

Broadbanding
Australia



25 July 2011

Our Ref:

Dear

FOI Application

I am writing in relation to your request made under the *Freedom of Information Act 1982 (FOI Act)*. In particular, you were seeking access to the:

Four "Definitive Agreements" between NBN Co Limited and Telstra Corporation Limited, as referred to on numbered page 4 of the (NBN Co 23 June 2011) Media Release: Implementation and Interpretation Deed; Subscriber Agreement; Infrastructure Services Agreement; and Access Deed.

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* is attached for your information and may be found at the following link:

http://www.oaic.gov.au/publications/fact_sheets/FOI-fact-sheet12_your-rights_online_April2011.pdf

If you have any questions or need to discuss your FOI application, please feel free to contact the writer on Tel. (02) or via email on

Sincerely,

Senior Corporate Counsel
FOI and Knowledge Management

cc. Chief Legal Counsel, NBN Co

FREEDOM OF INFORMATION REQUEST –

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 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.
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, 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 23 June 2011, NBN Co received an FOI request from **the Applicant**), which sought the following:

Four Binding Definitive Agreements (BDAs) between NBN Co Limited and Telstra Corporation Limited (Telstra), as referred to on numbered page 4 of the (NBN Co 23 June 2011) Media Release:

- *Implementation and Interpretation Deed;*
- *Subscriber Agreement;*
- *Infrastructure Services Agreement; and*
- *Access Deed (collectively, the Requested Documents).*

8. On 27 June 2011, NBN Co emailed the Applicant, acknowledging receipt of the application, as required by section 15(5) of the FOI Act.
9. On 25 July 2011, I made my access decision, as outlined below. In total, I spent 25 hours in reviewing documents as well as drafting and finalising this decision. For reference, no fees are levied for the first 5 hours of decision-making time. In addition, other NBN Co staff spent approximately 7 hours in searching for documents, providing advice and undertaking administrative tasks related to this FOI request.
10. As per Regulation 3 of the *Freedom of Information (Charges) Regulations 1982 (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. Drawing from the Charges Regulation and the objects of the FOI Act, I have determined to exercise my discretion to waive the fees associated with this FOI application.

Findings of Material Fact

11. Following receipt of the Applicant's request, NBN Co identified the Requested Documents or 4 BDAs. The Requested Documents are substantial commercial agreements and represent almost 2 years of continuous and highly complex negotiations between NBN Co and Telstra, culminating in **the Telstra Deal**. Further details relating to the Telstra Deal are outlined below in my "Reasons for Decision" and "Additional Information".
12. To assist in making my decision, I reviewed the Requested Documents. In addition, I undertook discussions with relevant officers within NBN Co, including the company's Legal Team and business experts regarding the nature of the Requested Documents.
13. Under section 27 of the FOI Act, it was open to me to undertake consultations with Telstra in relation to the potential release of the Requested Documents. However, I determined that this was unnecessary for the reasons outlined below.

Decision

14. In conjunction with Part II of Schedule 2, section 7(3A) of the FOI Act exempts NBN Co from the operation of the Act in respect of documents relating to its commercial activities.
15. It is my decision that the Requested Documents fall within the meaning of section 7(3A) of the FOI Act, for the reasons outlined below. As such, they are not subject to the operation of the Act.
16. It is also my decision that the Requested Documents would be exempt on other grounds within the FOI Act, being sections 45 (Material obtained in confidence) and 47 (Commercially valuable information), for the reasons outlined below.
17. Without limiting the foregoing, there are other potential grounds upon which to refuse access to the Requested Documents, including financial or property interests of the Commonwealth (s. 47D), business and commercial affairs (s. 47G), the economy (s. 47G), among other grounds. However, I have determined not to provide reasons in relation to those conditional exemptions.

Reasons for Decision

Commercial Activities - Background

18. Part II of Schedule 2 to the FOI Act specifies that certain agencies are exempt from the operation of the FOI Act in respect of particular documents. In the case of NBN Co, our company is exempt from the operation of the FOI Act "in relation to documents in respect of its commercial activities".
19. As per section 7(3A) of the FOI Act, "commercial activities" mean:
- (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.*
20. Before considering whether the Requested Documents are "documents in respect of the commercial activities" of NBN Co, it is important to understand the company's functions and powers, as well as its obligations to act in accord with sound commercial practices. This is made clear by the following:
- i. NBN Co is a public company limited by shares incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**).
 - ii. NBN Co is a wholly-owned Commonwealth company under the *Commonwealth Authorities and Companies Act 1997* (Cth) (**CAC Act**). NBN Co is also a prescribed Commonwealth GBE.
 - iii. NBN Co enjoys the same rights and is subject to the same obligations as other public companies incorporated under the Corporations Act. These rights and responsibilities include:
 - Directors duties under part 2D.1 of the Corporations Act;
 - Financial reporting obligations under part 2M of the Corporations Act; and
 - Restrictions on the management of its capital, including the issuance of shares, dividends, share capital reductions and share buy-backs under parts 2H and 2J of the Corporations Act.
 - iv. The Commonwealth of Australia holds all shares in NBN Co and ownership interest is represented by the Minister for Broadband, Communications and the Digital Economy (**Minister for BCDE**) and the Minister for Finance and Deregulation (collectively **the Shareholder Ministers**). In December 2010, the Shareholder Ministers provided the Chairman of NBN with a Statement of Expectations, which may be found at the following link:

http://www.dbcde.gov.au/data/assets/pdf_file/0003/132069/Statement_of_Expectations.pdf
 - v. Among other matters, the Statement of Expectations outlines the Shareholder Ministers and the Commonwealth Government's vision for NBN Co and the following principles:
 - The company should operate as a commercial entity;
 - At an appropriate time, NBN Co will raise debt on its own behalf;

- During rollout, the Government will provide equity funding, so as to provide NBN Co and the market with the certainty required to enter into long-term commercial contracts;
 - During rollout, the Government will retain full ownership of NBN Co in order to achieve its policy objectives, but with the intention to privatise NBN Co once the Minister for BCDE declares that the national broadband network is built and fully operational, among other conditions precedent; and
 - NBN Co should continue to conduct its planning and the execution of its strategy in a publicly transparent manner, subject to any requirements for commercial confidentiality, and reflect this in its annual reporting.
- vi. As a GBE, NBN Co is subject to the Governance Arrangements for Commonwealth Government Business Enterprises (June 1997) (**GBE Guidelines**), which may be found at the following link:
- <http://www.finance.gov.au/publications/governance-arrangements/index.html#Part4>
- vii. In the "Mandate and Objectives" section, the GBE Guidelines provide 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.

In addition, GBEs are to work towards a financial target and a dividend policy, agreed in advance with the Shareholder Ministers. Financial targets are to be set on the basis that each GBE should be required to earn commercial returns at least sufficient to justify the long-term retention of assets in the business and to pay commercial dividends from those returns.

- viii. The GBE Guidelines also provide guidance to NBN Co in relation to its corporate governance arrangements, which are typical of commercial entities operating within Australia. These include requirements to:
- prepare a corporate plan and report on the plan's progress;
 - report on operations and financial statements;
 - manage risks;
 - appoint a board of directors with an appropriate mix of skills; and
 - establish a target optimal capital structure, among other matters.
21. Based upon the above points, it is my opinion that NBN Co clearly operates as a commercial entity. However, I am required to examine the Requested Documents, and whether they fit within the meaning of "documents in respect of commercial activities" under section 7(3A), as detailed above.

Application of Commercial Activities Exemption to NBN Co

22. The "Guidelines Issued by the Australian Information Commissioner under Section 93A of the FOI Act" (**the AIC Guidelines**) do not provide specific guidance as to the meaning of the phrase "commercial activities". In addition, the AIC has, to date, made no decisions that consider that phrase.

23. In addition, NBN Co only became subject to the FOI Act on 11 June 2011. As such, there are no Federal Court or Administrative Appeals Tribunal decisions that have considered the term "commercial activities" in relation to NBN Co.

24. Furthermore, NBN Co's "commercial activities" exemption is different from that of other government entities, such as Australia Post and the CSIRO. In particular, both the CSIRO and Australia Post's "commercial activities exemptions" are limited by a competition requirement. In particular, section 7(3) defines the exemption as applying to:

*(a) activities carried on by an agency on a commercial basis **in competition with persons other than governments or authorities of governments**; or*

*(b) activities, carried on by an agency that may reasonably be expected in the foreseeable future to be carried on by the agency on a commercial basis **in competition with persons other than governments or authorities of governments**." (Emphasis added)*

25. In contrast to the above, section 7(3A) of the FOI Act contains no similar competition requirement for NBN Co, nor is there a requirement that such competition should relate to non-government entities. It follows that NBN Co's commercial activities exemption is broader in scope than that of Australia Post, CSIRO and other similar Commonwealth Government entities.

26. Beyond the points made above, it would be difficult to articulate a comprehensive definition of NBN Co's "commercial activities", particularly as NBN Co is in its start-up phase. As a new and an evolving commercial entity, NBN Co's commercial activities will change as the company evolves. It follows that any decision dealing with an exemption under section 7(3A) of the FOI Act will require an analysis of NBN Co's commercial realities at the time of a given request.

27. In light of the above points, it is my opinion that there is no relevant definition, nor a commonly accepted understanding of the term "commercial activities", which can be applied to NBN Co. As such, I have determined to adopt a "Plain English" understanding of the term.

28. As detailed above, the FOI Act defines the term "commercial activities" as "activities carried on by NBN Co on a commercial basis". The two key elements in that definition are "activities" and "commercial". It is my intention to adopt the relevant meanings of those words from the Macquarie On-Line Dictionary, which read as follows:

- i. *"Commercial"* – This word is defined in a number of ways, including: *"of, or of the nature of, commerce"; "engaged in commerce"; and "capable of returning of profit".*
- ii. *"Activities"* – This word is defined as *"the state of action; doing"; and "an exercise of energy or force; an active movement or operation".*
- iii. *"Commerce"* – To assist in the understanding of the term "commercial", I also drew upon the word "commerce", which is defined in a number of ways, including: *"trade" and "business."*

29. Drawing from the above points, it is my opinion that the documents would be considered exempt from the application of the FOI Act under section 7(3A), if they are documents relating to NBN Co's "active business or

trade operations that would be capable of returning a profit either at present or in the reasonably foreseeable future”.

30. It is my opinion that the Requested Documents fall within the criteria, outlined in the paragraph directly above, for the following reasons:

- i. The Telstra Deal was a negotiated outcome, resulting from nearly two years of complex commercial dialogue between NBN Co and Telstra. Both parties negotiated the Telstra Deal with their respective commercial interests in mind, as befits Telstra as a publicly listed company and NBN Co as a GBE.
- ii. The Requested Documents contain provisions and information that each party believes are essential in order to protect its long-term commercial interests during the 35+ years over which the Telstra Deal will operate. The Requested Documents also outline the business framework required to manage relations between Telstra and NBN Co over the life of the agreements. It follows that the Telstra Deal would constitute an “active” business operation or undertaking.
- iii. As detailed in NBN Co’s media releases of 23 June 2011, the Requested Documents represent a significant milestone for NBN Co. In addition to meeting corporate planning objectives, the Requested Documents provide for payments, over time, that will deliver approximately \$9 billion in June/2010-post-tax-net-present-value to Telstra. For reference, Telstra has indicated in its ASX announcements that the Telstra Deal, together with related ancillary Government arrangements, will – as a package – deliver approximately \$11b in post-tax-net-present-value over the deal’s long-term life.
- iv. It would be difficult to estimate the precise impact that the Telstra Deal will have on NBN Co’s capacity to return a profit. This is particularly the case as the company is in its “start-up” phase and it is reliant upon Commonwealth government funding for its operating budget. At present, NBN Co is expected to generate an internal rate of return at a level similar to or higher than the return of government bonds. Details may be found in NBN Co’s Corporate Plan at the following link:

<http://nbnco.com.au/assets/documents/nbn-co-3-year-gbe-corporate-plan-final-17-dec-10.pdf>.

- v. It is my understanding that the Telstra Deal will generate significant cost and operating savings, thereby increasing NBN Co’s rate of return and eventual profitability. I also understand that the Telstra Deal is expected to provide greater certainty for NBN Co’s revenue projections. In particular, the Telstra Deal:
 - Enables NBN Co to use essential, existing physical infrastructure, including Telstra’s ducts, pits, manholes, exchanges, lead-in conduits and other assets over the life of the agreements;
 - Provides for interim arrangements, so that NBN Co may immediately access certain Telstra assets, so as to accelerate network deployment;
 - Gives NBN Co access to Telstra infrastructure over a minimum 35-year period. This will enable NBN Co to roll out the national broadband network more efficiently, with greater certainty over its cost base and with reduced disruption to the community;

- Obviates the need for NBN Co to duplicate existing infrastructure and other assets. This will have clear benefits for NBN Co's long term profitability and will make the company more attractive for investors in any future privatisation efforts;
- Provides greater certainty over revenues as Telstra, Australia's largest retail telecommunications provider, agreed to a fixed-line network preference in favour of NBN Co for wholesale fixed line services for a period of 20 years; and
- Provides for Telstra, among other matters, to progressively disconnect customers from its copper and HFC networks (subject to certain exceptions) through the terms of the Subscriber Agreement (**the SA**). Combined with the network preference obligations in the SA, this will provide greater certainty in relation to NBN Co's customer base and service take-up.

31. I think the above factors make it clear that the Requested Documents constitute a key element in NBN Co's commercial strategy and, thereby, have a profit element. As such, they would fit within the above "Plain English" definition of "commercial activities".
32. Therefore, it is my opinion that the Requested Documents fall within section 7(3A) and are not be subject to the operation of the FOI Act. However, in the event that I am incorrect in that decision, there are other grounds upon which the Requested Documents may be found to be exempt from release, as outlined below.

Other Exemptions (Confidential Materials)

33. Section 45 of the FOI Act exempts documents from release if they contain material obtained in confidence and their disclosure would found an action for breach of confidence. The relevant section of the Act reads as follows:

Material Obtained in Confidence

45(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.

34. It is my understanding that to found an action for breach of confidence, the following criteria must be satisfied:
- The confidential information must be specifically identified* – Each of the Requested Documents contains express and strict undertakings of confidentiality, which cover the documents in their entirety. Both parties have formally agreed to those terms.
 - The information must have the quality of confidentiality, meaning that it must be secret or only known to a limited group of people* – NBN Co has only shared the specific details of the Requested Documents with its senior corporate officers, directors, Shareholder Ministers, relevant advisers and other parties to the Telstra Deal, all of whom would be bound by strict obligations of confidentiality. Drawing from the terms of the Requested Documents, it is clear that Telstra would have required its officers, directors, advisers and other relevant parties to abide by its obligations to hold the Requested Documents in strict confidence.
 - There must be a mutual understanding of confidence, meaning that NBN Co must have understood and accepted an obligation of confidence* – See response in relation to paragraph (i) above.

- iv. *There must be an unauthorised disclosure or the threat of unauthorised disclosure* – The Requested Documents have only been shared with parties to the Telstra Deal and relevant staff, officers, etc. If this FOI application were successful, the Requested Documents would be released both to the Applicant and to the world-at-large through NBN Co's FOI Disclosure Log. This is required under section 11C of the FOI Act. This potential disclosure would be in clear violation of the above-mentioned undertakings.
- v. *The unauthorised disclosure has or will cause detriment to the person who provided the confidential Information* – While I cannot provide details, the Requested Documents contain a confidentiality regime, which – if breached – could give rise to a cause of action. This is a clear detriment. In addition, I make the following points:
- The potential release of the Requested Documents would have a significant and negative impact upon both NBN Co and Telstra, as the documents contain highly sensitive commercial undertakings, financing and pricing arrangements, intellectual property and other information.
 - If the Requested Documents were released, the information could be used by other players in the marketplace to gain a competitive advantage in their dealings with Telstra, NBN Co and others within the telecommunications industry.
 - The potential release of the Requested Documents would have a significant and detrimental effect on NBN Co's future business activities. In particular, commercial entities and other potential business partners would, most likely, limit the scope of confidential information provided to NBN Co. In addition, businesses and other parties may refuse to share such information with our company – or only do so at an increased cost to NBN Co.
 - In summary, NBN Co's ability to engage high quality and competitive business partners would be undermined. It follows that NBN Co's negotiating position would be compromised, along with its capacity to generate shareholder value. In the extreme, it may mean that NBN Co would be unable to proceed with its mandate to roll out the national broadband network, which would have a negative impact on the Australian public.

35. For these reasons, it is my opinion that the potential release of the Requested Documents would found an action for breach of confidence. Therefore, it is my opinion that the Requested Documents are exempt from release under section 45 of the FOI Act and access is denied.

Other Exemptions (Commercially Valuable Materials)

36. 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 reads as follows:

Trade Secrets or Commercially Valuable Information

47(1) A document is an exempt document if its disclosure under this Act would disclose: (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.

37. As outlined above, the Requested Documents represent the outcome of a highly complex, far-reaching commercial negotiation process. The Requested Documents are expected to govern the relations between Telstra and NBN Co for 35 years and more. The detail of those provisions and the nature of the information contained in the Requested Documents mean that disclosure to third parties is likely to cause significant commercial harm to one, or both parties – for the reasons provided above in the “Confidential Materials” section. This would clearly diminish – or destroy – the value of information to both NBN Co and Telstra.
38. Furthermore, the Requested Documents contain highly sensitive commercial and financial arrangements, intellectual property and other information, all of which are protected by confidentiality arrangements. If that information were released, it could give rise to right of action against NBN Co for a breach of confidence. An action for breach of confidence would obviously increase legal and transaction costs to both NBN Co and Telstra, thereby greatly diminishing the value of the Telstra Deal.
39. If the Requested Documents were released, current and future business partners would, most likely, limit the scope of commercially valuable information provided to NBN Co. Alternatively, parties may refuse to share such information with our company. As outlined above, this would undermine NBN Co's ability to engage high quality and competitive business partners. It follows that the potential release of the Requested Documents would either destroy or significantly diminish the commercial value of the Telstra Deal and other future deals.
40. Beyond the obvious detriment to the parties, there would be a significant detriment to the general public/Australian taxpayer, as it would push back the progress of NBN Co's roll out, drive up costs and undermine efficiencies, all of which would negatively impact the public purse.
41. Therefore, it is my opinion that the Requested Documents are exempt from release under section 47 of the FOI Act and access is denied.

Additional Information

42. As outlined above, NBN Co fosters and promotes a pro-disclosure culture, with a focus on transparency and accountability. At the same time as promoting a pro-disclosure culture, NBN Co must consider its legitimate commercial objectives and legal obligations. In particular, the company has a responsibility to its Shareholder Ministers and the general public to ensure that it operates as any other commercial player in the marketplace, seeking to maximise returns and minimise costs. In my opinion, the potential release of the Requested Documents would have the effect of undermining NBN Co's commercial position, as well as being in breach of our confidentiality obligations. It would also have a significant and adverse effect on NBN Co, our shareholders and the public-at-large.
43. Considering that I have determined that the Requested Documents are not subject to the operation of the FOI Act (as per section 7(3A) and are exempt under sections 45 and 47, there is no requirement for me to review any public interest considerations. However, I do note that the Applicant has made the following points, among others, in the original letter of application:

The Media Release includes only a limited outline of the deal between Telstra and NBN Co. Beyond stating that a definitive agreement has been reached, the public and industry is not provided greater clarity into details of the deal than had previously been publicly expressed. In order for Internode and other industry players to have a reasonable understanding of how the deal affects the competitive landscape during the

NBN's rollout and after its full implementation, complete details of the deal need to be made public. At this stage, the only parties privy to this vitally important information are Telstra, NBN Co and the government... Taxpayers are also entitled to know how their money is being spent and that it is being spent wisely in a manner that assists the long term viability of the major infrastructure spend that is the NBN.

44. In relation to the above comments, I think it is important to note the following:

- i. Telstra has released a significant amount of information concerning the Telstra Deal in fulfilment of its ASX and other public disclosure obligations. These disclosure obligations are standard requirements for publicly listed companies after the completion of a commercial deal. Telstra will also likely be publicly releasing further information as a requirement of its upcoming shareholder approval process in respect to the Telstra Deal.
- ii. A significant amount of information regarding NBN Co's business planning and similar processes were made available during the Australian Competition and Consumer Commissioner's (ACCC) review of company's plans to establish Points of Interconnect (POIs). I also note that Internode made submissions in that review process. For reference, a summary and key documents relating to the ACCC's POI review may be found at the following link:

<http://www.accc.gov.au/content/index.phtml/itemId/952292>

- iii. The ACCC recently published an issues paper, relating to the preparation of explanatory material on new non-discrimination provisions that form part of the *Competition and Consumer Act 2010* (the Non-Discrimination Issues Paper). More detail may be found at the following link:

<http://www.accc.gov.au/content/index.phtml/itemId/996674>

It is expected that the Non-Discrimination Issues Paper will provide industry players with a reasonable understanding of the competitive landscape following the Telstra Deal. In addition, the ACCC is currently seeking comments on the Non-Discrimination Issues Paper. During this process, the ACCC will likely provide further detail about the Telstra Deal, unless it would violate confidentiality obligations or reveal valuable commercial information. Through this commentary and review process, it is expected that the ACCC will ensure that the telecommunications sector operates in a competitive manner and is subject to appropriate regulatory oversight.

- iv. In the coming months, the ACCC will hold a consultation process to assist in its review of Telstra's Structural Separation Undertaking (the SSU) and Migration Plan (the MP). During this process, it is expected that the ACCC may release further details of the Telstra Deal, if the information is deemed to be relevant to access seekers and other third parties. This process will enable the public, communications industry and others to comment effectively on the SSU and MP. As outlined above, this will help to ensure that the telecommunications sector operates in a competitive manner and is subject to appropriate regulatory oversight.
- v. Through a number of Parliamentary Committees, NBN Co is subject to public oversight and scrutiny and, in particular, as it relates to the company's financial performance. These include the following:

- House Committee on Infrastructure and Communications: Inquiry into the role and potential of the National Broadband Network
- Senate Committee on Environment, Communications & the Arts
- Joint Committee on the National Broadband Network.

45. 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.



Freedom of information – Your review rights

April 2011

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see FOI fact sheet 13 – *Freedom of information: How to make a complaint*.

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.

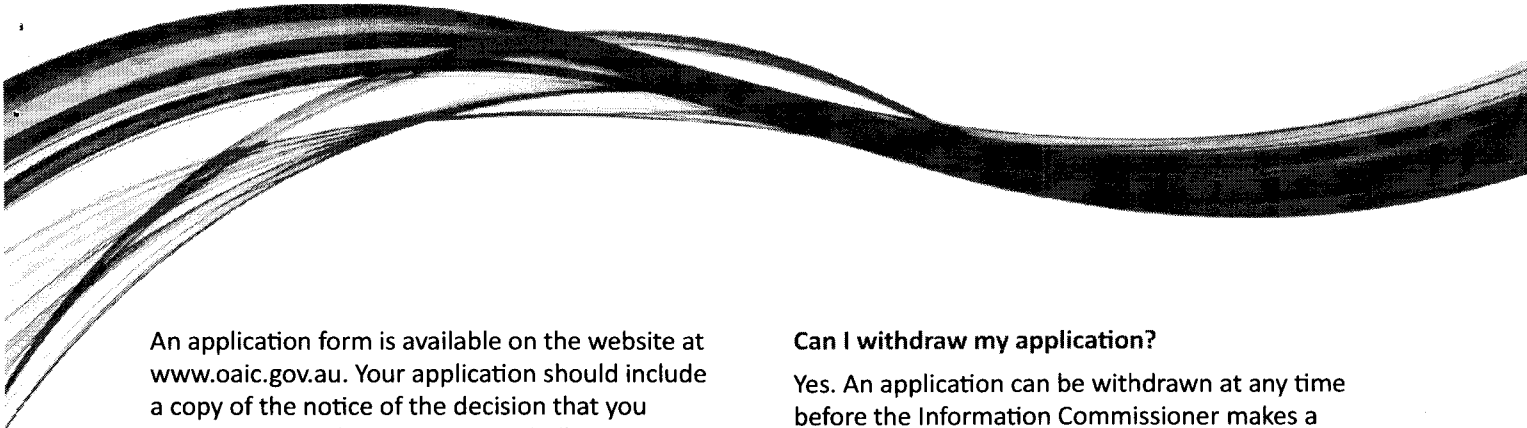
Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online: www.oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
fax: +61 2 9284 9666
email: enquiries@oaic.gov.au
in person: Level 3,
175 Pitt Street
Sydney NSW 2000



An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

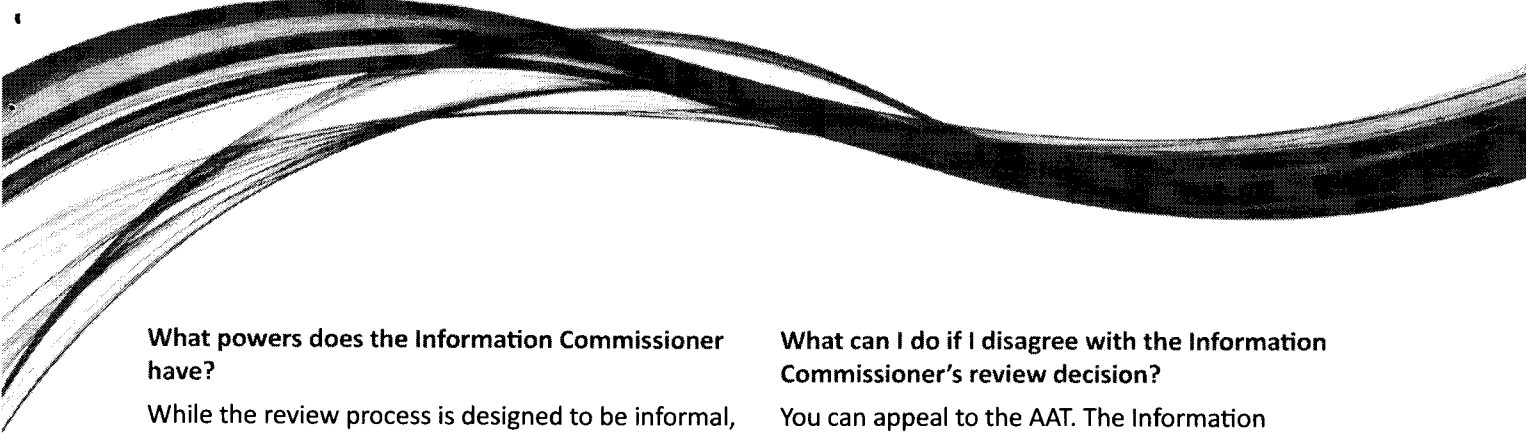
There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.



What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. The fee for lodging an AAT application is \$777 (at November 2010), although there are exemptions for health care and pension concession card holders and the AAT can waive the fee on financial hardship grounds.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

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