



Response to Consultation

Guidelines on the treatment of confidential information

Final text of Guidelines

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1 Introduction

This is ComReg's response to the consultation launched by document 05/02 issued on 11th January 2005 which set out draft Guidelines on the treatment of confidential information. ComReg received submissions from the following parties to that consultation document:

- Matheson Ormsby Prentice
- Esat BT
- eircom Limited
- Vodafone Ireland Limited

All of those submissions will be published on the ComReg website. ComReg has carefully considered the contents of those submissions and has made a number of amendments to the draft Guidelines in the light of the respondents' submissions. This document summarises the main points made by the respondents and also sets out the text of the final Guidelines.

2 Summary of the points made by the respondents and ComReg's comments

The types of information covered by the Guidelines:

A number of respondents asked whether the Guidelines applied only to information supplied in the course of a consultation process. One respondent suggested that a definition of "information" should be included in the Guidelines and further submitted that "information" should include both written and verbal data which is communicated in either a formal or informal manner. The draft Guidelines stated that they applied to information supplied to ComReg *for example* in the course of the consultation process. However, for the sake of clarity, ComReg has amended the Guidelines to make it clear that they are not limited to information received in the course of such a process (see paragraph 1 of the Guidelines).

Whilst any information received by ComReg (whether in documentary form or given orally) may be confidential, the Guidelines are couched in terms of the provision of confidential and non confidential versions of documents to ComReg. This is because it would be unlikely for ComReg to request a non confidential version of an oral statement. In any event, most information imparted orally is subsequently followed up by a document.

Finally in this regard, although the Guidelines are aimed mainly at the content of documents, it should be remembered that in appropriate circumstances, the identity of a respondent may, of itself, be confidential.

Process issues:

Most respondents raised general and detailed points related to the process described in the Guidelines in particular in paragraphs 11 onwards. These may be summarised as follows:-

(i) Natural justice:

The draft Guidelines stipulated that where only a confidential version of a document was provided to ComReg, ComReg would carry out an assessment in order to decide whether the material in question was, as a matter of fact and law, confidential. Where ComReg concludes that the material in question is not confidential it would so inform the respondent and give reasons for the conclusion it had reached. If ComReg proposed to publish the material in question it would give the Respondent a period of seven days within which to make representations. Having considered any such representations, ComReg may publish the material in question if the case for confidentiality had not been made out. In such circumstances ComReg would give its reasons for publishing the material.

A number of respondents stated that where ComReg intended to publish the information, it should notify the party supplying the information as to when it would publish that information. The Guidelines have been amended to take into account this suggestion (see paragraph 19 of the Guidelines).

ComReg believes that the opportunities for respondents to make representations (or take action to prevent ComReg from publishing) coupled with the fact that ComReg will further give the respondent warning of the date when it intends to publish fully satisfy the requirements of natural justice.

(ii) The assessment process:

Some respondents wanted greater clarity of the assessment process that ComReg would carry out in deciding whether or not information was, in fact and in law, confidential. The draft Guidelines (paragraph 16) summarised the tests laid down by law for this purpose. ComReg believes those tests to be sufficiently well known. In addition, in any individual case, ComReg will give the reasons which underline its assessment. Interested parties will therefore be able to assess whether ComReg has applied the correct legal tests.

(iii) Timescale for assessment of whether or not information is confidential:

One respondent suggested that ComReg should make its assessment of whether or not information was confidential within seven days. Whilst ComReg would ordinarily expect to be able to carry out the assessment within a seven day period, the length of some documents received from respondents and the possible need to correspond to those respondents on the subject may mean that an assessment cannot be carried out within seven days. For that reason ComReg has not amended the Guidelines to stipulate a seven day period for assessment.

(iv) The situation where information is only confidential vis à vis certain third parties:

One respondent suggested that where information supplied was only confidential vis à vis certain third parties, it should nonetheless be disclosed to parties in respect of whom it is not confidential. In response to this point, ComReg will consider all the circumstances of each case in deciding whether or not to disclose the information.

(v) Where disclosure of information by ComReg may put a respondent in breach of its obligations to third parties:

One respondent suggested that if ComReg did disclose information, such disclosure might cause a respondent to be in breach of its obligations of confidentiality to third parties. Whilst that may well be true, ComReg believes that the respondent supplying the information is best placed to raise this point either when initially submitting a confidential document or subsequently, when ComReg notifies that respondent that it intends to disclose some or all of the information provided by the respondent.

(vi) The situation where although a non confidential version of a document has been produced, ComReg still takes the view that some material in the confidential version is in fact and in law, non confidential:

Two respondents dealt with this situation. One respondent suggested that only the non confidential version of the document should be disclosed, and the other respondent took exactly the opposite approach. The object of requiring respondents to provide non confidential versions of their document is to aid the transparency of the consultation process. If respondents were able to set out information in their confidential response which they did not repeat in their non confidential response, and if that information was, in fact and in law, non confidential, then the object of supplying a non confidential version would be defeated. ComReg may, subject to the Guidelines, publish those aspects of the allegedly confidential version which were in fact and in law non confidential.

(vii) Withdrawal of a confidential document:

One respondent suggested that if only a confidential version of a document were supplied to ComReg, and after carrying out its assessment ComReg decided the material was not confidential, the respondent should be able to withdraw the document entirely.

In ComReg's view such an approach would be inconsistent with the scheme of the legislation described in the Guidelines. That legislation clearly envisages publication of allegedly confidential material in appropriate circumstances.

(viii) Relationship of the Guidelines with the Freedom of Information Act and the data protection legislation:

One respondent asked for clarity as to how the Guidelines interact with the obligations on ComReg to disclose information under the Freedom of Information Act and the data protection legislation. As was clearly stated in paragraph 2 of the Guidelines, the Guidelines are without prejudice to the rules set out in the freedom of information and data protection legislation to disclose information and any exceptions to the obligation to disclose.

For that reason, it is not appropriate to deal with the procedures under the Freedom of Information and data protection legislation in these Guidelines.

(ix) Information exchanged with Government departments, agencies and the European Commission:

One respondent sought clarity as to the interaction between the proposed Guidelines on exchanges of information between ComReg and the Competition Authority and the Director of Consumer Affairs. The same point was made in relation to information provided to the European Commission.

In this regard ComReg would refer to Article 3 (5) of the Framework Directive¹ that provides that national regulatory authorities and national competition authorities shall provide each other with the information necessary for the application of the provisions of the Framework Directives and the other associated Directives. In respect of the information exchanged, the receiving authority is to ensure the same level of confidentiality as the originating authority. As regards information provided to the European Commission, ComReg would refer to Regulation 17 of the Framework Regulations 2003² which lays down the procedure for the supply of information to the European Commission and in particular issues of confidentiality.

(x) Further consultation:

One respondent suggested that there should be a further round of consultation on the draft Guidelines. However, given that ComReg has carefully considered all points made and has amended the draft Guidelines in accordance with the points made, it is not felt appropriate to conduct a formal reconsultation. ComReg will keep the

¹ Directive 2002/21 Regulatory Framework for Electronic Communications networks and services. See also the agreement between the Competition Authority and ComReg pursuant to Section 34 of the Competition Act 2002, available on the web sites of ComReg and the Competition Authority.

² S.I. NO307 of 2003

workings of the Guidelines under review and would welcome any comments during the course of the forthcoming months as to if, and how, the Guidelines may be improved.



2.1 GUIDELINES ON THE TREATMENT OF CONFIDENTIAL INFORMATION

The purpose of the document

1. These Guidelines explain how ComReg will treat claims by respondents that information supplied to it, for example in the course of a consultation process, is confidential. However, these Guidelines are not limited to information received in the course of a consultation process. ComReg will normally follow these Guidelines and will give reasons if it departs from them. The Guidelines are intended to assist stakeholders in understanding ComReg's processes and thus aid transparency.
2. The Guidelines are without prejudice to the provisions of the Freedom of Information Acts and the data protection legislation. Furthermore there are specific arrangements regarding the exchange of information between ComReg and the Competition Authority and between ComReg and the European Commission to which reference should be made ¹

The legislative framework

3. A number of provisions in the Regulations which transpose the EU Communications Directives deal with confidential information. For example, Regulation 21 of the Framework Regulations ² provides:

“In these Regulations the Regulator shall, subject to the Freedom of Information Acts 1997 and 2003, maintain and accept as confidential any information provided by an undertaking expressed by it to be confidential, except where the Regulator has good reason to consider otherwise”.

4. Similarly, Regulation 17(11) provides:

“The Regulator shall, subject to the protection of the confidentiality of any information which it considers to be confidential, publish from time to time such information as would, in the opinion of the Regulator, contribute to an open and competitive market”.

5. In the context of cooperation with the Director of Consumer Affairs, Regulation 18(2) of the Framework Regulations provides:

“The Regulator and the Director of Consumer Affairs shall, subject to the Freedom of Information Acts 1997 and 2003, maintain and accept as confidential any

¹ See the co-operation agreement between ComReg and the Competition Authority dated 16th December 2002 (available on ComReg's web-site) and also Regulation 17 (6) of the European Communities (Electronic Communications Network and Services) (Framework) Regulations 2003, S.I. No. 307 of 2003.

² European Communities (Electronic Communications Network and Services) (Framework) Regulations 2003, S.I. No. 307 of 2003.

information provided [.....] by an undertaking providing electronic communications networks or services expressed by it to be confidential, except where the Regulator and the Director of Consumer Affairs have good reason to consider otherwise”.

6. Finally in this regard, Regulation 3 of the Access Regulations ³provides:

“For the purposes of these Regulations, where the Regulator may consider whether information is confidential or not, it shall, subject to the Freedom of Information Acts 1997 and 2003, accept as confidential any information which is expressed to be confidential, except where it has good reasons to consider otherwise”.

7. As can be seen, all of the above provisions give ComReg a measure of discretion with regard to the treatment of information for which confidentiality is claimed.
8. Other provisions of the Regulations are silent on the question of ComReg’s discretion. For example, Regulation 19(6) of the Framework Regulations (which deals with consultation prior to the adoption of certain types of measures) provides:

“The results of any consultation under this Regulation shall be made publicly available by the Regulator, except in the case of confidential information”.

9. Although this provision does not refer to whether or not ComReg considers information to be confidential, it is clear that ComReg would still have to make an assessment of whether the information is, as a matter of fact and law, confidential.
10. A number of provisions similar to those quoted above are to be found in the implementing Regulations.

ComReg’s practice with regard to the treatment of claims for confidentiality

11. Against the background set out above, ComReg will adopt the practice described below.
12. Respondents who supply information and observations to ComReg are asked to supply a non-confidential document, with any information for which confidentiality is claimed supplied in a separate annex. This is particularly important as ComReg intends to publish respondents’ submissions on its website.
13. Where a respondent supplies only a document for which confidentiality is claimed (in other words, where the request in paragraph 12 has not been complied with), or where the document contains various paragraphs or other material spread throughout the document which are alleged to be confidential, the following procedure will apply.
14. In the first place ComReg will request that a non-confidential version be supplied within a short timescale, usually seven days.
15. If the respondent fails to supply a non-confidential version within the stipulated timescale, ComReg will assess the information supplied to see whether, as a matter of fact and law, the material is confidential.

³ European Communities (Electronic Communications Network and Services) (Access) Regulations 2003, S.I. No. 305 of 2003.

16. In making its assessment, ComReg will apply the tests laid down by law. These tests are well known. In essence, the material must have the necessary “quality of confidence” for it to be confidential. In this regard, ComReg will assess:
 - (a) Whether the material is material which the respondent believes would be injurious to him (or advantageous to his competitors or others) if it were released.
 - (b) Whether the respondent believes the material to be confidential.
 - (c) Whether that belief is reasonable.
 - (d) The usages and practices of the communications sector with regard to the material in question.
17. If ComReg concludes that the material is not confidential it will so inform the respondent and give reasons for the conclusion it has reached. If ComReg proposes to publish the material in question, it will give the respondent a period of seven days within which to make representations. (This period of time is the same as that provided for in cases in which the European Commission requests ComReg to provide it with information ⁴).
18. In urgent cases, the period of seven days may be abridged. If the period is abridged ComReg will state the reasons for this.
19. Having considered any representations which the respondent has made, ComReg may publish the material in question if it considers that the case for confidentiality has not been made out. Before publishing the material ComReg will notify the respondent of the date on which it proposes to publish.
20. Where ComReg does publish the material, it will state its reasons for so doing.



⁴ See Regulation 17(6) of the Framework Regulations.