



12 March 2024

JM  
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nbn Ref: FOI2324033.003

Dear JM

## FOI Act Application – Access Decision

I am writing in relation to your application made under the *Freedom of Information Act, 1982 (FOI Act)* seeking access to documents related to an incident that occurred in Anglesea on 21 June 2023.

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 FOI application.

Yours sincerely

**Shmuel Loebenstein**  
Legal Counsel | Freedom of Information



**FREEDOM OF INFORMATION REQUEST – FOI2324033**  
**ACCESS DECISION**  
**STATEMENT OF REASONS – 12 MARCH 2024**

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**Application Chronology and Terms of Request**

1. On 14 February 2024, **nbn** received an email from JM (**Applicant**) via the Right to Know website, making an application under the *Freedom of Information Act, 1982* (**FOI Act**) requesting:
  - “1.  
*Case/Incident Records for the following cases:*  
*INC19526143*  
*INC19526241*  
*INC19526411*  
*INC19526412*
  2.  
*Case/Incident Records for the P1/Major Incident created/collated from the above 4 cases.*  
*Please also include any correspondence with the energy provider, Ausnet Services.”*
2. On 15 February 2024 I wrote to the Applicant to notify them that I had received the request and that I would respond to the request.
3. On 12 March 2024 I made my access decision, as outlined below.

**Access Decision**

4. For the purposes of this access decision, I will refer to the first and second paragraphs of the Applicant’s request as, respectively, Part 1 and Part 2 of the request.
5. Following receipt of the Applicant’s request, **nbn** staff undertook searches and enquiries to locate any relevant documents falling within the scope of Parts 1 and 2.

*Part 1 of request*

6. I refuse access to the Relevant Documents (as defined below) on the basis of **nbn’s** commercial activities carve-out (**CAC**) or carve-out from the application of the FOI Act.  
Findings on material questions of fact (Part 1)
7. **nbn** staff undertook searches within the company’s records and located document falling within the scope of Part 1 of the request being the relevant service portal records (Relevant Documents).
8. I make the following findings in relation to the Relevant Documents:
  - a. the Relevant Documents contain information regarding an outage of the **nbn** network in relation to specified services and includes information relating to the **nbn** network, services and operations;
  - b. the Relevant Documents were brought into existence in connection with services provided by **nbn** under commercial arrangements;
  - c. the Relevant Documents and their content were created in the course of **nbn** conducting its commercial activities in relation to the operation of the **nbn** network and the maintenance of connections to that network.



### Access Decision (Part 1)

9. 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.
10. 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).
11. Application of the CAC is a threshold issue, and I must consider it first before considering any other grounds for refusal of access.
12. 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".
13. 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.
14. 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.*"
15. 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.
16. Accordingly, **nbn** operates as a commercial entity and, having regard to the foregoing, is bound to do so.
17. In the Internode Decision, the then Freedom of Information Commissioner, Dr James Pople, 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*"<sup>1</sup>; 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*

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<sup>1</sup> *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.



*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".<sup>2</sup>*

18. 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."<sup>3</sup>*
19. 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:
- have a commercial goal or purpose;
  - are related to, engaged in, or used for commerce; and/or
  - are related to a profit-making motive, generating income or revenue, among other matters.
20. 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.
21. In looking at the whole of the circumstances, I am of the opinion that the Relevant Documents are in respect of **nbn**'s commercial activities because they were brought into existence and used by **nbn** in the course of carrying out its commercial activities. This includes the maintenance of the **nbn** network, the operation of which is **nbn**'s primary commercial purpose and which is carried out by **nbn** on a commercial basis. The Relevant Documents were directly related to **nbn** operating the network and ultimately achieving a commercial outcome.
22. For the above reasons, I am of the opinion that the Relevant Documents are in respect of **nbn**'s commercial activities and is exempt from release under section 7(3A) of the FOI Act.
23. It is unnecessary to consider any further exemptions in light of my determination that the Relevant Documents fall within the meaning of the commercial activities carve-out. Without limiting the foregoing, there may be 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:
- s47 (documents disclosing commercially valuable information) of the FOI Act;
  - s47D (substantive adverse effect on the financial or property interests of the Commonwealth); and
  - s47G (business, commercial or financial affairs).
24. I have determined not to provide reasons in relation to those general and conditional exemptions. However, **nbn** reserves its right to rely on these grounds on review or appeal.

#### *Part 2 of request*

25. Per section 24A(1) of the FOI Act, all reasonable steps have been taken to find relevant documents within the scope of Part 2 of the request and I am satisfied that such documents do not exist.
26. Given that the FOI Group and **nbn** staff identified no documents falling within the scope of Part 2 of the request, as well as the short time involved in drafting this decision, I have determined to waive all 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.

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<sup>2</sup> *Johnston and Australian Postal Corporation* [2006] AATA 144 as referred to in *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr4 at paragraph 13.

<sup>3</sup> *Battersby and NBN Co Ltd* [2013] AICmr 61 at paragraph 16.



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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