



Crowe and NBN Co Ltd [2011] AICmr 1 **(25 January 2011)**

Decision and reasons for decision of Freedom of Information Commissioner, Dr James Popple

Applicant:	David Crowe
Respondent:	NBN Co Limited
Decision date:	25 January 2011
Application number:	MR11/00006
Catchwords:	Freedom of information — Whether respondent falls within definition of ‘prescribed authority’ — (CTH) Freedom of Information Act 1982 s 4(1)

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Summary

1. I affirm the decision of NBN Co Limited (**NBN Co**) on 16 December 2010. I find that NBN Co is not an entity that is subject to the *Freedom of Information Act 1982* (the **FOI Act**).

Background

2. By letter dated 8 December 2010, Mr David Crowe applied to NBN Co for access to ‘NBN Co submissions to the Australian Competition and Consumer Commission regarding the issues at stake in determining the number and location of Points of Interconnect (POI) for the National Broadband Network’.

3. By letter dated 16 December 2010, NBN Co refused Mr Crowe's request on the basis that 'NBN Co is not subject to the *Freedom of Information Act 1982*. NBN Co is an incorporated company and is not prescribed under the *Freedom of Information (Miscellaneous Provisions) Regulations 1982*.'
4. Mr Crowe did not seek internal review of that decision.
5. By letter dated 18 January 2011, Mr Crowe sought IC review of the decision under s 54N of the FOI Act.

Decision under review

6. The decision under review is the decision of NBN Co on 16 December 2010 to refuse Mr Crowe's request.

Meaning of 'prescribed authority' (s 4(1))

7. The FOI Act applies to agencies and to ministers. An agency is 'a Department or a prescribed authority' (s 4(1)). The question in this review is whether NBN Co is a prescribed authority for the purposes of the FOI Act.
8. Section 4(1) of the FOI Act relevantly provides that 'prescribed authority' means:
 - (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council, other than:
 - (i) an incorporated company or association; ...
 - (b) any other body, whether incorporated or unincorporated, declared by the regulations to be a prescribed authority for the purposes of this Act, being:
 - (i) a body established by the Governor-General or by a Minister; or
 - (ii) an incorporated company or association over which the Commonwealth is in a position to exercise control; ...

Findings

9. For the FOI Act to apply to NBN Co it would have to come under the definition of 'prescribed authority' in s 4(1).
10. The National Names Index maintained by the Australian Securities and Investments Commission (available at www.asic.gov.au) shows that NBN Co has been registered as an 'Australian Public Company, Limited By Shares' since 9 April 2009.

11. It is not necessary to consider whether NBN Co was 'established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council' because, even if it were, it is an incorporated company and covered by the exception in paragraph (a)(i) of the definition of 'prescribed authority'. So paragraph (a) does not apply.
12. NBN Co has not been declared by the regulations to be a prescribed authority for the purposes of the FOI Act. So paragraph (b) does not apply.
13. NBN Co is not a prescribed authority and, therefore, is not an agency for the purposes of the FOI Act. The FOI Act does not apply to NBN Co.
14. The FOI Act can apply to documents held by entities to which the Act does not apply. Section 6C of the FOI Act requires an agency to take contractual measures to ensure that it can receive related documents from an entity that is contracted to provide a service to the public in connection with the performance of that agency's functions or the exercise of its powers. This is not relevant to the current review, as there has been no suggestion that NBN Co has such a contractual relationship with any agency; and, in any event, s 6C relates to circumstances where an access request is made to the relevant agency, not to the contracted entity.

Decision

15. Under s 55K of the FOI Act, I affirm the decision of NBN Co that NBN Co is not subject to the FOI Act.

Dr James Popple
Freedom of Information Commissioner
25 January 2011

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$777, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.