



## FOI matters & nbn's commercial activities

### About nbn and the FOI Act

1. **nbn's mandate** – Established as a Commonwealth government business enterprise (GBE) in 2009, **nbn** has the mandate of realising the Australian Government's vision to develop a national broadband access network that is truly national in character.
2. **Prescribed authority under FOI Act** – In June 2011, Parliament amended the *Freedom of Information Act 1982 (Cth)* (**the FOI Act**) and declared **nbn** to be a prescribed authority under the FOI Act. **nbn** is committed to meeting its obligations under the FOI Act and our company recognises that information is a vital and valuable resource, both for **nbn** and for the broader Australian community. That is why **nbn** fosters and promotes a pro-disclosure culture, with the goal of creating an organisation that is open, transparent and accountable. In that light, members of the public will be able to find a large amount of information that is freely available on **nbn's website** – for reference, and where you see underlined hyperlinks in this document, you can press the "CTRL" key and click to the relevant link and documents.
3. **Commercial carve-out** – Unlike other Commonwealth agencies, **nbn** is not required to release documents under the FOI Act if those documents were received or brought into existence in the course of – or for the purposes of – carrying on its commercial activities. This is known as a "legislative carve-out" from the application of the FOI Act. In **nbn's** case, this is generally referred to as the commercial activities carve-out (**the CAC**) and it places commercially-related documents outside the scope of the FOI Act.
4. **Definition of commercial activities** – **nbn's** "commercial activities" are defined at section [7\(3A\)](#) and [Schedule 2](#) of the FOI Act in the following way:
  - a. *activities carried on by **nbn** on a commercial basis; or*
  - b. *activities, carried on by **nbn**, that may reasonably be expected in the foreseeable future to be carried on by **nbn** on a commercial basis.*
5. **General principles behind nbn's legislative carve-out** – In general terms, the CAC ensures that **nbn** is not exposed to disadvantage in the marketplace and similar commercial environments. The CAC also enables **nbn** to function as any other commercial player in Australia's highly competitive telecommunications and infrastructure build industries. If **nbn** were required to release commercially-related information under the FOI regime, this could have various adverse consequences, including, but not limited to:
  - undermining **nbn's** ability to effectively and economically carry on its business efforts;
  - inhibiting **nbn's** capacity to negotiate competitive contracts;
  - limiting **nbn's** ability to develop products and services or grow its market share;
  - revealing sensitive and confidential information about **nbn** or its delivery partners. This would expose strategic business information to competitors, as well as making suppliers and delivery partners reticent to share confidential information with **nbn**; and
  - compromising **nbn's** ability to generate revenues, while driving up rollout costs. Ultimately, Australian taxpayers would have to bear those cost increases and other adverse consequences.



## Decisions and principles relating to nbn's commercial carve-out

6. **Two OAIC decisions about nbn's CAC** – To date, the Office of the Australian Information Commissioner (**OAIC**) has considered **nbn's** CAC in two key OAIC Review decisions: [Internode Pty Ltd and nbn Ltd \[2012\] AICmr 4](#) (**Internode Decision**) and [Battersby and NBN Co Ltd \[2013\] AICmr 61](#) (**Battersby Decision**).

i. **Internode Decision** – In the Internode Decision, the then-FOI Commissioner, Dr James Popple held that certain agreements between **nbn** and Telstra (**the Telstra Agreements**) fell within the meaning of **nbn's** legislative carve-out or CAC. In making this determination, the then-Commissioner reviewed previous cases dealing with analogous commercial activities carve-outs under the FOI Act, i.e. those applying to the CSIRO and Australia Post. Dr Popple highlighted the following key principles or tests that may be considered in determining whether documents relate to **nbn's** commercial activities:

- **Whole of circumstances, including commercial goal** – Drawing from *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40 (**CSIRO Decision**), the then-FOI Commissioner outlined the “importance” for FOI decision-makers to consider:

*“...the whole of the circumstances including the commercial goal (profit-making or the generation of income or return) in determining whether particular activities are sufficiently related to commerce to be characterised as commercial activities.” (Emphasis added)*

- **Related to, engaged in or used for commerce** – Also referring to the CSIRO Decision, the then-FOI Commissioner indicated that “activities are conducted on a commercial basis if they are related to, engaged in or used for commerce.” (Emphasis added)
- **Generate trade and sales with view to profit and large scale** – Referring to *Johnston and Australian Postal Corporation* [2006] AATA 144, the then-FOI Commissioner considered that a 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.” (Emphasis added)*

- **No dominant commercial purpose required** – In considering **nbn's** CAC, the then-FOI Commissioner highlighted that **nbn** could rely upon its legislative carve-out, even if documents were not created for the dominant purpose of **nbn's** commercial activities. To paraphrase the then-Commissioner's reasoning, **nbn's** CAC would apply to given documents even if they were created for a combination of commercial and non-commercial purposes.

With respect to the Telstra Agreements, the then-FOI Commissioner noted that those documents translated financial heads of agreement between **nbn** and Telstra into legally binding contracts, were valued at \$9 billion and were of a financial benefit to **nbn**. Dr Popple ultimately found that the activities, to which the Telstra Agreements relate, were carried on (and can be expected to be carried on in the future) by **nbn** on a commercial basis. The Telstra Agreements had also been brought into existence in the course of, or for the purpose of, the carrying on of **nbn's** commercial activities. Therefore, **nbn** could rely on the CAC in determining that the Telstra Agreements were outside the ambit of the FOI Act.



- ii. **Battersby Decision** – Dr Popple also completed the OAIC Review in the Battersby Decision. In that determination, the then-FOI Commissioner considered the application of **nbn**'s CAC to documents concerning **nbn**'s appointment of a financial services firm as **nbn**'s corporate advisor. The then-FOI Commissioner reiterated his reasoning from the Internode Decision and found that the activities to which those documents related were carried on (and can be expected to be carried on in the future) by **nbn** on a commercial basis. In addition to reiterating the principles or tests in the Internode Decision, the then-FOI Commissioner outlined the following principles in the Battersby Decision:
- **Broad scope of nbn's CAC** – **nbn**'s CAC is broader in scope to the commercial activities exemptions or carve-outs applicable to other GBEs and similar entities subject to the FOI Act.
  - **No competitive element, nor 'private sector' involvement required** – In discussing **nbn**'s CAC, the then-FOI Commissioner also noted that other FOI agencies' commercial carve-outs included a requirement that the activities be "in competition with persons other than governments or authorities of governments." In the case of **nbn**, there is no such "competitive" requirement. As indicated by the then-FOI Commissioner, "it is enough that they [the commercial activities] are intended to make a profit..." It follows that the CAC could apply to **nbn**'s activities that involve governments or government authorities if those activities have a commercial goal or purpose, i.e. that they enable or assist **nbn** in generating profits, sales, trade and so forth.

### [nbn's FOI determination process](#)

7. **Factors to consider in an FOI decision** – In making a determination regarding the application of the CAC, **nbn**'s FOI Officer will take into account relevant parts of the FOI Act, [the OAIC FOI Guidelines](#), relevant case law (such as the cases cited above) and other applicable sources. Specific reasons, findings of fact and other contentions will be contained in a formal Statement of Reasons supplied to individual FOI applicants.
8. **Primary 'commercial' assessment** – Determining whether the CAC applies to given documents must be considered on a case-by-case basis. In making an FOI decision, **nbn**'s FOI Officer must first assess whether a document relates to **nbn**'s current or future commercial activities. If a document falls within the definition of **nbn**'s "commercial activities", it would be subject to the legislative carve-out or CAC and **nbn** would not be required to release the document to an FOI applicant. Some factors that are relevant to making that preliminary commercial assessment include the following:
- **nbn's general commercial purpose** – **nbn**'s Shareholder Ministers' [Statement of Expectations](#) makes it clear that **nbn** should pursue its objectives and operate its business "on a commercial basis". Moreover, **nbn** is meant to function like any other commercial player "operating in a market environment and can compete and innovate like other companies in this environment in accordance with legal and policy parameters."
  - **GBE operational requirement** – As a GBE, **nbn** is subject to the [Commonwealth GBE Governance and Oversight Guidelines \(the GBE Guidelines\)](#). In the GBE Guidelines, the "Mandate and Objectives" section outlines that a GBE's principal objective is to add to shareholder value. To achieve this objective, GBEs are required to:
    - operate efficiently, at minimum cost for a given scale and quality of outputs;
    - price efficiently;
    - earn at least a commercial rate of return; and



- work toward a financial target and a dividend policy, agreed in advance with the Shareholder Ministers, with the principal financial target to be set on the basis that each GBE should be required to earn commercial returns at least sufficient to justify the long-term retention of assets in the business and to pay commercial dividends from those returns.
  - **Corporate goals** – nbn’s corporate goals are also relevant to whether a document relates to nbn’s commercial activities. As outlined in the company’s [2020-2023 Corporate Plan \(Corporate Plan\)](#), nbn has a number of commercial goals and broader corporate objectives, including (among others) growing its profitability. It is clear from the Corporate Plan that nbn is focused on creating a sustainable business, including one that enables reinvestment in network upgrades and operations and helps to improve and evolve nbn’s products and technologies.
9. **Common examples of commercial activities** – nbn’s FOI Officer is required to review and carefully consider each document so as to determine whether the CAC would apply in a given case. In making a formal FOI determination, nbn’s FOI Officer will review relevant case law (and particularly those cases outlined above), the OAIC FOI Guidelines and other sources in deciding whether the CAC may apply to a given document. While the following list is not exhaustive and is provided for information purposes only, there is a strong possibility that these types of documents may fall within the scope of nbn’s legislative carve-out:
- commercial contracts or agreements between nbn and its delivery or business partners;
  - suppliers’, contractors’ or consultants’ price lists and schedules of rates;
  - negotiations and commercial or strategic discussions with third parties;
  - information that is subject to a non-disclosure agreement or a confidentiality regime;
  - documents revealing information about nbn’s customers;
  - nbn’s or other parties’ intellectual property;
  - supply and purchase arrangements; and
  - current or proposed commercial activities, including the business cases supporting those proposals.
10. **No requirement to consider additional exemptions if CAC applies** – FOI applicants should note that if nbn’s FOI Officer determines that given documents relate to nbn’s commercial activities, there is no requirement to consider any further exemption grounds under the FOI Act. In terms of strict processing requirements, nbn’s FOI Officer would first need to make a finding that documents do not relate to nbn’s commercial activities before being required to consider any further exemptions from release. In practice, nbn’s FOI Officers are likely to provide additional grounds for exemption in their Statement of Reasons – either as a formal alternative to the CAC or as a list of other potential exemptions that may apply to the given documents.
11. **Additional or alternative grounds for exemption** – In addition to the CAC, nbn’s FOI Officers may also rely upon general or conditional exemptions in their Statements of Reasons. Examples of general exemptions under the FOI Act include: Cabinet documents ([s.34](#)), legal professional privilege ([s.42](#)), confidential materials ([s.45](#)) as well as trade secrets and commercially valuable information ([s.47](#)). Examples of conditional exemptions include: Commonwealth and State relations ([s.47B](#)), deliberative processes ([s.47C](#)), operations of agencies ([s.47E](#)), personal privacy ([s.47F](#)), business and professional affairs ([s.47G](#)), among other grounds.
12. **Applicants invited to discuss FOI request terms** – nbn welcomes FOI applicants to discuss the terms of their FOI requests, so as to assist them in refining the scope of a given application and to provide guidance regarding nbn’s commercial activities’ carve-out. Enquiries may be directed to nbn’s FOI email account at [FOIOfficer@nbnco.com.au](mailto:FOIOfficer@nbnco.com.au).