



11 October 2019

Mr Timothy Nothdurft

Sent via email: foi+request-5637-3f9ab3d2@righttoknow.org.au

Our Ref: 1920/27.02

Dear Mr Nothdurft

nbn FOI application

I am writing in relation to your request under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

My FOI decision is found at **Attachment A**.

An FOI decision may be reviewed, subject to sections 53A and 54 of the FOI Act. Please refer to the Office of the Australian Information Commissioner's website at the following [link](#), which provides details about your rights of review and other avenues of redress under the FOI Act.

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

David J Mesman

General Counsel

FOI, Privacy & Knowledge Management



ATTACHMENT A

FREEDOM OF INFORMATION ACCESS DECISION

STATEMENT OF REASONS (FOI1920/27)

Background Information

1. In making this decision, I took into account relevant parts of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and related legislation, the Office of the Australian Information Commissioner's (**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 FOI Act, documents relating to **nbn**'s commercial activities are carved-out from the application of the FOI 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 Background Document (**CAC Background 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 and infrastructure build industries. If **nbn** were required to release commercially-related information under the FOI regime, this would undermine **nbn**'s ability to negotiate competitive contracts, develop and protect its valuable intellectual property, create innovative 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 September 2019, **nbn**'s FOI Team received an email from Mr Timothy Nothdurft (**Applicant**) via the "Right to Know" website. In that email the Applicant sought "...*nbn Product Construct Paper, RMID0844 New AVC. Higher Speed Tiers, September 2019.*"
6. On 24 September 2019, **nbn**'s FOI Team acknowledged the Applicant's FOI request by email, as required by section 15 of the FOI Act.
7. On 11 October 2019, I completed this FOI access decision and emailed it to the Applicant.

Access Decision – Summary

8. The Applicant seeks the **nbn** document titled "**nbn** Product Construct Paper "*RMID0844 New AVC. Higher Speed Tiers*" (**Construct Paper**). The Paper relates to **nbn**'s commercial activities and is not required to be released pursuant to [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act.
9. Given my findings in relation to the Construct Paper, it is unnecessary to consider alternative exemption grounds under the FOI Act. However, I consider that there are other exemptions potentially available to **nbn** under the FOI Act concerning the Construct Paper. Among other grounds, these include the following sections of the FOI Act, being 47 (commercially valuable information), 47C (deliberative matters) and 47E (operations of agencies). My more detailed statement of reasons are set out below.



Access Decision – Findings of Fact and Reasons

10. I have carefully reviewed the Construct Paper, as well as other relevant documents and materials, including those referred to below. I make the following findings of fact in relation to the Construct Paper:
- a. The purpose of the Construct Paper is to enable **nbn** to consult with and obtain feedback from **nbn**'s Product Development Forum (**PD Forum**) participants on proposed product and pricing constructs for **nbn**'s Access Virtual Circuit (**AVC**) higher speed tiers.
 - b. In addition, the Construct Paper is an interim document that is subject to change. It is a core element in an iterative process, through which **nbn** engages with select industry participants and its Retail Service Provider (**RSP**) customers regarding proposed products and product specifications.
 - c. The Construct Paper is provided to PD Forum participants under a confidentiality regime. Clause 4 of the PD Forum Terms outlines the confidentiality obligations owed by the PD Forum participants, which is found at the [following link](#). The key (confidentiality) provisions are outlined at 4.2(a), (b) and (c).
 - d. Furthermore, the Construct Paper is clearly marked “commercial-in-confidence” and includes commercial-in-confidence information, such as **nbn**'s:
 - i. proposed service offerings, speed tiers, product ideas and product specifications;
 - ii. reasons for developing product ideas;
 - iii. pricing constructs; and
 - iv. research findings concerning end-users.
 - e. The Construct Paper includes a disclaimer that reiterates the confidential nature of the document and expressly states that: “The recipient must not use this document other than with the consent of **nbn**.”
 - f. The Construct Paper reflects **nbn**'s internal commercial ideas, assessments and considerations in relation to new AVC higher speed tiers.
 - g. The Construct Paper is **nbn**'s intellectual property, upon which **nbn** expended time and resources in developing. In this regard, I note that the Construct Paper includes a copyright notice that the document is “not for general distribution”.
 - h. The Construct Paper forms part of **nbn**'s asset base.

Commercial activities carve-out

11. As noted above and per [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act, **nbn** is exempt from the operation of the FOI Act “in relation to documents in respect of its commercial activities.” This includes **nbn**'s current and future commercial activities. There are various factors which may weigh in favour of an activity being considered as “relating to **nbn**'s commercial activities”. Among other factors, activities may be considered “commercial” for the purposes of the CAC if those activities:
- a. have a commercial goal or purpose; and/or
 - b. are engaged in or used for commerce; and/or
 - c. are related to a profit-making motive, generating income or revenue, among other matters.



12. Referring again to the CAC Background Document found at the following [link](#), the FOI case law has reinforced that **nbn**'s FOI decision-makers must consider "the whole of the circumstances" when determining what constitutes **nbn**'s "commercial activities." In that context, I note the following points:

- a. **Commercial purpose** – It is my view that the Construct Paper came into being for a clear commercial purpose. In particular, the Construct Paper enables **nbn** to consult with PD Forum participants and obtain feedback about **nbn**'s proposed product and pricing constructs concerning new AVC speed tiers. A core function of a commercial enterprise (particularly one operating within the competitive telecommunications market) is to develop new product and service constructs, ideas and concepts, as well as establishing appropriate pricing for those proposed products and services.
- b. **Role in revenue generation** – **nbn**'s product and service offerings, such as those proposed products found in the Construct Paper, generate revenue streams for **nbn**. The goal of generating profits, income or revenue is considered a key element in making a determination that a document relates to **nbn**'s commercial activities.
- c. **Choice not to publish due to commercial sensitivities** – **nbn** made a conscious choice to publish [RMID0821 Pricing Review Consultation Paper 2 \(CP2\)](#) as part of the company's pricing review process for higher AVC speed tiers. While there is a reference to the Construct Paper in CP2, **nbn** has not elected to publish the Construct Paper. It is my understanding that **nbn** chose not to publish the Construct Paper because of the commercially sensitive information contained in that document and other potentially adverse commercial impacts, as outlined below.

The commercial sensitivity of the Construct Paper is underscored by the clear difference in the level of detail and the contents found in the Construct Paper as compared to CP2. Noting my overall finding that the Construct Paper relates to **nbn**'s commercial activities, I cannot provide a detailed comparison between those documents. Ventilation of those details in this Statement of Reasons would make those reasons an exempt document under the FOI Act. However, I can provide general comparison points between the two documents. In particular, the Construct Paper contains more detailed and specific information about proposed speed tiers than CP2. Further, the Construct Paper contains information about proposed product ideas, as well as detailed information about proposed product specifications, which are not included in CP2. Noting the technical nature of the Construct Paper, it is clear that the Paper was drafted for a limited audience of (generally) sophisticated commercial entities and, in the main, **nbn**'s RSPs. These factors further suggest that the Construct Paper contains commercially sensitive information and relates to **nbn**'s commercial activities.

- d. **Proposed products so as to "test the market"** – Per the findings of fact, the products and pricing outlined in the Construct Paper are proposed. By definition, they have not been finalised, nor fully tested with **nbn**'s wholesale RSP customers. It follows that the details of those products and pricing constructs are not yet ready (and may never be ready) to be publicly released in their current form. In the Construct Paper, **nbn** details wholesale product ideas or concepts, upon which the company is consulting or "testing" with its wholesale, RSP clients before it makes a decision to build and ultimately launch such products or services. In those efforts to "test the market", **nbn** may seek to:
 - refine the scope of the prototype product and pricing variables;
 - determine to progress or "go to market",
 - Not progress or decide "not to go to market" with a given product or products, and
 - evaluate legal or other risks, among other commercial objectives.



Beyond the expense, resources and planning that went into developing those product concepts and pricing ideas outlined in the Construct Paper, the above factors have a clear and strategic commercial value to **nbn**. They effectively provide a “roadmap” of how **nbn** develops new products, which would have commercial value to competitors and other commercial players in the telecommunications, infrastructure build and related industries. It follows that **nbn** would be unwilling to disclose this type of strategic information, and particularly not before the company has received feedback or chosen to move from concept to final product phase. It is my view that most, if not all, companies would have similar concerns about the disclosure of strategic planning documents surrounding the development of their proposed products or services.

- e. **Potential exposure to claims of misleading end-users and brand impact** – Disclosure of the Construct Paper could also expose the company to various risks, including potentially misleading end-users or the retail consumer market about **nbn**’s products’ specifications and their potential or performance. This is because **nbn** supplies a Wholesale Layer 2 (**WL2**) product. The information in the Construct Paper is of a technical nature and concerns the WL2 service and not the service that an end user may ultimately receive. It follows that disclosure could drive consumer expectations regarding untested products, which **nbn** may never provide or may provide in a different form or with different pricing structures. This could expose **nbn**’s brand to adverse or negative consequences. It is for those and similar reasons that **nbn** only shared the Construct Paper with (generally) sophisticated business entities and industry participants – and under a confidentiality regime.
 - f. **Commercial and confidential markings** – The Construct Paper is also labelled “commercial-in-confidence”. This reinforces **nbn**’s clear intention to keep the information contained within the Construct Paper confidential and underscores the commercially sensitive nature of that document.
 - g. **Valuable intellectual property** – The Construct Paper constitutes **nbn**’s intellectual property and has an inherent commercial value for the company. In particular, **nbn** has expended time, resources and person-hours in developing the Construct Paper and similar documents. Beyond its investment in developing the Construct Paper, that Paper and documents like it serve an important operational function in that they are used by **nbn**’s business partners to improve and assist in helping **nbn** refine and determine what (if any) new products and services the company should develop. They also serve as a reference point for **nbn**’s staff and business partners in that iterative process. Disclosure of the Construct Paper would diminish **nbn**’s investment in developing these types of documents. In effect, **nbn** would be providing competitors (or others in related industries) with a valuable resource, for which they have not paid.
13. If **nbn** were required to release the Construct Paper, it could have a significant impact on **nbn**’s future commercial activities and business endeavours. In that regard, I further note:
- a. **Inhibiting nbn’s ability to develop innovative product and pricing constructs** – In addition to providing insights into the ways that **nbn** conducts its current business and commercial activities, the Construct Paper also details the way by which **nbn** considers and assesses its future or potential products and services. It follows that **nbn** may be limited in its ability to explore alternative products, technologies, pricing and business models if the company were required to disclose nascent product ideas and pricing constructs. This could inhibit **nbn**’s ability to develop cutting edge products, services and technologically advanced solutions because disclosure could signal to the market **nbn**’s strategic objectives. This could also cause **nbn** to limit the amount of detailed information shared with RSPs and PD Forum participants, thereby delaying the speed at which **nbn** brings products and services to market



as well as potentially limiting the breadth of services, products and pricing constructs. In effect, disclosure under the FOI regime could create a disincentive for **nbn** to invest in developing new products and services and limit **nbn**'s ability to create innovative pricing models. This could have adverse impacts upon **nbn**'s ability to grow market share and increase its revenues. It is for that and related reasons that **nbn** required PD Forum participants to enter into a confidentiality regime before sharing the Construct Paper with them.

- b. **Potentially anti-competitive effects** – The disclosure of the Construct Paper could have a potential anti-competitive effect. In this regard, it is important to note that the Construct Paper contains information that could inform the market and **nbn**'s competitors about **nbn**'s potential future price actions and product and service offerings. The ventilation of such information could place **nbn** at a significant commercial disadvantage compared with other providers in the highly competitive telecommunications industry.
- c. **Impact on nbn's IP base and future privatisation efforts** – Disclosure of the Construct Paper could also establish a precedent, whereby commercial entities and others may start to treat **nbn**'s valuable intellectual property and confidential information as part of the "public domain". Once a document enters the public domain, it undermines its commercial value. This is an important issue for **nbn**, particularly in light of any future privatisation efforts involving **nbn**. In any privatisation, intellectual property is a key asset, which will figure in the calculation of any future sale price. It follows that if documents, like the Construct Paper, become part of the "public domain" pursuant to FOI requests, **nbn** could potentially undermine the value of its asset base. For those reasons, there is a clear commercial value to **nbn** in the Construct Paper, both in the present and future.

- 14. Based on the above factors, it is my view that the CAC applies to the Construct Paper. Per [sections 7\(3A\)\(a\) and \(b\) of the FOI Act](#), the Construct Paper is not subject to the FOI Act.
- 15. As **nbn** has relied on the CAC, it is unnecessary to consider alternative exemption grounds under the FOI Act. However, for completeness, I note that there are other exemptions potentially available to **nbn** under the FOI Act concerning the Construct Paper. This includes exemptions under section 47 (commercially valuable information) and section 47E (operations of agencies), among other grounds. In addition, I refer to section 47C of the FOI Act (deliberative materials). In my opinion, the Construct Paper would clearly fall within the meaning of the meaning of section 47C. For the reasons outlined above, it is equally clear that the public interest would not favour disclosure of the Construct Paper.
- 16. For this FOI application, **nbn** was able to quickly search and retrieve the Construct Document. As this process took very little time, I have determined that no charges are payable with respect to this task. In relation to drafting this decision, **nbn**'s FOI Team spent approximately 10.5 hours reviewing and considering the relevant documents, making enquiries of relevant **nbn** personnel and drafting this decision (equivalent to \$110, noting that no fees are payable for the first five hours). Therefore, the total processing fees equate to \$110.
- 17. 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.
- 18. On balance, I have determined to waive the processing fees in relation to this FOI application. This is permitted by Regulation 8 of the *Freedom of Information (Charges) Regulations 2019*, which provides



decision-makers with a general discretion to impose or not impose a charge. In making this determination I took into the account the fact that the Applicant made the FOI request in a personal capacity. I also took into account the fact that **nbn** made a determination not to release the Construct Paper.

19. If you are dissatisfied with this decision, you have certain rights of review and other avenues of redress. These are outlined in the covering letter, provided with this Statement of Reasons.
