



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

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1 Introduction

- 1.1 Part 7 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (“**the 2023 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 2023 Act. Investigations of suspected regulatory breaches are carried out by Authorised Officers appointed by ComReg pursuant to section 39 of the Communications Regulation Act 2002 (“**the 2002 Act**”).
- 1.2 During the course of an investigation into a potential regulatory breach or breaches, investigatory material will be obtained, produced and/or assembled by Authorised Officers (“**the File**”).
- 1.3 This Policy document has been prepared for guidance purposes as to how Authorised Officers will generally approach the provision of access to certain categories of such investigatory material (“**Access to the File**”), including for the purposes of section 63(5) and section 71(2)(b) of the 2023 Act.
- 1.4 This Policy Document 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, as appropriate. It may also be amended from time to time.
- 1.5 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 2023 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 **Grant of access**

2.1 Access to the File will be granted, including for the purposes of section 63(5) and section 71(2)(b) of the 2023 Act, to the following persons (“**Notified Persons**”):

- (i) Persons upon whom an Authorised Officer has served a notice of suspected non-compliance (“**NSNC**”), under section 63 of the 2023 Act, and
- (ii) Persons upon whom an Authorised Officer has served a referral report under section 70 of the 2023 Act (“**Referral Report**”), having previously been served with an NSNC.

2.2 Access to the File is granted as soon as is practicable after the issuing of an NSNC to a Notified Person. Where applicable, further access will be provided to a Notified Person to any material not already provided at the NSNC stage, following a referral for adjudication. Where a settlement is agreed between an Authorised Officer and a Notified Person in accordance with section 68 of the 2023 Act, no further access will be provided.

2.3 As a matter of general principle, unless otherwise prohibited by law, where access is granted to a Notified Person under this Policy, such access may be exercisable by the employees, legal advisers and certain other professional advisers of Notified Persons,

3 Accessible and non-accessible material

3.1 As a matter of general principle, access will be provided to Notified Persons to investigatory material relevant to the regulatory breach or breaches the subject of the NSNC or Referral Report, the disclosure of which is required to facilitate the Notified Person to respond to an NSNC, or otherwise deal with the proceedings provided for under Part 7 of the 2023 Act in a fully informed manner. Access will not be provided to any other material. The File may be divided into the following four categories:

- (a) Material relied upon by the Authorised Officer for the purpose of issuing the notice of suspected non-compliance, or for the purpose of referring the matter to adjudication and exhibited to the NSNC or the Referral Report (“**Category A**”);
- (b) Material not exhibited to the NSNC or the Referral Report, which is relevant to the investigation, whether inculpatory or exculpatory, including material obtained from third parties (“**Category B**”);
- (c) Material not exhibited to the NSNC or the Referral Report which is in the Notified Person’s possession (“**Category C**”);
- (d) Material in the File, including ComReg’s internal documents, that does not fall within any of the above categories (“**Category D**”).

3.2 Access will be provided to material falling within Categories A and B above.

3.3 Access will not be provided to material falling within Category C. Category C material consists of all material provided by the Notified Person to ComReg (including compelled material), including any correspondence exchanged between a Notified Person and ComReg during the course of an investigation, which is not subsequently exhibited to the NSNC or Referral Report. Access will not be granted given such material is already in the possession of the Notified Person.

3.4 This rule may be departed from in appropriate cases, where reasonably practicable and where the Notified Person has set out to the satisfaction of the Authorised Officer, any reasons why access may be required in the circumstances.

3.5 Access will also not be provided to Category D material. That category includes ComReg’s internal operational documents such as draft documents, communications between staff, including authorised officers, and material subject to privilege. Where an Authorised Officer finds that any such material (or parts thereof) has lost its purely internal character, for example where it tends to prove or disprove the commission of a suspected regulatory breach, it will be included in either Category A or Category B and be subject to access accordingly.

4 How access will be granted

- 4.1 Access to the materials falling within Category A will be effected by furnishing copies of the exhibits as part of the NSNC or Referral Report together with an enumerative list of those exhibits.
- 4.2 The Authorised Officer will engage with the Notified Person for the purpose of making arrangements to facilitate access to Category B documents, immediately on issuing an NSNC or serving a Referral Report as the case may be, or as soon as practicable thereafter. Access to Category B material 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 may also be granted through a data room procedure if the Authorised Officer considers such an approach necessary. 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.
- 4.3 Where an Authorised Officer accedes to a request for access to Category C materials pursuant to paragraph 3.4, the same approach will be followed as for Category B.
- 4.4 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.

5 Redactions

- 5.1 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.
- 5.2 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.
- 5.3 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.
- 5.4 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 5.3 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.
- 5.5 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.
- 5.6 In accordance with Section 71(1) of the 2023 Act, only Category A material will be provided by the Authorised Officer to an adjudicator at the point of referral for

adjudication. Whilst Category B and C material will not be provided to an adjudicator by the Authorised Officer, this does not restrict a Notified Person from providing such material to an adjudicator when exercising their rights of defence. Where Category A material is redacted, the redactions will be applied to the Referral Report furnished to the adjudicator.