



2 September 2019

Mr Timothy Nothdurft

Sent via email: foi+request-5582-3e6020b0@righttoknow.org.au

Our Ref: 1920/18.02

Dear Mr Nothdurft

FOI Application – Processing fee determination

I am writing in relation to a request under the *Freedom of Information Act 1982* (**the FOI Act**) originally sent to the Department of Communications and the Arts (**DOCA**) and concerning “*NBN-NTO-EDS-359 Network Design Rules MTM Distribution Fibre Network*” (**the Standard**).

My understanding is that your original request to DOCA was not considered to be a formal FOI application, as the request sought the following:

“Are you in possession (sic) of the following document? ... Design and architecture decisions for MTM Distribution Fibre Network (DFN) - named document; NBN-NTO-EDS-359 Network Design Rules MTM Distribution Fibre Network”

On 19 August 2019, you clarified your request to DOCA, indicating that you were seeking:

“Any documentation (emails, notes, standards, procedures, correspondence) that references the document in question. Either the document itself or references to the document.”

On 21 August 2019, DOCA transferred the above request to **nbn** per section 16 of the FOI Act and on the basis that the application more closely related to **nbn**'s functions. Furthermore, the relevant document (the Standard) originated with **nbn**.

Consideration of previous decision

As you are aware, **nbn** refused your FOI request for a copy of the Standard on the basis of **nbn**'s commercial activities carve-out (**the CAC – nbn** reference FOI1819/116.15A). For your reference, I have attached a copy of that decision at **Appendix A**.

In addition, you made a request for an Internal Review of my decision in the above matter. **nbn** has appointed an Internal Reviewer, who is required to provide a decision to you by 16 September 2019 – or earlier, if possible. As a key element of the above FOI application (the Standard) is the subject of an Internal Review, **nbn** will not consider this part of your request until the completion of the Internal Review and any other administrative or related review processes.



Request to clarify

Under the FOI Act, members of the public have a general right of access to specific documents, rather than information, subject to certain exemptions. Per [section 15\(2\)](#) of the FOI Act, a valid FOI request must provide such information concerning the requested documents as is reasonably necessary for **nbn** to identify them, among other things.

As currently drafted, the terms of your request are not sufficiently clear to enable **nbn** to commence the processing of this application. In addition to being a further request for the Standard, the terms of your application refer to “*Design and architecture decisions*”, presumably in the context of the Standard. It is unclear what is meant by this phrase. In addition, it is unclear if you are seeking **nbn**’s correspondence to DOCA in relation to the Standard or all correspondence or decisions relating to the Standard. In circumstances where an FOI application is unclear, **nbn** will neither formally acknowledge, nor commence the processing of this request. Until you clarify the terms of your request, the statutory period for completing this request will not commence. In that regard, please inform me if there is a specific document, or set of documents, which you are seeking.

Your request also seeks “any documents” in – what appears to be – any format held by **nbn**, but also seems to include any document that references the Standard. In light of the time likely to be required to identify all documents falling within the scope of this request (and to make a decision regarding all those documents), I am also of the opinion that this would constitute an unreasonable diversion of **nbn**’s resources per [sections 24 and 24AA of the FOI Act](#). Moreover, a request for “any documentation” is effectively a request encompassing “all records” held by **nbn**. To provide some context, your request would require **nbn** staff to undertake searches through all of its hard copy, digital and email records of more 6000 staff members and a significant number of consultants working with **nbn**. In that regard, please refer to the points below concerning **nbn**’s approach to processing charges.

nbn’s Commercial Activities Carve-out

nbn’s commercial activities are carved-out from the application of the FOI Act per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the Act. Documents that relate to **nbn**’s current or future commercial activities are not subject to the operation of the FOI Act and would be exempt from release. The following link provides [general background information \(GBI Document\)](#) concerning **nbn**’s CAC. The GBI Document refers to two Australian Information Commissioner Reviews that considered **nbn**’s commercial carve-out – [Internode Pty Ltd and NBN Co Ltd \[2012\] AICmr 4](#) and the [Battersby and NBN Co Ltd \[2013\] AICmr 61](#).

In practical terms, the CAC ensures that **nbn** is not exposed to disadvantage in the marketplace and similar commercial environments. The CAC also enables **nbn** to function as any other commercial player in Australia’s highly competitive telecommunications industry. If **nbn** were required to release commercially-related information under the FOI regime, this would undermine **nbn**’s ability to protect the company’s valuable intellectual property, negotiate competitive contracts, develop products and services, grow market share and manage its staff, among other adverse effects. Disclosure of commercially-related information would also undermine **nbn**’s capacity to generate revenues, while driving up rollout costs. Ultimately, Australian taxpayers would have to bear those cost increases and other potentially adverse consequences.

While I am not making a formal decision and have not reviewed any documents, I note that there is a distinct possibility that documents falling within the terms of this request may be subject to the CAC, among other exemptions from release. In that regard, I again refer you to my decision at [Appendix A](#).



FOI Processing Period and Charges

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 **nbn** may impose processing charges in relation to FOI requests. I will inform you of any charges in relation to your request.

For your reference, processing charges for FOI applications are set by regulation and may be found at **nbn's** website – and, in particular, its [FOI page](#). The following hyperlink outlines **nbn's** approach to processing charges: 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. More information about charges under the FOI Act is available at the Office of the Australian Information Commissioner's (**OAIC**) website and in part 4 of the OAIC [FOI Guidelines](#).

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 have any questions or need to discuss your FOI application, please contact the writer via email on davidmesman@nbnco.com.au.

Yours sincerely

David Mesman
General Counsel
FOI Privacy & Knowledge Management



APPENDIX A

nbn FOI DECISION – STATEMENT OF REASONS (FOI1819/116)

Background Information

1. In making this decision, I took into account relevant parts of the *Freedom of Information Act 1982* (**FOI Act** or **Act**) and related legislation, the Office of the Australian Information Commissioner (**OAIC**) [FOI Guidelines](#), relevant case law and other applicable sources.
2. **nbn** is treated differently from other agencies and Commonwealth entities that are subject to the FOI Act. Per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the Act, documents relating to **nbn**'s commercial activities are carved-out from the application of the Act.
3. **nbn** has summarised the OAIC's and the Administrative Appeals Tribunal's decisions concerning **nbn**'s commercial activities carve-out (**CAC**) in a General Background Information Document (**GBI Document**) found at the following [link](#).
4. In practical terms, the CAC ensures that **nbn** is not exposed to disadvantage in the marketplace and similar commercial environments. The CAC also enables **nbn** to function as any other commercial player in Australia's highly competitive telecommunications industry. If **nbn** were required to release commercially-related information under the FOI regime, this would undermine **nbn**'s ability to negotiate competitive contracts, develop products and services and grow market share, among other adverse effects. Disclosure of commercially-related information would also undermine **nbn**'s capacity to generate revenues, while driving up rollout costs. Ultimately, Australian taxpayers would have to bear those cost increases and other potentially adverse consequences.

Terms of Request & Chronology

5. On 18 June 2019, **nbn**'s FOI Team received an email from Mr Timothy Nothdurft (**the Applicant**) via its FOIOfficer@nbnco.com.au account, seeking the following **nbn** Design Standard – NBN-NTO-EDS-359 Network Design Rules MTM Distribution Fibre Network (**the Standard**).
6. On 1 July 2019, **nbn**'s FOI Team acknowledged the Applicant's request and provided him with an advance deposit request for \$38.75. This was based upon a processing fee estimate of \$155, reflecting 12 hours of decision-making time and one hour for search and retrieval.
7. Also on 1 July 2019, the Applicant emailed **nbn** and questioned the processing fee estimate. The Applicant claimed that the decision-making time was "disproportionate", among other matters.
8. On 2 July 2019, **nbn**'s FOI Team reverted to the Applicant and invited him to make fee reduction submissions, as well as referring him to paragraphs 4.75-4.89 of the [FOI Guidelines](#).
9. On 2 July 2019, the Applicant provided **nbn**'s FOI Team with a series of contentions regarding the public interest in support of the release of the Standard.
10. On 23 July 2019, the Applicant emailed **nbn**'s FOI Team and, among other matters, he suggested that **nbn**'s FOI Team had not responded to his FOI application within the required time frame.



Also on 23 July 2019, I reverted to the Applicant, indicating that **nbn**'s FOI Team was – at the time, considering his fee reduction request and would respond within the required period, if not sooner.

Also on 23 July 2019, the Applicant emailed **nbn**'s FOI Team and indicated that he had not agreed to an extension and reiterated claims that **nbn** had not responded to his FOI application within the required legislative time frames. The Applicant also indicated that **nbn**'s FOI Team had not acted professionally, among other claims.

Also on 23 July 2019, I reverted to the Applicant and referred him to paragraphs 4.13 and 4.14 of the [FOI Guidelines](#), which make it clear that an FOI Charges Decision must be completed within 30 days (or earlier if practicable) after receiving an applicant's reasons for contesting the charge. As such, the deadline for completing the Charges Decision was 31 July 2019.

11. On 26 July 2019, I completed an FOI Charges Decision (**nbn** reference FOI1819/116.08A) and made findings that the original processing fee estimate was accurate, but I determined to reduce the search and retrieval time. In addition, I found that there was not sufficient public interest in the Standard to warrant a reduction in FOI processing charges. On that basis, I reissued the Applicant with an advance deposit request in the sum of \$35.94, based on total processing fees of \$143.75.
12. On 31 July 2019, **nbn**'s FOI Team emailed the Applicant, confirming receipt of the advance deposit payment, received by **nbn** on 29 July 2019.
13. On 16 August 2019, I completed this FOI access decision and emailed it to the Applicant.

Access Decision – Summary

14. The Standard relates to **nbn**'s commercial activities and is not subject to the FOI Act.
15. While it is unnecessary to consider alternative exemption grounds, there are other exemptions under the FOI Act potentially available to **nbn** in relation to the Standard. These include section 47 (commercially valuable information) and section 47E (operations of agencies), among other grounds.

Access Decision – Findings of Fact and Reasons

16. Following receipt of the Applicant's request, **nbn** staff undertook searches within the company's digital and other archives and located the Standard.
17. In making my FOI decision, I made the following finds of fact:
 - a. The Standard is not a public document. This is in contrast to the more general [Network Design Rules](#), which **nbn** publishes and updates via its externally facing website.
 - b. The Standard is labelled "sensitive" with directions "not to be distributed without **nbn**'s consent."
 - c. **nbn** distributes the Standard to **nbn**'s delivery partners and their agents on a confidential basis so as to assist them in their efforts to construct and build the **nbn**[™] broadband access network.



- d. The Standard's purpose is to describe **nbn** network design rules and assist **nbn**'s delivery partners in the construction and build of the network. Delivery partners are required to read and use the Standard in conjunction with a series of other similar design standards. These documents are similarly labelled as sensitive and are shared on a confidential basis with **nbn**'s delivery partners.
 - e. The Standard is **nbn**'s intellectual property, upon which **nbn** expended significant resources, both internally and externally, in developing.
 - f. The Standard forms part of **nbn**'s asset base.
 - g. Beyond expenses incurred in its development and creation, the Standard has value to **nbn** as a commercial document. It also has value as an ongoing reference point for the current and future rollout of the **nbn**TM broadband access network.
18. As outlined in the [GBI Document](#), there are various factors which may weigh in favour of an activity being considered as "relating to **nbn**'s commercial activities". In summary, activities are considered "commercial" for the purposes of the CAC if they are "related to, engaged in or used for commerce". However, determining what constitutes "commercial activities" must be considered "in the whole of the circumstances."
19. One key criterion for determining if a document relates to **nbn**'s commercial activities is whether it concerns profit-making. It is clear that **nbn** is a commercial entity, focussed on generating sales and profit. This fact is supported by the two published OAIC decisions relating to **nbn**'s CAC. **nbn**'s commercial nature is also made clear by the fact that **nbn** generated \$2.825 billion in revenue during FY19 and those totals are projected to grow to roughly \$4b per annum by 2020.
20. Despite **nbn**'s general commercial purpose and mission, **nbn**'s FOI Officer is required to determine whether specific documents, such as the Standard, relate to or are used in commerce in the whole of the circumstances.
21. In the [Battersby Decision](#), the OAIC indicated that **nbn**'s commercial activities are broad in nature and are not limited to activities carried out in competition either with government or private entities. Per the OAIC's reasoning, the activities do not necessarily need to be market-based or be limited to **nbn**'s involvement with the private sector in order to be commercial activities. However, it is clear that the Standard relates to **nbn**'s involvement with the private sector – it was drafted as a guidance document for **nbn**'s business and delivery partners, all of which are engaged by **nbn** pursuant to commercial contracts.
22. There are a number of other factors that suggest that the Standard "relates" to **nbn**'s current and future commercial activities, including:
- a. **nbn** provides the Standard, and documents like it, to its delivery partners on a confidential basis for a practical, business-related purpose. The Standard acts as a "guide book" for construction and other delivery partners to follow in the field for designing and constructing a "standard" Multi-Technology Mix (**MTM**) build.



- b. The Standard and similar **nbn** design documents have an inherent commercial value for **nbn** because they enable **nbn**'s delivery partners to increase standardisation in their practices and processes. Among other benefits, the Standard could assist in minimising interactions with delivery partners regarding routine issues for an MTM build. It could also increase efficiencies and the speed at which our company rolls out the **nbn**[™] broadband access network, thereby lowering **nbn**'s operating cost base, while expanding the number of connections and bolstering **nbn**'s revenue streams. This is made clear by the fact that **nbn** allocates significant resources, person hours and direct expenditures in its efforts to develop the Standard and like documents – and to educate delivery partners about the processes contained in them.
- c. Disclosure of the Standard to the Applicant also risks making the Standard part of the public domain. If a document enters the public domain, it would undermine its commercial value. This would clearly diminish **nbn**'s underlying investment in developing the Standard, as well as the competitive value of the information in the document.
- d. Disclosure of the Standard could also enable competitors in the telecommunications industry to identify potential business or commercial opportunities. This could include developing businesses cases for choosing to locate competitors' infrastructure or provisioning additional network capacity (or otherwise) to their commercial advantage. As other telecommunications providers could glean where they might introduce competing technologies (e.g. 5G and similar solutions), **nbn** could be placed at a commercial disadvantage.
- e. Additionally, **nbn**'s competitors in the telecommunications (or infrastructure build) industry could use the Standard to minimise the expenses associated with the drafting of designs and other commercial data found in the document. In effect, **nbn** would be providing competitors (or others in related industries) with a valuable resource, for which they have not paid. This clearly puts **nbn** at a commercial disadvantage.
- f. Disclosure of the Standard would tend to undermine **nbn**'s ability to control the use of its confidential information and intellectual property. This is an important issue, particularly in light of any future privatisation efforts involving **nbn**. In any privatisation or the sale of company assets, intellectual property is a key asset which will figure in the calculation of any future sale price. It follows that if the Standard and similar documents were made part of the public domain pursuant to FOI requests, **nbn** could potentially undermine the value of its intellectual property. This could, in turn, undermine the value of **nbn**'s asset base in any future sale of the company.
- g. Disclosure of the Standard could potentially increase **nbn**'s vulnerability to physical and other attacks – whether from hackers, vandalism, criminal elements or terrorists. This could reasonably be expected to cause damage to the security of the Commonwealth. If the Standard were to be released generally, **nbn** may be required to increase the level of security associated with or applied to the network, as well as providing for increased security costs in its budget and commercial planning processes. This could conceivably lead to cost and time overruns, as well as delaying the **nbn** rollout generally, which could adversely impact **nbn**'s ability to generate profits. Ultimately, these costs would be borne by Australian taxpayers.

23. Based upon the above points, it is my view that the Standard relates to **nbn**'s current and future commercial activities per [sections 7\(3A\)\(a\) and \(b\) of the FOI Act](#).



Decision-making Time and Fees

24. **nbn** staff spent approximately two hours searching and retrieving documents (equivalent to \$30), but this was reduced to 0.25 hours (\$3.75) following **nbn's** Charges Decision. In relation to drafting this decision, I spent more than the estimated 12 hours in reviewing documents and drafting this FOI decision (equivalent to \$140, noting that the first five hours of processing time are free). As the Applicant paid an advance deposit of \$35.94, the outstanding fees are \$107.81.
25. In its [Submission to the OAIC Charges Review](#), **nbn** outlined its support of fees and charges and their importance to the FOI scheme. Normally, **nbn** would charge applicants for processing fees incurred in relation to FOI requests. However, I also considered **nbn's** commitment to the objects of the FOI Act and, in particular, section 3(4) of the FOI Act, which seeks to facilitate and promote public access to information, promptly and at the lowest reasonable cost. I also took into account the fact that **nbn** made a determination not to release the Standard.
26. On balance, I have determined to waive the remaining 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.
27. If you are dissatisfied with this decision, you have certain rights of review. These are outlined in the covering letter, provided with this Statement of Reasons.

An FOI decision may be reviewed, subject to sections 53A and 54 of 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 or need to discuss your FOI application, please contact the writer via email on davidmesman@nbnco.com.au.

Yours sincerely

David Mesman
General Counsel
FOI Privacy & Knowledge Management