

GENERAL QUESTIONS

1. What is the role of fees and charges in the FOI Act?

NBN Co Limited (NBN Co or the Company) 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.

As a government business enterprise (GBE), NBN Co is in a unique position, as compared to Australian Government agencies and other bodies subject to the Freedom of Information Act, 1982 (the FOI Act). Unlike typical Commonwealth Government “agencies”, NBN Co is deemed to be an “agency” for the purposes of the FOI Act and the Company is the subject of specific exemptions in relation to its commercial activities. Mandated with constructing and rolling out Australia’s national broadband network, NBN Co has an obligation to ensure that it operates efficiently and according to sound business practices. In addition to building vital infrastructure for the nation, NBN Co is required to provide a commercial rate of return for its shareholders – our nominated Ministers, the Commonwealth Government and, more broadly, the Australian taxpayer.

Good business practice dictates that NBN Co should put a value on the time spent by its staff and charge accordingly for its services. To do otherwise would tend to undermine NBN Co’s obligations as a commercial entity. In that context, FOI fees and charges play an important role in offsetting some of the Company’s FOI processing costs on a user-pays basis, while providing an important public service. However, fees and charges only represent a small portion of the costs NBN Co incurs in processing FOI applications. In part, this is due to the fact that FOI processing fees have not increased since 1982. In addition, it would be fair to say that FOI charges do not reflect the current salary and related costs to GBEs and other Australian Government agencies. This is mirrored in the cost recovery figures (only circa 2% per annum of actual costs incurred are recovered) outlined in the Office of the Australian Information Commissioner’s (OAIC) “Review of Charges – Discussion Paper” (the ROC Paper). While FOI charges were never meant to operate on a full, user-pays cost recovery basis, it is clear that there is a significant imbalance between the current charging regime and the costs to agencies.

It is NBN Co’s opinion that the ability to charge for FOI processing time reflects the Australian Parliament’s and the community’s recognition that public servants’ time is a valuable resource, which should only be spent on appropriate public undertakings. This contention could be applied with even greater force to GBEs, which are expected to operate as any other player in the commercial 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 an FOI application to a final determination. This dovetails with the public interest in not wasting government resources.

NBN Co is also of the opinion that charges and fees provide an important incentive for applicants to refine and focus their applications. As a matter of standard practice, NBN Co’s FOI Officer works with all applicants to assist in refining the terms of their FOI requests. The requirement to pay for processing time also tends to limit the scope of work “written off” by Government entities in the event that an applicant withdraws a request. This ensures that NBN Co staff members’ time is efficiently utilised and applicants are able to obtain the documents which they require at the lowest reasonable cost. This is in accord with both the terms and the spirit of the FOI Act

For the above reasons, NBN Co is of the opinion that fees and charges play an integral role in FOI processes. As such, it is recommended that charges be retained and increased to reflect this important role and the significant cost to Government and the Australian taxpayer. Details in this regard are outlined below.

2. Do charges deter reasonable requests for access to information?

While NBN Co has only been subject to the FOI Act since 11 June 2011, the Company has found that charges do not deter reasonable requests for access to documents. In fact, 9 FOI applications were withdrawn during the current financial year. In the overwhelming majority of the withdrawal cases, NBN Co directed the applicants to information already in the public domain – Hansard, a Commonwealth agency’s website, etc. Only one applicant withdrew after being notified of processing costs. In that one case, the withdrawal followed on from an earlier and related FOI request that sought highly sensitive commercial information where release had been refused.

As outlined above, NBN Co’s FOI team actively works with applicants to refine their FOI requests and minimise unnecessary processing costs. In addition, NBN Co regularly provides general advice as to the likely grounds for exemption and ongoing costs estimates – particularly in instances where the number of documents and expenses may increase. By working within a defined framework and one where costs are clearly identified and estimated, NBN Co has been able to engage positively and proactively with the vast majority of FOI applicants.

APPLICATION FEES

General questions

3. Is it appropriate that the FOI Act does not impose an application fee for making an:

- **FOI request?** *As NBN Co only became subject to the FOI Act on 11 June 2011, the Company has never collected application fees. However, NBN Co recommends that application fees not be re-imposed, considering the small size of the fee and the relatively high administrative costs for processing payments, issuing receipts, refunds, fee reductions or waivers, etc.*

While not directly related to this question, the OAIC might consider centralising the cost-recovery or fee collection function within the OAIC. NBN Co raises this point in light of the relatively small sums collected through FOI charges as compared to FOI costs across the Government. In particular, all agencies replicate the FOI charging procedures, invoicing, etc. and dedicate staff to these functions. By centralising fee collection, the OAIC could take advantage of economies of scale, function more efficiently and apply uniform practices across the sector. In addition, the OAIC might consider establishing an on-line, EFPTOS or e-banking friendly solution. While rebating and notifying agencies of the fees collected would have some challenges, the OAIC might also consider retaining these fees either in whole or part to assist in funding its operations.

NBN Co does not recommend that the OAIC take responsibility for the assessment of FOI charges. Rather, NBN Co recommends that the fee assessment and setting-of-charges function remain with agencies.

- **FOI request for personal information?** *As above, no application fee should be charged. The fees should only reflect the substantive, FOI processing work.*
- **Application for internal review of an access refusal or access grant decision?** *As directly above. However, the OAIC might consider allowing agencies to charge for the time spent in internal reviews, excluding the first five hours of the internal reviewer’s time.*

- **Application for Information Commissioner review of an access refusal or access grant decision?** *NBN Co recommends that the OAIC should charge an application fee for reviews. As a general principle, NBN Co would recommend that the OAIC follow the same charging model as applicable to agencies. However, that model would not function well with the OAIC's investigative and review functions, which can be open-ended and, thereby, prohibitively expensive for applicants. As such, it is recommended that the OAIC should charge a capped fee for reviews, which would be subject to waiver by the OAIC in the case of genuine financial hardship.*
- 4. If you support FOI application fees, what level of fee should be imposed? Should it be subject to annual or biennial increase?** *N/A.*

For applicants

- 5. Would application fees for FOI requests deter you from making an application?** *N/A.*
- 6. Would fees for internal review or Information Commissioner review deter you from seeking review of an access refusal or access grant decision?** *N/A.*

For agencies

- 7. What effect has the abolition of application fees had on FOI requests to your agency?** *N/A – NBN Co only became subject to the FOI Act in June 2011 and, as such, has never charged application fees.*
- 8. What effect has the abolition of fees had on applications for internal review in your agency?** *N/A, as above.*

SCALE OF CHARGES

General questions

- 9. Is the scale of charges in the FOI Regulations appropriate (as set out in Table 2)? In particular, are the following charges appropriate?**
- **Search and retrieval: \$15.00 per hour** - *Not an appropriate rate. Charges should be standardised across all regulated activities. Refer to question 10), below.*
 - **Decision making: first five hours free and \$20 per subsequent hour** - *Not an appropriate rate. Charges should be standardised across all regulated activities. Refer to question 10), below. However, the first five hours of (free) decision making time should be retained. In relation to personal applications, there should be a cap on processing hours, along with an entitlement to 20 hours of free processing time, beyond which applicants should be required to pay standard rates up to a capped amount.*
 - **Electronic production: actual cost incurred in producing the copy** – *Appropriate.*
 - **Transcript: \$4.40 per page** – *Not an appropriate rate. Charges should be standardised across all regulated activities. Refer to question 10), below. In addition, charges should not be levied by the page, but rather, they should reflect the time spent in transcribing.*
 - **Photocopy: \$0.10 per page** – *Not an appropriate rate. No charge should be levied. These charges should be rolled into the standardised fees.*

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- **Other copies: \$4.40 per page** – *Not an appropriate charge. Agencies should charge the market rate, as applicable, to produce non-standard copies.*
- **Replay: actual cost incurred** – *Appropriate.*
- **Inspection: \$6.25 per half hour** – *Not an appropriate rate. Charges should be standardised across all regulated activities. Refer to question 10), below. In addition, charges should reflect the time spent in supervising the inspection of documents.*
- **Delivery: actual cost incurred** – *Appropriate.*

10. If the scale of charges needs to be amended, what level of charges should be imposed? Should they be subject to annual or biennial increase? Should they be capped?

- *NBN Co recommends that a uniform fee be applied to all FOI processing activities except for those permitted at “market rates” or “actual costs”, such as electronic production, replay and delivery. The reason for this suggestion is to simplify the administrative burden on agencies in calculating the costs involved. As to the amount, NBN Co recommends that the uniform FOI processing fee be in the range of rates charged in South Australia (\$44/hour).*
- *Charges should be the subject of annual increases, based on the CPI.*
- *As to the capping of charges, refer to the points below at Question 11.*

11. Should a different approach be adopted to imposing charges? What form should it take? For example, should the agency’s obligation to process a request be capped at a particular level, as in some countries? Or should the scale of a charge vary according to the nature of the applicant or the length of time taken to process the request? As a general principle, NBN Co is in favour of capping FOI processing fees, as is the case in United Kingdom and Scotland, along with a standardised hourly rate for all processing matters (Refer to the comments above). A processing fee “cap” would serve an important function in that it would require applicants to make highly specific and focussed FOI requests. Unless FOI applications are focussed, applicants would risk reaching the maximum threshold figure without obtaining the relevant documents that they require.

A cap would also ensure that applicants work cooperatively with FOI officers to scope down the terms of an application. In that regard, it is standard practice at NBN Co to require applicants to refine their requests so as to only capture documents created within a certain time period, involving certain staff or business units, geographical areas, relating to a given topic, etc. This process has worked well and the vast majority of NBN Co’s FOI applications have been finalised at a minimal cost.

As to upper limit of the cap, NBN Co would be supportive of a benchmark number of processing hours in the range of the Scottish FOI regime. Based upon the information provided in the ROC Paper, the Scottish authorities are able to charge 15£/hour to a maximum of 600£, translating to a maximum of 40 processing hours per application, unless the agency and the applicant come to another agreement. It is important to note that NBN Co is not advocating that the OAIC adopt an inflexible 40 hour limit, as this may not suit the requirements of all agencies, their work practices and resourcing levels across the Australian Government sector. In addition, a hard cap could disadvantage applicants where agencies have poor records management and search processes. As such, NBN Co recommends that there be some flexibility built into the process, such as agencies having the discretion to waive or extend the cap beyond the set benchmark.

As an alternative to a “hard cap” approach to processing charges, it may be useful for the OAIC to consider adopting principles similar to those articulated by the NSW Administrative Decisions Tribunal (ADT) in *Cianfrano v Premier’s Department* (2006) NSWADT 137 at paragraph 62 – **the Cianfrano decision**). That decision provides a benchmark of 40 hours at which NSW Government agencies may begin to consider that an FOI request constitutes a **“substantial and unreasonable diversion of resources” (SUDR)**. It is important to note that subsequent case law has held that the *Cianfrano* decision does not provide an exhaustive list of considerations. However, the *Cianfrano* decision outlines a useful series of principles, which agencies might take into account in making a SUDR decision. If the OAIC were to adopt a similar approach (building on the OAIC’s advice at paragraphs 3.54-55 of the FOI Guidelines), this may assist agencies in negotiating with applicants regarding what they consider to be a reasonable “cap” for processing time – and one that suits the needs of individual agencies, their staffing numbers, etc. As a practical issue, it would encourage agencies to be proactive in liaising with applicants and ensure that FOI requests are sufficiently scoped down or refined prior to commencing work on the application.

As to the scaling of processing costs, it is NBN Co’s opinion that this approach has some merit. This is particularly the case in relation to applicants using the FOI process as an inexpensive form of legal discovery or in the lead up to initiating a legal action. However, any further complexity (such as making a determination as to the nature of the applicant, their use of the material and so forth) would almost definitely increase administrative burdens and costs for agencies. On balance, NBN Co does not recommend creating different categories of applicants and corresponding (scaled) charging regimes as it would most likely lead to unnecessary complexity, administrative effort and corresponding costs. Rather, NBN Co supports firm guidelines regarding the SUDR principle and/or the use of processing time caps.

IMPOSITION OF CHARGES

General questions

12. In what circumstances should charges be imposed? As outlined above, NBN recommends that charges be imposed for the processing of all FOI applications, subject to claims of financial hardship. NBN Co also recommends that the current rules regarding fee reduction and waiver be abolished, except for instances of financial hardship. Refer to Question 22), below for further comments.

13. Is it appropriate that no charge is payable where the applicant is not notified of a decision on a request within the statutory time limit (including any extension)? In NBN Co’s opinion, it is appropriate that no charges be payable in the event that an applicant is not notified of an agency’s decision within the statutory time period – or not within an extended timeline as agreed with the applicant. However, agencies should still be able to charge applicants for processing time in the event that the decision period is extended by mutual consent.

At the same time, agencies should be able to rely upon the SUDR principle – and the benchmark principles outlined above – in the event that an agency is late in notifying an applicant of an FOI decision. In other words, an agency should be permitted to refuse an application as a SUDR, despite the organisation’s lateness in making an FOI decision. Notwithstanding this contention, the OAIC may wish to provide additional guidance to agencies in that they should apply the SUDR principles less stringently in the event that they are late in making an FOI decision. In particular, it is recommended that agencies should be expected to undertake additional processing efforts – beyond what would normally be expected with an “on time” application.

For agencies

14. In what circumstances does your agency impose charges? NBN Co has a policy of charging for all of its FOI processing time, unless an applicant is able to demonstrate that release of the documents is in the “general public interest” or that the applicant is experiencing financial hardship as per section 29 of the FOI Act.

15. What is the maximum charge that your agency has imposed? What is the typical range of charges that your agency has imposed? *To date, the maximum charge imposed by NBN Co was \$722. The typical range of charges runs from \$200 to \$400. However, it should be noted that NBN Co always undertakes a thorough scoping and refining exercise with all FOI applicants prior to proceeding with a request.*

16. Where charges are notified, does this result in narrowing the scope of the request? *As outlined above, NBN Co's standard practice is to discuss the terms of every FOI request with applicants. As a general rule, NBN Co will supply the applicant with a rough estimate of the number of documents captured by the terms of the application prior to notifying an applicant of charges. This practice inevitably leads to the narrowing of the scope of the application, limits time spent and processing charges.*

17. Where charges are imposed, does this result in applicants withdrawing their requests? *This has not been the case in NBN Co's experience.*

For applicants

18. What has been your experience of agency practice in notifying and imposing charges? Do agencies adopt different or inconsistent practices, and if so, is this a concern? *N/A.*

19. Has a charges estimate resulted in you withdrawing your request or narrowing your request? *N/A.*

EXCEPTIONS

General questions

20. Is it appropriate that requests involving an applicant's own personal information are free from charges? *NBN Co recommends that applicants receive a limited waiver on processing fees, along the lines of the NSW Government FOI model. In particular, the NSW Government Information (Public Access) Act 2009 and the repealed NSW FOI Act provide for 20 free processing hours. Beyond 20 hours, applicants are required to pay for processing charges at the standard rate. This contention dovetails with NBN Co's earlier submissions in relation to putting a value on public servants' time and the need to ensure that applicants work collaboratively with Commonwealth Government agencies, while still providing an important public service at a reasonable cost.*

It is important to note that NBN Co holds very little personal information and, as such, the Company has not processed any personal FOI applications to date. However, it is reasonable to assume that agencies that do hold large amounts of personal information – Centrelink, Veterans Affairs and other organisations – could be encumbered with unmanageable workloads where there are no practical "incentives" on the part of personal applicants to make targeted or focussed FOI applications. The existence of processing fees (for work beyond 20 hours) could provide this incentive. This would also complement agencies' ability to employ the SUDR principle and to combine applications as "substantially similar" and, thereby, refuse repeat applications on the same subject matter.

For the above reasons, NBN Co recommends that FOI applicants seeking personal information should be required to pay processing fees beyond 20 hours, subject to financial hardship. Again, please note that NBN Co has recommended that the "general public interest" fee waiver and reduction category should no longer apply. In addition, it is recommended that the OAIC provide formal guidance in relation to the management of personal applications and situations where agencies are able to invoke the SUDR principle.

COLLECTION OF CHARGES

For agencies

21. Does your agency face difficulties in collecting charges? What is the cost to your agency of applying and collecting charges? *NBN Co has not experienced difficulties in collecting charges. Beyond dedicated staffing resources, there are few other costs associated with the collection of FOI processing fees. The reason is that NBN Co established an electronic payment system when it became subject to the FOI Act in June 2011. As to the calculation or application of charges, the FOI Officer is responsible for these tasks. It would be impossible to separate the “charges” costs from those related to other FOI processing activities.*

CORRECTION, REDUCTION OR WAIVER OF CHARGES

General questions

22. Are there specific categories of applications that should not incur charges? Should charges be imposed where the applicant can demonstrate financial hardship? *As outlined previously, NBN Co recommends that all applications be the subject of processing fees, with the exception that personal matters should not be subject to charges for the first 20 hours of processing time.*

As noted above, NBN is of the opinion that applicants who are able to demonstrate financial hardship should not be charged for processing time. However, they should still be subject to the SUDR principles, as outlined above, or a processing fee “cap”.

23. In what circumstances should charges be reduced or waived? Does the public interest test for waiver of fees need to be amended? *In NBN Co’s experience, fee waiver and reduction requests take a significant amount of time to process. In particular, “charges decisions” require a fulsome review of the facts and a complete set of reasons. While not as complex as a full “access decision”, charges decisions can take a significant amount of time to complete. For example, NBN Co’s FOI Officer spent between 4 and 12 hours to complete its most recent charges reviews. Moreover, the contested fees (between roughly \$150 and \$700 for the full fees) often do not warrant the time and resources required to make an appropriate decision. Considering that agencies cannot charge applicants for the time spent on charges reviews, there is also a significant cost that is not reported or captured in relation to FOI processing.*

NBN Co recommends that the current rules regarding fee reduction and waiver be abolished, except for instances of financial hardship. The Company recommends this approach on the basis that Commonwealth Government agencies recover a very small percentage of their FOI processing costs. This does not account for the underreporting of FOI processing time, loss of productivity and other related costs. It follows that the Government already offers this important public service (FOI processing) at a significant discount. As such, it is NBN Co’s opinion that a further discount is not warranted and it would tend to undermine the user-pays principles, outlined above.

24. If reduction or waiver of charges is sought, what evidence of financial hardship should be required? *As indicated above, NBN Co has not processed any personal FOI applications. As such, the company does not have direct experience in relation to the evidence required to demonstrate financial hardship. However, NBN Co recommends that individual applicants be required to provide evidence of their financial situation in the form of a certified copy of a pension or concession card or some similar form of documentation. In the case of a lobby groups, not-for-profit and similar entities, NBN Co would recommend that officers of the organisation provide undertakings as to the organisation’s financial situation, along with evidence of its reliance on public or philanthropic funding.*

For agencies

25. Are there specific categories of applications that should not incur charges? Should charges be imposed where the applicant can demonstrate financial hardship? *As outlined above, NBN Co recommends that applicants not be charged for FOI processing fees if they can demonstrate financial hardship. However, the SUDR principle should still operate and agencies should also have the right to refuse applicants, regardless of their financial situation, if the work substantially and unreasonably diverts an agency's resources.*

26. In what circumstances does your agency reduce or waive charges? When does your agency reduce or waive charges on the basis of the public interest? *As per Regulation 3 of the FOI Charges Regulation, NBN Co's FOI Officer will exercise the discretion to reduce or waive charges if the applicant provides reasonable grounds to support a contention under section 29(5) of the FOI Act that the general public interest (or substantial section of the public) would be served by a document's release. Similarly, the FOI Officer will provide a fee reduction or waiver if the applicant provides proof of financial hardship.*

Regarding the public interest test, NBN Co will generally require some factual basis to substantiate such claims. In that regard, NBN Co will request that the applicant provide proof that the issue has been the subject of public scrutiny in the form of significant media commentary, Parliamentary or government (Commonwealth, State or Local) oversight and any other relevant evidence that supports a contention that the general public has an interest in the matter.

27. Does your agency experience difficulties in refunding charges? *To date, NBN Co has not refunded any charges. In addition, NBN Co has a policy of keeping applicants actively informed of any significant increases or decreases in processing charges. This helps to accurately predict charges and avoid the need to refund fees.*

Other issues

28. Are there any other issues that should be considered that have not been included in this discussion paper? *As outlined in question 1), it is clear that Australian Government agencies only collect a small fraction of their actual FOI processing costs. However, there are, arguably, significantly more FOI-related costs that go unreported. The ROC Paper makes reference to this fact at page 17 –*

The total cost reported includes staff hours spent on FOI matters and estimates of non-labour costs directly attributable to FOI (such as training and legal costs) as submitted by agencies. However, it has been suggested that agencies rarely keep exact records of hours spent by officers on FOI matters and other non-labour costs incurred.

In NBN Co's experience, there is a significant amount of staff time devoted to assisting the FOI Officer in locating, reviewing documents for potentially exempt material and briefing management on any relevant issues. Many of these tasks are not chargeable. As such, FOI processing and related tasks can cause substantial loss of productivity and tie up agency resources. In that context, NBN Co would recommend that the OAIC place specific limits or "caps" on the amount of processing hours which may be dedicated to a given application or a substantially similar subject matter. As outlined above, NBN Co also recommends that clear guidance be provided in situations where agencies may consider applications to be "substantially similar", so as to ensure that applicants do not make multiple applications on similar matters. The need for clear guidance and/or processing time caps would be particularly relevant in the event that the OAIC determines to abolish processing charges for some or all categories of applications.