



COMMERCE COMMISSION

Guidelines on Confidentiality Orders in proceedings under the Telecommunications Act 2001

These Guidelines are intended to clarify the effect and operation of Confidentiality Orders made by the Commerce Commission ('Commission') under s 100 of the Commerce Act 1986, as applied pursuant to s 15(i) of the Telecommunications Act 2001 ('Order'). These guidelines are designed to assist you in understanding the policies and processes underpinning such Orders. These Guidelines are not a substitute for independent legal advice, which the Commission recommends that you obtain before providing, giving access or seeking access to commercially sensitive information and before appointing a Nominated Counsel or submitting Deeds of Undertaking to the Commission. The Commission may vary these Guidelines from time to time.

Definitions

1. In these Guidelines, the following terms have the meanings ascribed to them in an Order made under Commerce Act s 100:
 - "Deed of Undertaking";
 - "Information";
 - "Party"; and
 - "Restricted Information".

Nominated Counsel

2. If you wish to receive or provide Restricted Information, you must appoint as a Nominated Counsel a lawyer who has a current certificate to practise as a Barrister and Solicitor of the High Court of New Zealand. The Nominated Counsel is responsible for ensuring that all the requirements of the Order are complied with by the person on whose behalf he or she is acting. This responsibility includes:
 - determining who needs access to Restricted Information to render professional services in relation to the matter;
 - providing the relevant Deeds of Undertaking to the Commission and the other Party or Parties to the Order; and

- making any necessary applications to the Commission for access by employees to Restricted Information.
3. Each Party must advise the Commission who their Nominated Counsel is and, if necessary, of any changes of Nominated Counsel during the term of the Order.
 4. If a Party fails to appoint a Nominated Counsel, the Commission may (if the Commission considers it necessary to do so) issue a further confidentiality order regarding access to, and use and disclosure of, Restricted Information by that Party. In deciding whether to release a further confidentiality order, the Commission will consider whether it is necessary for that Party to obtain access to confidential information for the purpose of the proceedings.

Provision of Information to the Commission

5. Information must be provided to the Commission and other Parties within the time periods prescribed by the applicable Order. Generally, a Party must provide Information (including any Information for which Restricted Information status or additional protection is sought) to the Commission no later than 5:00 pm on the due date or at such other time as may be specified by the Commission. A 'public' version of the Information, which omits any Information for which Restricted Information status or additional protection is sought) must be provided to the Commission in a form suitable for disclosure on the Commission's website, before the close of the next working day following the day on which the Restricted Information is provided to the Commission.
6. Where the supplying Party seeks protection of Information under an Order, that person must clearly identify the Information for which protection is sought, as discussed in paragraphs 21 to 23 of these Guidelines. The supplying Party must also set out specific reasons why the Information should be treated as Restricted Information or, if relevant, specific reasons why the Information should be accorded additional protection over and above that given to Restricted Information. Such grounds may be set out in a covering letter, email or submission to the Commission. The Commission expects that grounds will describe how and why publication of the information would be likely unreasonably to prejudice the commercial position of the person who supplied it or who is the subject of the information. The Commission will be assisted in making its decision by the statement of particular grounds, rather than the mere assertion that disclosure would be prejudicial.
7. In respect of all information for which protection as Restricted Information is sought, a Party's Nominated Counsel must certify in writing to the Commission that, in his or her opinion, protection of the Information as Restricted Information is necessary to

avoid likely unreasonable prejudice to the commercial position of the person who supplied or who is the subject of that Information.

8. A Party must provide a copy of all Information (including Restricted Information) provided to the Commission to the Nominated Counsel for the other Party or Parties in accordance with the timetable set but the applicable Order – generally, not later than 5:00 pm (or at such other time specified by the Commission) on the next working day following the day on which the Information is provided to the Commission.
9. A Party is required to provide the following versions of Information to Nominated Counsel for the other Party or Parties:
 - where the Information does not include any Information in respect of which the party requests protection as Restricted Information or additional protection, a ‘public’ version only;
 - where the Information includes any Information in respect of which the party requests protection as Restricted Information, a ‘public’ version (which omits all Information in respect of which protection as Restricted Information is requested) and a ‘restricted’ version (which includes and properly identifies all Information in respect of which protection as Restricted Information is requested); and
 - where the Information includes any Information in respect of which the party requests additional protection to that accorded Restricted Information, a ‘public’ version (which omits all Information in respect of which additional protection is requested) and a ‘protected’ version (which includes and properly identifies all Information in respect of which additional protection is requested); and
 - where the Information includes Information in respect of which the party requests protection as Restricted Information as well as Information in respect of which the party seeks additional protection, a ‘public’ version (which omits all Information in respect of which protection as Restricted Information or additional protection is requested), a ‘restricted’ version (which includes and properly identifies all Information in respect of which protection as Restricted Information is requested but omits all Information in respect of which additional protection is requested), and a ‘protected’ version (which includes and properly identifies all Information in respect of which additional protection is requested and includes and properly identifies all Information in respect of which protection as Restricted Information is requested).
10. Where protection of Information is requested, the Commission will decide on the appropriate confidentiality designation of the Information and the extent to which

parties should have access to the other Party's or Parties' Information. In deciding on whether it is necessary for one Party to have access to another Party's Information, the Commission will consider:

- the extent to which disclosure would be likely unreasonably to prejudice the commercial position of the Party who supplied or who is the subject of the Information;
- the significance of the Information to the issues in the proceeding; and
- the extent to which limitations on disclosure would appropriately address these matters.

11. Information provided pursuant to a s 98 notice is not automatically subject to any confidentiality Order or Deed of Undertaking. Such information is provided in compliance with the statutory notice and whether that information should be brought within the protection of the confidentiality regime is at the Commission's discretion. If there is a potentially applicable Order in force, the Commission will consider whether the information provided should properly be subject to that Order and designated accordingly. If there is no relevant Order in force, the Commission may issue one, if it considers it appropriate to do so. In any event, the Commission will determine whether, having regard to the character of the information in question and all relevant circumstances, it is necessary or desirable that information provided in response to a s 98 notice should be protected by a s 100 Order.
12. Parties providing information to the Commission in response to a s 98 notice should indicate their views as to the status of that information, and may identify the information as Restricted Information or request additional protection for the information. A request for additional protection may be made in the same manner as a request for additional protection made under Order. The Commission will then consider whether it is appropriate to bring the information provided to the Commission pursuant to the s 98 notice within the terms of a Confidentiality Order.
13. If information provided in compliance with a s 98 notice is protected by a s 100 Order, all rights and obligations of Nominated Counsel will apply.

Requesting additional protection

14. Where a party requires additional protection for any Information over and above that given pursuant to an Order to the category of Restricted Information, the Party must write to the Commission, setting out the details of the Information in question, the nature, extent and duration of protection required by the Party and the reasons why the Information should be subject to such additional protection. For example, a Party might consider that the information provided should not be disclosed to any other

Party (i.e. should be available to the Commission only) for a specified period. The Commission will be assisted in making its decision by the statement of particular grounds, rather than the mere assertion that disclosure would be pre judicial.

15. When requesting additional protection for Information, a Party's Nominated Counsel must certify that, in his or her opinion, the commercial sensitivity of the Information is such that:
 - protection of that information merely as Restricted Information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; and
 - additional protection of the nature, extent and duration that is sought is necessary in order to avoid likely unreasonable prejudice to the commercial position of the person who supplied or who is the subject of the information.
16. The Commission will review the continuing need for additional protection of Information in situations where a Party requests that such Information be re-designated as Restricted Information or where the Commission considers it necessary to review that Information for the purposes of the proceeding.
17. The Commission expects that requests for additional protection under the Order will be made from time to time in exceptional circumstances in which it is evident that protection as Restricted Information will be inadequate to avoid likely unreasonable commercial prejudice. The Order sets out procedures for making such requests and identifying relevant Information but does not provide for any particular form of additional protection. Rather, the Commission will advise Parties on a case-by-case basis on how it will handle any particular request.
18. Where the Commission considers a request for additional protection, the Commission will assess the merits of the application on a case-by-case basis. In general, the Commission will only grant additional protection for critically sensitive information (e.g. to protect vulnerable intellectual property or critically sensitive financial information) where disclosure to other parties is likely to cause material commercial disadvantage to the Party providing the information. The Commission will only accept claims for additional protection in exceptional cases. An exceptional case may be shown to exist where the potential prejudice to the supplying Party from disclosure on even a restricted basis clearly outweighs the potential prejudice to other Parties from withholding that Information.
19. By way of example, the Commission has previously granted additional protection (to information it designated as 'Commission Only' information) to call revenue and call volume information provided by parties. This information was used by the Commission to estimate the average industry price for a telecommunications service,

which average was disclosed to all parties as Restricted Information. In this case, the Commission considered that the prejudice to the parties' commercial interests outweighed the prejudice from denying the opportunity for other parties to make submissions on the individual call revenues and volumes, and considered that designating the averaged industry price as Restricted Information struck an appropriate balance between protecting confidential data and ensuring that parties have an adequate opportunity to comment on matters affecting their interests. Exceptionally, access might be limited to external experts and legal counsel (excluding other internal experts) to ensure that the affected parties have an opportunity to submit expert comment on matters that affect their interests, whilst maintaining additional protection for critically sensitive information. Following the Commission's review of the request, the Commission will advise the relevant parties of its decision.

20. The Commission will decide the appropriate degree of additional protection, if any, that Information should be given and the extent to which such Information may be accessed for the purpose of the proceedings. In cases in which the Commission determines that the Information does not warrant additional protection, the Information will be designated as Restricted Information (or, possibly, as public information).
21. The Commission is not obliged to return to the supplying Party Information for which additional protection is sought, in the event that the Information is designated as Restricted Information or public information.

Identifying Restricted Information

22. The Party requesting that Information be protected as Restricted Information must clearly express the designation it proposes in respect of every piece of Restricted Information that it provides to the Commission by:
 - placing enclose any Restricted Information inside within square brackets with the designation of the Restricted Information next to those brackets (eg Commission designated Restricted Information [] **CRI**; or AAA designated Restricted Information [] **AAARI**; BBB designated Restricted Information [] **BBBRI**); and
 - clearly marking documents containing Restricted Information with the word "Restricted" on the front page.
23. Where a document contains only one designation of Restricted Information, a Party will be deemed to have clearly expressed the designation of every piece of Restricted Information in that document where the Party includes a clear statement at the

beginning of the document that all the Restricted Information in the document (as identified by enclosure in square brackets) is of the same designation and clearly marks the word “Restricted” on the front page of that document.

24. The Party must clearly express the designation of every piece of Information for which it seeks additional protection for by placing the Information in square brackets with the requested designation of the Information next to those brackets (eg Information for which BBB seeks additional protection [] **BBBAP**).

Access to Restricted Information

25. No person may obtain access to, publish, communicate or give evidence in relation to any Restricted Information except as provided for in the relevant Order.

26. A Nominated Counsel who wishes to gain access to Restricted Information must execute and deliver to the Commission and Nominated Counsel of the other Party (on the same day) a Deed of Undertaking in the form attached to the Order. The Nominated Counsel may disclose Restricted Information only to one or more of the following persons, where disclosure is reasonably necessary to enable that person to render professional services in relation to the Commission’s proceeding:

- other counsel (including internal counsel) who are actively engaged on behalf of the Party in relation to the proceeding;
- partners, associates, secretaries, assistants and employees of counsel; or
- external consultants or external experts under the supervision of counsel retained to render professional services in relation to the proceeding.

27. Any person to whom Restricted Information is to be disclosed must first have executed and delivered to the Commission a Deed of Undertaking in the prescribed form, prior to receiving any Restricted Information.

28. A person, who has executed and delivered a Deed of Undertaking to the Commission, becomes entitled to receive Restricted Information in accordance with the terms of the applicable Order. In general:

- where the person’s entitlement to have access to Restricted Information is not the subject of an application for review – three working days after the day on which the Commission releases a copy of the Deed of Undertaking;
- where the person’s entitlement to have access to Restricted Information is the subject of a review – on the day the Commission decides that that person shall be entitled to have (or continue to have) access to the Restricted Information; or

- where all relevant parties agree that that person shall be entitled to have access to the Restricted Information – on the date that the Commission receives written confirmation to that effect from all parties.

29. The Commission will provide a copy of each Deed of Undertaking it receives to other parties within two working days of receipt, unless the parties agree on access the same day that the Deed is provided to the Commission. The Commission will update Schedule 2 of the Order on its website when reasonably practicable to reflect Deeds received.

Use and disclosure of information

30. Any person (apart from the Commission and any person designated by the Commission) who receives Restricted Information pursuant to an Order:

- must use the Restricted Information only in the conduct of the Proceeding;
- must not use the Restricted Information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings; and
- must return or destroy all copies of the Restricted Information, except Restricted Information belonging to them, in accordance with the applicable Deed of Undertaking.

31. Any person who receives Restricted Information under the terms of an Order may disclose, describe, or discuss the Restricted Information in any written material submitted to the Commission in relation to the proceeding, provided that:

- the written material is identified as Restricted Information in accordance with the Order; and
- the written material is also submitted to the Commission and the other Party in accordance with the Order.

32. A Party supplying Information to the Commission in relation to the Proceeding may use and disclose that Party's own Information (including its own Restricted Information) at its discretion and is not required to comply with provisions in the Order regarding access to, use and disclosure of information.

Destruction of Information

33. For proceedings under Part 2 or Part 3 of the Act, each person who signs a Deed of Undertaking on behalf of a Party (“the Signatory”) is required to return or destroy all Restricted Information (apart from Restricted Information belonging to that person or that person’s employer or client) by the earlier of the expiry of the Order or twenty working days from the date on which the Commission issues its Final Determination. Each Signatory must provide the Commission with written confirmation that all Restricted Information has been returned or destroyed within twenty working days of either event.
34. For investigations under Schedule 3 of the Act, each Signatory is required to return or destroy all Restricted Information on the day that the Commission’s Final Report is provided to the Minister, as s 100 requires that the Order shall cease to have effect after that day. This does not prevent the affected Parties agreeing on terms for continuing access to such information and the destruction or return of the information, independently of the Order. Once an Order ceases to have effect, it is no longer an offense under Commerce Act s 100(4) to disclose that information (though such disclosure might be in breach of a deed or private contract between the parties).
35. Within twenty working days following the Parties returning or destroying all Restricted Information in accordance with the Order, written confirmation of that must be provided to the Commission.

Destruction of Information in electronic form

36. The Deed of Undertaking requires Restricted Information to be returned or destroyed on or before the later of expiry of the Order or twenty working days following the date on which the Commission issues a determination.
37. In order to destroy Restricted Information in electronic form, a Signatory to a Deed is required to destroy Restricted Information backed up on individual storage devices (such as CD-ROM or DVD) and delete confidential information from the parties’ live server.
38. A Signatory is not required to delete records of Information that exist as “back-up” copies on tape or mass storage unit, but must delete, as soon as practicable, any back-up data that subsequently is restored to a live server.

Review of a person’s access to Restricted Information

39. The Commission may, on its own initiative or on request by a Party, review whether an individual should become, or should cease to be, entitled to have access to Restricted Information.

40. If the Nominated Counsel for a Party wishes to disclose Restricted Information to persons other than that Party's counsel and external experts, the Nominated Counsel must apply to the supplying Party for approval of the terms of access (including the period and scope of access).
41. The Nominated Counsel of the first-mentioned Party and of the supplying Party must endeavour to reach agreement on the terms of access within two working days. Where agreement on the terms of access is reached, the Nominated Counsel should promptly advise the Commission in writing accordingly.
42. Where agreement on the terms of access is not reached within two working days, the Nominated Counsel for the requesting Party may submit a written application to the Commission (copied to the supplying Party) requesting access for specified persons and outlining the grounds for access and particulars of the Restricted Information.
43. A Party may request review of a person's entitlement to have access to Restricted Information only where:
 - that Party has, not more than two working days previously, received a Deed of Undertaking executed by the person in relation to whom the review is sought; or
 - that Party has, immediately prior to making the request, unsuccessfully attempted to negotiate with another Party terms of access to the Restricted Information by the person in relation to whom the review is sought; or
 - the Information to which the Party seeks access on behalf of the individual concerned has been designated as Restricted Information by the Commission.
44. A request by a Party for review of a person's entitlement to have access to Restricted Information should be submitted in writing to the Commission setting out:
 - particulars of the Restricted Information to which the request for access relates;
 - particulars of the person on whose behalf the request is made, including his or her job title, job description, qualifications and statement as to the extent to which he or she participates in or contributes to strategic or commercial decision making on behalf of his or her organization; and
 - the grounds supporting the application.
45. The supplying Party and any other affected Parties may make written submissions to the Commission in respect of the review within two working days of receipt of either the other Party's request for review or the Commission's notice that it is initiating a review, as the case may be.

46. In carrying out a review of a person's entitlement to have access to Restricted Information, the Commission will have regard to any submissions received by it in relation to a review which are compliant with relevant provisions of the Order. In determining whether it is appropriate for a person to have access to another Party's Restricted Information, the Commission will balance the potential prejudice to the supplying Party of requiring further disclosure of the Restricted Information against the potential prejudice to the Party seeking access if such disclosure were not authorised. In assessing this matter, the Commission considers the extent to which the internal expert staff member makes commercial decisions or is involved in commercial negotiations. The Nominated Counsel for the requesting Party should provide the Commission with details of the job description and responsibilities of the persons on whose behalf access is sought.
47. The Commission will make reasonable efforts to determine the person's entitlement to have access to Restricted Information within five working days of receipt of either the other Party's request for review or the Commission's notice that it is initiating a review, as the case may be.

Review of status of information

48. The Commission may, on its own initiative or on request by a Party, review the status of, or the terms of access to, any Information, including Information which is public, protected as Restricted Information under an Order, or in respect of which additional protection has been agreed. The Commission will give notice of any such review to the Party who supplied the Information and allow affected Parties to comment, if circumstances permit, within such period as is specified by the Commission. The Commission will notify the Parties of the outcome of its review. Pending the outcome of the Commission's review, the relevant Information remains subject to the applicable Order, and may not be disclosed otherwise than in accordance with extant arrangements or at the discretion of the supplying Party.
49. Any Party may request that the Commission review the status of, or the terms of access to, any Information, including information which is public, protected as Restricted Information under an Order, or in respect of which additional protection has been agreed. Such an application should be submitted in writing to the Commission, setting out:
- particulars of the Information in question;
 - if the request relates to additional protection, the terms of access agreed or sought to be agreed; and
 - the grounds supporting the application.

50. A Party seeking review of the protection given to particular Information must provide a copy of its application to the supplying Party and any other affected Parties.
51. The supplying Party and any other affected Parties may make written submissions to the Commission in respect of the review within two working days of receipt of either the other Party's request for review or the Commission's notice that it is initiating a review, as the case may be.
52. The Commission will make reasonable efforts to decide on the request within five working days of:
- receipt of a Party's request for a review of the status of particular Information; or
 - giving notice to Parties of the Commission's intention to review the status of particular Information.
53. Where the Commission decides, following a review, to change the status of, or terms of access to, any Information, the supplying Party must provide the Commission with an amended version of the Information, which reflects the changes made by the Commission, by the date specified by the Commission.
54. The Commission is not obliged to return the original Information to the supplying Party in the event that the status of any Information is changed.

No Corporate Record

55. Restricted Information may only be used by parties for the purpose of the proceeding, and (apart from a party's own Information) must be returned or destroyed in accordance with the requirements of the Deed of Undertaking and the applicable Order. Parties are not permitted to retain Restricted Information as a corporate record.
56. A Party may request access to the Commission's records after an Order has expired if and when they can demonstrate that such access is justified in the circumstances.

Enforcement

57. The Commission will consider a breach of any of the provisions of clause 11 of the Order an offence for which fines are provided under s 100(4) of the Commerce Act.

58. A person who publishes or communicates any information contrary to an Order is liable on summary conviction to a fine not exceeding \$4,000 for a natural person or \$12,000 for a body corporate.
59. In considering whether the Commission should commence proceedings for a breach of the Deed of Undertaking, the Commission will consider the following factors:
- whether the person's use or reference to the Restricted Information was deliberate;
 - the amount of Information disclosed and its nature;
 - to whom the Information was disclosed;
 - the likely harm that may result from the use or disclosure of the Information; and
 - any other factors that the Commission considers appropriate in the circumstances.