add to shareholder value. To achieve this objective, GBEs are required to operate efficiently, function at a minimum cost for a given scale and quality of outputs, price efficiently as well as 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 should 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.
20. In addition, Government agencies and GBEs incur significantly more costs than those captured by the Charges Regulation or collected for FOI processing time. This was made clear in the AIC's [Review of Charges under the FOI Act 1983 \(the AIC Charges Review Report\)](#). 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. In light of the above points, it is 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 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.
 - The requirement of a processing fee 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 that context, NBN Co's general policy is to charge applicants for 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 canvassed in the foregoing.

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 a 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. Whilst it is clear that there is a general public interest in the rollout of the NBN, it is unclear that there is general public interest in the specific information sought by the Applicant. In considering this request, I noted that the Applicant has not advanced any argument as to why the giving of access to the documents would be in the general public interest or in the interest of a substantial section of the public. As such, I am not persuaded that a substantial section of the public may benefit from the release of relevant information as per section 29(5)(b) of the FOI Act, or that there is general public interest in the information requested.
26. In addition to the two matters set out in subsections 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."

27. As outlined above, the Applicant contends that the decision making time should be less than 24 hours as the "program summary report" (**PSR**) is reviewed each week by the NBN Co Executive & Management Team and that as a consequence, any commercial issues which arise with respect to the PSR, should be well understood by NBN Co. Whilst the NBN Co Executive & Management Team may be generally familiar with the content of the PSR, before a decision can be reached about providing access to all or part of the PSR, careful consideration must be given to all of the commercial issues associated with disclosure of each aspect of PRS in the context of this Application, and whether any FOI Act exemptions apply to the PSR, or any part of it. Moreover, the members of the NBN Co Executive & Management Team are not the FOI decision-makers and their familiarity with the PSR is relevant only to the extent that

they may be called upon to provide background and information to assist the decision-maker in making findings of fact. In addition, FOI decision making is an independent process that requires careful analysis of the facts, legal principles and public policy issues.

28. Furthermore, NBN Co's FOI Group recently reviewed its substantive FOI decisions and confirmed that most were estimated at and required more than 24 hours of decision-making time, on average. 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 in the context of changing Commonwealth Government policy. 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, particularly given that this is the first FOI request of its kind seeking access to the PSR. Generally speaking, underestimations of processing fees are not recouped from applicants and tend to be written off by agencies.
29. Finally, I would like to ensure that the Applicant appreciates that they are not being charged for the full 24 hours of decision making time but rather is only being charged an amount comparable to 19 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.
30. Based upon the above points, it is my opinion that the Applicant has not demonstrated that the general public interest would be served by the release of the information in question. In addition, the 24 hours of decision making time quoted by NBN Co is consistent with the time required to decide previous substantive FOI decisions made by NBN Co. As such, I have refused this request for a reduction or waiver in FOI processing charges. I also believe that the charges take into account the "lowest reasonable cost objective" in the FOI Act and would not tend to discourage the Applicant from proceeding with the application, noting the relatively low processing fees. Moreover, this determination takes into account NBN Co's obligation to operate as a business entity and it appropriately accounts for its staff members' time and resources, including its FOI officers' decision-making time.
31. It should be noted that 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. It should also be noted that if the Applicant agrees to pay the requested charge, 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 in section 11B of the FOI Act. In that regard, please note that the public interest test found at section 11B is different from the public interest test employed for the purposes of deciding to reduce or not impose a charge.
32. The Applicant should be aware that **24 days** had passed at the point at which this application was suspended for the purposes of requesting an advance deposit.
33. 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.