



20 November 2023

John Smith  
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**nbn** Ref: FOI2324017

Dear John

## Freedom of Information Application

I am writing in relation to your request, made under the *Freedom of Information Act 1982* (**the FOI Act**) seeking access to communications regarding a complaints case.

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

An FOI decision may be reviewed, subject to sections 53A and 54 of the FOI Act. Please refer to the Office of the Australian Information Commissioner's website at the following [link](#), which provides details about your rights of review and other avenues of redress under the FOI Act.

Please feel free to contact me on (02) 9031 3022 if you have any questions, or if you would like to discuss your request. The access decision for your request will issue shortly.

Yours sincerely

**Rohan Singh**  
Freedom of Information Officer



## FREEDOM OF INFORMATION REQUEST – FOI2324017.004

20 NOVEMBER 2023

ACCESS DECISION

STATEMENT OF REASONS

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### Summary of Access Decision

1. I find that the Relevant Documents (as defined below) are not subject to the *Freedom of Information Act* 1982 (the **FOI Act**) because they relate to **nbn**'s commercial activities. Accordingly, I refuse access to the Relevant Documents.

### Background – nbn and the FOI Act

2. **nbn** is a government business enterprise (**GBE**), which has the mandate of realising the Australian Government's vision for the development and operation of Australia's broadband infrastructure.
3. **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. To that end, **nbn** makes a large amount of information freely available to the public on our website: <http://nbnco.com.au/>.
4. **nbn** also 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 considering our commercial and other legal obligations.
5. 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**.
6. Under subsection 23(1) of the FOI Act, **nbn**'s Chief Executive Officer authorises me, to make decisions about access to documents and related matters under the FOI Act.
7. Under subsection 26(1) 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 Scope of Request

8. On 21 October 2023, **nbn** received an email from a person identifying themselves as "John Smith" (the **Applicant**) requesting the following:

*"the communications in the case with the reference number 16183789."*
9. On 23 October 2023, **nbn** wrote to the Applicant to acknowledge receipt of his email informally, and again on 20 November 2023 to inform the Applicant that this access decision would follow shortly.
10. On the date set out above, I made my access decision, as outlined below.

### Findings on material questions of fact

11. Following receipt of the Applicant's amended request, **nbn** staff undertook searches within the company's records for documents falling within the scope of the request (**Relevant Documents**).
12. **nbn** staff located documents falling within the scope of the Relevant Documents. The Relevant Documents consist of communications between **nbn** and an individual (**Individual**) in relation to a query made to **nbn**. The communications are comprised of email messages and records of communications stored in **nbn**'s computerised complaints and queries case management system.
13. The Relevant Documents include details of the subject of the query, which relates to **nbn**<sup>TM</sup> network assets, locations of **nbn**<sup>TM</sup> network assets which are the subject of the Individual's query, personal



information concerning the Individual, and personal information of **nbn** staff. The communications also contain details of **nbn**'s activities in relation to its network assets.

### Access Decision - Relevant Documents

14. In undertaking my review of the Relevant Documents, it is my view, having regard to the nature and subject matter of the request and the relevant provisions of the FOI Act, that one or more exemptions to release are applicable, as outlined below.
15. 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, including the [general background information](#) concerning **nbn**'s commercial activities carve-out. That background document references two reviews by the Australian Information Commissioner that considered **nbn**'s Commercial Activities Carve-out (**CAC**): the [Internode Decision](#) (in January 2012) and the [Battersby Decision](#) (in July 2013).

### **nbn**'s commercial activities carve-out

16. Application of the CAC is a threshold issue, and I must consider it first before considering any other grounds for refusal of access.
17. Section 7(3A) of the FOI Act excludes documents that are related to **nbn**'s "commercial activities" from the operation of the FOI Act. 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. **nbn** is exempt from the operation of the FOI Act "in relation to documents in respect of its commercial activities".
18. Per section 7(3A) of the FOI Act, "commercial activities" means:
  - (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.*
19. As per section 7(4) of the FOI Act, in "*subsection (2AA) and Part II of Schedule 2, a reference to documents in respect of particular activities shall be read as a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities.*"
20. Relevantly, **nbn**:
  - a. is a public company limited by shares incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**);
  - b. is wholly owned by the Commonwealth and a prescribed GBE;
  - c. is subject to the same obligations as other public companies incorporated under the Corporations Act;
  - d. generates sales and profit; and
  - e. operates for a commercial purpose, with a mandate or objective to earn at least a commercial rate of return.
21. Accordingly, **nbn** operates as a commercial entity and, having regard to the foregoing, is bound to do so.
22. In the Internode Decision, the then Freedom of Information Commissioner, Dr James Popple, considered the meaning of "commercial activities" in relation to **nbn**'s CAC. Relevantly, he noted as follows:
  - a. in *Bell v Commonwealth Scientific and Industrial Research Organisation*, the Full Court of the Federal Court considered the meaning of "commercial activities" with reference to analogous provisions to sections 7(2) and 7(3A) of the FOI Act. In that case, the Court said that "*activities are conducted on a commercial basis if they are related to, engaged in or used for commerce*" and referred to "*the importance of the whole of the circumstances including the commercial goal (profit making or the generation of income or return) in determining whether particular activities are sufficiently related to commerce to be characterised as commercial activities*" [*Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40 as referred to in *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr4 at paragraph 12.]; and



- b. in *Johnston and Australian Postal Corporation*, the Administrative Appeals Tribunal concluded that commercial activity "can be regarded as a business venture with a profit-making objective and, strictly speaking, will involve activity to generate trade and sales with a view to profit. This is particularly so when the volume of activity is on a large scale". [*Johnston and Australian Postal Corporation* [2006] AATA 144 as referred to in *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr4 at paragraph 13.]
23. The subsequent Battersby Decision reinforced the aforementioned considerations and further noted:

*"... there is no doubt that the definition of 'commercial activities' is broader for NBN Co than it is for other government business enterprises listed in Part II of Schedule 2."* [*Battersby and NBN Co Ltd* [2013] AICmr 61 at paragraph 16.]
24. As outlined above, there are various factors that may weigh in favour of an activity being categorised as commercial for the purposes of the FOI Act, such as (among other factors), if those activities:
  - a. have a commercial goal or purpose;
  - b. are related to, engaged in, or used for commerce; and/or
  - c. are related to a profit-making motive, generating income or revenue, among other matters.
25. Furthermore, for the CAC to apply, the document under consideration need not meet a commercial value threshold or be a commercially significant document. All that is required is that the document is received by **nbn** or brought into existence in the course of, or for the purposes of, the carrying on of **nbn**'s commercial activities.
26. In looking at the whole of the circumstances, I conclude that the Relevant Documents are in respect of **nbn**'s commercial activities for the following reasons:
  - a. The communications comprising the Relevant Documents were created or received by **nbn** in the course of **nbn** carrying out its queries and complaints process about the **nbn**<sup>TM</sup> network. Operation of the **nbn**<sup>TM</sup> network is **nbn**'s primary commercial purpose, and handling complaints or queries regarding assets and equipment that form part of the **nbn**<sup>TM</sup> network therefore directly relates to **nbn**'s commercial operations and activities.
  - b. The Relevant Documents are captured in **nbn**'s system for handling complaints and queries, which includes data that forms part of **nbn**'s intellectual property, both in the content of the communications regarding **nbn**'s assets, and the business and quality assurance processes disclosed by those communications and system. If they were made public, these data could be commercialised by others in the telecommunications retail and wholesale markets, as well as by other network asset owners who may be able to use the Relevant Documents to their commercial advantage in their own businesses. This information is commercially valuable to **nbn** and the broader telecommunications market. If **nbn** were to release the Relevant Documents, they would potentially provide **nbn**'s competitors, including other telecommunications players in the market, with an unfair advantage. In effect, this would make **nbn**'s business methods and processes "open source", thereby undermining **nbn**'s investments in these methods and processes.
27. For the above reasons, I am of the opinion that the Relevant Documents relate to **nbn**'s commercial activities.
28. It is unnecessary to consider any further exemptions considering my determination that the Relevant Documents fall within the meaning of the commercial activities carve-out. Without limiting the above, there are other grounds upon which access to the Relevant Documents could potentially be refused. In my opinion, the Relevant Documents may also be exempt from release on the basis of the following sections of the FOI Act:
  - a. s47 (documents disclosing commercially valuable information);



- b. s47D (substantive adverse effect on the financial or property interests of the Commonwealth);
  - c. s47F (personal privacy);and
  - d. s47G (business, commercial, or financial affairs).
29. However, I have determined not to provide reasons in relation to those general and conditional exemptions.

### **Decision-making Time and Fees**

30. **nbn** staff spent time searching for the Relevant Documents to respond to the request. Additionally, I have spent time in drafting and finalising this FOI decision, in addition to completing relevant correspondence in respect of the request.
31. No fees are levied for the first five hours of FOI decision-making time and on this basis, no fees are payable in respect of the decision-making time in this instance.
32. Considering the relatively small sum involved for staff searches, together with **nbn**'s commitment to transparency, I have exercised my discretion to waive all relevant fees.
33. 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.

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