

21 June 2016

Renai LeMay
Sent via email: renai@delimiter.com.au

Our Ref: 1516/52.09

Dear Mr LeMay,

FOI Application – Trial results in Ballarat and Karingal

I am writing in response to your request for information from **nbn** about trial results in Ballarat and Karingal, made under the *Freedom of Information Act 1982* (the **FOI Act**).

The Statement of Reasons (**Attached**) outlines the access decision, the decision-maker's findings and the specific terms of the FOI request.

The decision is subject to review under the FOI Act. The Office of the Australian Information Commissioner's *FOI Fact Sheet 12: Your review rights* may be found here: [link](#).

If you have any questions or require any other information relating to this matter, please contact me on (02) 9927 4118 or at katefriedrich@nbnco.com.au.

Yours faithfully,

Kate Friedrich
Legal Counsel
FOI, Privacy & Knowledge Management



FREEDOM OF INFORMATION REQUEST –1516/52 (Renai LeMay)

ACCESS DECISION STATEMENT OF REASONS

Background

1. **nbn** is a government business enterprise (**GBE**), which has the mandate of realising the Australian Government's vision for the development of Australia's new broadband network.
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. In that light, members of the public will be able to find a large amount of information freely available on our website: <http://nbnco.com.au/>.
3. **nbn** manages its information assets within the terms and spirit of the *Freedom of Information Act 1982* (**the FOI Act**). We 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**.
5. Under subsection 23(1) of the FOI Act, **nbn's** Chief Executive Officer authorises me, Kate Friedrich, to make decisions about access to documents and related matters 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. Those findings are outlined below.

Application chronology and terms of request

7. On 7 March 2016, **nbn** received an email from Mr Renai Lemay (**the Applicant**), in which he made an application under the *Freedom of Information Act, 1982* (**the FOI Act** or **the Act**) for access to:
any document detailing the results of these two trials [Ballarat and Karingal].
8. On 11 March 2016, **nbn's** FOI Group wrote to the Applicant and requested he clarify the terms of his application, per section 15 of the FOI Act. In particular, the Applicant had not specified the type of document or documents he was seeking, nor had he specified a timeframe in which the relevant searches should be undertaken. In its letter, the FOI Group also indicated that the Applicant's request, in its then-current form, would likely be considered a substantial and unreasonable diversion of resources under section 24 of the FOI Act.
9. On 28 March 2016, the Applicant emailed **nbn** and referred to public statements made about the trials by **nbn's** Chief Executive Officer. The applicant suggested the public statements may be used to refine the scope of the application.



10. On 29 March 2016, **nbn**'s FOI Group emailed the Applicant, noting the application would still need to be clarified. **nbn** recommended the Applicant consider limiting the scope of the application by requesting specific types of documents. As the request consultation period had expired, **nbn** also informed the Applicant that **nbn** would need to start a new application file.
11. On 30 March 2016, **nbn** received an email from the Applicant requesting any documents sent to **nbn** executives.
12. On 31 March 2016, **nbn** wrote to the Applicant and requested he specify a timeframe for relevant documents. On the same day, the Applicant responded and specified calendar years 2015 and 2016.
13. On 22 April 2016, the **nbn** FOI Group wrote to the Applicant and indicated that it had identified a data set containing more than 2,000 pages of materials that may be related to the application. Based on an estimate of the time that would be required to review these materials, the **nbn** FOI Group informed the applicant that the scope of the application was still too broad to process. **nbn** requested again that the Applicant refine the scope of the application.
14. During late April 2016, the Applicant and **nbn** continued to discuss limiting the scope of the application by email.
15. On 30 April 2016, **nbn** received an email from the Applicant limiting the scope of the application to 'formal briefing documents or memos'.
16. On 6 May 2016, the **nbn** FOI Group emailed the Applicant and acknowledged receipt of this FOI application. In the same letter, **nbn**'s FOI Group provided the Applicant with an advance deposit request for \$59.38, based on an estimated decision-making period of roughly 15 hours and search and retrieval time of approximately 2.5 hours.
17. On 30 May 2016, **nbn**'s Finance Group confirmed the Applicant had paid the advance deposit.
18. On 21 June 2016, I completed my FOI decision. I then sent the Applicant a copy of the decision.

Findings of Material Fact

19. In response to the Applicant's request, **nbn** staff undertook searches through the company's electronic and other files, and located documents within the scope of the application (the **Relevant Documents**).
20. In addition, I discussed the Relevant Documents with **nbn** staff and made the following findings:
 - i. The Relevant Documents were brought into existence in the course of **nbn** carrying out its functions to complete the rollout in a way that achieves commercial return, consistent with the Government's April 2014 [Statement of Expectations \(SoE\)](#). Particularly, the trials are directly connected to **nbn**'s mandate to determine cost-effective ways to rollout the **nbn**TM network, including which 'technologies are utilised on an area-by-area basis' and 'best matched to each area of Australia'.
 - ii. **nbn** also conducted the trials with a view to determining potential costs and timing to roll out the **nbn**TM network, from which **nbn** generates sales revenue by selling its services to retail service providers, who then resell **nbn**TM network packages to their customers in homes, businesses and so forth.



- iii. **nbn** does not generally publicly disclose the commercial details or results of trials. Instead, **nbn** uses trial data internally to analyse potential costs and timing associated with particular available technologies, among other matters, to determine appropriate ways to roll out the **nbn**TM network. This analysis activity is an integral part of **nbn** aiming to meet its corporate objective to optimise economic returns.
- iv. Content within the Relevant Documents relates to live and ongoing **nbn** technology and commercial analysis activity. **nbn** is committed to continuing to meet the Government's expectation of a high degree of transparency, through regular reporting of network deployment and active services (see the SoE). However, as I understand it, the Government's expectation does not extend to **nbn** reporting on ongoing analysis or future commercial activities, as release of this information could have a material impact on **nbn**'s ability to achieve 'its mandate to efficiently build, operate and maintain a wholesale-only access network' (see **nbn**'s 2014-2017 [Corporate Plan](#)).

Access Decision - Reasons

21. In making my decision, I took into account relevant parts of the FOI Act and related legislation, the Office of the Australian Information Commissioner (**OAIC**) [FOI Guidelines](#), relevant case law and other sources.
22. As per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act, documents that relate to **nbn**'s "commercial activities" are not subject to the operation of the FOI Act. The following link summarises and provides [general background information \(the Backgrounder\)](#) concerning **nbn**'s commercial activities exemption (**CAE**) or carve-out from the application of the FOI Act, and should be referenced and considered as forming part of this decision.
23. As outlined in the Backgrounder, there are various factors that may weigh in favour of an activity being categorised as commercial for the purposes of the FOI Act. In summary, **nbn**'s commercial activities are those related to, engaged in or used for commerce, but should be considered in the whole of the circumstances. A key issue is whether there is a profit-making objective that involves activity to generate trade and sales with a view to profit. As outlined in the Backgrounder, it is clear that **nbn**, as a company, is focussed on generating sales and profit.
24. I am of the opinion that the Relevant Documents relate to **nbn**'s commercial activities for the following reasons:
 - i. **They contain costs, margins and processes:** The Relevant Documents contain data such as cost estimates and process considerations. If the Relevant Documents were released under the FOI Act, data within them could be used to undermine **nbn**'s ability to effectively negotiate contracts in a very competitive market. Particularly, the potential release could adversely impact **nbn**'s ability to negotiate commercial contractual terms, under its wholesale supply arrangements in relation to certain technologies, if potential customers have already ascertained **nbn**'s costs, margins and processes. These factors could adversely impact on **nbn**'s ability to make an adequate return on investment and its overall profitability.
 - ii. **They relate to ongoing commercial endeavours:** The subject matter of the Relevant Documents is directly related to **nbn** completing the network rollout and ultimately achieving a commercial outcome. Particularly, the trial results were brought into existence in the course of and for the purposes of **nbn**'s research into innovative



technologies and, particularly, the potential for those technologies to lead to commercial returns if used in the rollout.

- iii. **They contain nbn R&D data:** I again note the SOE, which allows **nbn** flexibility in operational, technology and network design decisions. However, the SOE details the Government's expectation that **nbn** make those decisions within the constraints of its funding agreement with the Commonwealth. In this way, **nbn** is expected by the Commonwealth to act as a commercial entity when conducting trials of the sort that are the subject of the application, and ultimately making decisions about suitable technologies.

In addition, research and development (**R&D**) into new and developing technologies are key elements in **nbn**'s competitive framework, especially in meeting our corporate objective to rollout the **nbn**[™] network cost-effectively. Particularly, **nbn** needs to consider '*infrastructure based competition and the economic benefit of alternatives...*' (see **nbn**'s [Corporate Plan](#)). Like any other commercial player, **nbn** is committed to R&D initiatives and actively seeks to develop and to protect its intellectual property in those initiatives. If **nbn** were to release the Relevant Documents, it would provide competitive networks and other telecommunications players with an unfair advantage, i.e. the fruits of **nbn**'s R&D efforts. In effect, this would make **nbn**'s R&D methods "open source" technologies or methods, thereby undermining **nbn**'s investments in R&D and the potential commercial advantages associated with them.

- iv. **They contain nbn intellectual property:** Release of the Relevant Documents could also set a precedent expectation that **nbn** should release its intellectual property, for example innovative technology processes, simply because the company is subject to the FOI Act. As flagged previously, the FOI Act does not apply to **nbn**'s commercial activities, so that **nbn** can operate like any other commercial (non-GBE) entity does. If **nbn** were required to release information regarding its R&D in response to an FOI request, this could undermine **nbn**'s commercial reason-for-being as well as its competitive place in the market. In turn, this could impact the company's ability to generate a commercial return on our shareholders' investment in the **nbn**[™] network and—ultimately taxpayers' investment in—key national infrastructure.
- v. **Their release would negatively impact on commercial relationships:** The Relevant Documents also contain data about and belonging to our business partners (including pricing data). As this data was exchanged between **nbn** and its business partners in confidence and under commercial arrangements, its release could have a significant detrimental effect on **nbn**'s future business activities. In particular, **nbn**'s suppliers, related commercial entities and other potential business partners could limit the scope of confidential information they provide to **nbn**, if **nbn** may be required to disclose information about their companies in response to an FOI request. The potential perception from release of the Relevant Documents, that **nbn** does not protect its business partners' confidential and commercial information, could also negatively impact on **nbn**'s brand and reputation. It follows that **nbn**'s ability to engage high quality and competitive business partners would be undermined. As a consequence, **nbn**'s ability to rollout the **nbn**[™] network cost-effectively and its capacity to generate shareholder value could be compromised. In my view, this would impact **nbn**'s profitability, thereby relating clearly to **nbn**'s commercial activities.
- vi. As a side, I also note the risk here that release of the Relevant Documents could found an action for breach of confidence. Therefore, the Relevant Documents would also



potentially be exempt from release, per s 45 of the FOI Act, but relevantly, would also relate to our commercial activities.

25. For the above reasons, I am of the opinion that the Relevant Documents relate to **nbn's** commercial activities and are exempt from release.

26. I am also of the opinion information in the Relevant Documents is either irrelevant to the application or too intrinsically linked with **nbn's** commercial activities to be released in part.

FOI Processing Charges and Review Rights

27. **nbn** staff spent approximately two and a half hours searching for the Relevant Documents. In addition, I spent approximately 19 hours reviewing documentation, drafting and finalising this FOI decision, and completing relevant correspondence. As fees are not charged for the first five hours of FOI decision-making time, the fees payable would be \$317.50. This is based upon 14 hours of decision making time (19-5 hours = 14 hours x \$20 = \$280) and two and a half hours (2.5 hours x \$15 = \$37.50) of search time.

28. It is **nbn's** general policy to charge applicants for FOI processing time. In its [Submission to the OAIC Charges Review](#), **nbn** outlined its support of fees and charges and their importance to the FOI scheme. Among other points, **nbn** highlighted the following issues:

- Government agencies and authorities should be 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 and that users should share in the cost of service provision.
- The ability to charge for FOI processing time reflects the Commonwealth Parliament's and the community's recognition that public servants' time is a valuable resource and that such resources should only be spent in appropriate public undertakings. Similar reasoning animates section 24AA of the FOI Act, which enables decision-makers to refuse requests that substantially and unreasonably divert resources of agencies or GBEs.
- The above contention and the need to utilise resources efficiently may be applied with even greater force to GBEs, which are expected to operate as any other commercial player in the marketplace.
- 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 that regard, processing fee payments and advanced deposits tend to limit the scope of preliminary and other similar work typically "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 Office of the Australian Information Commissioner's (the OAIC) [Review of Charges under the FOI Act 1983](#), the OAIC 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.



29. In making my decision in relation to FOI processing charges, I took into account the above points. I also considered **nbn**'s commitment to the objects of the FOI Act and, in particular, section 3(4) of the FOI Act, which seeks to facilitate and promote public access to information promptly and at the lowest reasonable cost. In addition, I took into account the fact that this issue (the trial results in Ballarat and Karingal and **nbn**'s ongoing R&D efforts) was an important, live commercial issue, for which the business would need guidance in the future.
30. In light of the above points, 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.
31. This decision is subject to review under 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](#).