



13 June 2013

Mr Joel Dickins

Sent via email: foi+request-85-50ae1d01@righttoknow.org.au
foi+request-111-1600658b@righttoknow.org.au

Our Ref: FOI1213/19.42
FOI1213/25.12

Dear Mr Dickins,

FOI Application

I am writing in relation to your requests made under the *Freedom of Information Act 1982 (the FOI Act)*. In particular, you sought NBN Co's rollout and activation figures for the periods ending 31 March 2013 and 30 April 2013.

The Statement of Reasons (**Attached**) outlines the specific terms of these FOI requests, the decision-maker's findings and the access decisions, one of which is a supplemental decision following on from NBN Co's FOI previous decision (FOI1213/19.24). For your reference, 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* is attached for your information and 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) 8918 8596 or via email on davidmesman@nbnco.com.au.

Sincerely,

David Mesman
FOI Officer

FREEDOM OF INFORMATION REQUEST – 1213A/19 & 1213A/25

JOEL DICKINS – RIGHT TO KNOW

ACCESS DECISION STATEMENT OF REASONS

Background

1. NBN Co Limited (**NBN Co**) is a government business entity (**GBE**), which has the mandate of realising the Australian Government's vision to develop a national broadband network that is truly national in character.
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](#).
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, NBN Co's Chief Executive Officer has authorised me, David Mesman, to make decisions about access to documents under the FOI Act.
6. Under section 26 of the FOI Act, I am required to provide a Statement of Reasons for my decisions in relation to FOI access 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 8 April 2013, NBN Co received an FOI request from Mr Joel Dickins from the "Right-To-Know" website (**the Applicant**), which sought the following information:

1. *Brownfields Fibre Rollout*
 - a. *Number of premises under construction;*
 - b. *Number of premises passed (able to order a service);*
 - c. *Number of premises with an active Brownfield Fibre NBN service.*
2. *Fixed Wireless Rollout*
 - a. *Number of premises covered by an 'actively under construction' tower site;*
 - b. *Number of premises covered by active tower site (able to order a service);*
 - c. *Number of premises with an active Fixed Wireless NBN Service.*
3. *Interim Satellite coverage – Number of premises with an active Interim Satellite NBN Service.*

8. On 11 April 2013, NBN Co acknowledged receipt of the Applicant's FOI request, as required by section 15(5) of the FOI Act.
9. On 8 May 2013, I made my original FOI decision – our reference FOI1213-19.24, which deferred access to the information requested, as permitted by section 21(1)(b) of the FOI Act. In my decision, I also made reference to section 21(2) of the FOI Act, which requires Commonwealth authorities to inform applicants of the reasons for their decision and, as far as practicable, the period for which the deferral will operate. At the time of my decision, I received advice that NBN Co planned to table the relevant information during Budget Estimates Hearings, with the intention to make the information public on or around the end of May 2013.
10. On 9 May 2013, NBN Co received an additional request (FOI1213/25) from the Applicant in the same terms as outlined above, but seeking rollout data for the period ending 30 April 2013. As required by section 15(5) of the FOI Act, NBN Co acknowledged the Applicant's additional request on 9 May 2013.
11. On 8 June 2013, the Applicant wrote to NBN Co, requesting an explanation as to the delay in the finalisation of his FOI request in relation to FOI1213/19.
12. On 12 June 2013, I emailed the Applicant apologising for the delay and indicated that I would be making a decision on that day or 13 June 2013 at the latest. For reference, FOI1213/25 was due for determination on 8 June 2013, which was a Saturday. As outlined at paragraph [8.73 of the OAI's FOI Guidelines](#), Commonwealth entities are permitted to make an FOI decision on the next available business day following the end of the 30-day processing period, which was 11 June 2013.
13. On 13 June 2013, I forwarded a copy of this decision to the Applicant. As outlined below, I made a supplementary FOI decision in relation to FOI1213/19 and another FOI decision in relation to FOI1213/25. As permitted by the *FOI Act and Charges Regulation*, I have determined to waive any relevant fees applicable to this access decision.

Findings of Material Fact

14. 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 the above 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".
15. In light of the above points, NBN Co staff undertook searches through the company's hard copy, electronic and other files, so as to locate the relevant information. NBN Co staff also informed me that it would be possible to establish a preliminary data set, covering most of the information sought in the Applicant's requests. As permitted by section 17 of the FOI Act, it would then be possible to create a new document containing the relevant information.
16. NBN Co's Chief Financial Officer (CFO) also informed me that our company had initiated an external review in the lead-up to NBN Co's end-of-financial year. That external review will provide assurances on the accuracy of NBN Co's data and performance metrics, including the data requested by the Applicant. The CFO also indicated that he expected that this external review would be completed on or around the week commencing 15 July 2013.
17. The following points should also be noted:
 - NBN Co published a media release on 19 April 2013, with an attachment containing a series of key NBN Co metrics, current to 31 March 2013. This document included some of the statistics and information that

responds in part to the Applicant's FOI original request (FOI1213-19). That information may be found at the following link:

<http://nbnco.com.au/assets/media-releases/2013/report-to-parliamentary-joint-committee.pdf>

- NBN Co also published a press release on 15 May 2013, which contained various statistics, which contained some, but not all, of the March 2013 data requested by the Applicant. That information may be found at the following link:

http://www.nbnco.com.au/assets/media-releases/2013/press_release_march_rollout_update_2013-15-may-2013.pdf

- NBN Co tabled certain preliminary data during the 30 May Budget Estimates Hearings – that information may be found at the following link:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/estimates/bud_1213/bcde/nbn_288-345.pdf

Access Decision

18. NBN Co is a "prescribed authority" and is subject to the FOI Act. However, Part II of Schedule 2 of the FOI Act exempts NBN Co from the operation of the Act in respect of documents relating to its commercial activities. Section 7(3A) of the FOI Act defines "commercial activities" as:

- (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.*

19. As an FOI decision maker, it is open to me to consider whether the requested information falls within the terms of section 7(3A) of the FOI Act. It would also be open to me to consider the application of other exemptions, such as sections 47 (Commercially valuable information). However, I have not formally considered these exemptions, as NBN Co plans to release the requested data, as outlined below.

20. As permitted by section 21(1)(b) of the FOI Act, I have determined to defer access to all of the data requested in relation to FOI1213-19 and FOI1213-25. For reference, section 21 of the FOI Act enables Commonwealth entities to defer access to a document:

(b) if the document concerned has been prepared for presentation to Parliament or for the purpose of being made available to a particular person or body or with the intention that it should be so made available -- until the expiration of a reasonable period after its preparation for it to be so presented or made available.

21. In relation to section 21(1)(b) of the FOI Act, NBN Co plans to provide the relevant data to its Board for review and consideration in relation to NBN Co's corporate planning efforts.

22. In addition, section 21(2) of the FOI Act requires Commonwealth authorities to inform applicants of the reasons for their decision and, as far as practicable, the period for which the deferral will operate. In my opinion, it would be inappropriate to release the requested data, pending the outcome of NBN Co's external review of its performance

metrics. The review will ensure the accuracy of this information and dovetail with NBN Co's corporate reporting processes, thereby limiting unnecessary expense and the duplication of efforts.

23. Allowing for the external review to be finalised and presented to NBN Co's Board, it is expected that the data will be ready for publication on or around mid-to-late July 2013. At roughly the same time, this information should be made publicly available on NBN Co's website.
24. 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.