

11 April 2017

Mr Robert Hudson
President, ITPA
Sent via email: pfoi+request-3351-061140c8@righttoknow.org.au

Our Ref: 1617/57.05

Dear Mr Hudson,

I am writing in relation to your request, made under the *Freedom of Information Act 1982* (the **FOI Act**), seeking:

The number of workers holding 457 visas hired by NBN over the last 18 months. The details we are seeking are:

- 1) *Descriptions of the roles that were filled;*
- 2) *The salary/wage brackets that were / are being paid to 457 visa holders in these roles;*
- 3) *The market testing that was done to prove that local workers were not available to fill the roles filled by workers holding 457 visas.*

Request to Clarify

Thank you for your email of 11 April 2017 – I note that you have changed the time frame from the last 18 months to 1 July 2015 to the present.

Unfortunately, it is still not clear as to the information that you are seeking. In that regard, please note that **nbn** is not a Commonwealth Government Department. In addition, **nbn**'s employees are not members of the Australian Public Service (**APS**). As such, **nbn** staff members are not classified within APS or similar salary bands, to which you appear to be referring. In particular, **nbn** is a Government Business Entity and operates as a commercial entity and our staff members' salaries are generally determined by individual negotiations and contractual regimes. **If you could please confirm that you are seeking a list of individual (unnamed) staff members' salaries and their job titles, previously referred to as the "description of the roles that were filled".**

In addition, you have requested the following:

Documentation around this market testing - job ads which were produced, documentation of where, when and for how long the ads were run, and any documentation (with personally identifiable information redacted if necessary) around the response/s that nbn received to this market testing.

You also seem to be requesting individual job seekers' details and copies of their job applications with personal information redacted. Please confirm if that it is the case.

If you are seeking those sorts of details, i.e. individual employees' salaries or details of individual job applications, it is likely that this information would relate to **nbn**'s commercial activities and/or individual's personal and business affairs. As indicated previously, **nbn** has made previous decisions that individual salaries do relate to our commercial activities, noting that release of these sorts of details would effectively set a benchmark or floor at which **nbn** would be required to negotiate similar salaries, thereby adversely impacting **nbn**'s ability to obtain competitive rates for its staff. I refer you to the paragraph below, concerning **nbn**'s carve out from the application of the FOI Act.

While I note that you have requested salary information to be anonymised, I also note that the potential publication of job titles could be triangulated with staff members' social media profiles and other publicly accessible information. This would



mean salary data could potentially be reverse engineered, along with details of job applicants – either successful or otherwise. It would be incumbent upon me to undertake third party consultations under the FOI Act in that regard.

I am not required to provide information that could reveal potentially exempt information, such as the number or the existence of 457 visa holders employed by **nbn**. However, I am of the opinion it would be a substantial and unreasonable diversion of **nbn**'s resources to undertake the required third party consultations with any 457 visa holders, noting that **nbn** has already made a determination regarding individual salaries, i.e. that they relate to **nbn**'s commercial activities. I would ask you to consider any further clarification of this FOI request in that context.

Request Consultation Process

I also refer you to section 24 of the FOI Act, which 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 **nbn** to provide applicants with written notice stating their intention to refuse access and to initiate a request consultation process. Accordingly, I request that you review the scope of your FOI request and notify me by 25 April 2017 whether you wish to:

- withdraw the request, or
- make revised request, or
- not revise the request.

Our team would be happy to assist you in refining the scope of your request. In that regard, I would invite you to call me on the number below or ring my colleague, Kate Friedrich on (02) 9927 4118. If you have not notified me 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.

nbn's Commercial Activities Exemption

I again refer you to **nbn**'s commercial activities exemption (**the CAE**), as per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act. **Please be aware that documents that relate to **nbn**'s "commercial activities" are not subject to the operation of the FOI Act and would likely be exempt from release.** The following link summarises and provides [general background information](#) concerning **nbn**'s commercial activities carve-out. That background document references two Australian Information Commissioner reviews that considered **nbn**'s CAE: the [Internode Decision](#) (in January 2012) and the [Battersby Decision](#) (in July 2013). While I am not making a formal decision, nor have I reviewed any documents, there is a possibility that documents falling within the terms of this request may be subject to the CAE, among other exemptions from release.

FOI Processing Period and Charges

As outlined above, the statutory period for processing an FOI request is 30 days, subject to any suspension of the processing period or extension of the time for deciding the application. Please also note that processing charges may be imposed in relation to FOI requests. 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.**

Disclosure Log

nbn is required to publish documents provided to FOI applicants within 10 working days after release. The information you seek may be published in full (as released to you) or with some additional redactions as per section 11C of the FOI Act. For further information and other details, please visit our [Disclosure Log](#) on **nbn**'s website. If you need to discuss your application, please feel free to contact the writer on (02) 8918 8596.

Yours faithfully,

David Mesman

General Counsel – FOI Privacy & Knowledge Management