

MCA's Internal Guidelines on Confidentiality

16th December 2004

Introduction

These guidelines are meant to provide clarity to stakeholders with regard to the treatment by the Malta Communications Authority (MCA)¹ of information that is submitted by operators. They are not meant to be taken as rigid rules in that ultimately every case needs to be assessed on its own merits. These Guidelines do not in any way prejudice the Authority's rights and obligations, including those pertaining to the collection of information, emanating from the law as in force from time to time.

Guidelines

1. Information received from operators, subsequent to a reasoned request made by the Authority, is potentially public unless the Authority, in line with the relevant provisions at law, considers the information to be of a confidential nature.

The onus to clearly state why information, documentation or submissions however so described should be treated by the Authority as confidential, in line with the relevant provisions at law, rests with the operator. In deciding whether to accept a request for confidentiality, the Authority will give heed to the commercial sensitivity of the information provided.

Without prejudice to the Authority's final discretion to publish information, in line with its rights and obligations, wherever an operator challenges the Authority's intention to publish information concerning the said operator, the Authority shall meet up with the said operator to discuss the issue.

Without prejudice to the above, the Authority reserves the right to remove the confidential material in question and make the rest of the document public, marking any omissions that were made.

2. One criterion for confidentiality is that this reveals the commercial strategy of an authorised provider. The onus of proof is primarily on the operator. However the MCA may assess whether even documentation that has not been marked as confidential by the operator should be treated as such.
3. The most common instances of commercial confidentiality claims emanate from the submission of detailed cost accounting information that goes beyond the standard accounts submitted to other Authorities. Any such information should be considered as confidential unless the Authority determines that there is a necessity to publish it in whole or in part in support of decisions taken by the Authority, which need to be made public.
4. Information specifically required to be published at law is not considered as confidential.

¹ Hereinafter referred to as the 'Authority'

5. The Authority has a quasi-judicial function in adjudicating inter-operator and other disputes. There is therefore an obligation on the part of the MCA to ensure that a claim made by one party is passed on to the other party for a right of reply. During a dispute, submissions made to the Authority in view of that dispute will not be considered as confidential except in those cases specified at law.
6. Operators having a DMP² or SMP³ designation are bound to provide a significantly higher amount of information than the rest. It is therefore expected that there will be a higher level of discussion on confidentiality with DMP or SMP operators. This aspect has to be borne in mind in case of claims of discrimination in the treatment of information on the part of such operators.
7. Information relative to operators that is already in the public domain or that is already in the possession of a third party (excluding persons contracted by the operators, or persons in the unlawful possession of the information) prior to being submitted to the MCA will not be considered as confidential.
8. Studies and reports relating to an investigation commissioned by the MCA will in general be considered as public unless they reveal the commercial strategy or commercial information as defined above of any operator.
9. When publishing any information which, in its opinion, would contribute to an open and competitive market, the MCA shall take all the necessary measures to protect the confidentiality of any part of such information.
10. Any contractors commissioned by the MCA, who are entrusted with information pertaining to operators, are strictly bound not to divulge any such information. The appropriate confidentiality clauses are inserted in any contract for service that is signed up by the MCA and the contracted party.
11. Without prejudice to the Authority's obligations with respect to the publication and sharing of confidential information, including the informing of the operator of the Authority's intention to publish the information, any information that is passed on to the MCA by the operator for the purposes of a particular requirement, may be used for any other purpose for which it may be required, irrespective of whether it is deemed as being confidential or not.
12. The MCA will treat requests for the approval of new service offerings, offers and marketing ideas that will be launched by an operator as confidential unless the MCA is required at law to consult publicly on any such service offerings etc. Where the Authority is required to consult publicly, the Authority should endeavour to reduce any

² Under those provisions of Legal Notices 170 of 1999, 151 of 2000 and 167 of 2001 which have not as yet been deleted

³ under the Electronic Communications (Regulation) Act (ECRA) and the Electronic Communications Networks and Services (General) Regulations (ECNSR)

detailed accounting information in support of the applicant's request to the extent that this does not prevent other stakeholders from making an informed judgement as to the validity of the request.

13. Data held for statistical purposes will not, as a rule, be considered as confidential. Statistics passed on to international bodies as a result of an international obligation of Malta will therefore not be considered as confidential.
14. The Authority will consider accepting complaints and related information from operators' customers in confidence. The Authority may require the latter to give valid reasons to justify why the information so submitted should be treated in confidence. In such a case the complainant must also specify which part of information submitted should be treated as confidential and why. The MCA will encourage openness in this regard though it is aware that an operator's customer may have valid reasons to submit a complaint and pass on information under the guarantee of confidentiality. The MCA will however make it clear to complainants that it might not be able to take the necessary action against the operator or service provider if it has no hard and fast evidence to back a particular complaint.
15. Information falling under data protection legislation will be considered as such.
16. Any information exchanged between the MCA and the competent authorities responsible for competition issues in Malta, as required by law, will be treated by the receiving authority with the same degree of confidentiality as that exercised by the originating authority.

Definitions

Commercial confidentiality includes the concept of trade secrecy and other related legal concepts (such as intellectual property) which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order to obtain or retain business advantages it derives from its rights to the information. This includes detailed accounting information especially relating to cost components and business secrets, the publication of which may cause the business concerned substantial harm.

Commercial confidentiality will, as a rule, be accepted if it relates to plans for future commercial activities (commercial strategy) that are not yet implemented and publication of which may lead to benefits being usurped by others, or a material financial loss or prejudice of a competitive position being experienced by the undertaking to whom the information relates

Commercial confidentiality will not be granted if the information is already in the public domain or if it is already in the possession of a third party prior to being submitted to the regulator. It will also not be granted if there is a requirement at law to publish the information in question.

There might be instances where commercial information would not fit into this definition. When this occurs, an element of discretion will be used.

Request for commercial confidentiality means that an operator has made a claim that the information passed on to the Authority is entitled to confidential treatment for reasons of commercial confidentiality. The Authority will advise the operator of its decision whether to accept or reject the request accordingly.