



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Access to the File Policy

**in respect of investigations by ComReg under the
Communications Regulation and Digital Hub
Development Agency (Amendment) Act 2023**

Document Number: 25/16a

Date: 26 March 2025

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1 Introduction

- 1.1. Part 7 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (the **Act**) was commenced on 9 June 2023, establishing *inter alia* an administrative sanctions regime to deal with “*regulatory breaches*” within the meaning of section 2(1) of the Act. This document sets out the procedures ComReg intends to follow when providing access to its file in the context of investigations into suspected regulatory breaches (**Investigations**).
- 1.2. Investigations are carried out by **Authorised Officers** appointed pursuant to section 39 of the Communications Regulation Act 2002. The **File** the subject matter of this Policy document is that consisting of any and all material that will have been relied upon by the Authorised Officer for the purpose of issuing a notice of suspected non-compliance under section 63 of the Act (an **NSNC**), preparing a report under section 70 of the Act (a **Referral Report**), or referring a matter to an adjudicator pursuant to section 69(b) of the Act. The File also comprises the additional evidence or material as described in Section 3 below.
- 1.3. This Policy document is intended to provide guidance to persons on whom an NSNC has been served (**Notified Persons**) and their advisers in relation to how Authorised Officers will normally approach the provision of access to the File at appropriate stages of the statutory process. It is not intended to be a binding statement regarding how discretion will be exercised in a particular situation and should not be taken as such. This Policy document may be departed from in particular circumstances.
- 1.4. This Policy document is without prejudice to any confidentiality guidelines or similar procedures that may be published by ComReg from time to time; however, where, in the context of proceedings provided for under Part 7 of the Act, there is a conflict between any provision of this document and any other such guidelines or procedures, this document is to take precedence.

2 When and how access to the File is granted

- 1.5. Access to the File is granted only upon receipt of an NSNC by a Notified Person. As a matter of general principle, unless otherwise prohibited by law, the employees, legal advisers and other professional advisers of Notified Persons will also be entitled to such access where they are acting on behalf of the Notified Person concerned in the context of the particular investigation.
- 1.6. Having completed an Investigation and issued an NSNC, an Authorised Officer may, with the consent of the Commission, decide to refer a matter for adjudication pursuant to section 69(b) and in accordance with section 71 of the Act. In such circumstances, the Authorised Officer will prepare a Referral Report for an adjudicator in accordance with section 70 of the Act. A copy of the Referral Report will thereafter be provided to the Notified Person in accordance with section 71(2)(a) of the Act. At that stage, section 71(2)(b) of the Act obliges the Authorised Officer to provide Notified Persons with a copy of, or access to, any material not already provided that has been relied upon for the purpose of the referral. In circumstances where a settlement is agreed between an Authorised Officer and a Notified Person in accordance with section 68 of the Act, the Authorised Officer will prepare a report (distinct from a Referral Report) for the purpose of making a referral for an adjudication on consent; in such circumstances, further access to the File will not be provided.
- 1.7. In order to facilitate access to the File, an Authorised Officer will issue to a Notified Person an enumerative list of documents setting out the contents of the File (the **Schedule**). The Schedule will be provided either at the same time as the NSNC or as soon as practicable thereafter. The Authorised Officer will then engage with the Notified Person for the purpose of making arrangements to facilitate access.
- 1.8. In circumstances where a referral is made to an adjudicator and to the extent that further documents are added to the File after service of the NSNC, the Authorised Officer will issue to the Notified Person a Schedule of those additional documents in order to facilitate further access to the File. This Schedule will be issued either at the same time as a copy of the Referral Report is provided, or as soon as practicable thereafter.
- 1.9. Access to the File may be granted electronically (e.g. through e-mail or access to an electronic platform), by providing copies of documents in paper form, or by a combination of both methods, taking due account of the practicability of providing access through any particular method. Access to the File may also be granted through a data room procedure if the Authorised Officer considers such an approach necessary in the circumstances of any particular case. In such cases,

the Authorised Officer may make the provision of access via the data room conditional on adherence to rules and procedures that the Authorised Officer may specify at their absolute discretion. Where necessary to protect the rights of defence of Notified Persons, in appropriate cases the inspection of original documents may be facilitated. Authorised Officers are under no obligation to provide a translation of documents on the File.

- 1.10. Access to the File is granted subject to the condition that the information thereby obtained can only be used for the purpose of responding to an NSNC or to otherwise deal with the proceedings provided for under Part 7 of the Act.

3 Extent of access

Documents to which Access will usually be provided

- 1.11. Access will be granted as a matter of course to documents to which explicit reference is made in the NSNC or Referral Report. Access will also be granted to additional evidence not referred to in the NSNC or Referral Report, where the provision of such evidence is considered necessary in order that the Notified Persons have the opportunity to respond to an NSNC or to otherwise deal with the proceedings provided for under Part 7 of the Act in a fully informed manner.

Documents to which access will not usually be provided

- 1.12. Access will not generally be granted to documents internal to ComReg, its staff or Authorised Officers. Examples of such documents include – but are not limited to – draft documents, communications between staff, or any other documents or records including those over which a claim of privilege might reasonably be made. Where such documents (or parts of such documents) lose their purely internal character, for example where they tend to prove or disprove the commission of a suspected regulatory breach, they may be considered (in full or in part) to form part of the File and will be subject to access where appropriate.
- 1.13. Where documents have been provided to an Authorised Officer by a Notified Person in the course of an Investigation, such documents, while forming part of the File, will not, as a general rule, be made available for access, since they will be presumed to already be in the possession of the Notified Person. This rule may be departed from in appropriate cases, where necessary and reasonably practicable; it will, however, be necessary for Notified Persons to set out the reasons why further access is required to such documents.
- 1.14. Paragraphs 3.3 and 3.4 do not apply to documents to which explicit reference is made in the NSNC or Referral Report, which remain subject to access as a matter of course.

Limitations on access

- 1.15. The provision of access to the File is subject to such redactions as the Authorised Officer may consider necessary and appropriate in order to protect the rights of any person, to protect commercially sensitive information, or for any other good and sufficient reason. In this context, as appropriate and on a case-by-case basis, Authorised Officers will balance the need to safeguard the rights of Notified Persons against the need to protect the rights of third parties.

- 1.16. Authorised Officers have a wide discretion to apply whatever redactions may be appropriate in any particular case. Material provided by a third party during the course of an Investigation will normally be disclosed unredacted to Notified Persons unless Authorised Officers determine for good and sufficient reason that redactions are appropriate having regard, *inter alia*, to submissions made by the third party concerned at the time when providing the material, that the material contains confidential or commercially sensitive information.
- 1.17. It is also to be presumed that Authorised Officers will not accede to requests to redact information tending to prove or disprove the commission of a suspected regulatory breach. In the event of such a request, in order to minimise the impact on the rights of the third parties concerned, Authorised Officers may require Notified Persons, their employees, legal advisers and other professional advisers to give appropriate undertakings prior to providing access to the relevant information.
- 1.18. In certain cases, information on the File may be commercially sensitive but may nonetheless tend to prove or disprove a suspected regulatory breach. In such cases, in order not to give any party an unfair competitive advantage or to otherwise distort competition, the provision of undertakings envisaged in paragraph 3.7 may be insufficient. Authorised Officers may, in such circumstances, put in place a procedure whereby the provision of access to the information in question is restricted to specific persons, e.g. experts, or legal advisors, retained on behalf of the Notified Person, for the purpose of preparing confidential submissions in aid of their defence.
- 1.19. If a Notified Person wishes to gain access to information redacted by an Authorised Officer, a written request must be made to the Authorised Officer outlining why the document or redacted information is likely to be necessary to allow the Notified Person to exercise their rights of defence. Since the redactions at first instance will already have necessitated the Authorised Officer conducting a balancing exercise with regard to the competing rights referenced above, it is a matter for the Authorised Officer's discretion whether a re-assessment of the relevant redactions is warranted in the circumstances of any particular case.