



Battersby and NBN Co Ltd [2013] AICmr 61 **(26 July 2013)**

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant:	Lucy Battersby
Respondent:	NBN Co Limited
Decision date:	26 July 2013
Application number:	MR12/00275
Catchwords:	Freedom of information — Commercial activities — Whether documents are in respect of commercial activities of NBN Co — (CTH) <i>Freedom of Information Act 1982 ss 7(2), 7(3A), 7(4); Schedule 2, Part II</i>

Contents

Summary	1
Background	2
Decision under review	2
NBN Co and its commercial activities	2
Findings	4
Decision	5

Summary

1. I affirm the decision of NBN Co Limited (**NBN Co**) of 26 July 2012 to refuse access to the documents requested under the *Freedom of Information Act 1982* (the **FOI Act**). NBN Co is exempt from the operation of the FOI Act in relation to the documents requested.

Background

2. On 19 March 2012, Ms Lucy Battersby, a journalist with *The Age*, applied to NBN Co for access to documents related to the appointment of Goldman Sachs¹ (a financial services firm) as a corporate advisor to NBN Co. On 21 April 2012, Ms Battersby amended the scope of her request so that it covered the following:
 - final copies of minutes of meetings held between June 2009 to January 2010 where the appointment of Goldman Sachs as corporate advisor was discussed, including emails sent between the CEO and CFO which decided the appointment
 - presentation material provided by Goldman Sachs to NBN Co between June 2009 and January 2010 in its bid for a corporate advisory role
 - a copy of the letter/email sent to Goldman Sachs advising them of the appointment, and
 - the number of advisors considered for the role.
3. On 26 July 2012, NBN Co refused access to all the requested documents on the basis that it was exempt from the operation of the FOI Act in relation to each of the documents requested because of s 7(2) and Part II of Schedule 2 of the Act. NBN Co also claimed that, if it was not exempt from the operation of the FOI Act in relation to those documents, the documents would be exempt from disclosure on various other grounds.
4. On 28 November 2012, Ms Battersby sought IC review of that decision under s 54L of the FOI Act.

Decision under review

5. The decision under review is the decision of NBN Co on 26 July 2012 to refuse Ms Battersby's request.

NBN Co and its commercial activities

6. The key issue in this IC review is whether the documents that Ms Battersby has requested are documents in respect of NBN Co's 'commercial activities', as that term is defined in s 7(3A) of the FOI Act.
7. NBN Co is subject to the FOI Act because it is listed in paragraph (aa) of the definition of 'prescribed authority' contained in s 4(1) of the FOI Act. However, s 7(2) of the FOI Act provides that '[t]he persons, bodies and Departments

1 Throughout this decision, I refer to the corporate advisor as 'Goldman Sachs' (consistent with Ms Battersby's application). However, it appears that the corporate advisor was a joint venture of two financial services firms: Goldman Sachs and JBWere.

specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.’ Part II of Schedule 2 includes ‘NBN Co, in relation to documents in respect of its commercial activities’. And s 7(4) of the FOI Act relevantly provides that:

In ... Part II of Schedule 2, a reference to documents in respect of particular activities shall be read as a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities.

8. So, 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.
9. Section 7(3A) of the FOI Act provides that:

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.
10. I considered the application of s 7(3A) in *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4. In that decision, I noted that the Full Court of the Federal Court had considered analogous provisions of the FOI Act in *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40. The Court said that ‘activities are conducted on a commercial basis if they are related to, engaged in or used for commerce’ and referred to ‘the importance of 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’.²
 11. In *Internode*, I also referred to the Administrative Appeals Tribunal’s decision in *Johnston and Australian Postal Corporation* [2006] AATA 144. In that case, the Tribunal concluded 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’.³
 12. I also noted in *Internode* that, for s 7(2) to apply, it is not necessary that the document in question be created for the dominant purpose of the carrying on of commercial activities.⁴

² *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40 [28].

³ *Johnston and Australian Postal Corporation* [2006] AATA 144 [30].

⁴ *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4 [11].

13. In its original decision, NBN Co said:

While [*Johnston* and *Bell*] are instructive, it is important to note that NBN Co's commercial activities exemption is (arguably) broader in scope than those of [Australia Post] and ... CSIRO. For reference, the general exemptions relating to those Commonwealth bodies contain a competitive element and only exclude documents relating to commercial activities in competition with private entities. As NBN Co's general exemption does not contain a similar competitive element, it can be read as broader in nature.

14. In submissions to the Office of the Australian Information Commissioner, Ms Battersby said:

It is recursive to include the advisors who helped NBN Co draft a contract into the category of 'commercial activities'. By this logic, every input into NBN Co from the outside world should be exempt from FOI because it gets funnelled toward its 'commercial activities'.

15. Section 7(3A) of the FOI Act defines NBN Co's 'commercial activities'; s 7(3) defines the 'commercial activities' of the other government business enterprises listed in Part II of Schedule 2. These two definitions differ only in that the definition in s 7(3) is limited to activities carried on 'in competition with persons other than governments or authorities of governments'.
16. I do not take this difference to mean that NBN Co's 'commercial activities' are limited to activities carried on in competition with persons whether government or non-government. For NBN Co, under s 7(3A), 'commercial activities' means those of its current activities that are—or that are reasonably expected, in the future, to be—carried on on a commercial basis. There is no requirement that those activities be competitive; it is enough that they are intended to make a profit (as explained in *Bell* and in *Johnston*). In practice, this distinction may never arise: it may be that all of NBN Co's profit-making activity is also competitive. But 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.

Findings

17. Ms Battersby has requested documents relating to NBN Co's appointment of a corporate advisor. I have not examined the documents in question, but it is clear from the material provided by the applicant and by NBN Co, including the schedule of documents provided by NBN Co, that the documents fall into three categories:
- internal assessments of potential advisors
 - a schedule of fees for Goldman Sachs, and
 - letters of engagement and supplementary engagement terms between NBN Co and Goldman Sachs.

18. NBN Co submits, and I accept, that the corporate advisor helped write and negotiate agreements with Telstra Corporation Limited,⁵ and other transactions. The corporate advisor was expected, amongst other things: to provide assurances that NBN Co will operate efficiently and at a minimal cost; to ensure quality of outputs; and, in the longer term, to maintain a commercially viable business platform that will allow NBN Co to pay commercial dividends and eventually privatise. I consider that the role of such a corporate advisor is commercial, and that documents in the last two categories listed above directly relate to NBN Co's commercial activities.
19. Documents in the first category (the assessment of potential advisors) relate to the appointment of the corporate advisor. That appointment process is separate from the provision of advice on commercial activities. Nonetheless, it also takes into account commercial considerations and has a commercial purpose. I think that those documents, too, are sufficiently related to NBN Co's commercial activities.
20. 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. Those activities are 'commercial activities' for the purposes of the reference to NBN Co in Part II of Schedule 2 (s 7(3A)). The documents have been brought into existence in the course of, or for the purposes of, the carrying on of NBN Co's commercial activities (s 7(4)). NBN Co is exempt from the operation of the FOI Act in relation to these documents (s 7(2)). Accordingly, there is no need for me to consider other exemptions relied upon by NBN Co.
21. I do not think that applying the FOI Act in this way is 'recursive' (as Ms Battersby put it). Nor does it mean that 'every input into NBN Co from the outside world ... gets funnelled toward its "commercial activities"'. But NBN Co's exemption from the operation of the FOI Act is broad enough to cover the documents that are the subject of this IC review.

Decision

22. Under s 55K of the FOI Act, I affirm NBN Co's decision of 26 July 2012.

James Popple
Freedom of Information Commissioner
26 July 2013

⁵ These agreements were the subject of *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4.

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.