



16 October 2019

“MG” – a pseudonym

Sent via email: foi+request-5638-bc9f289e@righttoknow.org.au

Our Ref: 1920/24.03

To whom it may concern

nbn FOI request – COAT Program

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

FOI ACCESS DECISION – STATEMENT OF REASONS (FOI1920/24)

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 Commonwealth Government agencies and other 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](#). The CAC Background Document should be considered as an integral part of this FOI decision.
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 or 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 "MG", a pseudonym (**Applicant**) via the "Right to Know" (**RTK**) website. In that email, the Applicant sought the following:

Documents/information relating to the Change Of Access Technology (COAT) program. Specifically:

- 1. Criteria used to assess whether a premises (or a number of premises) is eligible for inclusion in the program (**COAT Eligibility Criteria**).*
 - 2. Flowchart (or other documentation) outlining the COAT process from initial assessment to completion (either completion to change the technology type or completion to leave the existing technology type in situ) (**COAT Process Flowchart**).*
6. On 30 September 2019, **nbn**'s FOI Team acknowledged the Applicant's FOI request by email, as required by section 15 of the FOI Act. Following receipt of the Applicant's FOI request, **nbn** personnel undertook enquiries and searches for relevant documents. From those searches, **nbn** staff identified two Draft COAT Process Trial Flowchart documents and a third Draft COAT (Customer-Focussed) Process Flowchart (collectively, **Draft Flowcharts**), which fell within the terms of the 2nd part of the Applicant's FOI request. No other relevant documents were located.
 7. On 16 October 2019, I completed this FOI access decision and subsequently emailed it to the Applicant.



Access Decision – Summary

8. In relation to the 1st point of the Applicant’s FOI request (COAT Eligibility Criteria), relevant details are found within the COAT Test Agreement, found at the [following link](#) and are already in the public domain. I refer to [section 24A of the FOI Act](#) and make a finding that **nbn** staff have taken all reasonable steps to find additional COAT Eligibility Criteria and I am satisfied that they do not exist.
9. In relation to the 2nd point of the Applicant’s FOI request (COAT Process Flowchart), I have determined that the Draft Flowcharts relate to **nbn**’s commercial activities, as would similar documents concerning **nbn**’s COAT Trial Processes. As such, **nbn** is not required to release those documents pursuant to [section 7\(3A\)](#) and [Part II of Schedule 2](#) of the FOI Act.
10. Given my findings in relation to the Draft Flowcharts, 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 those documents – and documents like them. Among other grounds, this includes 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

11. I have carefully reviewed the Draft Flowcharts, as well as other relevant documents and materials, including those referred to below. In particular, I make the following findings of fact in relation to the Draft Flowcharts and more generally about the COAT Trial Process:
 - a. **nbn** undertook a COAT Process Test, i.e. a COAT trial process, and recently published a COAT Industry Consultation Paper (**COAT ICP**) in August 2019 via **nbn**’s Product Development Forum (**PD Forum**).
 - b. The purpose of the COAT ICP was to allow **nbn** to consult with and obtain feedback from **nbn**’s wholesale broadband customers, i.e. **nbn**’s Retail Service Providers (**RSPs**), and other telecommunications industry specialists about the development of proposed COAT processes.
 - c. **nbn** provided PD Forum participants with the COAT ICP on a confidential basis. In that regard, **nbn** has made recent FOI determinations, refusing access under the FOI Act where documents were provided via confidential PD Forum processes. In particular, **nbn**’s FOI Officer found that a High Speed AVC Pricing Construct Paper (**Construct Paper**) related to **nbn**’s commercial activities and was carved-out from the application of the FOI Act. The Construct Paper FOI decision and its detailed reasons may be found at the [following link](#) on the RTK website. In line with previous FOI decisions, **nbn** would most likely not release the COAT ICP (or similar documents) for the same or substantially similar reasons.
 - d. As part of the COAT Process Test, **nbn** requires RSPs to enter into a COAT Test Agreement, found at the [following link](#). The COAT Test Agreement makes it clear that **nbn** “is currently developing a process through which it may plan and perform various types of COATs.” (Emphasis added).
 - e. Among other objectives, the COAT Process Test is seeking to test:
 - i. the capability of **nbn** to implement various types of COATs in respect of premises to which **nbn** currently supplies **nbn**TM Ethernet; and
 - ii. **nbn**’s and Test Participant’s systems and processes to plan and perform various types of COATs in respect of such premises.



- f. At clause 4.2, the COAT Test Agreement provides details concerning the “Selection of the Eligible Premises”. It is my view that this clause responds to the 1st part of the Applicant’s request. Following discussions with relevant **nbn** business stakeholders, I was satisfied that no additional COAT Eligibility Criteria documentation exists and I refer to [section 24A of the FOI Act](#). To provide further detail, no such criteria exists because **nbn**’s COAT Process Tests and the broader COAT program are focussed on enabling changes in technology, rather than determining whether these changes should be made.
- g. **nbn** has not yet finalised, nor developed formal COAT process flowcharts. However, **nbn** has developed Draft Flowcharts, illustrating **nbn**’s proposed process flows as part of developing and designing COAT processes. Again, the COAT Test and COAT program, generally, are focussed on enabling changes to **nbn**TM network technology. In that regard, it should be noted that the Draft Flowcharts:
- i. are internal **nbn** documents that describe trial or proposed business processes so as to enable changes to **nbn**TM network connection technologies;
 - ii. are labelled “confidential” and make it clear that these documents may not be used without **nbn**’s consent;
 - iii. contain commercial-in-confidence information, such as **nbn**’s:
 - internal commercial ideas, assessments and considerations;
 - proposed process flows and indicative RACIs, i.e. those individuals or groups who are responsible, accountable, consulted and informed in the trial processes;
 - indicative time frames for **nbn**’s, **RSPs**’ and **nbn**’s delivery partners’ process flows;
 - potential challenges, solutions and other issues relating to the test process flows; and
 - action points for different parties as part of the development process, along with other matters and issues.
 - iv. are part of iterative processes. As flagged above, the Draft Flowcharts are illustrative of test processes, which are not yet finalised and are still in a development phase. This is made clear by markings on all three documents, indicating that they are in draft form and “not reflecting **nbn** co’s final position on the subject matter... and may change as a consequence of **nbn** co finalising formal technical specifications, or legislative and regulatory developments...”
 - v. constitute **nbn**’s intellectual property, upon which **nbn** expended time and resources in developing. In this regard, I note that the Draft Flowcharts include copyright notices; and
 - vi. form part of **nbn**’s asset base.



Commercial activities carve-out

12. 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 is known as **nbn**’s commercial activities carve-out or CAC.
13. The CAC also applies to **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.
14. 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 Draft Flowcharts have a clear commercial purpose. In particular, they are draft documents, used for internal business purposes with a goal of establishing parameters and the processes, through which an existing **nbn**[™] network technology may be changed to another technology solution. This process has a direct link to **nbn**’s connection and migration processes, which impact upon the company’s revenue streams.
 - b. **Proposed or untested processes and products** – Per the findings of fact, the Draft Flowcharts provide details of proposed processes and an associated **nbn**[™] network product, i.e. a technology change. The Draft Flowcharts (and the thinking behind them) have not been finalised. It follows that the details of those processes and products are not yet ready (and may never be ready) to be publicly released in their current form. In addition, the Draft Flowcharts detail wholesale product ideas or concepts, upon which **nbn** 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” and the market response to **nbn**[™] network technology changes, **nbn** may seek to:
 - refine the scope of the proposed services or products;
 - determine whether premises are capable of a technology change;
 - explore relevant delivery times and quality assurance processes;
 - determine to progress the service and “go to market”,
 - determine not to progress or “not to go to market” with given products or services, and
 - evaluate legal or other risks, among other commercial objectives.

In my view, the above activities are inherently commercial because they relate to **nbn**’s strategic business modelling. In particular, the activities concern **nbn**’s efforts to test and enable technologies that may be allocated to given premises, suburbs or specific areas. Ventilation of this information (and information like it) in the public domain could leave **nbn** open to “cherry picking” by competitors. In particular, it could reveal opportunities for **nbn**’s competitors to overbuild in given areas or identify areas to introduce competing technologies. This could clearly impact upon **nbn**’s customer volumes, migrations to the **nbn**[™] network and revenue base.



- c. **Inhibiting nbn’s ability to develop innovative products** – In addition to providing insights into the ways that **nbn** conducts its current business and commercial activities, the Draft Flowcharts also outline the way by which **nbn** assesses and quality checks potential products and services. If the company were required to disclose nascent product ideas and related process flows under the FOI regime, there may be a disincentive for **nbn** to explore new products and business models or for **nbn** to delay the marketing of such products. Alternatively, it could prematurely signal **nbn**’s strategic objectives to the market, thereby undermining **nbn**’s ability to introduce innovative products, expand its network connections or grow market share. Disclosure would also run contrary to **nbn**’s Shareholder Ministers’ [Statement of Expectations](#), which makes it clear that **nbn** should function like any other commercial player “operating in a market environment and can compete and innovate like other companies in this environment in accordance with legal and policy parameters.” (Underlined emphasis added)
- d. **Template for developing new products** – In line with the strategic value of the Draft Flowcharts, these documents could provide a “roadmap” or template, outlining how **nbn** develops and tests new products or services. This 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 finalised its COAT business planning processes. 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. As a GBE, **nbn** is no different from other telecommunications providers and has a clear commercial interest in protecting its business development processes, as well as the format and thinking processes that go into those processes.
- e. **Confidential markings and valuable intellectual property** – The Draft Flowcharts are also labelled as confidential. This reinforces **nbn**’s clear intention to keep the information contained within these documents confidential and underscores the commercially sensitive nature of the documents. In addition, the Draft Flowcharts constitute **nbn**’s intellectual property and they have a commercial value for the company. Beyond **nbn**’s investment in developing the Draft Flowcharts, they also serve as a reference point for **nbn**’s staff and business partners in quality assurance and product improvement processes. Disclosure of the Draft Flowcharts 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.
- f. **Impact on nbn’s IP base and future privatisation efforts** – Disclosure of the Draft Flowcharts could also establish a precedent, whereby commercial entities and other parties 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 Draft Flowcharts, become part of the “public domain” pursuant to FOI requests, **nbn** could potentially undermine the value of its own asset base. For those reasons, there is a clear commercial value to **nbn** in the Draft Flowcharts – and documents like them.

15. Based on the above factors, it is my view that the CAC applies to the Draft Flowcharts. Per [sections 7\(3A\)\(a\) and \(b\) of the FOI Act](#), those documents are not subject to the FOI Act.

16. As **nbn** has relied upon the CAC, it is unnecessary to consider alternative exemption grounds under the FOI Act. However and for completeness, I note that there are other exemptions potentially available to **nbn** under the FOI Act concerning the Draft Flowcharts. This includes exemptions under section 47 (commercially valuable



information) and section 47E (operations of agencies), among other grounds in the FOI Act. In particular, I refer to section 47C of the FOI Act (deliberative materials). In my opinion, the Draft Flowcharts would almost certainly fall within the meaning of section 47C. For the reasons outlined above, it is **nbn**'s opinion that the public interest would not favour disclosure of the Draft Flowcharts.

17. For this FOI application, **nbn** personnel spent approximately one hour and fifteen minutes searching for and retrieving relevant documents. That would equate to \$18.75 (1.25 hours x \$15/hour). In relation to the drafting of this decision, **nbn**'s FOI Team spent approximately eleven hours reviewing and considering the relevant documents, making enquiries of relevant **nbn** personnel and drafting this decision (11 hours x \$20/hour = \$220, but equivalent to \$120, noting that no fees are payable for the first five hours of decision-making time). Therefore, the total processing fees would equate to \$138.75.
18. In its [Submission to the OAIC Charges Review](#), **nbn** outlined its support of fees and charges and their importance to the Commonwealth 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.
19. On balance, I have determined to waive the processing fees in relation to this FOI application. This is permitted by the *Freedom of Information (Charges) Regulations 2019*, which provides decision-makers with a general discretion to impose or not impose FOI charges. In making this determination, I took into the account the fact that the COAT Test processes are an important business development issue for **nbn** and that it was useful to clarify the commercial nature of the COAT processes as they relate to **nbn**'s CAC. I also took into account the fact that **nbn** made a determination not to release the Draft Flowcharts.
20. 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.
