



9 October 2014

Mr David Cooper

Sent via email: foi+request-744-57c34885@righttoknow.org.au

Our Ref: FOI1415/16.06

Dear Mr Cooper,

FOI Application – Instructions for detailed design and construction – 2CYS FSA

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* 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
Acting GM FOI, Privacy & Knowledge Management

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

NBN Co Limited ACN 136 533 741 © NBN Co 2013

FREEDOM OF INFORMATION REQUEST – 1415/16

Mr David Cooper

ACCESS DECISION STATEMENT OF REASONS

Application Chronology and Terms of Request

1. On 22 August 2014, NBN Co received an email from Mr David Cooper 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 a document containing the:

current expected date for:

1. *instructions to commence detailed design and field inspection work; and*
2. *instructions to commence construction work,*

to be issued to NBN Co's delivery partners in relation to the Brownfields Fibre build in the 2CYS Fibre Serving Area.

2. On 2 September 2014, I wrote to the Applicant seeking to assist the Applicant to reduce the scope of his request.

3. On 9 September 2014, the Applicant responded to confirm that he would like a document

outlining the current date that NBNCo expects to instruct (or has instructed, if that is the case) those Delivery Partners to:

1. *commence detailed design and field inspection work; and*
2. *commence construction work,*

in relation to the Brownfields Fibre build in the 2CYS Fibre Serving Area.

4. On 10 September 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 10 October 2014, subject to any suspension of the processing period due to requests for charges or third party consultations. The 10 October 2014 due date for the determination was incorrect and it should have been stated as 9 October 2014.
5. On 09 October 2014, I forwarded this decision to the Applicant.

Summary of Access Decision

6. 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 containing some of the information falling within the scope of the Applicant's request and as further detailed in paragraph 7 below.

7. The results of the searches referred to in paragraph 6 above, produced information within the scope of the Applicant's request in so far as it related to contract instructions having been issued to commence detailed design and field inspection work (**Detailed Design Information**). A document was created containing the Detailed Design Information (**Document**).
8. As a result of the searches carried out by NBN Co staff and referred to in paragraph 6 above, I received advice from NBN Co staff that it would not be possible to create an appropriate document containing information outlining the *"current date that NBNCo expects to instruct (or has instructed, if that is the case) those Delivery Partners to commence construction work, in relation to the Brownfields Fibre build in the 2CYS Fibre Serving Area."* In that regard, and as per section 24A (1) of the FOI Act, I am satisfied that all reasonable steps have been taken to find the relevant documents and I am confident that such documents do not exist or cannot be created.
9. As an FOI decision maker, it is open to me to consider whether the Document 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 Document falls within the CAE. It is also my decision that the Document is exempt from release based on section 47 of the FOI Act (Commercially valuable information).
10. Other potential exemptions could apply to the Document either in whole or in part. In my opinion, it is unnecessary to consider these exemptions as the Document was already exempt from the operation of the FOI Act as per the CAE and section 47 of the Act.

Reasons for FOI Decision – Commercial Activities Exemption

11. As outlined above, I refer you to a summary explanation regarding NBN Co's CAE (**CAE Summary**), found at the following [link](#). As explained in the [CAE Summary](#), NBN Co's activities generally have a commercial goal or purpose, for example profit-making, for the reasons listed in the CAE Summary, including the expectations for NBN Co to operate efficiently and to earn, at a minimum, a commercial rate of return.
12. The Document contains information directly related to NBN Co's roll-out activities, specifically detailed design and field inspection activities which may be carried out by NBN Co's service delivery partners. NBN Co's technology mix is subject to change during the rollout to a given region or locality particularly during the period in which detailed design and field inspection activity 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.
13. If NBN Co were to disclose the Document, it could send a signal to the market and NBN Co's business partners. In particular, the premature announcement of the (awarding of) design and field inspection work could impact upon a retail service provider's (**RSPs**) plans to invest in marketing and provide 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 NBN Co products. It follows that the release of Document could potentially undermine NBN Co's ability to maximise returns for our Shareholder Ministers and, ultimately, the Australian taxpayer.
14. For the reasons set out above I am of the opinion that the CAE applies to the Document and as such the Document is exempt from the operation of the FOI Act and should not be released.

General Exemptions (Commercially Valuable Information)

15. 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:

(a) trade secrets; or

(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.

16. Drawing from the points made in relation to the “commercial activities” exemption above, I am of the opinion that the information contained in the Document falls within the meaning of commercially valuable information. If NBN Co were to release the Document:
- a) It could provide companies in the telecommunications sector, including construction companies and RSPs, with competitive commercial intelligence which could be used to gain an advantage in their dealings with their own competitors or with NBN Co; and
 - b) In relation to NBN Co itself, the release of the Document 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.
17. Having considered the points above, it is my opinion that the Document falls within the meaning of section 47(1) of the FOI Act. The Document contains commercially valuable information, which would be, or reasonably be expected to be destroyed or diminished, if disclosed. As such, the Document is exempt from release.

Processing Charges

18. NBN Co staff spent approximately 2 hours in sourcing the relevant information. In addition, I spent approximately 8 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.
19. Under subsection 29(1) of the FOI Act, I would be entitled to charge the Applicant, \$90 by way of processing costs for this matter, as further detailed below:

Search and Retrieval Time	2 hours @ \$15.00 per hour	\$30.00
Decision Making Time	8 hours @ \$20.00 per hour	\$160.00
Sub-total		\$190.00
Less first 5 hours decision making time(as required by the FOI Act)		(\$100.00)
TOTAL		\$90.00

20. However, I have decided not to impose these charges as I have 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. 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.

21. 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.