



2 September 2019

Mr Timothy Nothdurft

Sent via email: foi+request-5586-2af03af0@righttoknow.org.au

Our Ref: 1920/16.02

Dear Mr Nothdurft

FOI Application – OAIC statistics

I am writing in relation to your request made under the *Freedom of Information Act 1982* (**the FOI Act** or **the Act**) in which you sought information regarding **nbn**'s FOI activities and what was described in the Right-to-Know (**RTK**) website as "statistical data on **nbn** FOI teams".

In particular, you made an FOI request for the following:

- *Number of FOI requests received – breakdown by year;*
- *Number of approved FOI requests and approving officer – breakdown by year;*
- *Number of declined FOI requests and declining officer;*
- *The clause for declining the request – breakdown by year i.e. Number of FOI declined due to Commercial in confidence;*
- *Number of FOI declined based of cyber security or other threats;*
- *Staff turnover and numbers that are responsible for FOI requests; and*
- *Revenue generated from FOI requests (both declined and approved).*

Statistics available at data.gov.au

I refer you to the following [link](#), which contains the statistical breakdown of FOI matters in relation to all relevant Commonwealth FOI entities, including **nbn**. That link provides downloadable dataset – in Excel spreadsheets, and includes breakdowns by FOI agency of all FOI applications received and determined, exemptions claimed, fees advised, revenue collected and details regarding the number of staff members responsible for FOI matters, among other matters. It is my understanding that the Office of the Australian Information Commissioner (**the OAIC**) collects these data on a quarterly basis and publishes the same via data.gov.au on an annual basis. The OAIC has, at times, also published the same information via the OAIC website and in conjunction with its annual reporting efforts.

Specific terms of FOI request

- **Approving and declining officer** – By the term "approved" FOI request or "approving" officer, I presume that you are referring to FOI determinations in which a document was released. Similarly, I presume that by "declined" and "declining", you are referring to FOI determinations which were refused by **nbn**. In the past, **nbn** has refused to provide staff members' details and other information regarding the nature of their work on the basis of **nbn**'s commercial activities carve-out (**the CAC**). In that regard, I refer you to the paragraphs below concerning **nbn**'s CAC. I also refer you to **nbn**'s FOI



page and the [following link](#), which outlines **nbn**'s submission to the OAIC's Review into the disclosure of public servants' names and other details.

Per its submission to the OAIC, **nbn** indicated that its staff members are not public servants and there is no requirement that their details be made public as they are not performing "public functions." Rather, they are employed under individual employment contracts and similar commercial arrangements. In addition, **nbn** has consistently asserted that there are clear links between employee engagement, staff morale and our company's ability to assist in protecting the personal privacy and professional reputations of **nbn** staff. In turn, these factors have an impact upon **nbn**'s ability to achieve corporate goals, not least of which is **nbn**'s ability to generate revenue and maintain a minimum return on investment, as required by **nbn**'s [Shareholders' Statement of Expectations](#).

In that regard, **nbn** has refused to disclose its staff members' names, contact details, working arrangements and work product on the basis of the CAC. Similarly, information regarding the management of a given business unit, such as the FOI Team, work allocation and the identity of FOI decision-makers would also fall within the terms of **nbn**'s CAC. In my opinion, there is a clear link between the ability to manage staff and **nbn**'s capacity to operate effectively and, thereby, generate profits. As this information would be subject to the CAC, **nbn** would not be obliged to disclose staff members' details, nor their individual refusal/release rates in relation to FOI applications.

Notwithstanding the above points, I can confirm that I (David Mesman) have been employed by **nbn** and have acted as the company's FOI Officer since 2011 to the present. To date, I have completed the vast majority of FOI decisions in that period. As such, you may cross reference the data found at the above link, and attribute the vast majority of decisions to me.

- **Number of FOIs declined base on cyber security or other threats** – It is unclear what you mean by this part of your request, i.e. "other threats". In addition, there is no formal exemption under the FOI Act relating to cyber (or other threats). If you could please outline in more detail what you are seeking, that would be appreciated.
- **Staff turnover** – As flagged above, **nbn** would likely refuse a request regarding staff turnaround on the basis of the CAC – and for the reasons outlined above. In addition, it is unclear what you mean by the phrase "numbers that are responsible for FOI requests". It is my understanding that the FOI statistics at this [link](#) contain details regarding the breakdown of staff numbers – full time equivalents – within **nbn**'s FOI Group.

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 – and per my notes above, the terms of your request are not sufficiently clear to enable **nbn** to commence the processing of this application, nor will the statutory deadlines for responding to an FOI request commence.



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.

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