



9 December 2016

Mr Geoff Winestock

Sent via email: foi+request-22759-af3376bb@righttoknow.org.au

Our Ref: FOI1617/28.02

Dear Mr Winestock,

FOI Application – nbn Credit Ratings Matters

I am writing in relation to your request made under the *Freedom of Information Act, 1982* (**the FOI Act**) to the Department of Finance (the **DOF**) – DOF reference 16/128. Under section 16 of the FOI Act, the DOF transferred part of that FOI request to **nbn** on 5 December 2016. **nbn** accepted the part transfer in relation to:

Any correspondence in the Department of Finance's possession with either NBN or credit rating agencies that discusses the request for the credit rating, the negotiations for obtaining the credit rating or the final credit rating itself.

For the sake of clarity, I understand that **nbn** would hold copies of all correspondence falling within the terms of the above request.

Request to clarify

Under section 15(2) of the FOI Act, a valid FOI request must provide such information concerning the requested document/s as is reasonably necessary to enable **nbn** to identify them. Your application seeks "any correspondence", which would include all hard copy letters, emails and other forms of correspondence, which relate to the entire credit rating process undertaken by **nbn** and shared with the DOF. In addition, you have not specified a time frame. In order to find "any" such correspondence, **nbn** would be required to review all employees' email accounts dating back to **nbn**'s inception. It would also require reviews of hard copy and electronic record systems across different parts of our business. Please also note that **nbn** has more than 5000 full, part time and temporary staff members.

It follows that **nbn**'s IT Group would be required to create a set of (email) data cubes, which would need to be searched, culled for relevance and organised. Relevant executives and senior managers of **nbn** would also need to be involved in consideration of the documents, which would be a significant interference with the performance of their usual responsibilities. As you could imagine, identifying and sorting all relevant emails and other correspondence would require an enormous effort, and that does not account for legal review of those documents for potential exemption from release.

For reference, I would recommend that you consider limiting your FOI request terms to:

- a specific (shorter) time period,
- types of documents (contained in an email or letter), such as a formal briefing document or memo,
- those addressed to/sent by a senior executive of the company, such as **nbn**'s CEO or CFO, and
- excluding legally privileged, draft documents and commercially sensitive information, among other grounds of potentially exempt information under the FOI Act.

In addition, I would happy to discuss the terms of your FOI request, so as to help you limit its scope. In that regard, please do not hesitate to contact me on the number listed at the end of this letter – or via email. I would also ask that you refer to **nbn**'s approach to processing charges. I would also refer you to the summary information below, regarding the treatment of **nbn**'s [commercial activities](#) under the FOI Act.



Request consultation process

In light of the volume of documents likely to fall within the scope of your request – and for the reasons set out above, I am of the opinion that it would be an unreasonable diversion of **nbn's** resources to process this FOI application in its current form. In that regard, I am relying upon [sections 24](#) and [24AA of the FOI Act](#).

Section 24 of the FOI Act requires **nbn** to undertake a request consultation process before issuing a notice to refuse access. Before issuing a refusal notice, [section 24AB of the FOI Act](#) requires Government entities to provide applicants with written notice stating their intention to refuse access and to initiate a request consultation process. In that context, I request that you review the scope of your FOI request and notify the writer by **23 December 2016** as to whether you wish to withdraw the request; or make a revised request; or not revise the request.

If you have not notified the writer by the above-mentioned date, **nbn** will consider that this application has been withdrawn as per section 24AB(6) of the FOI Act. In accordance with section 24AB(8) of the FOI Act, the time taken to consult with you regarding the scope of a request is not taken into account when calculating the 30-day statutory time limit for processing FOI applications. As such, 17 days have passed in calculating the processing period for this FOI application.

nbn's Commercial Activities Exemption

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](#) concerning **nbn's** commercial activities exemption (**CAE**). That background document references two Office of the Australian Information Commissioner reviews that considered **nbn's** CAE in January 2012 (the [Internode Decision](#)) and in July 2013 (the [Battersby Decision](#)). While I am not making a formal decision, there is a possibility that documents falling within the terms of this FOI request may be subject to the CAE, among other exemptions from release.

Processing Charges

nbn's policy is to levy processing charges in relation to FOI requests, subject to contentions regarding public interest. You will be advised of any charges in relation to your request. For reference, **nbn's** approach to processing charges is outlined at the following hyperlink: Submission to the Office of the Australian Information Commissioner [Charges Review](#). In particular, **nbn** supports – and will generally apply – Recommendation 24 in the [Hawke Review into FOI Legislation](#), (**the Hawke Review**) as a benchmark in reviewing FOI applications. For your reference, Recommendation 24 suggests a 40-hour ceiling for all FOI processing charges.

Third Party Consultation Required

As per section 15(6) of the FOI Act, please be advised that I have determined to extend the FOI processing period to 60 days, so as to comply with the consultation requirements per section 27 and 27A of the FOI Act. FOI decision-makers are required to provide individuals – as well as businesses and other organisations, where required – with a reasonable opportunity to make submissions relating to documents that may potentially be exempt under the FOI Act.

Disclosure Log – Please also be advised that **nbn** is required to publish documents on its website within 10 working days after the release of the documents to an FOI applicant. The information you seek may be published in full (as released to the applicant) or with some additional redactions, based upon exceptions under section 11C of the FOI Act. For further information please visit our website and click on the [Disclosure Log 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