

7 December 2012

Mr Richard Glenn
Assistant Secretary
Business and Information Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Sent via email: foireview@ag.gov.au

Dear Mr Glenn

Review of FOI Laws

I am writing in relation to the Attorney-General's Department (**AGD**) request for submissions concerning the review of the operation of the *Freedom of Information Act 1982* (**FOI Act**) and the *Australian Information Act 2010* (IC Act), being undertaken by Dr Allan Hawke AC.

NBN Co Limited's (**NBN Co**) Chief Executive Officer, Mike Quigley, has authorised me to provide the AGD with NBN Co's submission, which I have attached electronically to an email containing this letter.

If you have any questions in relation to NBN Co's submission, please feel free to contact the writer by telephone on (02) 8918 8596 or via email on davidmesman@nbnco.com.au.

Sincerely,

David J Mesman
GM Legal – FOI and Knowledge Management

Background

NBN Co Limited (**NBN Co**) only became subject to the *Freedom of Information Act 1982 (the FOI Act)* on 11 June 2011. As such, NBN Co does not have any working experience of the pre-November 2010 FOI regime, nor was our company required to undertake any transitional processes. In that context, NBN Co can only report on its relatively recent corporate experience.

NBN Co is in a unique position as compared to other Commonwealth Government agencies, as well as some other government business entities (**GBEs**). This is due to the fact that NBN Co is exempt from the operation of the FOI Act in relation to its “commercial activities”, as outlined at section 7(3A) of the FOI Act. The section 7(3A) or commercial activities exemption (**CAE**) is in addition to the general and conditional exemptions under the FOI Act. NBN Co’s CAE is similar in nature to exemptions operating in relation to organisations such as Australia Post and CSIRO, among other government entities. However, our company’s CAE differs from other government entities in that it applies generally to NBN Co’s commercial activities. In contrast, other Commonwealth entities’ CAE is limited to commercial activities in competition with non-government bodies.

In our [Submission to the Charges Review](#), NBN Co provided a detailed summary of the company’s approach to FOI matters. The Office of the Australian Information Commissioner’s (**OAIC**) [Review of Charges under the FOI Act \(the OAIC Charges Review\)](#) referred to NBN Co’s submission on a number of occasions. NBN Co relies upon its comments in that submission and makes reference to those comments, below.

A) NBN Co’s Comments – OAIC Charges Review Recommendations

1) NBN Co requests that the Attorney General’s Department (**AGD**) considers NBN Co’s [Submission to the Charges Review](#) in relation to the AGD’s Review of the FOI Act and the *Australian Information Commissioner Act 2010 (the AIC Act, collectively the FOI Acts Review)*.

2) NBN Co’s [Submission to the Charges Review](#) reflects many of the OAIC’s 10 Recommendations in the OAIC Charges Review. As such, NBN Co strongly supports the OAIC’s Recommendations, subject to the points outlined below. NBN Co also makes additional points as per the FOI Acts Review Terms of Reference, at section B) of this document (below).

a) OAIC Charges Review – OAIC’s Recommendation 7 – Waiver

- i) **Abolition of Fee Waiver and Reduction, Except for Financial Hardship** – For the reasons outlined at page 7 (Q23) of its [Submission to the Charges Review](#), NBN Co supports the abolition of fee waivers, except for those applicants experiencing financial hardship. In summary, NBN Co outlined that there were significant costs and resources allocated to undertaking such reviews and, in many cases, the amounts in dispute were quite small, thereby bringing into question the benefit of allocating significant resources to these matters.

- ii) **Delegation of Decision-Making for Charges Decisions** – According to the OAIC’s Annual Report, that agency had 357 Information Commissioner (IC) Reviews outstanding as at 30 June 2012¹ and the OAIC only processed 32.8% of its IC Reviews within six months.

At present, section 25(e) of the AIC Act prohibits the Information Commissioners from delegating IC Reviews to OAIC staff. In an effort to expedite the IC Review process, it may be more efficient to consider amending the AIC Act to enable OAIC staff to make relatively simple IC Review decisions, such as those concerning excess processing charges, fee waivers and reductions, etc. From an administrative law perspective, ultimate decision-making authority may still need to reside with the Information Commissioner. However, it may be more time-efficient to allow OAIC staff to undertake first-instance “charges reviews” or other simple reviews.

Additionally, it may be advisable to consider the possibility of deeming certain decisions, such as those relating to charges by an agency, as not subject to internal or external review. This is the approach adopted by Queensland under sections 81 and 86 of the *Right to Information Act, 2009*.

Presuming that the OAIC’s recommendation of a 40-hour ceiling is eventually adopted by the Government, it is likely that there will be an increase in IC Review applications for fee waivers, excess charge claims and calculation of processing time estimates. This would particularly be the case with a new FOI charging regime in its start-up phase. Either of the above suggestions could assist in managing some of the OAIC backlog and any increase in the number of IC Reviews following the adoption of the 40-hour ceiling. The suggestions could also assist in expediting the processing of FOI requests, as IC Fee Reviews can have the effect of stopping an application for (potentially) a significant period of time.

- b) **OAIC Charges Review – Recommendation 8 – Reduction for Delayed Processing** – NBN Co does not support a reduction in fees for delayed processing. As outlined generally in our company’s [Submission to the Charges Review](#), NBN Co supports a simplified administrative regime. Any reduction in fees due to delay would lead to complexity in relation to calculating fee payments and refunds, particularly with respect to the raising of invoices, receipting, etc. NBN Co supports the current model, under which no fees are payable if an agency is late in providing a decision, subject to an agreement with the applicant or as approved by the OAIC.

¹ http://www.oaic.gov.au/publications/reports/annual-report_11-12/chapter8.html#p3

B) The FOI Acts Review – Terms of Reference

Impact of reforms to FOI laws in 2009 & 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system

Under the old FOI regime, the release of documents was largely a matter between the applicant and the relevant Australian Government agency or entity. As a result, FOI applicants could choose not to bring the information to the attention of the public. Examples include a journalist not publishing a story or a Member of Parliament not raising the matter in a public forum, such as Parliament. With the reformed FOI Act and the Disclosure Log requirements, this is no longer possible as agencies must release documents on their websites within 10 days of release to an applicant. NBN Co is of the opinion that the Disclosure Log requirements have increased transparency and openness within the Australian public sector. In particular, Disclosure Logs provide the general public with greater and longer-standing access to information than under the previous FOI regime.

Building on the above reforms, NBN Co would support the creation of a centralised whole-of-Government Disclosure Log on the OAIC website or on a similar platform. Agencies could then upload relevant documents disclosed pursuant to an FOI request. A centralised Disclosure Log would provide the Australian public with a straightforward, “one-stop-shop” for all documents in a standard publishing format, with a single RSS feed for updates. It would also simplify procedures for Australian Government agencies – particularly smaller entities.

Effectiveness of the Office of the Australian Information Commissioner

NBN Co is of the opinion that a key challenge facing the OAIC is to ensure that it finalises IC Reviews in a timely fashion. In that regard, please refer to NBN Co’s comments at paragraph A-2(a)(ii) above (re: OAIC Charges Review – Recommendation 7), concerning the delegation of decision-making authority to OAIC staff.

Effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters

NBN Co has had no experience with Internal Reviews as its FOI applicants have only ever sought IC Review directly, without first requesting an Internal Review. As outlined above, NBN Co is in favour of the OAIC’s Recommendation 7 in the OAIC Charges Review and, in particular, the requirement for applicants to pay an application fee for an IC Review. For the reasons outlined above, NBN Co would strongly support Recommendation 7 as a means to reduce the OAIC’s backlog and limit demands on its resources.

In addition, NBN Co relies upon its comments at page 3 of our company’s [Submission to the OAIC Charges Review](#) relating to Internal Reviews and IC Reviews. In particular, NBN Co indicated that both agencies and the OAIC should be able to charge for their time spent on Internal and IC Reviews. Considering the OAIC’s policy objective of emphasising Internal Reviews – supported by the \$100

charge for IC Review, there are strong arguments to be made that agencies should be permitted to recoup their processing time for Internal Reviews, either in the form of a flat fee or processing charges. The review fee should be similar to that of the IC Review fee – reasonable so as not to discourage worthy applicants, but sufficient to ensure that Government resources are not unnecessarily wasted.

Reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account: (i) the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and (ii) the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government

NBN Co does not generally deal with Cabinet matters, as those issues are largely the responsibility of central agencies. However, NBN Co has had experience in applying the “new” public interest test and, in particular, the deliberative matters exemption. In that regard, NBN Co has reviewed the [OAIC Guidelines](#) at paragraph 6.56ff and the Department of Prime Minister and Cabinet’s (DPMC) [Guidance Notes](#) relating to Cabinet and deliberative documents (DPMC Guidance Notes). In practice, it is relatively simple to exclude the irrelevant considerations as per section 11B(4) of the FOI Act, being: embarrassment, misunderstanding, seniority of the public official or confusion. In addition, the DPMC Guidance Notes provide some guidance in relation to where it is permissible to protect the Government’s “thinking space”. However, it is much more difficult to reconcile the OAIC FOI Guidelines at paragraph 6.77, which indicate that certain factors are not consistent with the objects clause – or section 3 of the FOI Act. Those “inconsistent” factors are the disclosure of policy development and inhibition of frankness and candour.

In relation to deliberative matters, NBN Co’s approach to the application of the public interest test has been to consider the central issue of “harm” and whether there are “live issues” for the company. If those “live issues” were made public by way of an FOI access decision, then there would likely be harm to the company or other parties’ interests. The more difficult issue to reconcile is at what point do issues stop being “live”? The DPMC flagged this matter at paragraph 41 of the DPMC Guidance Notes, indicating that there may be instances where the Government’s thinking space may be of “an enduring nature”. At paragraph 44, the DPMC also flagged that a decision-maker would need to consider whether the release of a document could “impair future advice on such issues”.

Taking the DPMC’s guidance to its logical conclusion, a Government entity could refuse access to a document indefinitely, because it may reveal a policy issue or consideration, which was – for all intents and purposes – “dead”. However, it may be revisited at some indefinite point in the future. That is clearly not the intention of the DPMC’s advice, but it does raise an important and unresolved question as to how such matters should be appropriately classified as “deliberative” and, therefore, “alive”.

As outlined in the DPMC’s advice, the question is one that can only be resolved on a case-by-case basis. However, it would be of assistance if the OAIC in its FOI Guidelines or the Information Commissioner in IC Reviews could articulate more comprehensive principles as to what constitutes a deliberative matter, along with other principles animating the conditional exemptions.

Notwithstanding the above comments, NBN Co is of the opinion that the current irrelevant and inconsistent factors (noted above) should be retained in relation to the public interest test.

Appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act

NBN Co was subject to a [Review of FOI Compliance](#) undertaken by Mr Stuart Morris, QC. That review provided some background in relation to NBN Co's FOI activities and its general approach to FOI matters. NBN Co supports Mr Morris' findings, which recommend that no change be made to NBN Co's commercial activities exemption. As per Mr Morris' statement at page 9 of the Review of FOI Compliance, "an attempt to confine the exemption is likely to add complexity and uncertainty to the concept; and is likely to produce anomalous outcomes". Arguably, the same approach would apply to other Commonwealth entities with similar exemptions.

Role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime

Please refer to NBN Co's [Submission to the Charges Review](#) and the points made above in relation to the OAIC Charges Review and the OAIC's recommendations.

Desirability of minimising regulatory & administrative burden, including costs on government agencies

Please refer to NBN Co's [Submission to the Charges Review](#) and the points made above in relation to the OAIC Charges Review and the OAIC's recommendations.