

31 May 2016

Mr Josh Stewart

Sent via email: foi+request-1730-a3c11a99@righttoknow.org.au

Our Ref: 1516/50.13

Dear Mr Stewart,

FOI Application – Installation Data

I am writing in relation to your request, made under the *Freedom of Information Act, 1982 (the FOI Act)*, requesting information concerning **nbn** installation data.

The Statement of Reasons (**Attached**) outlines the specific terms of the FOI request, the decision-maker's findings and the access decision. For your reference, the FOI decision is subject to review under the FOI Act. The Office of the Australian Information Commissioner's FOI Fact Sheet 12 – Your review rights may be found at the following [link](#).

If you have any questions, need to discuss your FOI application or require any other information relating to this matter, please feel free to contact the writer on Tel. (02) 8918 8596 or via davidmesman@nbnco.com.au.

Yours faithfully,

David J Mesman

General Counsel

FOI, Privacy & Knowledge Management



FREEDOM OF INFORMATION REQUEST –1516/50 (Josh Stewart)

ACCESS DECISION STATEMENT OF REASONS

Background

1. **nbn** is a government business enterprise (**GBE**), which has the mandate of realising the Australian Government's vision for the development of Australia's new broadband network.
2. **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. In that light, members of the public will be able to find a large amount of information freely available on our website, which may be found at the following link: <http://nbnco.com.au/>.
3. **nbn** manages its information assets within the terms and spirit of the *Freedom of Information Act 1982* (**the FOI 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**.
5. Under subsection 23(1) of the FOI Act, **nbn's** Chief Executive Officer authorised me, David Mesman, to make decisions about access to documents and related determinations under the FOI Act.
6. Under section 29(8) 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 Terms of Request

7. On 10 March 2016, **nbn** received an email from Mr Josh Stewart (**the Applicant**), in which he made an application under the *Freedom of Information Act, 1982* (**the FOI Act** or **the Act**) requesting access to:

*...any records you have that show instances where **nbn** technicians have not attended installations or service call outs when scheduled to do so. This includes missed bookings with reasons such as (But not limited to) "Technician Shortfall" etc. Ideally I would like to see records for this over a recent 12 month period (Rolling 12 month or 2015 calendar year). I do not need any record details that would include any personal information, just a date and a reason for not attending the booking. If other details such as installation type (FTTP, FTTB, FTTN etc) can be included, that would also be of assistance.*

8. On 11 March 2016, **nbn's** FOI Group wrote to the Applicant and requested that he clarify the terms of his request as per section 15 of the FOI Act. In particular, the Applicant had not specified the type of document or documents that he was seeking, nor had he specified a timeframe in which the relevant searches should be undertaken. In **nbn's** letter of 11 March, the FOI Group also indicated that the Applicant's request, in its then-current form, would likely be



considered a substantial and unreasonable diversion of resources as per section 24 and following of the FOI Act.

9. On 15 March 2016, the Applicant reverted to **nbn**, confirming that he was:

...seeking data from NBN Co's service job tracking system, commonly interfaced by RSPs and the NSOC through the 'Service Portal'. The extract of these records should show all instances in the below period where an appointment was made for service or installation of an NBN service, but where this was cancelled or postponed by NBN Co or the service agent. Other details requested remain per the original request (Eg record date, reason for cancellation etc). These records should cover the period March 1st 2015 through 29th Feb 2016

10. On 23 March 2016 – and after having undertaking detailed discussions with relevant subject matter experts in the business – **nbn**'s FOI Group emailed the Applicant and acknowledged receipt of this FOI application. In the same letter, **nbn**'s FOI Group provided the Applicant with an advance deposit request in the amount of \$115.63, based upon an estimated decision making period of roughly 19 hours, along with search and retrieval time of approximately 11.5 hours. For reference, **nbn** could have charged the Applicant the market rate for the time expended to create the Relevant Document. However in the interests of transparency and the objects of the FOI Act, **nbn** chose not to charge market rates in this instance. Regulation 3 of the *Freedom of Information (Charges) Regulations 1982* 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.

11. On 18 April 2016, the Applicant wrote to **nbn**, indicating his intention to pay the advance deposit and he also requested that **nbn** change the scope of the request along the following lines:

"I am seeking data from NBN Co's service job tracking system, commonly interfaced by RSPs and the NSOC through the 'Service Portal'. The extract of these records should show all instances in the below period where an appointment was made for service or installation of an NBN service, but where this was cancelled or postponed by NBN Co or the service agent. This should include occurrences where the technician failed to attend without the appointment being cancelled or postponed in advance. Other details requested remain per the original request (E.g. record date, reason for cancellation etc). These records should cover the period March 1st 2015 through 29th Feb 2016." As this is only a clarification of the existing request, I do not believe this should materially change the fulfilment time required, but if it does so please do let me know".

12. On 21 April 2016, I responded to the Applicant, indicating that it was possible to extend the period and the terms, as outlined above. However, I would first need to revert to the business to confirm whether the scope has changed significantly, and whether this may constitute a substantial and unreasonable diversion of resources, as per section 24 and following of the FOI Act. On the same day, I confirmed that it would be possible to change the scope of the FOI application without a significant impact upon the FOI decision making time. As such, I informed the Applicant that the advance deposit fee would remain the same.

13. On 26 April 2016, **nbn**'s Finance Group confirmed that the Applicant had paid the advance deposit.



14. On 18 May 2016, the Applicant emailed me, requesting what further actions were required to finalise this FOI application. On the same day, I emailed the Applicant, indicating that once he made the final processing fee payment, I would release the decision and any relevant documents, if the FOI decision contemplated the release of documents. In that email, I also stressed that the payment of FOI processing fees would not guarantee access to information or documents and I also invited the Applicant to discuss his application with me.
15. On 20 May 2016, I completed my FOI decision and requested that the Applicant pay the remaining processing fees. For reference, **nbn** staff spent more than the estimated 11.5 hours, per the Advance Deposit Request, searching and retrieving information and data for this FOI request. In addition, I spent approximately 12 hours in drafting and finalising this FOI decision, as well as completing relevant correspondence and undertaking discussions with **nbn's** IT group and other experts in our business regarding this request.
16. On 31 May 2016, **nbn's** Finance Group confirmed that the Applicant had made the final, FOI processing fee payment and I subsequently forwarded a copy of this decision to the Applicant.

Findings of Material Fact

17. Following receipt of the Applicant's request, **nbn** staff undertook searches through the company's electronic and other files, so as to locate any relevant documents falling within the scope of the Applicant's request.
18. As per section 3(1)(b) of the FOI Act, members of the public have the right to seek access to "documents", rather than discrete bits of information. It is clear from the terms of the Applicant's FOI request that he was seeking data, rather than a document. Moreover, **nbn** does not normally prepare a report in the form requested by the Applicant. To respond to the request, **nbn** would be required to create a document, which is contemplated under section 17 of the FOI Act. In particular, Government authorities may provide applicants with information, where such information is not available in a discrete written form and where the information is "*ordinarily available to the agency for retrieving or collating stored information*". In that regard, I received advice from **nbn** staff that it would be possible to create a document containing the information requested by the Applicant (the **Relevant Document**).
19. **nbn** staff created the Relevant Document by importing data from various **nbn** internal repositories and creating a new data set. For the sake of simplicity, I will refer to the data in the Relevant Document as missed appointment information (**MAI**). For reference, the Applicant's FOI request seemed to suggest that the MAI could be found within **nbn's** Service Portal. However, that is not factually accurate. The Service Portal was only one of various sources used to collect the MAI.
20. In addition, I undertook discussions with subject matter experts within **nbn** regarding the MAI and made the following findings:
 - i. **nbn** collects various data sets, which the company uses to generate metrics relating to the operation of the **nbn**TM network.
 - ii. Among other purposes, **nbn** collects and reports on various data to assist in meeting its contractual reporting obligations under the [Wholesale Broadband Agreement \(WBA\)](#), including but not limited to **nbn's** Product Catalogue - Service Levels Schedule (**the SLS**).



- iii. Under sections 2.2 and 15.3 of the SLS, **nbn** is required to produce various Performance Reports for our wholesale customers, i.e. retail service providers (**RSPs**).
- iv. Relevant to the current FOI request, section 2.2 of the SLS outlines certain performance objectives, which **nbn** reports to RSPs, in relation to end user connection appointments.
- v. Under section 2.2 of the SLS, **nbn** reports on rescheduled appointments. It follows that this performance objective data (**PO Data**) and report are similar to, but not the same as the request for data made by the Applicant, noting that the Applicant requested all cancelled and postponed, i.e. rescheduled, appointments, among other information.
- vi. Section 15.2(a) of the SLS makes it clear that "Performance Reports and any measurement and monitoring information produced by NBN Co are the Confidential Information of NBN Co". This confidentiality provision covers the PO Data and related reports under the SLS.
- vii. The WBA contains a rebate scheme in 1.4 of the SLS which is related to the PO Data. In particular, individual RSPs may potentially make a rebate claim to **nbn** if the company has not met various target metrics, including certain data contained in the PO Data. It follows that the details of the PO Data concerning individual RSPs are highly sensitive commercial information.
- viii. **nbn** only shares RSP specific Performance Reports with the individual RSPs to which the data relates.
- ix. Via the Service Portal, RSPs may access their own individual metrics, including the PO Data. Again, the data on the Service Portal only contains information on which **nbn** reports. For the purposes of this FOI request, the key data set is rescheduled appointments.
- x. **nbn** has not publicly disclosed its Performance Reports under WBA, nor associated data/metrics such as the PO Data, nor data sets similar to the MAI.
- xi. There is no regulatory requirement that the Performance Reports under the WBA, the PO Data or associated metrics be disclosed.
- xii. **nbn** uses the PO Data, among other data sets and information, to track the company's internal key performance indicators.
- xiii. **nbn** also uses the PO Data, among other data sets and information, to benchmark the performance of various delivery partners under certain **nbn** construction, network rollout and maintenance contractual regimes.

Access Decision - Reasons

21. 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.
22. As per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act, documents that relate to **nbn's** "commercial activities" are not subject to the operation of the FOI Act. The following link



summarises and provides [general background information \(the Backgrounder\)](#) concerning **nbn's** commercial activities exemption (**CAE**) and should be referenced and considered as forming part of this access decision.

23. As outlined in the Backgrounder, there are various criteria against which to make a determination that a given activity is commercial for the purposes of the FOI Act. In summary, **nbn's** commercial activities are those that are related to, engaged in or used for commerce, but should be considered in the whole of the circumstances. A key issue is whether there is a profit-making objective and it involves activity to generate trade and sales with a view to profit. As outlined in the Backgrounder, it is clear that **nbn**, as a company, is focussed on generating sales and making a profit. As related to the current application, **nbn** generates sales revenue by selling its services to RSPs, which then resell **nbn**TM network packages to their retail customers – in homes, businesses and so forth.
24. Per the Findings of Material Fact, it is clear that **nbn's** PO Data and reports relate to the company's commercial activities, noting that these metrics provide a basis upon which RSPs may seek a rebate from **nbn** for its supply of wholesale broadband services. The commercial sensitivity of this information is highlighted in the WBA, which contains a confidentiality provision. Moreover, these metrics relate directly to **nbn's** profit making activities, as any rebates would impact **nbn's** overall profitability. For those and other reasons, **nbn** tracks the PO Data – and other metrics – internally as a means to gauge effective corporate performance and set benchmarks for various business units.
25. However, **nbn's** PO Data are not the same as the MAI. As outlined above, the Applicant made a request for all postponed and cancelled appointments across the network, while **nbn** only reports on rescheduled appointments and at the RSP-specific level. In addition, the MAI does not relate directly to a given RSP, nor does it give details that are regional or State specific. This would suggest that the MAI may not be readily linked to a given RSP's performance, nor that of a construction delivery partner. These facts could be viewed as supporting the contention that the MAI, in its current form, may not have the same level of commerciality as PO Data linked to individual RSPs.
26. Irrespective of the above contentions, I am of the opinion that the MAI and the Relevant Document relate to **nbn's** commercial activities for the following reasons:
 - i. **Incentive regime under construction, maintenance and rollout contracts** –If the MAI were released under the FOI Act, it could be used to undermine **nbn's** commercial position in negotiating construction, maintenance and operational contracts. In particular, **nbn** has negotiated contractual regimes that incentivise our delivery partners to meet and exceed connection appointment targets, with the objective of accelerating the rollout of the **nbn**TM network and meeting **nbn's** contractual commitments to its customers, the RSPs. Some of these incentives relate to our delivery partners' performance in completing end-user activation appointments in a certain time, rather than **nbn's** own performance regarding meeting appointments.

However, the two metrics noted above are connected in a commercial sense. In particular, **nbn's** ability to negotiate increased performance from its delivery partners could be undermined if those delivery partners knew **nbn's** MAI data in advance. In other words, there may be less incentive for delivery partners to do more than simply meet **nbn's** own MAI rate, thereby undermining a key objective in **nbn's** contracting model of accelerating the rollout and meeting **nbn's** contracted commitments to its RSP customers. A slower rollout would likely translate into lower take up of **nbn**TM network



services by end users and potential exposure to greater rebate claims from **nbn**'s own customers, the RSPs. These factors could adversely impact upon **nbn**'s ability to make an adequate return on investment and its overall profitability. In my opinion, this clearly relate to **nbn**'s commercial activities.

- ii. **Impact on WBA regime** - The Relevant Document contains a large data set with numerous postponed/cancelled appointments broken day by days over an entire year. I also note that details of **nbn**'s customers, the RSPs, are made public, as are their relative market share across **nbn**'s various technologies by the Australian Competition & Consumer Commission (**ACCC**) in its [Wholesale Market Indicators Report \(WMI Report\)](#). If the MAI were made public, it may be possible to use the information in ACCC's WMI Report to extrapolate individual RSPs' estimated or likely PO Data. It may also be possible to estimate the rebates available to individual RSPs, which is confidential information under the WBA. The potential release of the MAI could also adversely impact the company's ability to negotiate favourable contractual terms under its wholesale supply arrangements via the WBA in relation to performance, among other metrics. This could impact **nbn**'s profitability, thereby relating clearly to **nbn**'s commercial activities.
- iii. **Impact upon nbn's standing in business community** - Drawing from the previous point, the release of, what is effectively, confidential information under the WBA, could also have an impact upon **nbn**'s standing in the business community. In particular, commercial partners may be less willing to share confidential information with **nbn**, or may only do so at an increased cost to **nbn**, noting that the company could be required to release such information pursuant to an FOI request. This could have an impact on **nbn**'s commercial affairs, particularly in its ability to attract and retain commercial partners of the highest quality, thereby impacting on **nbn**'s ability to sell its services and rollout its network.
- iv. **Internal assurance processes and benchmarking** - **nbn** also employs data in the Relevant Document for internal assurance processes that relate directly to one of **nbn**'s key corporate performance indicators, being premises activated. Beyond **nbn**'s goal of activating 8 million premises by 2020, there are weekly, quarterly and yearly (as well as longer term) milestones that **nbn** is required to meet. The number of activations and any delays in activating premises caused by rescheduling, cancellations and so forth are the subject of intense scrutiny by **nbn**'s executive. In that regard, significant executive and line management efforts go into business modelling and planning efforts to ensure that corporate targets are met. Again, I note that **nbn** does not report on the specific data set created for this FOI application. It follows that the release of MAI may not fully reflect the company's performance, as it is a mixture of data and indices brought together from various sources. On that basis, the release of the MAI - as well as extrapolated PO Data - could undermine **nbn**'s ability to develop robust business plans to ameliorate its own, internal performance regarding activations, among other benchmarks. This could have the effect of reducing the efficacy of business modelling and plans, as well as limit **nbn**'s executives' ability to conceptualise, time and implement these plans. On that basis as well, I am of the opinion that the MAI relates to **nbn**'s commercial activities.

27. For the above reasons, I am of the opinion that the Relevant Document and the MAI relate to **nbn**'s commercial activities. As such, they are not subject to the application of the FOI Act. This decision is subject to review under the FOI Act. The Office of the Australian Information Commissioner's FOI Fact Sheet 12 - Your review rights may be found at the following [link](#).