



29 June 2021

Chris  
foi+request-7301-7293141a@righttoknow.org.au

Our Ref: FOI 2021/87.06

Dear Chris

**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  
Freedom of Information



## FREEDOM OF INFORMATION REQUEST – FOI 2021/87.06

### ACCESS DECISION STATEMENT OF REASONS 29 June 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://nbnc.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 6 May 2021, **nbn** received an email from “Chris” (the **Applicant**) in the following terms:

*“Under Freedom of Information, can you please advise me of the distance between my house and the node I will be/am contacted to?”*
8. The Applicant also provided the relevant address.
9. On 20 May 2021, I wrote to the Applicant to ask for clarification so as to comply with the provisions of section 15(2) of the FOI Act. At that time, I also indicated to the Applicant that the materials within the proposed 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
10. On 30 May 2021, the Applicant sent me an email in which he agreed to amend the scope of the request, to:



*“Either the direct distance or the length of any cabling to from my premises to the relevant node”.*

11. On 30 May 2021, I confirmed receipt of the Applicant’s email.
12. On the date set out above, I made my access decision, as outlined below.

#### **Findings on material questions of fact**

13. 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**).
14. In addition, I reviewed the Relevant Information and discussed it with relevant **nbn** staff.
15. I make the following findings in relation to the Relevant Information:
  - a. the Relevant Information came into **nbn**’s possession or was brought into existence in relation to the connection of premises to the **nbn**<sup>TM</sup> 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**<sup>TM</sup> network;
  - c. the Relevant Information is not in the public domain and includes or may disclose **nbn**’s commercial-in-confidence information, including information in relation to:
    - i. the distance of the copper cabling between the premises, and inferentially nearby premises, and the location of the node serving those premises; and
    - ii. the route or location of cabling from the premise to the node.

#### **Access Decision**

16. 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.
17. 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](#)).
18. 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”.
19. 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.*
20. 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."
21. 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](#)).*
22. Accordingly, **nbn** operates as a commercial entity and, having regard to the foregoing, is bound to do so.
23. 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".*
24. The subsequent Battersby Decision reinforced the considerations referenced above, 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."*
25. 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.
- 26. 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.
- 27. 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 the distance from premises to the node servicing those premises.
  - b. 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 by disclosing the copper cable length to a specific residence, from which the length to nearby premises could be inferred. The Relevant Information could be used by **nbn**'s commercial competitors to inform decisions about where to offer competitive services, either using fixed line or alternate technology. The Relevant Information is therefore commercially valuable to **nbn** and the broader telecommunications market.
  - c. If the distance to the node is known, this may indicate or allow a person to determine the location of the relevant node servicing the premises and the location or route of cabling from the premises to the node.
  - d. The Relevant Information describes an aspect of the **nbn**<sup>TM</sup> network which may have an effect on the performance and operation of the network. The subject matter and content of the Relevant Information is therefore directly related to **nbn** achieving a commercial outcome because operation of the **nbn**<sup>TM</sup> network generates revenue 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.
- 28. 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.
- 29. 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.
- 30. 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).

31. However, I have determined not to provide reasons in relation to any general or conditional exemptions.

**Decision-making Time and Fees**

32. In light of the above points, and the small time taken for **nbn** staff to locate the Relevant Information on this occasion, I have 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. Given my decision to refuse access to the Relevant Information, I have also not pressed my request for the Applicant to prove his identity and connection to the premises.
33. 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.

\*\*\*\*\*