



Disclosure of Public Servants' Details under FOI Legislation

nbn's Submission to the OAIC's Discussion Paper

Summary of comments

nbn would like to thank the Office of the Australian Information Commissioner (**OAIC**) for the opportunity to present our company's views regarding the OAIC's [Discussion Paper: Disclosure of public servants' names and contact details](#) (**Discussion Paper**). **nbn** respectfully submits that the Discussion Paper, its guidance and the cases considered do not generally apply to **nbn** due to the application of **nbn**'s commercial activities carve-out (**CAC**) and due to the fact that **nbn**'s employees, officers and directors (collectively **nbn staff**) are not public servants. Additionally, our company has concerns regarding the potential disclosure of **nbn** staff details and the consequential risks to staff engagement, morale, health and safety and general wellbeing, among other factors. These concerns could potentially be applied by FOI decision-makers in considering whether "special circumstances" exist regarding the potential disclosure of public servants names and details.

General comments

nbn is a Commonwealth Government Business Entity (**GBE**) that was established in 2009 with the mandate to design, build and operate Australia's wholesale broadband access network. In January 2011, the Australian Information Commissioner made a finding in [Crowe and NBN Co Ltd \[2011\] AICmr 1](#) that **nbn** was not subject to the *Freedom of Information Act 1982* (**the FOI Act** or **the Act**). In June 2011, Parliament amended the FOI Act and declared **nbn** to be a prescribed authority under the Act. However, those amendments carved-out or excluded documents relating to **nbn**'s commercial activities from the ambit of the FOI legislation. As such, **nbn** is not required to release documents that fall within the meaning of the CAC.

In practical terms, the CAC ensures that **nbn** is not exposed to disadvantage in the marketplace and similar commercial environments. The CAC also enables **nbn** to function as any other commercial player in Australia's highly competitive telecommunications industry. If **nbn** were required to release commercially-related information under the Commonwealth FOI regime, this would undermine **nbn**'s ability to negotiate competitive contracts, develop products and services, grow market share and manage its staff, among other adverse effects. Disclosure of commercially-related information would also undermine **nbn**'s capacity to generate revenues, as well as drive up costs in relation to the **nbn**TM broadband access network rollout. Ultimately, Australian taxpayers would have to bear those cost increases and other potentially adverse consequences.

In making **nbn** subject to the FOI Act, Parliament chose to treat **nbn** differently from Government agencies as well as other 'prescribed' Commonwealth entities, such as Australia Post or Comcare. That was made clear in [Battersby and NBN Co Ltd \[2013\] AICmr 61](#), where the then-Australian Information Commissioner, Dr James Popple noted the broad scope of **nbn**'s commercial activities carve-out and indicated that:

"...there is no doubt that the definition of 'commercial activities' is broader for NBN Co than it is for other government business enterprises listed in Part II of Schedule 2."



Another key difference between **nbn** and other FOI agencies relates to staffing. Unlike employees in Commonwealth Government Departments, **nbn staff** are not public servants within the meaning of the *Public Service Act 1999*. Nor are they subject to the Australian Public Service Commissioner's (**APSC**) Directions or APSC oversight. Rather, **nbn** staff are employed under individually negotiated employment contracts and other commercial arrangements. We raise these points in the context of the OAIC's Discussion Paper, which deals with the disclosure of public servants' names and details.

To paraphrase [FOI Memorandum No. 94](#) and the OAIC's guidance, there are no personal privacy interests in public servants' names in the normal course of their duties. There are various exceptions to that rule, such as in instances where the information clearly relates to the public servant's personal affairs, e.g. a request for bereavement leave, or where "special circumstances" exist. With respect, **nbn** considers that these principles do not apply to **nbn** staff on the basis that they are not public servants, among other reasons.

Specific comments

The following, specific comments provide context to **nbn's** FOI decision-making processes and issues that may arise regarding the disclosure of **nbn** staff members' names and related details.

- 1. Primary 'commercial' assessment** – In making an FOI decision, **nbn** must first assess whether a document relates to **nbn's** commercial activities. If a document is found to be within the meaning of **nbn's** CAC, it would be outside of the scope of the FOI Act. In that situation, **nbn** would not be required to consider additional (general or conditional) exemptions from release. On a practical level, **nbn** would need to make a finding that documents do not relate to **nbn's** commercial activities before considering any general or conditional exemptions. Our understanding is that the Discussion Paper's commentary almost exclusively relates to conditional exemptions. Key examples include sections 47E(c) & (d) of the FOI Act (management of personnel and operations of the agency) and section 47F of the Act (personal privacy of public servants). Putting aside the fact that **nbn** staff are not public servants, the OAIC's guidance would have limited, practical application to **nbn**. Assuming that the OAIC's guidance were to apply to **nbn** in a limited fashion, any such application would be further limited to documents that are not commercial in nature and by the points, outlined below.
- 2. Commercial nature of nbn staff details** – Where relevant, **nbn** will make its own objections to the disclosure of **nbn** staff details in so far as they relate to **nbn's** commercial activities. For example, **nbn** would have serious concerns about disclosing **nbn** staff details in situations where disclosure could expose them to the possibility of unwanted attention in their personal lives; being targeted or harassed online or via social media campaigns; or similar adverse consequences. Disclosure of **nbn** staff contact details could also have adverse consequences in relation to **nbn's** ability to attract, hire and retain high quality staff. **nbn** has consistently asserted that there are clear links between employee engagement, staff morale and our company's ability to assist in protecting the personal privacy and professional reputations of **nbn** staff. In turn, these factors have an impact upon **nbn's** ability to achieve corporate goals, not least of which is **nbn's** ability to generate revenue and maintain a minimum return on investment, as required by **nbn's** Shareholders' [Statement of Expectations](#).

We ask that the OAIC consider the above points in revising its guidance regarding the disclosure of public servants' details. In particular, the risk of public servants being targeted or harassed online or via similar platforms could potentially be considered as factors in determining whether "special circumstances" exist. These factors would obviously need to be balanced against the public interest in transparency and accountability in government action and decision-making, along with the relevance of a public servant's identity to those processes.



Specific comments (Continued)

3. **OAIC guidance to FOI agencies for third party consultations – nbn** is treated as a non-government entity in relation to third party consultations by Commonwealth FOI agencies. Similar practices generally apply at the State Government level. These practices reflect guidance provided to **nbn** by the OAIC, which permit Commonwealth entities to extend FOI processing time to sixty days for third party consultations with **nbn**. It is also the reason that **nbn** is entitled to rely upon section 47G (business affairs) in making objections to the release of documents that may adversely impact upon **nbn**. As relevant, **nbn** may also object to the disclosure of **nbn** staff members' details on the basis that such disclosure could adversely impact **nbn**'s business affairs in **nbn**'s capacity as an employer, among other reasons.
4. **Business entities' staff may object in personal capacity** – It is well established FOI practice that individual staff members of business entities may object to the release of documents in their personal capacities, as distinct from the objections of the business entity. It follows that **nbn** staff – be they employees, officers or directors – would be able to make objections to disclosure in their personal or professional capacities in the same way as the staff members, director and officers of any other business entity. These objections could be made on the basis of personal privacy (section 47F) or professional affairs (section 47G). It is **nbn**'s practice to inform **nbn** staff regarding the possible disclosure of their names or other details under the FOI regime, as well as their ability to object to disclosure in their personal capacities. This practice applies to FOI requests made directly to **nbn**, as well as to third party consultations received by **nbn**.