

20 March 2015

Jxeeno

Sent via email: foi+request-889-9dec076d@righttoknow.org.au

Our Ref: 1415/33

Dear Jxeeno

FOI Application – Network Footprint Boundaries

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. +61 2 8918 8596 or via email on davidmesman@nbnco.com.au.

Sincerely,

David Mesman

GM Legal Counsel – FOI, Privacy & Knowledge Management

cc. Justin Forsell, Chief Legal Counsel, NBN Co

FREEDOM OF INFORMATION REQUEST – 1415/33

Jxeeno

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, David Mesman, 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 January 2015, NBN Co received an FOI request from Jxeeno, through the Right to Know website (**Applicant**). In particular, the Applicant sought access to:

"...a copy of NBN Co's network footprint boundaries as provided to Access Seekers through the NBN Co Notifications Site for all rollout regions currently classed as:

- * Ready for Service*
- * In build*
- * Build Preparation"*

As part of this request, the Applicant specified that the "...document (computer file) requested is a ZIP file containing MapInfo (MID/MIF) files which provide the network boundaries."

8. On 29 January 2015, NBN Co's FOI Group acknowledged the Applicant's FOI application, which is required by section 15(5) of the FOI Act.

9. On 19 February 2015, NBN Co emailed the Applicant a processing fee deposit request in the sum of \$81.88.
10. On 19 February 2015, 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:

"The information requested in FOI1415/33 is freely published by NBN Co to the public domain on their public website. The network boundaries are provided to the public on the NBN Co rollout map, found here: <http://nbnco.com.au/develop-or-plan-with-the-nbn/check-rollout-map.html>.

Given the FOI request simply requests for the original file that is used to render these network maps, I find it quite extraordinary that a total 21 hours will be required to assess the commercial sensitivity of this information. As the information is already publicly available in a different format, one would conclude that NBN Co conducts at least 21 hours of weekly analysis on this commercial sensitivity issue. As such, a duplication of such work would be unnecessary.

Therefore, I find there to be no reason that:

- a) the information is commercially sensitive given it is already publicly published by NBN Co, and;*
- b) if the information were sensitive, that this FOI request to require an additional 21 hours to come to a decision, given that NBN Co would most definitely have to conduct such analysis on a weekly basis (as it updates its rollout maps)*

Please reconsider these charges in light of this contention."

11. On 20 March 2015, 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 \$327.50, which included 21.5 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 (estimated) application cost 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, as set out above. In making my decision, I also 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

14. 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.

15. 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.
16. 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.
17. 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.
18. 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.
19. 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.
20. 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.

21. 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

22. 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.

23. 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 contentions in relation to financial hardship. As such, I have not considered that issue in this decision.
24. 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.
25. In a general sense, information about NBN Co’s rollout regions may be a matter of public interest. However, it is less clear whether the release of the specific MID/MIF files sought by the Applicant 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 MID/MIF files 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.

26. In addition to the two matters set out in subsection 29(4) and (5) of the FOI Act, I have taken into account paragraph 4.49 of the Information Commissioner's FOI Guidelines which sets out a number of instances where it is appropriate to impose an FOI charge. In particular, these instances include where:

"the information in the documents are already been published by an agency and the documents do not add to the public record."

27. I note that as part of the Applicant's contentions, the Applicant has correctly identified that the information sought is currently in the public domain, albeit in a different form, via our publicly available website. NBN Co invests considerable time and effort to regularly update this information on our publicly available website. It then follows that the release of the specific documents sought by the Applicant would not add to the public record as this information has already been published by NBN Co.
28. 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.
29. 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.
30. The Applicant should be aware that **22 days out of 30**, had passed at the point at which this application was suspended for the purpose of requesting an advance deposit.
31. 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.