



Australian Government

# **Review of NBN Co. Limited compliance with FOI**

June 2012



**Review of the operation of the *Freedom of Information Act 1982*  
insofar as it applies to documents held by  
NBN Co. Limited**

**Report to the Attorney-General**

**29 June 2012**

**Stuart Morris QC**

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## Foreword

This report reviews the operation of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) in so far as that Act relates to documents held by the NBN Co. Limited (**NBN Co.**). The review was conducted pursuant to subsection 100A(1) of the *National Broadband Network Companies Act 2011* (Cth) (**NBN Co. Act**).

NBN Co. was established to implement a technology policy of unprecedented size and scale: to deliver high-speed broadband to all Australian premises.<sup>1</sup> While NBN Co. is owned by the Commonwealth, it is, in every respect, a corporation.

Parliament determined that NBN Co. should be subject to the FOI Act, except “in relation to documents in respect of its commercial activities.”<sup>2</sup> While a “commercial activities” exemption applies to agencies such as Comcare, Australia Post and Medicare Australia, that exemption incorporates a requirement of competition which does not apply to NBN Co. Accordingly, Parliament adopted a “commercial activities” exemption that is specific to NBN Co.

The purpose of this review was to examine whether NBN Co. has complied with its obligations under the FOI Act, and, in particular, whether NBN Co.’s “commercial activities” exemption was working in practice.

In my view, NBN Co. has not only fulfilled its lawful responsibilities under the FOI Act, but also has achieved a high standard in its administration of the Act. My review does not reveal any basis to change its “commercial activities” exemption.

Stuart Morris QC  
29 June 2012

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<sup>1</sup> NBN Co. Limited Annual Report 2009-2010, p 22; NBN Co. Limited Statement of Corporate Intent 2011 – 2013, p 4.

## Glossary

<b>AAT</b>	Administrative Appeals Tribunal
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>Australia Post</b>	Australian Postal Corporation
<b>CSIRO</b>	Commonwealth Scientific and Industrial Research Organisation
<b>DBCDE</b>	Department of Broadband, Communications and the Digital Economy
<b>Disclosure Log</b>	Section of NBN Co.'s website where it publishes information accessed pursuant to a FOI request: see  <a href="http://www.nbnco.com.au/about-us/freedom-of-information/disclosure-log.html">http://www.nbnco.com.au/about-us/freedom-of-information/disclosure-log.html</a>
<b>DPMC</b>	Department of the Prime Minister and Cabinet
<b>FOI</b>	Freedom of Information
<b>FOI Act</b>	<i>Freedom of Information Act 1982</i> (Cth)
<b>FOI Commissioner</b>	Freedom of Information Commissioner appointed under subsection 14(2) of the <i>Australian Information Commissioner Act 2010</i> (Cth)
<b>Information Commissioner</b>	Australian Information Commissioner appointed under subsection 14(1) of the <i>Australian Information Commissioner Act 2010</i> (Cth)
<b>IC Review</b>	A review of an Information Commissioner reviewable decision undertaken by the Information Commissioner under Part VII of the FOI Act.
<b><i>Internode</i></b>	<i>Internode Pty Ltd and NBN Co. Ltd</i> [2012] AICmr 4
<b>NBN</b>	National Broadband Network
<b>NBN Co.</b>	NBN Co. Limited
<b>NBN Co. Act</b>	<i>National Broadband Network Companies Act 2011</i> (Cth)
<b>OAIC</b>	Office of the Australian Information Commissioner
<b>Refined Request</b>	An FOI request to NBN Co. where the scope of the request was refined

## About the review

The terms of reference for this review were issued by the Attorney-General, the Hon. Nicola Roxon MP, on 16 April 2012.

### Terms of Reference

Pursuant to subsection 100A(1) of the *National Broadband Network Companies Act 2011*, these terms of reference are for a review of the operation of the *Freedom of Information Act 1982* (FOI Act) so far as that Act relates to documents held by the NBN Co. Limited (NBN Co.).

The review should include examination of the extent to which the NBN Co. has achieved compliance with the legislative arrangements for the NBN Co. under the FOI Act. In particular, the review should include consideration of:

- the number of requests made to the NBN Co. for access to documents under the FOI Act since 11 June 2011
- the nature and scope of the those requests
- the responses of the NBN Co. to those requests
- the timeframes for the responses of the NBN Co. to those requests, and
- any grounds given by the NBN Co. for refusing any, or part of any, of those requests, including the extent to which NBN Co. declined to release documents because they fall within the exemption for documents concerning the commercial activities of the NBN Co.

The review should include examination of:

- the number of applications made to the Information Commissioner under the FOI Act for the review of decisions made by the NBN Co.
- the Information Commissioner's decisions under the FOI Act in response to those applications
- the number of applications made to the Administrative Appeals Tribunal for the review of those decisions
- the number and nature of complaints made to the Information Commissioner about the NBN Co.
- the action taken by the Information Commissioner in response to those complaints, and
- the number and nature of any other matters (including telephone and written enquires) raised with the Office of the Australian Information Commissioner about the operation of the FOI Act in relation to the NBN Co.

The review should include consultation with relevant stakeholders, including, for example:

- the NBN Co.
- the Office of the Australian Information Commissioner, and
- the Department of Broadband, Communications and the Digital Economy.

The review should be completed eight weeks from the issue of the reference.

[Authority: section 100A of the *National Broadband Network Companies Act 2011* (Cth)]

On 9 May 2012 the Government appointed me to conduct the review.

I am a barrister in private practice, having commenced practice in 1976. I was appointed Queens Counsel in 1991. I was a Justice of the Supreme Court of Victoria between 2003 and 2007 and the President of the Victorian Civil and Administrative Tribunal between 2003 and 2007. I have considerable experience in freedom of information matters, both as a barrister and a judge.

I was assisted in the review by Ms Fiona Batten. Ms Batten is a barrister who was formerly employed by the Victoria Government Solicitor's Office and has practised in the field of public law.

### **Consultation**

In the course of this review, the following people have been consulted:

- Senator Ludlam, Australian Greens;
- Dr James Popple, the Freedom of Information Commissioner, Office of the Australian Information Commissioner;
- Mr David Mesman, Senior Corporate Counsel, FOI and Knowledge Management, NBN Co.;
- Jessica Blacklaws, Paralegal, FOI and Knowledge Management, NBN Co.;
- Ms Elizabeth O'Shea, Assistant Secretary, Department of Broadband, Communications and the Digital Economy; and
- Seven people who made requests for documents from NBN Co. under the FOI Act, and who consented to being contacted as part of the review.

## Executive summary

### Background to review

NBN Co. was established on 9 April 2009.<sup>3</sup>

When established, NBN Co. was not subject to freedom of information legislation. This was confirmed by the Office of the Australian Information Commissioner (**OAIC**) on 25 January 2011, when the OAIC held that NBN Co. was not an entity that was subject to the FOI Act.<sup>4</sup>

The FOI Act was subsequently amended, with the result that the NBN Co. became subject to the FOI Act on 11 June 2011.<sup>5</sup> On 24 March 2011, at the instigation of Senator Ludlam, the Parliament amended the NBN Co. Act to require a review of the operation of the FOI Act in so far as it related to documents of NBN Co.<sup>6</sup>

Section 100A of the NBN Co. Act provides<sup>7</sup>:

#### **Review of operation of the Freedom of Information Act 1982 so far as that Act relates to documents of NBN Co.**

- (1) Before the first anniversary of the commencement of this section, the FOI Minister must cause to be conducted a review of the operation of the *Freedom of Information Act 1982* so far as that Act relates to documents of NBN Co.
- (2) The FOI Minister must cause to be prepared a report of a review under subsection (1).
- (3) The FOI Minister must cause copies of the report to be tabled in each House of the Parliament.
- (4) For the purposes of this section, the question of whether a document is a document of NBN Co. is to be determined in the same manner as that question is determined under the *Freedom of Information Act 1982*.
- (5) In this section:  
"document" has the same meaning as in the *Freedom of Information Act 1982*.  
"FOI Minister" means the Minister administering the *Freedom of Information Act 1982*.

As I understand the Parliamentary Debates, the primary purpose of the review is to ascertain whether the provisions of the FOI Act that apply to NBN Co. "have achieved the correct balance in practice between the pro-disclosure requirements of the FOI Act and the protection of commercially sensitive information that NBN Co. may hold."<sup>8</sup>

This review commenced in May 2012, and involved reviewing:

- the requests for documents made to NBN Co. under the FOI Act;
- NBN Co.'s responses to those requests;
- applications to the OAIC; and

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<sup>3</sup> NBN Co. Limited Annual Report 2008-2009, p 2.

<sup>4</sup> *Crowe and NBN Co. Ltd* [2011] AICmr 1.

<sup>5</sup> Sections 115 – 122, Part 4, Schedule 1 of the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements)* Act 2011

<sup>6</sup> Commonwealth, *Parliamentary Debates*, Senate, 24 March 2011, 1868 – 1875 (Scott Ludlam, Simon Birmingham, Nick Xenophon, Stephen Conroy).

<sup>7</sup> There is no explanatory memorandum for section 100A. *Parliamentary Debates*, Senate, 24 March 2011, 1869 (Scott Ludlam).

<sup>8</sup> Commonwealth, *Parliamentary Debates*, Senate, 24 March 2011, 1870 (Stephen Conroy).

- the OAIC's responses to those requests.

The review also involved consulting with persons who had made FOI requests or who have been involved in access decisions. The period covered by the review is 11 June 2011 to 31 May 2012.

### Requests to NBN Co. for documents

NBN Co. received 35<sup>9</sup> requests for documents under the FOI Act within the period of the review.

#### *Summary of NBN Co's responses to FOI requests*

Requests	Request withdrawn	Full release	Partial access	Access refused	Access deferred	No documents	Request transferred	To be finalised
35	17	2 <sup>10</sup>	4	3	1	4	1	3

Almost half of the requests were withdrawn before a decision on access was made. NBN Co. released all of the requested documents in two cases. It provided partial access in four cases, and refused access altogether in three cases. In response to four requests, no documents were found to exist. One request was transferred to the Department of the Prime Minister and Cabinet. Three requests are yet to be finalised.

### Grounds for refusal

#### *Summary of the grounds relied on by NBN Co. to refuse access to information*

Ground of FOI Act relied on	Occasions relied on
Section 7(3A) NBN Co.'s commercial activities	4
Section 45 Material obtained in confidence	2 (in the alternative to 7(3A))
Section 47 Documents disclosing trade secrets or commercially valuable information	4 (in the alternative to 7(3A))
Section 47C Public interest conditional exemptions – deliberative processes	2 (1 in the alternative to 7(3A))
Section 47F Public interest conditional exemptions – personal privacy	1
Section 47G Public interest conditional exemptions – business	1

### Applications, complaints and enquiries made to the OAIC

Four applications have been made to the OAIC. In *Internode Pty Ltd and NBN Co. Ltd*<sup>11</sup> (*Internode*), the FOI Commissioner affirmed the decision of NBN Co. to refuse access to the requested documents. In *Requests 16, 17 and 18*, a delegate of the Information Commissioner finalised the three applications the subject of the review, under section 54W(a)(i) of the FOI Act, on the basis that the applications for review were lacking in substance.

No complaints and no enquiries have been made to the OAIC.

### Applications made to the Administrative Appeals Tribunal

<sup>9</sup> I have treated Part A and Part B of Request 29 as two different requests.

<sup>10</sup> I have treated the applicant to Request 13 as receiving full access, even though in relation to one aspect of the request no documents existed.

<sup>11</sup> *Internode Pty Ltd and NBN Co. Ltd* [2012] AICmr 4 (20 January 2012)

No applications have been made to the Administrative Appeals Tribunal.

### **Summary of findings**

This review has not identified any vexatious use of freedom of information provisions in relation to NBN Co. In my view, NBN Co. has not only fulfilled its lawful responsibilities under the FOI Act, but also has achieved a high standard in its administration of the Act.

In summary, I find that NBN Co. has:

- complied with its lawful requirements in administering the FOI Act;
- used a careful process to identify exempt documents, has clearly articulated the reasons for the claimed exemptions, and has not been extravagant in claiming exemptions;
- sought to minimise the cost to applicants by actively assisting in identifying possible documents that are the real basis of the request;
- operated in a timely manner; and
- generally adopted a pro-disclosure attitude.

My review of the operation of the FOI Act in relation to the NBN Co. does not reveal any basis to change the “commercial activities” exemption. There is no basis to conclude that the broad nature of “commercial activities” exemption has been abused; or that it has had the effect of unreasonably broadening the field of exempt documents. Moreover, in my view, an attempt to confine the exemption is likely to add complexity and uncertainty to the concept; and is likely to produce anomalous outcomes.

Finally, I find that the high standard achieved by NBN Co. in relation to its FOI Act obligations are, in no small part, due to the competence and training of the FOI officer engaged by NBN Co.

## Part A – NBN Co. and the FOI Act

### 1. NBN Co.

NBN Co. was established to implement the National Broadband Network policy initiative.<sup>12</sup> It was established with the intention that it would eventually be privatised.

It is, and is expected to operate as, a corporation. This includes not only the duties and obligations that apply under the *Corporations Act 2001* (Cth), but also the expectation that it will generate a profit.

Thus, NBN Co. is unlike most other agencies subject to the FOI Act.

The following documents provide a clear picture of the role of NBN Co. and what is expected of NBN Co.:

- Statement of Expectations, released by the two representative Shareholder Ministers: the Minister for Finance and Deregulation and the Minister for Broadband, Communications and the Digital Economy;<sup>13</sup>
- NBN Co. Annual Reports<sup>14</sup>;
- NBN Co.’s Statement of Corporate Intent; and<sup>15</sup>
- The Commonwealth Government Business Enterprise Governance and Oversight Guidelines.<sup>16</sup>

The principal activities of NBN Co. are to design, build and operate a National Broadband Network to deliver high-speed broadband to all Australian premises.<sup>17</sup> NBN Co. intends to roll out fibre-based broadband services to 93 percent of premises in Australia, wireless to four percent and satellite to three per cent.<sup>18</sup>

### 2. Application of the FOI Act to NBN Co.

NBN Co. has been subject to the FOI Act since 11 June 2011.<sup>19</sup> NBN Co. is subject to the FOI Act because it is a “prescribed authority”.<sup>20</sup> The FOI Act gives every person a legally enforceable right to obtain access to a document of a prescribed authority, other than an exempt document.<sup>21</sup>

#### Documents in respect of “commercial activities” exemption

Subsection 7(2) of the FOI Act exempts the agencies specified in Part II of Schedule 2 from the operation of the FOI Act, to the extent specified in that Schedule. Nine agencies are exempt in relation to documents in

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<sup>12</sup> NBN Co. Limited Statement of Corporate Intent 2011 – 2013

<sup>13</sup> [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0003/132069/Statement\\_of\\_Expectations.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0003/132069/Statement_of_Expectations.pdf)

<sup>14</sup> NBN Co. Limited Annual Report 2008-2009; NBN Co. Limited Annual Report 2009-2010; NBN Co. Limited Annual Report 2010-2011.

<sup>15</sup> NBN Co. Limited Statement of Corporate Intent 2011 – 2013.

<sup>16</sup> [http://www.finance.gov.au/publications/governance-arrangements/docs/GBE\\_Guidelines.pdf](http://www.finance.gov.au/publications/governance-arrangements/docs/GBE_Guidelines.pdf) (NBN Co. is prescribed as a Government Business Enterprise by the *Commonwealth Authorities and Companies Act 1997* (Cth): NBN Co. Limited Annual Report 2010-2011, p 3; Regulation 4(2) of the *Commonwealth Authorities and Companies Regulations 1997* (Cth))

<sup>17</sup> NBN Co. Limited Annual Report 2009-2010, p 22; NBN Co. Limited Statement of Corporate Intent 2011 – 2013, p 4.

<sup>18</sup> NBN Co. Limited Annual Report 2009-2010, p 3.

<sup>19</sup> Sections 115 – 122, Part 4, Schedule 1 of the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements)* Act 2011

<sup>20</sup> Section 4(1) of the FOI Act.

<sup>21</sup> Section 11 of the FOI Act. The exemptions are contained in Part IV of the FOI Act.

respect of the agency's commercial activities, or the commercial activities of a designated body within the agency.<sup>22</sup>

When it is used in relation to the Albury-Wodonga Development Corporation, the Attorney-General's Department, Australia Post, Comcare, CSIRO, Department of the Treasury, Indigenous Business Australia, and Medicare Australia, the definition of "commercial activities" in subsection 7(3) of the FOI applies. Subsection 7(3) defines "commercial activities" to mean:

- (a) activities carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments; or
- (b) activities, carried on by an agency, that may reasonably be expected in the foreseeable future to be carried on by the agency on a commercial basis in competition with persons other than governments or authorities of governments.<sup>23</sup>

A "commercial activities" exemption has been part of the FOI Act since it was enacted in 1982, although originally the exemption applied to "competitive commercial activities". The requirement of competition is now incorporated in the definition of "commercial activities" in section 7(3).

The definition of "commercial activities" in section 7(3) does not apply to NBN Co. Notably, the requirement of competition does not apply to NBN Co.

"Commercial activities", when used in relation to NBN Co., is defined in subsection 7(3A) of the FOI Act as follows:

In Part II of Schedule 2, *commercial activities*, when used in relation to NBN Co, means:

- (a) activities carried on by NBN Co. on a commercial basis; or
- (b) activities, carried on by NBN Co, that may reasonably be expected in the foreseeable future to be carried on by NBN Co. on a commercial basis.

### **Decisions to be made by authorised persons**

Under section 23(1) of the FOI Act, the Chief Executive Officer of NBN Co., Mr Mike Quigley, has authorised Mr David Mesman, Senior Corporate Counsel – FOI & Knowledge Management, to make decisions about access to documents under the FOI Act.

### **Information Publication Scheme**

Division 2 of Part II of the FOI Act requires NBN Co. to publish certain information in an Information Publication Scheme, including:

- details of the structure of NBN Co.'s organisation;
- details of the functions of NBN Co.;
- the information in NBN Co.'s annual reports that are laid before Parliament;
- information to which NBN Co. routinely gives access in response to requests under Part II of the FOI Act (access to documents) except certain information it would be unreasonable to publish; and
- NBN Co.'s operational information.

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<sup>22</sup> Division 1, Part II, Schedule 2, of the FOI Act.

<sup>23</sup> Section 7(3) of the FOI Act.

NBN Co.'s Information Publication Scheme may be viewed at <http://www.nbnco.com.au/about-us/freedom-of-information/information-publication-scheme.html>.

### **Disclosure Log**

Where an agency, including NBN Co., provides an applicant access to a document in response to a FOI request, section 11C of the FOI Act requires the agency to publish the information contained in the document on its website. The agency is not required to publish personal information, information about the business, commercial, financial or professional affairs of any person, or information that is not reasonably practicable to publish.<sup>24</sup> The agency is required to publish the information on its website within 10 working days after the day the applicant is given access to the document.<sup>25</sup>

The information published on the website must be available for downloading or via a link to another website. Alternatively, the website may contain details of how the information may be obtained.<sup>26</sup>

NBN Co. has published the information contained in the documents it has provided access to in response to FOI requests on a "Disclosure Log" which may be viewed at <http://www.nbnco.com.au/about-us/freedom-of-information/disclosure-log.html>.

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<sup>24</sup> Section 11C(1) of the FOI Act

<sup>25</sup> Section 11C(6) of the FOI Act

<sup>26</sup> Section 11C(3) of the FOI Act

## Part B – Requests made to NBN Co. between 11 June 2011 and 31 May 2012

### 3. Number of FOI requests

**Thirty-five** requests were made to NBN Co. for access to documents under the FOI Act between 11 June 2011 and 31 May 2012, from **fourteen** different applicants.<sup>27</sup> Half (seven) of the applicants were journalists; one was a politician; one applied on behalf of a telecommunications service provider; three were from commercial consultancies or entities; and the remaining two were individuals.

### 4. Nature and scope of the FOI requests

Request No.	Nature and scope of Request	Outcome
1	“the resumes and references provided by Michael Quigley and Jean-Pascal Beaufret, documents provided to the board about their prospective appointment, minutes of the board meeting/s where their prospective appointment was discussed and any evaluations by the board or NBN Co’s recruitment advisers.”	NBN Co. requested that the applicant <b>refine the scope</b> of the request.  <i>Request withdrawn</i>
2	“the latest summary or briefing note detailing any former Alcatel or Alcatel-Lucent employees now working for the NBN Co and, where applicable, the recruitment process used.”	<i>Request withdrawn</i>
3	“all correspondence between the NBN Co and the office of the Communications Minister and Department of Broadband, Communications and the Digital Economy regarding, and to the point of, the decision to suspend construction tenders.”	NBN Co. requested that the applicant <b>refine the scope</b> of the request.
Refined Request 3	“All correspondence between the CEO of NBN Co and the office of the Communications Minister and Department of Broadband, Communications and the Digital Economy (DBCDE) ( <b>the Minister’s Office</b> ) regarding the decision to suspend construction tenders; and All correspondence between the Principal of NBN Co’s Government Relations and External Affairs group and the Minister’s Office regarding the decision to suspend construction tenders. For the purposes of this FOI request, the time frame for the requested correspondence is two weeks prior to the suspension of the construction tenders on 12 April 2011 (29 March to 12 April 2011).”	<b>No documents identified</b>
4	“the full report that Greenhill Caliburn completed on the NBN Co corporate plan.”	<b>Request transferred to another agency</b>
5	“all correspondence between the NBN Co and the federal Government regarding labour concerns and risks.”	NBN Co. requested that the applicant <b>refine the scope</b> of

<sup>27</sup> Three FOI requests are yet to be finalised.

		the request.
Refined Request 5	<p>“All correspondence between the Human Resources group of NBN Co and:</p> <ul style="list-style-type: none"> <li>• Senator Conroy (and the office of Senator Conroy)</li> <li>• Department of Broadband, Communications and the Digital Economy;</li> <li>• Treasury; and</li> <li>• Department of Prime Minister &amp; Cabinet,</li> </ul> <p>... regarding any anticipated skills shortages, or wage pressures, in relation to the construction of the national broadband network. For the purposes of this FOI request, the time frame for the requested correspondence is between November 2010 – May 2011.”</p> <p>The applicant agreed the request excluded personal details and purely administrative matters.</p>	<b>Partial access provided</b>
6	“the NBN Co’s response to the federal government on the McKinsey implementation study.”	<b>Partial access provided</b>
7	“the NBN Co’s latest plan, summary document or briefing note on the points of interconnection on its network.”	<b>Request withdrawn</b>
8	“all reports and presentations provided to NBN Co by Lazard, or provided to the federal Government by Lazard regarding the NBN.”	<b>No documents</b>
9	“all correspondence between the NBN Co and independent members of the House of Representatives regarding the NBN, all briefing notes to the chief executive, board or minister on independent MHRS, along with all documents detailing the planned, or possible, rollout and timing of rollout of infrastructure on an electorate-by-electorate basis.”	NBN Co. requested that the applicant <b>refine the scope</b> of the request.
Refined Request 9	<p>“1) All correspondence between NBN Co’s CEO and independent members of the House of Representatives (IMHRs) regarding the NBN; and</p> <p>2) All correspondence between the Principal of NBN Co’s Government Relations and External Affairs group and IMHRs regarding the NBN; and</p> <p>3) All briefing notes to the chief executive, board or minister on IMHRS.</p> <p>For the purposes of this FOI request, searches should be limited to the following time frame: 14 September 2010 to 7 July 2011.”</p>	<b>Partial access provided</b>
10	“all correspondence between Michael Quigley and the board and minister, including letters and briefing notes, about allegations raised in the media about Alcatel and his former role with the company, along with all NBN Co documents detailing talking points for senior officials and/or a media strategy for dealing with the allegations.”	NBN Co. requested that the applicant <b>refine the scope</b> of the request.  <b>Request withdrawn</b>
11	“Any correspondence between NBN Co and local councils before April 1, 2010. In particular the following:	NBN Co. requested that the applicant

	<ul style="list-style-type: none"> <li>- Armidale Dumaresque Council</li> <li>- Townsville City Council</li> <li>- Moreland City Council</li> <li>- City of Onkaparinga</li> <li>- Kiama Municipal Government”</li> </ul>	<b>refine the scope</b> of the request.
Refined Request 11	<ul style="list-style-type: none"> <li>• “Any formal (hard copy) correspondence between NBN Co and Armidale Dumaresque Council, Townsville City Council, Moreland City Council, City of Onkaparinga, Kiama Municipal Government from 9 April 2009 to 1 April 2010; and</li> <li>• Any email correspondence between NBN Co’s CEO and the four Local Councils mentioned above from 9 April 2009 to 1 April 2010; and</li> <li>• Any email correspondence between the Principal of NBN Co’s Government Relations &amp; External Affairs (GREA) group or relevant GREA officers and the four Local Councils mentioned above from 9 April 2009 to 1 April 2010.”</li> </ul>	<b>Request withdrawn</b>
12	<p>“documents providing details on the roll-out schedule for the national broadband network.</p> <p>...</p> <p>If a final schedule is not available, I seek documents that provide details on sites where the NBN Co is considering rolling out the NBN after the “second release” sites, which have already been announced.”</p>	<p>NBN Co. requested that the applicant <b>refine the scope</b> of the request.</p> <p><b>Request withdrawn</b></p>
13	<p>“documents, held in printed or electronic form, showing the following:</p> <ul style="list-style-type: none"> <li>- the job description for each staff member listed in the NBN Co’s annual report who receives a salary package valued at \$200,000 or more</li> <li>- please state the individual’s salary and their job description.”</li> </ul>	NBN Co. requested that the applicant <b>refine the scope</b> of request.
Refined Request – 13	<p>“The position descriptions of the senior executives mentioned [in] the following website:</p> <p><a href="http://nbnco.com.au/wps/wcm/connect/main/site-base/resources/about-nbn-co/executive-team">http://nbnco.com.au/wps/wcm/connect/main/site-base/resources/about-nbn-co/executive-team</a>”</p>	<b>Full access</b> <sup>28</sup>
14	<p>“NBN Co’s hospitality register or similar document that details the organisations hosting NBN Co staff members at lunches, events etc.</p> <p>... any gift register kept by NBN Co detailing gifts given to NBN Co staff.”</p>	<p>NBN Co. requested that the applicant <b>refine the scope</b> of the request.</p> <p><b>No documents</b></p>
15	<p>“the following four “Definitive Agreements” between NBN Co Limited and Telstra Corporation Limited, as referred to on numbered page 4 of the Media Release<sup>[29]</sup>:</p> <ul style="list-style-type: none"> <li>• Implementation and Interpretation Deed</li> <li>• Subscriber Agreement</li> </ul>	<b>Access refused</b>

<sup>28</sup> I have treated the applicant to Request 13 as receiving full access, even though in relation to one aspect of the request no documents existed.

<sup>29</sup> <http://www.nbnco.com.au/assets/media-releases/2011/nbn-co-and-telstra-sign-binding-definitive-agreements-23-jun-11.pdf>

	<ul style="list-style-type: none"> <li>• Infrastructure Services Agreement</li> <li>• Access Deed”</li> </ul>	
16	“Minutes of NBN Co board meetings as they relate to the previous employment at Alcatel of Mr Michael Quigley and Mr Jean-Pascal Beaufret”	<i>Deemed withdrawal</i>
17	“Internal NBN Co. working documents, emails, communications, etc as they relate to the previous employment at Alcatel of Mr Michael Quigley and Mr Jean-Pascal Beaufret.”	NBN Co. requested that the applicant <b>refine the scope</b> of the request.
Refined Request – 17	<p>“1) From 1 November 2010, final copies of memos, board papers, briefings or advice relating to the previous employment at Alcatel of Mr Michael Quigley and Mr Jean-Pascal Beaufret to or from the CEO or his EA, the principal of the Government Regulations unit and those staff directly reporting to him/her, the Chief Legal Counsel and those staff directly reporting to him/her and the Chief Financial Officer and those staff directly reporting to him.</p> <p>2) From 1 November 2010, emails relating to the previous employment at Alcatel of Mr Michael Quigley and Mr Jean-Pascal Beaufret (from 1 November 2010) sent or received by the CEO, his EA, Principal of the Government Relations unit, the Chief Legal Counsel and the Chief Financial Officer only.”</p>	NBN Co. requested that the applicant <b>further refine the scope</b> of request.
Further Refined Request – 17	<p>“1) From 1 November 2010, final copies of memos, board papers, briefings or advice relating to the previous employment at <i>Alcatel Standard</i> of Mr Michael Quigley and Mr Jean-Pascal Beaufret to or from the CEO or his EA, the principal of the Government Regulations unit and those staff directly reporting to him/her, the Chief Legal Counsel and those staff directly reporting to him/her and the Chief Financial Officer and those staff directly reporting to him.</p> <p>2) From 1 November 2010, emails relating to the previous employment at <i>Alcatel Standard</i> of Mr Michael Quigley and Mr Jean-Pascal Beaufret (from 1 November 2010) sent or received by the CEO, his EA, Principal of the Government Relations unit, the Chief Legal Counsel and the Chief Financial Officer only.”</p>	<i>Deemed withdrawal</i>
18	“The response(s) provided to questions from the Department of Premier and Cabinet in Tasmania in October 2010, as referred to in the answer to Question on Notice No 236 asked through the Senate Standing Committee on Environment and Communications February 2011 Additional Estimates in the Broadband, Communications and the Digital Economy portfolio.”	<i>Deemed withdrawal</i>
19	“The total remuneration packages provided to the CEO, the Chief Financial Officer, the Chief Technology Officer, the Chief Human Resources Officer and Head of Corporate Services, the Head of Commercial Strategy, the Head of Construction, the Head of Network Operations, the Head of Product Development and Sales, and the Head of Strategy Business Development.”	<b>Access deferred</b>
20	“1. Financial and legal reporting dates for NBN Co. for this financial year	<b>Practical refusal</b>

	[FY 2011/2012] 2. The documents that are required to be produced for parliament and stakeholders (i.e. Annual reports etc.) 3. If all publicly available reports are listed on your website (or is there also another government website I should refer to go to)? 4. The latest financial information showing the Share Value Added (SVA) – where can this be sourced from?”	<b>Deemed withdrawal</b>
21	“the report which NBN commissioned from Deloitte earlier this year. The report looked at the availability of skilled technicians needed to construct the broadband network, general staffing needs and available workers.”	NBN Co. requested that the applicant <b>refine the scope</b> of the request.
Refined Request 21	“A copy of the NBN Co. Powerpoint presentation of 9 June 2010, entitled “Workforce Modelling Overview.””  The applicant confirmed that NBN Co. could redact commercially sensitive information from the document, and that such information would be considered outside the scope of the FOI request.	<b>Access granted</b>
22	“(a) the “binding agreement” between NBN Co. Limited and SingTel Optus Pty Ltd and other Optus entities to migrate Optus’ subscribers to the National Broadband Network (NBN), as referred to in the Optus Media Release; or  (b) in the event that NBN Co. Limited decides that parts of this “binding agreement” are exempt from disclosure under the Act, an edited copy of the “binding agreement” with exempt matter deleted in accordance with s 22 of the Act.”	<b>Request withdrawn</b>
23	“... any information regarding the price and/or non-price conditions under which NBN Co Limited is obtaining the right to access and use Telstra Corporation Limited’s dark fibre links. According to numbered pages 4 and 11 of the Telstra Media Release <sup>[30]</sup> , these rights are granted to NBN Co Limited under the Infrastructure Services Agreement.”	<b>Request withdrawn</b>
24	“ ... the four “Definitive Agreements” between NBN Co. Limited and Telstra Corporation Limited, as referred to on numbered page 4 of the Telstra Media Release <sup>[31]</sup> : a) Implementation and Interpretation Deed; b) Subscriber Agreement; c) Infrastructure Services Agreement; d) Access Deed ( <i>the DAs</i> ); with exempt matter deleted in accordance with s 22 of the Act.”	<b>Request withdrawn</b>
25	“A briefing or similar document that outlines why NBN Co. selected the rollout to Armidale Dumaresque Council, Townsville City Council, Moreland City Council, City of Onkaparinga and Kiama Council.”	<b>Partial release</b>
26	“updated (18 <sup>th</sup> August 2011 release) of Access Seeker Operations Manual”	<b>Request withdrawn</b>

<sup>30</sup> <http://www.nbnco.com.au/assets/media-releases/2011/nbn-co-and-telstra-sign-binding-definitive-agreements-23-jun-11.pdf>

<sup>31</sup> <http://www.nbnco.com.au/assets/media-releases/2011/nbn-co-and-telstra-sign-binding-definitive-agreements-23-jun-11.pdf>

27	“details on who the successful company was in relation to [the TenderA070 – Equipment Racks]”	<b>Request withdrawn</b>
28	“all internal documents relating to this paragraph in NBN Co’s 2010 financial report: NBN Co has entered into negotiated settlement with one supplier of Pre-Release and has received a claim from another supplier. NBN Co has settled with one Contractor Company who was delayed in the FRS deployment.”	NBN Co. requested that the applicant <b>refine the scope</b> of the request.  <b>Request withdrawn</b>
29	“information relating to comments made by NBN Co to a parliamentary committee after 20 September 2011: NBN Co. undertook a fibre network extension trial in Tasmania. The trial included selected properties that border the Tasmania stage 2 sites. Only a small number of properties were included in the scope of the trial. Within the scope of the trial, eight requests for quotes were received and one has accepted the quote.” ... the quote given to the Tasmanian resident referred to by NBN Co. for the installation of fibre to their premise, which is located outside of the initial fibre footprint.  <ul style="list-style-type: none"> <li>• Correspondence between NBN Co and the Tasmania resident (and/or any other party including a contractor) who has accepted NBN Co’s offer to bring fibre to their premise under the fibre extension trial.</li> <li>• Any formal or informal price quote given to the resident for the proposed work.</li> <li>• Correspondence (internal, external) between NBN Co staff regarding the results of the fibre extension trial and the installation of fibre at the premises of the aforementioned resident.”</li> </ul>	NBN Co. requested that the applicant <b>refine the scope</b> of the request.
Refined Request 29A	“The price quoted to the Tasmania resident in relation to NBN Co’s offer to bring fibre to their premise under the fibre extension trial”	<b>Access refused</b>
Refined Request 29B	“The methodology employed to come to the quote.”	<b>Full access</b>
30	“information on the use of web browsers and social media”	<b>Request withdrawn</b>
31	“ALL emails, discussion output and documents related to the decision surrounding North Sydney.  Please explain why other “city” areas [Hobart, Canberra, Melbourne] will be included.”	NBN Co. requested that the applicant <b>refine the scope</b> of the request.  <b>No documents</b>

## Part C – NBN Co.’s responses to the requests

### 5. Request that scope of FOI request be refined

It is the duty of NBN Co. to take reasonable steps to assist an applicant make a request in a manner that complies with section 15 of that Act.<sup>32</sup> In response to thirteen requests, NBN Co. requested that the applicant refine or clarify the scope of its request.

For example, NBN Co. advised the applicant for Requests 1, 3, 5, 9 and 10 that the requests were unclear and that it would assist NBN Co. if the applicant would identify with greater clarity the documents to which access was being sought. This would ensure NBN Co. was able to process the requests quickly and efficiently. Without clarification, the search and retrieval process could involve officers spending more time, at the applicant’s expense, trying to identify the relevant documents and/or involve a substantial and unreasonable diversion of NBN Co.’s resources.

The applicants for Requests 3, 5, 9, 11, 13, 17, 21 and 29 refined the scope of their original requests. Requests 1, 10, 12, 14 and 28 remained in their original form.

I note that a number of applicants expressed their gratitude at the time taken by the FOI Officer to assist them refine the scope of their request.

### 6. Requests withdrawn

Almost half of the FOI requests made to NBN Co. were withdrawn before a decision on access to the documents requested was made.

Request 1	Request 1 was withdrawn after the applicant was advised that NBN Co. did not hold the requested documents, and was referred to DBCDE and DPMC. DBCDE subsequently made an FOI decision in relation to the requested documents. <sup>33</sup> Further information was made publicly available at the Senate Environment & Communications Committee on 16 June 2011. <sup>34</sup>
Request 2	Request 2 was withdrawn after the applicant was advised that the information requested had already been made public. NBN Co. provided the applicant with links to the publicly available information. <sup>35</sup>
Request 7	Request 7 was withdrawn after NBN Co. provided the applicant with a link to the relevant information on the website of the ACCC. <sup>36</sup>

<sup>32</sup> Section 15(3) of the FOI Act.

<sup>33</sup> [http://www.dbcde.gov.au/about\\_us/freedom\\_of\\_information\\_disclosure\\_log/foi\\_list/007-2011 - Documents relating to the appointment of the NBN Chief Executive Officer and documents referring to Alcatel-Lucent](http://www.dbcde.gov.au/about_us/freedom_of_information_disclosure_log/foi_list/007-2011_-_Documents_relating_to_the_appointment_of_the_NBN_Chief_Executive_Officer_and_documents_referring_to_Alcatel-Lucent)

<sup>34</sup> See <http://202.14.81.230/hansard/senate/commttee/s115.pdf> from page 32

<sup>35</sup> Senate Environment & Communications Committee transcripts of 16 June 2011 at pages 95-95:

<http://202.14.81.230/hansard/senate/commttee/s115.pdf>

Senate Standing Committee (Estimates) in June 2011 – Question on Notice 333:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=ec\\_ctte/estimates/bud\\_1112/bcde/nbnco\\_303-340.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/estimates/bud_1112/bcde/nbnco_303-340.pdf)

<sup>36</sup> <http://www.accc.gov.au/content/index.phtml/itemId/952292>

Request 10	In relation to Request 10, NBN Co. notified the applicant that it had received another similar application (Request 16). The applicant withdrew its request after it was informed NBN Co. could refuse Request 16 as it was substantially similar to Request 10.
Request 11	The applicant in relation to Request 11 informed NBN Co. that it was interested in information concerning the councils' requests and pitches to be chosen for the first release of the NBN. NBN Co. explained to the applicant that none of the requested documents contained such information and provided the applicant with information detailing the logic behind the first release sites. <sup>37</sup> The applicant withdrew Request 11.
Request 12	The documents requested in Request 12 had not been finalised by NBN Co. at the date of the request (15 June 2011). As a result, the applicant withdrew Request 12.
Requests 22, 23, 24	NBN Co. advised the applicant that it considered these requests were substantially similar to the applicant's previous request (Request 15). <sup>38</sup> The applicant withdrew Requests 22, 23 and 24.
Request 26	Request 26 was withdrawn after NBN Co. provided the applicant with a link to the information sought, outside the FOI process. <sup>39</sup>
Request 27	Request 27 was withdrawn after the applicant obtained the information from NBN Co.'s Procurement Group, outside of the FOI process.
Request 28	NBN Co. advised the applicant that negotiated settlements would be subject to a confidentiality regime and were likely to be exempt from the operation of the FOI Act. The applicant withdrew Request 28.
Request 30	In Request 30, the applicant sent NBN Co. a survey it had sent to all Commonwealth Government agencies. The survey sought information regarding NBN Co.'s social media use. NBN Co. responded to the survey outside of the FOI process. The applicant withdrew Request 30.

## Deemed withdrawals

### *Requests 16, 17 and 18*

The applicant in relation to Requests 16, 17 and 18 requested that "any charges not be imposed due to the giving of access being in the general public interest." In each case, NBN Co. requested an advance deposit for processing fees.

The applicant requested that the processing charges be waived on the basis that the access to the documents it requested was in the public interest. The FOI Officer decided to exercise his discretion and provide a 25% reduction in NBN Co.'s processing fees in each case.

<sup>37</sup> Question on Notice 325 & 333 from February 2011 Senate Estimates Hearing  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=ec\\_ctte/estimates/add\\_1011/bcde/nbn\\_319-360.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=ec_ctte/estimates/add_1011/bcde/nbn_319-360.pdf)

<sup>38</sup> Subsection 24(2) of the FOI Act.

<sup>39</sup> <http://nbnco.com.au/assets/documents/nbn-co-operations-manual-18-aug-11.pdf>

The applicant sought a charges review from the OAIC.<sup>40</sup> A delegate of Information Commissioner refused the review on the basis that the applicant had provided insufficient reasons in support of the review.

The applicant did not refine its FOI requests to NBN Co. or pay the advance deposit. Accordingly, NBN Co. deemed Requests 16, 17 and 18 to be withdrawn.<sup>41</sup>

*Request 20*

The applicant requested information that was in the public domain. NBN Co. wrote to the applicant to clarify the documents sought. The applicant did not respond to NBN Co’s correspondence. NBN Co. deemed the request to be withdrawn.

**7. Full access provided**

NBN Co. has provided full access in response to three FOI requests.

Request 13	<p>NBN Co. released the job descriptions for the following positions:</p> <ul style="list-style-type: none"> <li>• Chief Financial Officer</li> <li>• Chief Technology Officer</li> <li>• Chief Human Resources Officer and Head of Corporate Services</li> <li>• Head of Commercial Strategy</li> <li>• Head of Construction</li> <li>• Head of Network Operations</li> <li>• Head of Product Development and Sales</li> <li>• Head of Strategy Business Development<sup>42</sup></li> </ul>
Request 21	<p>NBN Co. provided the applicant with a copy of the Workforce Modelling Overview powerpoint presentation, with the commercially sensitive information in the document redacted, as agreed with the applicant.<sup>43</sup></p>
Refined Request 29B	<p>NBN Co. released a document which outlined the methodology employed to determine the price quoted to a Tasmanian resident to bring fibre to their premises under the fibre extension trial.<sup>44</sup></p> <p>NBN Co. stated that it released the document because it intended to publish a policy document with similar information, the strong public interest in the issue, and no commercially sensitive information would be revealed unless the document was combined with relevant information, such as the Fibre Extension Price (the subject of Refined Request 29A) or a given location or community.</p>

<sup>40</sup> Part G below.

<sup>41</sup> Subsections 24AB(6)(c) and 24AB(7) of the FOI Act.

<sup>42</sup> <http://nbnco.com.au/assets/documents/nbn-co-executives-position-descriptions.pdf> NBN Co. did not hold a job description for its CEO. Accordingly, NBN Co. refused access to that document on the basis that it had taken all reasonable steps to find relevant documents and the FOI Officer was satisfied that the document requested did not exist.

<sup>43</sup> <http://www.nbnco.com.au/assets/presentations/foi-file-no-1112-06-workforce-modelling-overview-19-sep-11.pdf>

<sup>44</sup> <http://nbnco.com.au/assets/documents/d-f/foi-no-1112-14-nbn-co-tas-fibre-extension-network-trial-released-1-february-2012.pdf>

## 8. Partial access provided

NBN Co. provided partial access<sup>45</sup> to the requested documents in response to four FOI requests.

Request	Information in issue	FOI Act sections relied on
Refined Request 5	<p>The applicant was given access to nine documents. Personal identifying information and information that was outside the scope of the request was excluded, as agreed by the applicant.<sup>46</sup></p> <p>NBN Co. refused access to three documents on the basis that the documents disclosed the deliberative process of DBCDE and NBN Co.</p>	47C
Request 6	<p>NBN Co. provided the applicant access to an edited version of the McKinsey letter<sup>47</sup>, with exempt material redacted under subsection 7(3A) (NBN Co.'s "commercial activities") and sections 47 (Trade secrets or commercially valuable information) and 47C (Public interest conditional exemptions – deliberative processes) of the FOI Act.<sup>48</sup></p>	7(3A) 47 47C
Request 9	<p>NBN Co. provided the applicant with access to 22 documents.<sup>49</sup> The applicant was provided with full access to 19 documents. NBN Co. removed "personal details" in one document, but otherwise provided access to this document.</p> <p>The applicant was granted partial access to two documents. NBN Co. relied on section 47G (Public interest conditional exemptions – business) in both cases, and section 47F (Public interest conditional exemptions – personal privacy) in one case.</p>	47F 47G
Request 25	<p>NBN Co. released a redacted version of a document entitled "Technology Discussion Paper: Field Trial Fibre."<sup>50</sup></p> <p>Certain information was redacted on the basis of subsection 7(3A) (NBN Co.'s "commercial activities") and section 47 (Trade secrets or commercially valuable information) of the FOI Act.</p>	7(3A) 47

<sup>45</sup> Section 22 of the FOI Act.

<sup>46</sup> Part 1 - <http://nbnco.com.au/assets/documents/foi-no-1011-05-nbn-co-labour-costs-and-potential-skills-shortages-released-4-oct-11-part1.pdf>

Part 2 – <http://nbnco.com.au/assets/documents/foi-no-1011-05-nbn-co-labour-costs-and-potential-skills-shortages-released-4-oct-11-part2.pdf>

Part 3 – <http://nbnco.com.au/assets/documents/foi-no-1011-05-nbn-co-labour-costs-and-potential-skills-shortages-released-4-oct-11-part3.pdf>

Part 4 - <http://nbnco.com.au/assets/documents/foi-no-1011-05-nbn-co-labour-costs-and-potential-skills-shortages-released-4-oct-11-part4.pdf>

<sup>47</sup> As permitted by section 22 of the FOI Act.

<sup>48</sup> <http://nbnco.com.au/assets/documents/foi-no-1011-06-nbn-co-response-to-mckinsey-implementation-study-released-29-jul-11.pdf>

<sup>49</sup> <http://nbnco.com.au/assets/documents/foi-no-1011-09-nbn-co-correspondence-with-independent-mps-released-15-sep-11.pdf>

<sup>50</sup> <http://nbnco.com.au/assets/documents/foi-no-1112-10-nbn-co-1st-release-sites-technical-paper-released-4-oct-11.pdf>

## 9. Access refused

NBN Co. refused access to the requested documents in response to two FOI requests. In each case NBN Co. notified the applicant that the decision was subject to review under sections 53A and 54 of the FOI Act and provided the applicant with the OAIC's *FOI Fact Sheet 12 – Your review rights*.<sup>51</sup>

Request	Information in issue	FOI Act sections relied on
Request 15	NBN Co. refused access to the documents requested in Request 15 (Telstra agreements) on the basis that the documents were related to NBN Co.'s commercial activities, and therefore the documents were exempt from the operation of the FOI Act by reason of subsection 7(3A). <sup>52</sup> Alternatively, NBN Co. relied on sections 45 (Material obtained in confidence) and 47 (Trade secrets or commercially valuable information) of the FOI Act.	7(3A) 45 47
Refined Request 29A	NBN Co. refused access to a document which quoted the fibre extension price was exempt from the operation of the FOI Act because the document fell within the meaning of the "commercial activities" exemption under section 7(3A) of the FOI Act. Alternatively, NBN Co. relied on 45 (Material obtained in confidence) and 47 (Trade secrets or commercially valuable information) of the FOI Act.	7(3A) 45 47

Section 26 of the FOI Act requires a decision maker to cause the applicant to be given notice in writing of a decision to refuse to grant access to a document or to defer providing access to a document.

NBN Co. provided the applicant with a Statement of Reasons where the FOI Officer decided to grant access, grant partial access, refuse access or defer providing access to the requested documents. An example of a Statement of Reasons provided by NBN Co. (with personal information redacted) is included in Appendix 2.

## 10. Request transferred

Request 4 was transferred to the Department of Prime Minister and Cabinet (**DPMC**). NBN Co. advised the applicant that the DPMC commissioned the Greenhill Caliburn Report on NBN Co's corporate plan, and it did not hold a copy of the report.<sup>53</sup>

<sup>51</sup> As required by section 26(1)(c) of the FOI Act.

<sup>52</sup> The applicant applied to the OAIC for a review of NBN Co's decision. See *Internode Pty Ltd and NBN Co.Ltd* [2012] AICmr 4 in Part 3.2.1 below.

<sup>53</sup> DPMC subsequently published the Executive Summary and certain extracts of the Greenhill Caliburn Report on its website. [http://www.dbcde.gov.au/data/assets/pdf\\_file/0015/132711/Review\\_of\\_NBN\\_Co\\_Limiteds\\_Corporate\\_Plan-Executive\\_Summary.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0015/132711/Review_of_NBN_Co_Limiteds_Corporate_Plan-Executive_Summary.pdf); [http://www.dPMC.gov.au/foi/docs/ips/disclosure\\_logs/2011-090.pdf](http://www.dPMC.gov.au/foi/docs/ips/disclosure_logs/2011-090.pdf).

## **11. No documents existed**

In response to Requests 8, 14 and 31, and Refined Requests 3, NBN Co. advised the applicant that all reasonable steps had been taken to find the document and the FOI Officer was satisfied the requested did not exist.<sup>54</sup>

## **12. Access deferred**

In relation to Request 19, on 5 September 2011 NBN Co. deferred access to the documents requested under subsection 21(1)(b) of the FOI Act on the basis that it planned to release the information requested in its 2010-2011 Annual Report. NBN Co. intended to present the Annual Report to its Shareholder Ministers in early October 2011, and expected the document would be tabled in Parliament shortly thereafter.

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<sup>54</sup> Section 24A(1) of the FOI Act. NBN Co. also advised the applicant to Request 13 that no document existed in relation to one aspect of its request.

## Part D – Grounds relied on by NBN Co. to refuse access

In refusing access to documents, or refusing access to certain parts of documents, NBN Co. relied on the following sections of the FOI Act<sup>55</sup>:

- (a) Section 7(3A) – NBN Co.’s “commercial activities”
- (b) Section 45 – Material obtained in confidence
- (c) Section 47 – Documents disclosing trade secrets or commercially valuable information
- (d) Section 47C – Public interest conditional exemptions – deliberative processes
- (e) Section 47F – Public interest conditional exemptions – personal privacy
- (f) Section 47G – Public interest conditional exemptions – business

### 13. Section 7(3A) – NBN Co.’s “commercial activities”

The FOI Officer adopted the following position on “commercial activities” in response to Requests 6, 15 and 25<sup>56</sup>. The FOI Officer noted that the “commercial activities” exemption in section 7(3A) was different from the “commercial activities” exemption in section 7(3) that applied to other government entities. Notably, the “commercial activities” exemption in section 7(3) is limited by a competition requirement, while no such competition limitation applied in relation to section 7(3A). The FOI Officer concluded that the “commercial activities” exemption in relation to NBN Co. was broader in scope than the “commercial activities” exemption that applied to other government entities.

The FOI Officer decided to adopt a “Plain English” understanding of the term “commercial activities”. The FOI Officer adopted the definitions of “commercial”<sup>57</sup>, “activities”<sup>58</sup> and “commerce”<sup>59</sup> as those words are defined in the Macquarie On-line Dictionary. The FOI Officer concluded that documents would be exempt under section 7(3A) if they were documents relating to NBN Co.’s

“active business or trade operations that would be capable of returning a profit either at present or in the reasonably foreseeable future.”

### Request 6

The FOI Officer considered the requested document in Request 6 included references to:

- parts of NBN Co.’s business model, including highly sensitive commercial information;
- negotiating positions taken by NBN Co. and positions it was likely to take in the future; and
- future business opportunities, and NBN Co.’s position in relation to those opportunities.

As a result, the FOI Officer considered NBN Co. was clearly an “active business” that was seeking to advance its commercial interests. The FOI Officer explained that he considered NBN Co. had a profit element because NBN Co. was expected to:

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<sup>55</sup> The text of the sections is set out in Appendix 3.

<sup>56</sup> These decisions were made before the Information Commissioner’s decision in *Internode*.

<sup>57</sup> Defined to include “of, or of the nature of, commerce”; “engaged in commerce”; and “capable of returning of profit”.

<sup>58</sup> Defined as “the state of action; doing”; and “an exercise of energy or force; and active movement or operation”.

<sup>59</sup> Defined to include “trade” and “business”.

- generate an internal rate of return at, or higher than, the return of government bonds;
- operate in a commercial manner, with a view to privatisation; and
- generate dividends and profits over a long period of time.

In addition, NBN Co.'s activities were generally focused on making a profit, and NBN Co. was required to minimise costs and maximise returns. The FOI Officer concluded that the requested document fell within the meaning of "commercial activities". Nonetheless, the applicant was provided with access to an edited version of the document, with exempt information redacted.

### **Request 15**

In response to Request 15, the FOI Officer concluded that the requested documents (the four "Definitive Agreements" between NBN Co. and Telstra) fell within the meaning of section 7(3A) of the FOI Act and were therefore not subject to the FOI Act for the following reasons:

- The "Telstra Deal" recorded in the documents was negotiated after two years.
- The "Telstra Deal" constituted an "active" business operation or undertaking as the documents:
  - (i) contained provisions and information NBN Co. and Telstra believed were to protect their long-term commercial interests; and
  - (ii) outlined the business framework required to manage relations between Telstra and NBN Co. for the duration of the deal.
- The documents provide for payments of approximately \$9 billion to Telstra.
- The requested documents constituted a key element in NBN Co.'s commercial strategy and thereby had a profit element.
- The "Telstra Deal" would generate significant cost and operating savings to NBN Co., thereby increasing NBN Co.'s rate of return and eventual profitability. The Telstra Deal was also expected to provide greater certainty for NBN Co.'s revenue projections.
- NBN Co. was expected to generate an internal rate of return at, or higher than, the return of government bonds.

### **Request 25**

In relation to Request 25, the FOI Officer considered the requested document fell within the section 7(3A) of the FOI Act for the following reasons:

- The document detailed the design and cost parameters used to formulate the "Network Cost Model". It outlined sensitive planning and cost differences between aerial and underground fibre deployment in the same area across a number of geo-types.
- The fibre network rollout was to take place in stages, over nearly a decade. Initial pricing, planning and scheduling information was therefore highly commercially sensitive.
- The information in the document constituted a key element in NBN Co.'s commercial planning efforts, and revealed NBN Co.'s bargaining position in relation to tender bids for the rollout of the fibre network.
- The disclosure of the information in the document would
  - undermine NBN Co.'s ability to obtain value for money in the market place.
  - most likely have a negative impact on NBN Co.'s long term business plans and its ability to operate in a competitive market. This could impair NBN Co.'s ability to provide a commercial rate of return and impair NBN Co.'s prospects for privatisation; and
  - impact on NBN Co.'s ability to operate commercially and thereby make a profit.

## Refined Request 29A

The FOI Officer adopted the statements cited at paragraphs 12 and 13 of the *Internode* decision (refer to Part H below), but noted it would be difficult to articulate a comprehensive definition of NBN Co.'s "commercial activities" beyond those points, particularly as NBN Co. was in an early operational phase.

The FOI Officer noted eight background circumstances surrounding the "fibre extension program", which was at the heart of Refined Request 29A:

- NBN Co.'s fibre footprint was based upon detailed procurement and construction modelling, to enable NBN Co. to roll out fibre broadband connectivity to 93% of Australian premises in the most cost efficient manner.
- The remaining 7% of premises would be covered by wireless (4%) and satellite services (3%).
- Occupants of premises outside the fibre footprint may request NBN Co. to provide them with a quote to extend fibre to their premises. The occupant would be required to pay the Fibre Extension Price and other costs associated with the fibre extension.
- The fibre footprint extension programme is in a trial phase. NBN Co. expects to publish a policy document to assist the public in understanding the parameters of the fibre extension program.
- The Fibre Extension Price for any fibre extension project will vary, and will depend on factors including the site location, geography, topography, distance from fibre connection point, and the number of premises sharing the cost.
- The Fibre Extension Price will reflect NBN Co.'s cost to provide the service extension. This is inherently commercially valuable information to NBN Co. and its construction partners. If the price were released with the quote methodology document<sup>60</sup>, it would be possible to reverse engineer the quote to calculate the fibre extension builder's cost. NBN Co. provides the Fibre Extension Price to interested parties on a confidential basis, so as to safeguard NBN Co.'s and its business partners' commercially sensitive and confidential information.
- The Fibre Extension Price information could be used by players within the telecommunications or construction industries to gain an advantage in their dealings with competitors or NBN Co. The release of the Fibre Extension Price with the quote methodology document would impact on NBN Co.'s ability to go to market and receive competitive tender bids for elements of the network's roll-out.
- The Fibre Extension Price information could also reveal NBN Co.'s business model and commercial strategy, which would make the company more vulnerable to current and future competitors. It could also make NBN Co. potentially less attractive to investors when it eventually privatises.

## 14. Section 45 – Material obtained in confidence

Under s 45(1) of the FOI Act, a document is an exempt document if its disclosure would found an action, by a person other than an agency or the Commonwealth, for breach of confidence.

The FOI Officer relied on section 45, *in the alternative* to section 7(3A) of the FOI Act, to refuse access to the Telstra Definitive Agreements (Request 15) and the Fibre Extension Price quoted to a Tasmanian resident (Request 29A).

### Request 15

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<sup>60</sup> Which was provided to the applicant.

The FOI Officer considered the following criteria were satisfied:

- (i) *The confidential information must be specifically identified* - Each requested document contained express and strict undertakings of confidentiality;
- (ii) *The information must have the quality of confidentiality* - The specific details of the requested documents were only provided to NBN Co.'s senior corporate officers, directors, Shareholder Ministers, relevant advisers and other parties to the Telstra Deal. Each of whom was bound by strict obligations of confidentiality;
- (iii) *There must be a mutual understanding of confidence* – The FOI Officer repeated the response to (i) above;
- (iv) *There must be an unauthorised disclosure or the threat of unauthorised disclosure* - If the requested documents were disclosed, they would be released to the applicant and the world at large through NBN Co.'s Disclosure Log, as required by section 11C of the FOI Act. This would violate the undertakings of confidentiality.
- (v) *The authorised disclosure has or will cause detriment to the person who provided the confidential information* - Breach of the confidentiality regime in the requested documents could give rise to a cause of action.

The FOI Officer concluded that the release of the documents requested in Request 15 would found an action for breach of confidence, and therefore the documents were exempt under section 45(1) of the FOI Act.

#### **Revised Request 29A**

- (i) *The confidential information must be specifically identified* - The information used by NBN Co. to produce the Fibre Extension Price was provided by its construction partner in confidence. Both parties agreed to those terms. Release of the Fibre Extension Price together with the quote methodology document would indirectly disclose this confidential information.
- (ii) *The information must have the quality of confidentiality* -NBN Co. only shared the specific details of the Fibre Extension Price with its relevant staff, contractors and the Tasmanian resident concerned, all of who have agreed to strict obligations of confidentiality.
- (iii) *There must be a mutual understanding of confidence* – The FOI Officer repeated the response to (i) above;
- (iv) *There must be an unauthorised disclosure or the threat of unauthorised disclosure* - If this FOI application were successful, NBN Co. would be required to release the Fibre Extension Price, both to the applicant and the world-at-large through NBN Co.'s Disclosure Log, under section 11C of the FOI Act. This potential disclosure would be in clear violation of the undertakings referred to above;
- (v) *The authorised disclosure has or will cause detriment to the person who provided the confidential information* – NBN Co. is subject to a confidentiality regime under its contract with the Tasmanian fibre extension builder.

The FOI Officer relied on the following additional points in relation to the detriment that would be suffered by NBN Co.:

- The potential release of the Fibre Extension Price could be used to calculate NBN Co.'s construction partners' costs, business model and pricing formulas. This information could be used by NBN Co.'s business partners' competitors in the construction sector, thereby potentially undermining NBN Co.'s construction partners' market share and profitability. If NBN Co. were to

release the Fibre Extension Price, this could give rise to cause of action against the company, along with a claim for damages.

- The potential release of the Fibre Extension Price would have a significant and detrimental effect on NBN Co.'s future business activities. In particular, commercial entities and other potential business partners would, most likely, limit the scope of confidential information provided to NBN Co. In addition, businesses and other parties may refuse to share such information with NBN Co. – or only do so at an increased cost to NBN Co.
- NBN Co.'s ability to engage high quality and competitive business partners would be undermined. It follows that NBN Co.'s negotiating position would be compromised, along with its capacity to generate shareholder value. It may mean that NBN Co. would be unable to proceed with its mandate to roll out the national broadband network, which would have a negative impact on the Australian public.

For these reasons, the FOI Officer's opinion was the potential release of the Fibre Extension Price document would found an action for breach of confidence. As such, the Fibre Extension Price would be exempt from release under section 45 of the FOI Act and access to this information was denied.

### **15. Section 47 – Documents disclosing trade secrets or commercially valuable information**

Section 47 of the FOI Act provides that a document is an exempt document if its release would disclose trade secrets or commercially valuable information.

The FOI Officer relied on section 47, in the alternative to section 7(3A), in response to Requests 6, 15, 25 and Revised Request 29A. The reasoning provided by the FOI Officer was as follows.

#### **Request 6**

The disclosure would reveal NBN Co.'s business modelling, negotiating positions, business and product development plans. The FOI Officer considered that this information was inherently valuable, particularly as NBN Co. was progressing, finalising and implementing significant commercial agreements with key players in the telecommunications market. In the FOI Officer's view, disclosing the information would destroy or greatly diminish NBN Co.'s negotiating position, its ability to engage with business partners in a competitively neutral manner and obtain value for money in the market place.

#### **Request 15**

- The requested documents represented the outcome of complex commercial negotiations. The documents were expected to govern the relations between Telstra and NBN Co. for at least 35 years. Disclosure of the information contained in the requested documents was likely to cause significant commercial harm to one or both parties, which would clearly diminish or destroy the value of information to NBN Co. and Telstra.
- The requested documents contained highly sensitive commercial and financial arrangements and intellectual property which was protected by confidentiality arrangements, disclosure of which could give rise to an action against NBN Co. for breach of confidence.
- The disclosure of the requested documents would be likely to limit the scope of commercial valuable information current and future business partners provided to NBN Co., or alternatively may result in parties refusing to share such information with NBN Co. The result would be to undermine NBN Co.'s ability to engage high quality, competitive business partners and would destroy or significantly diminish the commercial value of the "Telstra Deal" and future deals; and

- There would be a significant detriment to the general public/Australian taxpayer, as it would push back the progress of NBN Co's roll out, drive up costs and undermine efficiencies.

#### **Request 25**

- The document contained sensitive design and cost parameters used in the formulation of the Network Cost Model.
- The disclosure of costs, pricing and planning processes related to the fibre trial and rollout would be likely to cause significant commercial harm to NBN Co.
- Release of that information would diminish the value of the information to NBN Co. by signalling entry price points for business partners or contractors. It would also reveal NBN Co.'s business modelling to competitors and/or competitive technologies.
- There would be a significant detriment to the general public/Australian taxpayer if the document were released, specifically, it would drive up costs and undermine efficient business practices during the rollout.

#### **Revised Request 29A**

- NBN Co. used a quoting tool – combined with information from commercially negotiated agreements – to calculate the Fibre Extension Price. In addition to being protected by confidentiality arrangements, this information was said to be highly sensitive and also an integral part of the business model of both NBN Co. and its Tasmanian construction business partners. If this information were released in the public domain, the FOI Officer was of the opinion that its commercial value would be destroyed (or could reasonably be expected to be destroyed or diminished), as it would enable competitors to calculate construction costs or the market entry point.
- The potential disclosure of the Fibre Extension Price could give rise to a right of action against NBN Co. for a breach of confidence. An action for breach of confidence would obviously increase legal and transactions costs to both NBN Co. and its contractors, thereby greatly diminishing the value of the information.
- If the Fibre Extension Price were released, current and future business partners would, most likely, limit the scope of commercially valuable information provided to NBN Co. Alternatively, parties may refuse to share such information with NBN Co. This would undermine NBN Co.'s ability to engage high quality and competitive business partners. It follows that the potential release of the Fibre Extension Price would either destroy or significantly diminish the commercial value of NBN Co.'s brand, NBN Co.'s standing in the business community and its ability to obtain value-for-money when it goes to market.
- There would be a significant detriment to the general public and the Australian taxpayer, as it would push back the progress of NBN Co.'s roll out, drive up costs and undermine efficiencies, all of which would negatively impact the public purse.

### **16. Section 47C – Public interest conditional exemptions – deliberative processes**

Section 47C of the FOI Act conditionally exempts documents from release if they would disclose a deliberative process of any agency or prescribed authority. NBN Co. relied on section 47C in response to two requests – Refined Request 5 and Request 6.

#### **Refined Request 5**

NBN Co. relied on s 47C to refuse access to three documents which fell within Refined Request 5. These three documents were prepared as speaking points or prepared Parliamentary Questions for the Minister for Broadband, Communications and the Digital Economy. The NBN Co. FOI Officer accepted the objections to the release of these documents from the DBCDE for reasons which included:

- The documents contained:
  - opinions, advice and recommendations prepared by the DBCDE;
  - consultations and deliberations for the purpose of informing the decision making processes in relation to the NBN and managing the labour and skills required for the project; and
  - information concerning the ongoing management of policy issues surrounding the NBN rollout and NBN Co.'s current and future business planning processes.
- The advice in the documents would have a bearing on the Minister, and Government's future decisions and policies in relation to managing the supply of staff and industrial negotiations related to the NBN.
- The Minister had not utilised the information in the documents in Parliament or other similar forums.
- It was not possible or practical to separate the factual material in the documents from the deliberative information, therefore the exclusions in subsections 47C(2) and (3) did not apply.

## **Request 6**

In relation to Request 6, the FOI Officer considered the requested document contained deliberative material for the following reasons, the requested document contained:

- opinions, advice and recommendations prepared by NBN Co. for the purpose of briefing the Government and DBCDE on matters with respect to the NBN. This would have a later bearing on the Minister or the Government's decisions with respect to those issues.
- information relating to consultations and deliberations that had taken place for the purposes of informing Ministerial and Government decision-making processes in respect of
  - (a) The Government's response to the Implementation Study;
  - (b) The ongoing management of policy issues surrounding the NBN rollout; and
  - (c) Subsequent instructions to NBN CO. in the Statement of Expectations.
- Work undertaken for the preparation of Cabinet submissions by the Minister, progress of regulatory measures, the discussion of possible options in relation to negotiations currently underway with external stakeholders and the identification of matters proposed for later deliberation by Cabinet.

Further, the regulatory landscape that applied to NBN Co. was still being finalised. As such, disclosure of the requested document could have the effect of revealing the Government's interim and/or incomplete position in relation to a number of significant policy matters. This could undermine NBN Co.'s ability to negotiate acceptable policy positions during the ACCC review processes and undermine NBN Co.'s negotiation position and relationships with new or current commercial business partners. The FOI Officer decided to provide an edited copy of the McKinsey letter, with the exempt material redacted.

In each case, while s 47C requires access to be given to a conditionally exempt document unless it would be contrary to the public interest, the FOI Officer considered that the release of the documents would be contrary to the public interest because there is a strong public interest in matters relating to NBN Co. This was due to the sheer size of the project, the "national" scope of the project, and it is principally funded by the

Commonwealth Government. In forming this view, the FOI Officer considered the factors outlined in the OAIC's Guidelines favouring disclosure.<sup>61</sup>

### **17. Section 47F – Public interest conditional exemptions – personal privacy**

Section 47F provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information. Personal information is defined in subsection 4(1) of the FOI Act.

#### **Request 9**

One of the documents that fell within the scope of Request 9 was an email chain that contained details of a subcontractor and an accommodation supplier. The subcontractor had allegedly failed to pay the supplier's bill. The email contained private and personal details regarding the supplier and the subcontractor and other individuals related to their businesses. The FOI Officer concluded this information fell within the meaning of section 47F. The FOI Officer took into account the public interest considerations for disclosure and against disclosure as required by section 11A(5) of the FOI Act. He also considered the OAIC's Guidelines<sup>62</sup>, the factors favouring disclosure outlined in section 11B(3) of the FOI Act, and confirmed that he did not take account of any of the "irrelevant" factors listed in section 11B(4) of the FOI Act. The FOI Officer provided the applicant with a redacted version of the email chain.

### **18. Section 47G – Public interest conditional exemptions – business**

Section 47G provides that a document is conditionally exempt if its disclosure would disclose information concerning the business or professional affairs of a person, or the business, commercial or financial affairs of an organisation or undertaking, where that disclosure would unreasonably affect the person adversely or prejudice the future supply of information to NBN Co.

#### **Request 9**

In relation to the documents that fell within the scope of Request 9 (the email chain that contained details of a sub-contractor and an accommodation supplier) a second document contained references to the quality of a certain business. The FOI Officer concluded that the documents contained business information within the meaning of s 47G of the FOI Act, and that the disclosure of the document could reasonably be expected to have an unreasonable, adverse effect on the business affairs of the businesses.

The FOI Officer took into account the public interest considerations for disclosure and against disclosure as required by section 11A(5) of the FOI Act. He also considered the OAIC's Guidelines,<sup>63</sup> the factors favouring disclosure outlined in section 11B(3) of the FOI Act, and confirmed that he did not take account of any of the "irrelevant" factors listed in section 11B(4) of the FOI Act.

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<sup>61</sup> As required by section 11B(5) of the FOI Act.

[http://www.oaic.gov.au/publications/agency\\_resources/guide\\_freedom\\_of\\_information\\_act\\_1982.html](http://www.oaic.gov.au/publications/agency_resources/guide_freedom_of_information_act_1982.html)

<sup>62</sup> As required by section 11B(5) of the FOI Act.

[http://www.oaic.gov.au/publications/agency\\_resources/guide\\_freedom\\_of\\_information\\_act\\_1982.html](http://www.oaic.gov.au/publications/agency_resources/guide_freedom_of_information_act_1982.html)

## Part E – Review of grounds relied on by NBN Co. to refuse access

### 19. Section 7(3A) – NBN Co.’s “commercial activities”

The people who were consulted raised four main concerns with NBN Co.’s “commercial activities” exemption.

- First, these persons considered that the nature of the exemption is broad.
- Second, these persons considered that it is not clear from the FOI Act what test applies in determining whether a document falls within NBN Co.’s “commercial activities.”
- Third, these persons considered that there was concern that NBN Co. appeared unwilling to provide access to the requested documents, with the “commercial activities” information redacted.
- Fourth, these persons queried whether NBN Co. may have misused the “commercial activities” exemption.

#### (i) *Width of the exemption*

There is no doubt that the “commercial activities” exemption is broad. However it is by no means clear how this concept can be narrowed without adding undue complexity and without doing a disservice to the public interest in a particular case.

It is true that many of the activities of NBN Co. fall within NBN Co.’s commercial activities. The following reasoning of the FOI Officer, in refusing access to a particular document, illustrates this:

- NBN Co.’s ability to engage high quality and competitive business partners would be undermined.
- NBN Co.’s negotiating position would be compromised, along with its capacity to generate shareholder value.
- NBN Co. may be unable to proceed with its mandate to roll out the national broadband network, which would have a negative impact on the Australian public.
- If the document were released, current and future business partners may limit the scope of commercially valuable information it would provide to NBN Co., or refuse to provide such information to NBN Co.
- The release of the document would either destroy or significantly diminish the commercial value of NBN Co.’s brand, its standing in the business community and its ability to obtain value-for-money when NBN Co. goes to market.
- There would be a significant detriment to the general public and the Australian taxpayer, as it would push back the progress of NBN Co.’s roll out, drive up costs and undermine efficiencies, all of which would negatively impact the public purse.

This general issue was raised *Papps v Australian Postal Corporation*<sup>64</sup> (*Papps*) in the context of section 7(3) of the FOI Act. In *Papps*, the Administrative Appeals Tribunal (AAT) was required to decide whether the requested documents were exempt under section 7 of the FOI Act. The AAT accepted that if the letter service and standard postal service operated by Australia Post was characterised as a “commercial activity” of Australia Post, it would be difficult to imagine what activities of Australia Post would not be “commercial

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<sup>64</sup> [2004] AATA 833

activities”.<sup>65</sup> The AAT noted if Australia Post were completely excluded from the FOI Act, one might wonder why it was an agency exempt under Schedule 2 Part II of the FOI Act, rather than an “Exempt agency” under Schedule 2 Part I of the FOI Act.<sup>66</sup>

However, the definition of “commercial activities” in s 7(3) includes a requirement that the activities be carried out on a commercial basis in competition with persons other than government. It was partly due to the fact the letter service and standard postal service were not carried on in competition with anyone that the AAT concluded that they were not “commercial activities” of Australia Post.

No such requirement of competition applies to NBN Co. The “commercial activities” exemption is not limited. By the same token, NBN Co. is subject to the FOI Act. It is not an exempt agency; it is only intended to be exempt in respect of particular documents. While I note the concerns of some applicants that NBN Co.’s mandate is to serve a public interest, and therefore NBN Co. should be subject to greater scrutiny than would otherwise be placed on equivalent private sector companies, the Parliament has determined that the exemption that applies to NBN Co. is in relation to activities it conducts on a commercial basis.

The Explanatory Memorandum does not assist in the interpretation of “commercial activities”.<sup>67</sup>

In the context of section 7(3) of the FOI Act, “commercial activities” has been interpreted to include a requirement that the activities have an element of profit.<sup>68</sup> NBN Co. is clearly expected to generate a profit, and such profit must be sufficient to attract potential investors for eventual privatisation.

In my view, NBN Co., through its FOI Officer, has gone to considerable lengths to identify precisely why in each case he considers the particular documents requested concern information relating to NBN Co.’s commercial activities. Certain aspects of NBN Co.’s operations, notably the agreements with Telstra and the financial modelling behind the NBN rollout and the Fibre Extension Plan, clearly contain commercially sensitive information. From the material I have reviewed, NBN Co. has genuinely sought to give effect to the pro-disclosure requirements of the FOI Act, while appropriately protecting information that is commercially sensitive to NBN Co.

### ***(ii) Test to be applied***

In *Internode*, the FOI Commissioner considered the applicant’s submission that a dominant purpose test should apply in determining whether a document falls within the “commercial activities” exemption. He rejected this submission stating:

I can see no reason to read a ‘dominant purpose’ requirement into the exemption in s 7(2). I note that the exemption in s 34 (Cabinet documents) expressly involves a ‘dominant purpose’ requirement.

In my view, the FOI Commissioner was correct to reach this conclusion. There is nothing express or implicit in the language of section 7(2) that would suggest it is appropriate to apply a ‘dominant purpose’ test to

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<sup>65</sup> *Papps and Australian Postal Corporation* [2004] AATA 833 at [78].

<sup>66</sup> *Papps and Australian Postal Corporation* [2004] AATA 833 at [78].

<sup>67</sup> Revised Explanatory Memorandum, page 15: “The purpose of these amendments is to make NBN Co subject to the Commonwealth freedom of information laws and to provide a targeted exemption to NBN Co in order to protect the confidentiality of its commercial activities. The objects of the FOI Act are to give the Australian community broad access to information held by the Government by requiring agencies to proactively publish certain information and giving citizens a right of access to documents held by prescribed authorities and the proposed amendments are consistent with the objects of the FOI Act.”

<sup>68</sup> *Re Pye and Australian Postal Corporation* [2004] AATA 1097 at [32], referring to Kirby J in *Hodges v Frost* (1984) 53 ALR 373, at 381.

determine whether the documents fall within the “commercial activities” exemption. As the FOI Commissioner noted, a “dominant purpose” test is expressly used in section 34 of the FOI Act in relation to Cabinet documents. The fact that Parliament did not include a “dominant purpose” test in section 7(2) must be taken to have been a deliberate choice.

While I note the concerns of the applicant in this case that the FOI Act does not expressly state which test is to be applied in determining whether a document falls within the “commercial activities” exemption, it is clear enough that the test to be applied is whether the document was brought into existence for the *substantial* purpose of NBN Co.’s commercial activities. Section 7(4) of the FOI provides that a reference to documents in Part II of Schedule 2 is a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities. In the context of section 7(3), the Federal Court has interpreted the test in section 7(4) as follows:

“That test required the Tribunal to determine, on the evidence, the purposes for which the list was brought into existence; whether there was one or more purposes and if more than one purpose including a purpose of carrying on Australia Post’s commercial activities, whether that purpose was a **substantial purpose**.”<sup>69</sup> (Emphasis added)

As the Court was interpreting section 7(4), which applies to Part II of Schedule 2, this interpretation also applies to NBN Co.

### *(iii) Redacted information*

One applicant raised concerns that NBN Co. appeared unwilling to provide access to the requested documents, with the “commercial activities” information redacted. The documents that I have reviewed do not support this concern. NBN Co. relied on the commercial activities exemption in four cases. In two of those, NBN Co. refused access completely.<sup>70</sup> In the remaining two cases, NBN Co. did provide access to the requested documents but redacted commercially sensitive information.<sup>71</sup>

Request 15 related to the Definitive Agreements between Telstra and NBN Co., which were the subject of the FOI Commissioner’s decision in *Internode*. The FOI Commissioner did not examine the documents,<sup>72</sup> but was satisfied from the material provided by Internode Pty Ltd and NBN Co. that the activities to which the documents related were carried on by NBN Co. on a commercial basis.<sup>73</sup> Similarly, I have not reviewed the Definitive Agreements, but based on the information provided by Telstra to the ASX<sup>74</sup> and the reasons given by the FOI Officer, I am also satisfied that the Definitive Agreements have been brought into existence for the substantial purpose of carrying on NBN Co.’s commercial activities. Redaction is appropriate and practical for certain types of documents. For some documents, so much material would be required to be redacted that the redacted document becomes meaningless. Given the subject matter of the Definitive Agreements, I do not consider NBN Co. could have possibly redacted the Definitive Agreements in a way that would have resulted in a meaningful document for Internode Pty Ltd.

In Refined Request 29A the applicant sought the Fibre Extension Price quoted to a Tasmanian resident. As I understand it, the fibre extension price is the cost of extending NBN Co.’s fibre to particular premises that are beyond the reach of NBN Co.’s fibre broadband. Seven per cent of Australian premises fall within this

<sup>69</sup> *Australian Postal Corporation v Johnston* [2007] FCA 386 at [36]

<sup>70</sup> Request 15 and Refined Request 29A

<sup>71</sup> Requests 9 and 25.

<sup>72</sup> *Internode* at [18]

<sup>73</sup> *Internode* at [15]

<sup>74</sup> <http://www.asx.com.au/asxpdf/20110623/pdf/41zclcl1vjs25r.pdf>

category. I have reviewed the requested documents. The Fibre Extension Price is clearly an important component of NBN Co.'s business. NBN Co. has engaged, and will engage, construction partners to build fibre extensions. The cost of extending the fibre to the particular Tasmanian resident would provide potential construction partners valuable knowledge as to the financial modelling used in that instance, which would directly affect negotiations for future fibre extensions.<sup>75</sup> In my view, the documents have clearly been brought into existence for the substantial purpose of carrying on NBN Co.'s commercial activities. Moreover it would not have been possible to redact this document without making it meaningless.

I have reviewed the information that was redacted in the documents the subject of Requests 6 and 25. I note that in each case the majority of the document was not redacted. In my view, the information that was redacted was clearly commercially sensitive; it detailed NBN Co.'s commercial position in relation to a number of issues, pricing information, the identities of potential design partners, and commercial assumptions. The information therefore fell within the commercial activities exemption.

*(iv) Whether NBN Co. has misused the commercial activities exemption*

On the information I have reviewed, there is nothing to suggest that NBN Co. has misused the commercial activities exemption. As noted above, the exemption has only been relied on in response to four requests, and, in two of those, documents were provided with the commercially sensitive information redacted.

## **20. Section 45 – Material obtained in confidence**

The elements of a breach of confidence action in equity are well-established,<sup>76</sup> and were correctly identified by the FOI Officer. Each of these elements must be considered against a background of disclosure under the FOI Act. It is clear from the reasoning provided by the FOI Officer that the requested documents were subject to obligations of confidentiality, and that the release of the information would found an action for breach of confidence against NBN Co.<sup>77</sup>

I note the FOI Commissioner did not consider it necessary to examine the other exemptions relied on by NBN Co. in response to Request 15: see *Internode* at [17].

## **21. Section 47 – Documents disclosing trade secrets or commercially valuable information**

Each of the requested documents clearly contained information that was commercial in character,<sup>78</sup> and was valuable for the purposes of carrying on the commercial activities in which NBN Co. is engaged.<sup>79</sup> The information would be valuable outside of NBN Co.<sup>80</sup> In my view, the commercial value of the information

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<sup>75</sup> Particularly as once the information is released it is publicly available pursuant to section 11C of the FOI Act.

<sup>76</sup> *Corrs Pavey Whiting and Byrne v Collector of Customs* (1987) 14 FCR 434 at 443; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *Saltman Engineering Co Ltd v Campbell Engineering Co* (1948) 65 RPC 203.

<sup>77</sup> I note that in each case NBN Co. also explained to the applicant the potential detriment that would be suffered if the requested documents were released. Detriment is not an element of breach of confidence: *Smith, Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 28 FCR 291. *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39 concerned whether the Commonwealth itself could claim breach of confidence. I therefore do not consider the comments made by Mason J in relation to detriment in that case to be relevant.

<sup>78</sup> *Secretary, Department of Employment, Workplace Relations and Small Business v The Staff Development and Training Centre* (2001) 32 AAR 531 at [28]; *Re Mangan and The Treasury* [2005] AATA 898 at [36].

<sup>79</sup> *Re Sitel Australia Pty Ltd and Employment Advocate* (2005) 40 AAR 552 at 561, [2005] AATA 617 at [49].

<sup>80</sup> *Secretary, Department of Employment, Workplace Relations and Small Business v The Staff Development and Training Centre* (2001) 32 AAR 531 at [28].

could reasonably be expected to be destroyed or diminished if it were disclosed.<sup>81</sup> I am satisfied that the information contained commercially valuable information, and was therefore exempt under section 37 of the FOI Act.

The FOI Commissioner did not consider it necessary to examine the other exemptions relied on by NBN Co. in response to Request 15: see *Internode* at [17].

## **22. Section 47C – Public interest conditional exemptions – deliberative processes**

The words in section 47 should be given their natural and ordinary meaning.<sup>82</sup> In *Re James and Australian National University*<sup>83</sup>, Deputy President Hall noted (at 335) that:

With respect to deliberative process documents, Parliament itself cast the net very wide. It is sufficient to bring a document within s [47] if the disclosure of the document would disclose matter in the nature of or relating to opinion, advice, or recommendations *obtained, prepared or recorded* or consultation or deliberation that has taken place, *in the course of or for the purposes of* the deliberative processes involved in the functions of the agency.

I have reviewed the document requested in Request 6. The document contains opinions, advice and recommendations, which clearly reveal the deliberative processes of NBN Co. and DBCDE. The document is therefore conditionally exempt under section 47C of the FOI Act. While I have not reviewed the document the subject of Revised Request 5, I am satisfied, for the reasons given by the FOI Officer, that the document is also conditionally exempt under section 47C of the FOI Act.

## **23. Section 47F – Public interest conditional exemptions – personal privacy**

Personal information is defined in subsection 4(1) of the FOI Act to mean

information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

The nature of the private and personal details in the email chain is not entirely clear from the reasons provided by the FOI Officer. I have been advised that the information concerned the individuals' names, addresses, mobile phone numbers, and personal or business email addresses. I am satisfied that this information constitutes personal information. I also note that the applicant agreed with the FOI officer that personal details were outside the scope of the request.

## **24. Section 47G – Public interest conditional exemptions – business**

Section 47G was inserted in 2010 as part of the *Freedom of Information Amendment (Reform) Act 2010* amendments. Section 47G preserved the business affairs exemption that previously existed in section 43(1)(c), but introduced a new public interest test. In my view, as “business affairs” should be given its ordinary and natural meaning, the reasoning of the FOI Officer demonstrates that the documents contained information concerning the business affairs of the supplier and the subcontractor. Importantly, the FOI Officer considered the public interest considerations in determining whether to disclose the information. His conclusion, which I

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<sup>81</sup> *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 121.

<sup>82</sup> *Re James and Australian National University* (1984) 2 AAR 327 at 335 (considering the previous form of section 47, subsection 36(1)(a)).

<sup>83</sup> (1984) 2 AAR 327 at 335 (considering the previous form of section 47, subsection 36(1)(a)).

accept was correct, was to redact the “business affairs” information, and provide the applicant access to the rest of the documents.

## **Part F – Timeframes within which NBN Co. responded to FOI requests**

### **Notifying the applicant the FOI request had been received**

Under the FOI Act, NBN Co. must acknowledge receipt of an FOI request within 14 days of receiving the request.<sup>84</sup> In all 31 requests reviewed, NBN Co. notified the applicant the FOI request had been received within 14 days of receiving the request.

### **Notifying the applicant of NBN Co.’s decision**

NBN Co. has 30 days commencing after the date on which it receives the FOI request to enable the applicant to be notified of a decision on the request.<sup>85</sup> In calculating the length of the processing period, NBN Co. had regard to the FOI Act and the OAIC’s Guidelines.<sup>86</sup>

In 23 cases, NBN Co. was required to notify the applicant of its decision within 30 days. In 22 of these cases, NBN Co. notified the applicant within 30 days. NBN Co. responded to Request 15 within 31 days. The decision date for Request 15 fell on Sunday 24 July 2011. The decision was sent on Monday 25 July 2011.

#### *Extension of statutory processing period*

Four main factors affected the total processing time of FOI requests made to NBN Co.:

- Requests to revise the scope of the request<sup>87</sup>
- Requests for payment<sup>88</sup>
- Third party consultations<sup>89</sup>
- Agreement with the applicant.<sup>90</sup>

In eight cases, the processing time for the request was extended through agreement with the applicant or because NBN Co. conducted third party consultations. In each case, NBN Co. responded within the extended time limit.

In general, the applicants that were consulted were complimentary of the manner in which NBN Co. handled FOI requests and the timeframes within which NBN Co. responded. Applicants appreciated the FOI Officer telephoning them shortly after the request had been received to discuss the request.

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<sup>84</sup> Section 15(5)(a) of the FOI Act.

<sup>85</sup> Section 15(5)(b) of the FOI Act.

<sup>86</sup> [http://www.oaic.gov.au/publications/agency\\_resources/guide\\_freedom\\_of\\_information\\_act\\_1982.html#\\_Toc30853503](http://www.oaic.gov.au/publications/agency_resources/guide_freedom_of_information_act_1982.html#_Toc30853503)

<sup>87</sup> Section 15(2)(b) of the FOI Act;

[http://www.oaic.gov.au/publications/agency\\_resources/guide\\_freedom\\_of\\_information\\_act\\_1982.html#\\_Toc30853503](http://www.oaic.gov.au/publications/agency_resources/guide_freedom_of_information_act_1982.html#_Toc30853503)

<sup>88</sup> Under Subsections 29(1) or (6) of the FOI Act.

<sup>89</sup> Subsection 15(6) of the FOI Act, see also section 26A (Consultation – documents affecting Commonwealth-State relations etc.), section 27 (Consultation – business documents), and section 27A (Consultation – documents affecting personal privacy).

<sup>90</sup> Section 15AA(a) of the FOI Act. The OAIC notes extension by agreement is independent of the 30 day extension to facilitate consultation with third parties.

[http://www.oaic.gov.au/publications/agency\\_resources/guide\\_freedom\\_of\\_information\\_act\\_1982.html#\\_Toc30853503](http://www.oaic.gov.au/publications/agency_resources/guide_freedom_of_information_act_1982.html#_Toc30853503)  
See also subsections 29(1), (6) and 31(2).

**Disclosure Log**

NBN Co. provided access to documents in seven cases. In each case the information was uploaded onto NBN Co.'s "Disclosure Log" within working 10 days, as required by section 11C(6) of the FOI Act.

## **Part G – Costs imposed by NBN Co.**

NBN Co. imposed charges in relation to eight requests. The amount charged was based on the amounts recommended by the OAIC. In a number of cases the FOI Officer exercised his discretion to waive some of the fees, particularly where the amount of the outstanding fees was relatively small.

I note that one applicant commented that it was quite happy with what was charged and considered it to be quite reasonable for a FOI request.

## Part H – Applications made to the Office of the Australian Information Commissioner

### 25. Number of applications

Between 1 June 2011 and 31 May 2012, four applications were made to the OAIC for IC review.

### 26. Decisions of the OAIC

In *Internode Pty Ltd and NBN Co. Ltd*<sup>91</sup> (*Internode*), the FOI Commissioner affirmed the decision of NBN Co. to refuse access to the requested documents. A copy of the decision in *Internode* is attached at Appendix 3.

The applicant in Requests 16, 17 and 18 sought review of NBN Co.’s decision to charge the applicant processing fees. A delegate of the Information Commissioner finalised the review under section 54W(a)(i) of the FOI Act on the basis that the application for review was lacking in substance.

#### *Internode Pty Ltd and NBN Co. Ltd* [2012] AICmr 4

The applicant had requested access to four agreements made between NBN Co. and Telstra Corporation Limited.<sup>92</sup> The FOI Officer at NBN Co. refused access to the requested documents on the basis the documents were exempt from the operation of the FOI Act due to section 7(3A) and Part II of Schedule 2 of the FOI Act, and alternatively the documents were exempt under section 45 of the FOI Act (Material obtained in confidence) or section 47 of the FOI Act (Documents disclosing trade secrets or commercially valuable information).

The applicant applied to the Information Commissioner for a review of the FOI Officer’s decision, under section 54L of the FOI Act.

The FOI Commissioner stated “NBN Co. is subject to the FOI Act, but exempt from its operation in relation to documents received or brought into existence in the course of, or for the purposes of, the carrying on of its commercial activities.”<sup>93</sup>

The applicant argued that:

- The FOI Act did not specify how the exemption is to be applied when particular documents are received or brought into existence in the course of more than one type of activity or for more than one purpose.
- The dominant purpose of a document should determine whether the document falls within the exemption under Part II of Schedule 2 of the FOI Act. A document should only be exempt under Part II of Schedule 2 if its dominant purpose was commercial.
- The dominant purpose of the requested document was not commercial but to “fulfil the Australian government’s agenda” in relation to Telstra and the Australian telecommunications market as outlined in two media releases.<sup>94</sup>

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<sup>91</sup> *Internode Pty Ltd and NBN Co. Ltd* [2012] AICmr 4 (20 January 2012)

<sup>92</sup> See Request 15 above.

<sup>93</sup> *Internode Pty Ltd and NBN Co. Ltd* [2012] AICmr 4 (20 January 2012) at [7].

- The two media releases made it clear that
  - the Federal Government considered the deal between NBN Co. and Telstra was a political matter and of nation building importance, as opposed to a mere commercial agreement; and
  - the requested documents are predominately an exercise of political mandate and the documents should not be exempt from disclosure under Part II of Schedule 2 of the FOI Act.

The applicant submitted that access to the requested documents should be granted with reasonable redactions to protect legitimately confidential information.

The FOI Commissioner saw no reason to read a “dominant purpose” requirement into the exemption in subsection 7(2), and noted that the exemption in section 34 (Cabinet documents) expressly included a “dominant purpose” requirement.

The FOI Commissioner referred to *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40, where the Full Court of the Federal Court considered the meaning of “commercial activities” in subsections 7(2AA) and 7(3) of the FOI Act. The FOI Commissioner considered these provisions were analogous to subsections 7(2) and 7(3A), the subject of the IC review. The Full Court of the Federal Court said:

“activities are conducted on a commercial basis if they are related to, engaged in or used for commerce”

and noted that the AAT had emphasised:

“the importance of the whole of the circumstances including the commercial goal (profit making or generation of income or return) in determining whether particular activities are sufficiently related to commerce to be characterised as commercial activities.”<sup>95</sup>

In *Johnston and Australian Postal Corporation* [2006] AATA 144, the AAT considered various dictionary definitions of commercial activity and concluded (at [30]) that commercial activity:

“can be regarded as a business venture with a profit-making objective and, strictly speaking, will involve activity to generate trade and sales with a view to profit. This is particularly so when the volume of activity is on a large scale.”

The FOI Commissioner did not examine the four requested documents but noted it was clear from the material that the documents were agreements between NBN Co. and Telstra that

- translated financial heads of agreement signed in June 2010 into legally binding agreements;
- provided for the use by NBN Co. of Telstra’s infrastructure, and the decommissioning of some of Telstra’s network capability during the rollout of the national broadband network;
- have been valued at \$9 billion; and
- were financially beneficial to NBN Co.

The FOI Commissioner stated that the activities to which these documents relate are carried on – and can be expected to be carried on in the future – by NBN Co. on a commercial basis. The activities were “commercial activities” for the purposes of the reference to NBN Co. in Part II of Schedule 2 (section 7(3A)). The

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<sup>94</sup> [http://www.minister.dbcde.gov.au/media/media\\_releases/2011/203](http://www.minister.dbcde.gov.au/media/media_releases/2011/203),

[http://www.minister.dbcde.gov.au/media/media\\_releases/2011/131](http://www.minister.dbcde.gov.au/media/media_releases/2011/131)

<sup>95</sup> *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40 at [28].

documents have been brought into existence in the course of, or for the purposes of, the carrying on of NBN Co.'s commercial activities (section 7(4)).

The FOI Commissioner concluded that NBN Co. is exempt from the operation of the FOI Act in relation to the requested documents (section 7(2)).<sup>96</sup>

The FOI Commissioner accepted that the documents may be “an exercise of political mandate” but found the requested documents were also documents in respect of NBN Co.'s commercial activities. For section 7(2) to apply, the FOI Commissioner found it was not necessary that the dominant purpose of a requested document be the carrying on commercial activities.<sup>97</sup>

The FOI Commissioner noted that the source of the exemption is section 7(2) not section 7(3A) of the FOI Act.

The FOI Commissioner affirmed the decision of NBN Co. to refuse access to the requested documents and concluded that NBN Co. was exempt from the operation of the FOI Act in relation to each of the documents requested.<sup>98</sup> The FOI Commissioner considered that as the requested documents were exempt, it was not necessary for him to consider the other exemptions relied on by NBN Co.<sup>99</sup>

The decision notified the applicant of its review rights to the AAT under section 57A of the FOI Act. The applicant did *not* apply to the AAT for a review of the FOI Commissioner's decision.

### ***Requests 16, 17 and 18***

In Requests 16, 17 and 18 the applicant sought a full fee waiver of all charges on the basis that giving the applicant access to the requested documents was in the general public interest. The FOI Officer at NBN Co. exercised his discretion under Regulation 3 of the *Freedom of Information (Charges) Regulations 1982 (Cth)* and applied a 25% discount to processing fees. The FOI Officer therefore required the applicant to pay 75% of the estimated processing fees for each request.

The applicant applied to the Information Commissioner for a review of the FOI Officer's decision.<sup>100</sup>

A delegate of the Information Commissioner considered the applications for review and the three decisions of NBN Co.'s FOI Officer. The delegate requested the applicant provide further and better submissions by 25 October 2011 to satisfy the OAIC that the requests for IC review were warranted. The delegate notified the applicant that it was her intention to finalise the requests unless the applicant provided better and more fulsome reasons to reconsider the decision. No submissions were received from the applicant by 25 October 2011.

The delegate finalised the review under section 54W(a)(i) of the FOI Act on the basis that the applications for review were lacking in substance. The applicant was notified the matters were closed and advised of its review rights under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.

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<sup>96</sup> *Internode Pty Ltd and NBN Co.Ltd* [2012] AICmr 4 (20 January 2012) at [15].

<sup>97</sup> *Internode Pty Ltd and NBN Co.Ltd* [2012] AICmr 4 (20 January 2012) at [16].

<sup>98</sup> *Internode Pty Ltd and NBN Co.Ltd* [2012] AICmr 4 (20 January 2012) at [1], [15].

<sup>99</sup> *Internode Pty Ltd and NBN Co.Ltd* [2012] AICmr 4 (20 January 2012) at [17].

<sup>100</sup> Pursuant to subsections 54L(2)(a) and 53A(e) of the FOI Act.

## **27. Complaints made to the OAIC**

Between 11 June 2011 and 31 May 2012, the OAIC did not receive any complaints in relation to NBN Co. No other matters were raised with the OAIC in relation to NBN Co.

## **Part I – Applications made to the Administrative Appeals Tribunal**

### **28. Number of applications made to the AAT**

Between 11 June 2011 and 31 May 2012, no applications were made to the AAT for review of a decision of the Information Commissioner under s 57A of the FOI Act.

## **Part J – Findings and conclusions**

### **29. Use of freedom of information legislation**

This review has not identified any vexatious use of freedom of information provisions in relation to NBN Co.

Section 3 of the FOI Act, which sets out the objects of the Act, makes it clear that freedom of information legislation is designed to facilitate and promote public access to information. Consistent with this object, all the requests that have been made to NBN Co. have been genuine attempts to access information, notwithstanding that some of the requests have sought exempt documents.

In any event, the number of requests made over the last year has not been excessive. The number of requests (35) is very considerably less than the number of requests made to some other agencies.

Moreover I have not identified any repeated attempts (to access exempt information) that could be regarded as pointless or annoying, and thus wasting the time of NBN Co.

### **30. Administration of FOI legislation by NBN Co.**

The review has revealed that NBN Co. has not only fulfilled its lawful responsibilities under the FOI Act, but also has achieved a high standard in its administration of the Act.

First, I find that NBN Co. has complied with its lawful requirements in administering the FOI Act.

Second, I find that NBN Co. has used a careful process to identify exempt documents, has clearly articulated the reasons for the claimed exemptions, and has not been extravagant in claiming exemptions.

Third, I find that NBN Co. has sought to minimise the cost to applicants by actively assisting in identifying possible documents that are the real basis of the request.

Fourth, I find that NBN Co. has operated in a timely manner.

Fifth, I find that in relation to its FOI responsibilities NBN Co. has generally adopted a pro-disclosure attitude. For example, it provides considerable information on its website – not only information that is required to fulfil its FOI requirements.

### **31. Commercial activities exemption**

The review has revealed that NBN Co. has not used the “commercial activities” exemption unduly.

The “commercial activities” exemption has been thought by the Parliament to be necessary to ensure that the commercial purposes of NBN Co. are not imperilled by the disclosure of information that would be commercially sensitive. A substantially similar exemption applies to the Albury-Wodonga Development Corporation, Comcare, the CSIRO, Indigenous Business Australia, and Medicare Australia.

One can readily understand the basis of the exemption. Some agencies fulfil a commercial, as well as a public, role. In fulfilling a commercial role, documents will be created concerning costs, pricing and the like; and the revelation of such documents are bound to inhibit commercial dealings. For example, if prospective

contractors are privy to NBN Co.'s costings of a proposed facility, this will affect the price that they quote for their services.

My review of the operation of the FOI Act in relation to the NBN Co. does not reveal any basis to change the "commercial activities" exemption.

It is true that the notion of "commercial activities" is broad. But that is so of many concepts used in the law: such as "reasonableness" in the law of tort. Significantly, there is no basis to conclude that the broad nature of the exemption has been abused. Moreover, in my view, an attempt to confine the exemption is likely to add complexity and uncertainty to the concept; and is likely to produce anomalous outcomes.

Based on the operation of the FOI Act to NBN Co. over the past year, there is no basis to conclude that the "commercial activities" exemption has had the effect of unreasonably broadening the field of exempt documents. As the analysis shows, documents that have been held to be exempt by reference to the "commercial activities" exemption were also exempt by reference to other, long-standing exemptions, such as the exemption applied to information obtained in confidence. This is not to suggest that the "commercial activities" exemption is superfluous; as it will still have a legitimate role in circumstances where a document is not otherwise exempt.

### **32. Quality of FOI Act administration**

As is often the case, outcomes are influenced as much by people as systems. I find that the high standard achieved by NBN Co. in relation to its FOI Act obligations are, in no small part, due to the competence and training of the FOI officer engaged by NBN Co.

NBN Co. has handled freedom of information requests intelligently, by seeking to assist the applicant to identify the document or information that is sought. When a document has been claimed as exempt, the FOI officer has provided carefully crafted reasons. Responses have been timely.

I question whether this high standard is commonplace in Commonwealth and State agencies. I attribute the high standard achieved by NBN Co. – at least in part – to the appointment of a trained and competent FOI officer. Other agencies would do well to replicate this practice.

## **Appendix**

- Appendix 1** – **Statement of Reasons (personal information redacted) and OAIC’s *FOI Fact Sheet 12 – Your review rights***
- Appendix 2** – **Sections 7(3A), 45, 47, 47C, 47G, 47F of the FOI Act**
- Appendix 3** – ***Internode Pty Ltd and NBN Co. Ltd* [2012] AICmr 4 (20 January 2012)**