

18 September 2015

Supplementary Guideline No. 2
on the management of access to
CONFIDENTIAL INFORMATION
submitted to the Market Inquiry into
the Private Healthcare Sector (“the Inquiry”)

Introduction

1. This Supplementary Guideline No. 2 (“this Guideline”) is to be read with the Guidelines issued previously, including in particular paragraph 30 of the Guidelines for Participation in the Inquiry issued on 1 August 2014. It has no application beyond the scope of this Inquiry.
2. This Guideline takes effect on 18 September 2015. As in the case of the previous Guidelines, this Guideline is issued by the Competition Commission (“the Commission”) after consultation with the Panel and is binding on the Commission, Panel and participants in the Inquiry unless and until formally withdrawn, supplemented or amended.
3. In this Guideline, which includes its annexures, “confidential information” means information submitted to the Inquiry in respect of which the person submitting it (“the submitter”) has claimed confidentiality in terms of s 44 of the Competition Act 89 of 1998 as amended (“the Act”) and which has not been finally determined not to be confidential information as contemplated by s 45 of the Act.
4. No undertaking or consent referred to in this Guideline is intended to affect the power of the Commission in terms of s 44 of the Act, or the right of any person seeking access to information in terms of s 45 of the Act, to apply to the Competition Tribunal (“the Tribunal”) for a determination that the information in question is not confidential information as defined in s 1 of the Act.
5. The Commission (of which the Inquiry is a part) has no power itself to grant access to information that is the subject of a claim of confidentiality, and which has not been finally determined not to be confidential information, in terms of the Act. The purpose of this Guideline is to facilitate and manage a process by which access to confidential information may take place –
 - 5.1 with the consent of the submitter; or
 - 5.2 pursuant to an order concerning access in the event that such an order were to be made by the Tribunal in terms of s 44(3)(b) or s 45(1)(b) of the Act.
6. Deviations from this Guideline may be allowed in particular cases at the discretion of the Chairperson who will be guided by the principles of fairness and justice and the need to facilitate the proper conduct of the Inquiry, and who will furnish reasons for the deviation in each case; provided that no such deviation shall permit

access to confidential information, or materially relax the standard restrictions and rules governing access in terms of this Guideline in a manner potentially to the prejudice of the submitter, without –

- 6.1 the consent of the submitter; or
- 6.2 the specific approval of the Tribunal in terms of the Act.

- 7. The framework set out in this Guideline may also be appropriately adapted and applied according to circumstances in order to manage any access to information which, although not confidential information in terms of the Act, is nevertheless restricted information to which the information officer of the Commission (the Commissioner) may be required or permitted to allow access in terms of the Promotion of Access to Information Act 2 of 2000 as amended and/or the Commission's Rules.

A framework for managing access

- 8. A submitter who –
 - 8.1 has made a claim of confidentiality supported by a written statement in the prescribed form (Form CC7) in respect of information submitted;
 - 8.2 has not withdrawn or waived the claim; and
 - 8.3 is willing to consent to another person or persons having access to that information for purposes of the Inquiry subject to appropriate undertakings, may enter into an arrangement with the Inquiry Director for the management of such access in terms of this Guideline, with or without modifications agreed to by the submitter and approved by the Chairperson as the particular case may require.
- 9. Any person who seeks access to confidential information for purposes of the Inquiry, and wishes to obtain such access by way of the framework provided by this Guideline, should in the first instance approach the Inquiry Director in that regard. Persons seeking access are not, however, precluded from approaching or negotiating with submitters directly.
- 10. A person seeking access to confidential information who is refused access by the submitter, or who considers that the consent offered or granted by the submitter is inadequate, is not precluded from applying to the Tribunal for an appropriate order concerning access in terms of s 45(1)(b) of the Act.
- 11. The Panel itself, acting through the Inquiry Director, may in the interests of fairness and the integrity of the Inquiry (without disclosing the confidential information concerned) inform any party having a stake in the Inquiry that a submitter's submission, or a particular portion thereof, contains confidential information which could potentially lead to a conclusion adverse to that party. The Panel intends to do so whenever it becomes aware that confidential information is materially and specifically of this kind, and before relying on it to draw any such adverse conclusion. Having regard to paragraph 5 above, access by that party to that confidential information will nevertheless remain subject to the submitter's consent or, failing such consent, to an order by the Tribunal as contemplated by the Act.
- 12. The Panel may itself wish to procure access to confidential information on the part of specified persons who, in the view of the Panel, are likely to be able to assist it

materially in verifying, refuting, supplementing or explaining facts or contentions advanced by submitters under claims of confidentiality. The Inquiry Director may accordingly approach submitters to obtain consent to such access subject to appropriate undertakings by the persons concerned and such other arrangements pursuant to this Guideline as the particular case may require. Failing the necessary consent, or where the consent offered or granted is considered by the Panel to be inadequate, the Commission may apply to the Tribunal in terms of 44(3)(b) of the Act for an appropriate order concerning access.

13. In the event of an application being made to the Tribunal in connection with the Inquiry for an order concerning access in terms of s 44(3)(b) or s 45(1)(b) of the Act, the Commission may propose the terms of this Guideline, with modifications (if any) suitable to the case, as a framework for an appropriate order.

Conditional consent, subject to undertakings

14. In the absence of exceptional modified arrangements as contemplated in paragraph 8 above, access to a submitter's confidential information pursuant to this Guideline will be confined to –
 - 14.1 specified external legal and other expert advisers (the “external advisers”) of relevant other parties having a stake in the Inquiry and whose interests may be affected adversely by the confidential information;
or (as the case may be)
 - 14.2 specified persons for whom the Panel seeks access as contemplated in paragraph 12 above.
15. The undertakings contemplated in this Guideline, to be given by the individual external advisers and other persons specifically allowed access, are intended to protect a submitter's confidential information from any further disclosure in general, and in particular from disclosure to the actual competitors of the submitter and/or other parties with whom the submitter has competition-sensitive dealings as a supplier or purchaser, or as a negotiator on another's behalf.
16. **Annexure A** to this Guideline contains the proposed standard form of consent to be granted by a submitter to a named person or persons in order for the latter to have access to the submitter's confidential information, either in whole or in specified part, for purposes of the Inquiry.
17. **Annexure B** to this Guideline contains the proposed standard form of consent by a party to its external advisers having access to confidential information which may be relevant to its interests, on the basis of this Guideline and subject to the restrictive undertakings which those advisers provide.
18. **Annexures C and D** to this Guideline contain proposed standard forms of undertaking by the persons to be granted such access, and the giving of such an undertaking forms in each case the basis for the granting of consent by the submitter.
19. Once executed, any consent and any undertaking contemplated in paragraphs 16, 17 and 18 above become part of the record of the Inquiry, and a copy thereof must be lodged at the Inquiry registry forthwith.
20. The granting of consent by the submitter is further conditional upon the other

terms of this Guideline being adhered to, with any applicable modifications thereof in terms of paragraph 8 above.

21. The undertakings contemplated in this Guideline are undertakings to be given to the submitter by the persons granted access, and not undertakings by or on behalf of the Commission. The Commission intends, however, if it becomes aware of a breach of such an undertaking, to bring the facts available to it in that regard to the attention of the submitter.

Access room rules

22. The Inquiry will maintain at its offices a special room (“the access room”) in which confidential information may be accessed by persons having the necessary consent from the submitter or authority by order of the Tribunal to do so.
23. Arrangements for using the access room should be made with the Inquiry Director at the Inquiry’s offices at Trevenna Campus, Block 2A, 4th Floor, 70 Meintjies Street, Sunnyside, Pretoria. Tel: (012) 762 6900.
24. Only one party’s external advisers, and a total of no more than three such persons, may use the access room at any one time.
25. Every person using the access room –
 - 25.1 must be able to produce –
 - 25.1.1 an identity document or comparable means of identification; and
 - 25.1.2 the relevant written consent or authority allowing her or him access to the confidential information concerned;
 - and
 - 25.2 must sign an access room register –
 - 25.2.1 identifying herself or himself;
 - 25.2.2 identifying, if applicable, the party (the client) that she or he advises;
 - 25.2.3 recording the date and time of entry to the access room as well as the time of exit; and
 - 25.2.4 supplying references to the confidential information accessed which will enable it to be identified subsequently with reasonable precision.
26. The confidential information to which the consent or authority applies will be brought from secure storage to the access room by Inquiry staff for the purpose of allowing such access, and will be returned to secure storage immediately afterwards. In the case of electronic information, the Inquiry will provide in the access room a device or devices, including software, necessary for accessing it effectively.
27. No person permitted to access the confidential information as above may remove from the access room any document or other medium containing the confidential information that has been brought from storage or to which electronic access has been provided.

28. A member of the Inquiry staff may and if practicable will be present at all times when the access room is used so as to ensure effective supervision of the process.
29. The submitter has the right to have a representative present as an observer when the access room is used for the purpose of access to its confidential information in terms of this Guideline, and is entitled to reasonable notice of the relevant date and time so as to enable it to exercise this right if it so wishes. This will not preclude those accessing the confidential information from leaving the access room to confer privately among themselves before returning to the access room. If any notes are to be removed from the access room, the provisions of paragraph 33 below will apply.
30. A reasonable time will be allowed for accessing the particular confidential information, which, as far as possible, should be established at the time of making arrangements for the use of the access room as indicated in paragraph 23 above. Notwithstanding any such arrangements or the absence thereof, if the Inquiry Director declares that in his opinion a reasonable time has elapsed, the persons using the access room must vacate it forthwith. If the Inquiry Director's declaration of a reasonable time is disputed, the matter must be referred to the Chairperson for a final decision. If the Chairperson's decision is to extend the time allowed, the person or persons permitted to access the information may return to the access room accordingly (if necessary on a subsequent occasion).
31. While using the access room, persons may –
 - 31.1 access their own files and electronic devices in order to retrieve information stored therein;
 - 31.2 access the internet solely in order to obtain or retrieve relevant information for reference and comparative purposes – provided that, where the Inquiry itself makes available in the access room a device effectively enabling internet access, that device only and no private device may be used for internet access;
 - 31.3 make written notes, by hand or electronically, but only to the extent necessary to remind themselves of the essential substance of the confidential information needing to be dealt with subsequently, and so as to enable them (as the case may be):
 - 31.3.1 to provide advice to their client capable of eliciting, where necessary, a relevant and meaningful response; or
 - 31.3.2 to assist the Panel, at the latter's request, in verifying, refuting, supplementing or explaining facts or contentions advanced by the submitter.
32. While using the access room –
 - 32.1 persons may not –
 - 32.1.1 make photographic or comparable electronic recordings of confidential information, or record passages of confidential information by dictation or otherwise;
 - 32.1.2 transmit or otherwise convey via any electronic device any confidential information or any notes made concerning confidential information obtained in the access room;
 - 32.2 persons in possession of any device capable of being used to contravene any prohibition in paragraph 32.1 above must be able and willing at all times to

satisfy the Inquiry Director, or a member of the staff of the Inquiry designated by the Director, that –

32.2.1 when the device is used in the limited respects permitted by paragraph 31 above –

(a) all the functions of the device capable of being used to contravene any prohibition in paragraph 32.1.1 are inactive; and

(b) the device is not being used to contravene any prohibition in paragraph 32.1.2;

and

32.2.2 when the device is not being used as permitted in paragraph 31, it has been disabled.

33. When leaving the access room, all persons concerned must –

33.1 show to the Inquiry Director, or to a member of the staff of the Inquiry designated by the Director, the notes made while using the access room;

33.2 allow the Inquiry Director or designated member of staff to take a copy thereof for the Inquiry's records;

33.3 comply with any decision of the Inquiry Director or designated member of staff to embargo the removal of the notes (whether physical removal or removal by way of electronic transmission) from the Inquiry's offices, pending a decision by the Chairperson as to whether or not the notes comply with the limitations on note-taking stated in paragraph 31.3 above;

33.4 comply with any decision of the Chairperson pursuant to paragraph 33.3 above regarding restriction on removal of the notes, or for their secure disposal, subject to any right of recourse that may exist in that regard to a Court or the Tribunal.

Annexures

34. The following Annexures form an integral part of this Guideline, and must be read with and construed in the context of this Guideline as a whole:

34.1 **ANNEXURE A** : Form of submitter's consent to access to confidential information by specified persons;

34.2 **ANNEXURE B** : Form of consent by a party to the giving of undertakings by its external advisers in respect of their access to confidential information that may affect its interests;

34.3 **ANNEXURE C** : Form of undertaking by an external advisor granted or to be granted access to confidential information;

34.4 **ANNEXURE D** : Form of undertaking by other persons granted or to be granted access to confidential information when such access has been procured by the Panel.

ANNEXURE A

Consent given by a person who has submitted confidential information to the Market Inquiry into the Private Healthcare Sector (“the Inquiry”)

to enable specified persons to have access on certain conditions to the whole or
specified parts of that confidential information

Full name of the submitter (the undersigned party granting the consent to access)	PLEASE PRINT
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1. This consent is to be construed in the context of, and is given subject to, the Inquiry’s Supplementary Guideline No. 2 currently in effect, with the contents of which the undersigned submitter declares itself/herself/himself to be familiar. In this consent, unless the context indicates otherwise, plural expressions are intended to include the singular and vice versa.
2. This consent applies only to the following persons:

Full name of person granted access in terms of this consent	PLEASE PRINT
Full name of person granted access in terms of this consent	PLEASE PRINT
Full name of person granted access in terms of this consent	PLEASE PRINT
Full name of person granted access in terms of this consent	PLEASE PRINT

3. This consent is to be read together with the related undertakings that have been signed or are to be signed by the above-named persons. The submitter declares itself/herself/himself to be familiar with the contents thereof and grants this consent in each case separately on the basis that the relevant document containing the person’s undertaking, headed ANNEXURE C or ANNEXURE D as the case may be, has been or is forthwith duly executed.
4. *[Delete whichever is inapplicable]* This consent applies to the whole of the confidential information submitted by the undersigned submitter. / This consent

applies only to the following parts of the confidential information submitted by the undersigned submitter:

Specify here (if applicable) the precise parts of the confidential information to which the consent applies:

PLEASE PRINT CLEARLY THROUGHOUT

5. *[Delete if inapplicable]* This consent is further subject to the following modifications to Supplementary Guideline No. 2, approved in terms of paragraph 8 thereof:

PLEASE PRINT CLEARLY THROUGHOUT AND ATTACH AND SIGN AN ADDITIONAL SHEET OR SHEETS IF NECESSARY
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.....

Date:

Signature of submitter granting consent
or signature of the submitter's duly authorised representative
(who warrants her/his authority to sign)

ANNEXURE B

Consent given by a party whose external advisers must provide undertakings in order to be granted access to confidential information which may affect its interests,

that such advisers provide such undertakings for purposes of the Market Inquiry into the Private Healthcare Sector (“the Inquiry”)

Full name of the party providing this consent	PLEASE PRINT
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Full name of the submitter to whom the undertakings have been given or are to be given by the advisers	PLEASE PRINT
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1. This consent is to be construed in the context of, and subject to, the Inquiry’s Supplementary Guideline No. 2 currently in effect, with the contents of which the undersigned party declares itself/herself/himself to be familiar. In this consent, unless the context indicates otherwise, plural expressions are intended to include the singular and vice versa.
2. The undersigned party is aware that the following advisers have signed, or are to sign, undertakings in order to be allowed access to certain confidential information submitted to the Inquiry by the submitter:

Full name of adviser providing an undertaking	PLEASE PRINT
Full name of adviser providing an undertaking	PLEASE PRINT
Full name of adviser providing an undertaking	PLEASE PRINT
Full name of adviser providing an undertaking	PLEASE PRINT

3. The party providing this consent declares itself/herself/himself to be familiar with the contents of the relevant undertakings contained in separate documents headed ANNEXURE C, and consents in each case to the adviser concerned giving such an

undertaking to the submitter for purposes of the Inquiry.

4. While the undersigned party will respect the undertakings given by the advisers, this consent does not imply that the undersigned party gives the undertakings concerned to the submitter, or that the undertakings given by the advisers are given on behalf of the undersigned party.

.....

Date:

Signature of party providing this consent
or signature of the party's duly authorised representative
(who warrants her/his authority to sign)

ANNEXURE C

Undertaking by external adviser

who has been granted, or is to be granted, access to confidential information submitted to the Market Inquiry into the Private Healthcare Sector (“the Inquiry”)

a.	Full name of the undersigned external adviser (“the adviser”)	PLEASE PRINT
b.	Identity no. (or passport no. and country of issue)	
c.	Residential address	
d.	Name of adviser’s firm (if applicable)	
e.	Adviser’s business address	
f.	Adviser’s cellphone number	
g.	Name of party advised by the adviser (i.e. the client)	PLEASE PRINT
h.	Address of party advised by adviser	
i.	Name of responsible contact person at party advised by adviser	
j.	Cellphone number of that contact person	

1. This undertaking is to be construed in the context of, and subject to, the Inquiry’s Supplementary Guideline No. 2 currently in effect, with the contents of which the adviser declares herself/himself to be familiar.
2. This undertaking is to be read together with the related consent to access to confidential information that has been signed or is to be signed by or on behalf of the submitter of confidential information whose name is given in the box below (“the submitter”). The adviser declares herself/himself to be familiar with the contents of that consent, and signs this undertaking on the basis that the document containing that consent, headed ANNEXURE A, has been or is forthwith duly executed by the submitter.

Full name of the submitter (the party granting the consent to access by executing the separate ANNEXURE A)	PLEASE PRINT
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3. This undertaking is also to be read with the consent by the adviser's client, the party advised (identified in row **g.** of the table on the first page of this document), which is contained in the relevant document headed ANNEXURE B.
4. This undertaking becomes binding if and when the consents contained in the relevant documents headed ANNEXURE A and ANNEXURE B have been duly executed.
5. Once this undertaking has become binding, it may not be withdrawn or altered without the written consent of the submitter.
6. The adviser acknowledges that access to the confidential information identified in the above-mentioned submitter's consent ("the confidential information") is being granted to her/him solely in order to support the integrity of the Inquiry process by ensuring that the Panel will not draw conclusions adverse to the party advised by the adviser (the adviser's client) on the basis of such confidential information without having afforded that party a fair opportunity to provide a worthwhile response. This includes a fair opportunity to correct false or misleading information, or contest a methodology, which, if not corrected, contested or explained, might result in findings and/or recommendations by the Panel adverse to the interests of the said party.
7. The adviser hereby undertakes:
 - 7.1 to comply with the provisions of the Inquiry's Supplementary Guideline No. 2 referred to above, including in particular the access room rules, with such modifications thereof (if any) as are specified in the above-mentioned submitter's consent;
 - 7.2 not to disclose, transmit, communicate or otherwise make the confidential information available in any manner to any person other than another external adviser of the same party, who has been granted similar access to the submitter's confidential information and has signed a substantially similar undertaking that is lodged at the Inquiry registry;
 - 7.3 to use the confidential information solely for the purpose of formulating advice to the party advised (the adviser's client), so as to enable that party to provide where appropriate a meaningful response to the Inquiry;
 - 7.4 to ensure that any such advice, and any analysis supporting it that may be communicated to the party advised, does not disclose the confidential information to the party advised or contain information in relation thereto that is likely to assist it in enhancing its own competitive position or that of any other firm in any relevant market;
 - 7.5 to notify the Inquiry Director immediately upon becoming aware or suspecting on reasonable grounds that any other external adviser to the party advised who has signed a substantially similar undertaking, has failed to comply therewith.
8. If the adviser, in giving advice to the client, does so as part of a firm, the adviser hereby acknowledges that she/he is not at liberty to share the confidential information with the firm, or with any others within the firm save as may be allowed by paragraph 7.2 above, and warrants that any necessary consent of the firm for the adviser to enter into this personal undertaking has been obtained.
9. This undertaking shall not apply to any information which (although it may be found to be included in the confidential information to which the submitter grants

access) —

- 9.1 in fact belongs to the party advised;
- 9.2 is to be found in any non-confidential submission to the Inquiry that is made publicly available;
- 9.3 is in, or subsequently comes into, the public domain (other than through breach of this or any similar undertaking);
- 9.4 is required by law or regulation to be disclosed by the adviser — provided that, if possible, the Inquiry Director and the submitter are informed thereof a reasonable time in advance of any such disclosure.

.....

Date:

Signature of adviser

ANNEXURE D

Undertaking by person (other than a party's external adviser),

who, at the instance of the Panel, has been granted, or is to be granted, access to confidential information submitted to the Market Inquiry into the Private Healthcare Sector ("the Inquiry")

a.	Full name of the undersigned person granted access	PLEASE PRINT
b.	Identity no. (or passport no. and country of issue)	
c.	Residential address	
d.	Name of the person's firm (if applicable)	
e.	Business address (if applicable)	
f.	Cellphone number	

1. This undertaking is to be construed in the context of, and subject to, the Inquiry's Supplementary Guideline No. 2 currently in force, with the contents of which the undersigned person declares herself/himself to be familiar.
2. This undertaking is to be read together with the related consent to access to confidential information that has been signed or is to be signed by or on behalf of the submitter of confidential information whose name is given in the box below ("the submitter"). The undersigned person being granted access declares herself/himself to be familiar with the contents of that consent, and signs this undertaking on the basis that the document containing that consent, headed ANNEXURE A, has been or is forthwith duly executed by the submitter.

Full name of the submitter (the party granting the consent to access by executing the separate ANNEXURE A)	PLEASE PRINT
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3. This undertaking becomes binding if and when the submitter's consent contained in the relevant document headed ANNEXURE A has been duly executed.
4. Once this undertaking has become binding, it may not be withdrawn or altered without the written consent of the submitter.
5. The undersigned person acknowledges that access to the confidential information identified in the above-mentioned submitter's consent ("the confidential information") is being granted to her/him solely in order to enable her/him to

assist the Panel, and support the integrity of the Inquiry process, by identifying and correcting any false or misleading information that may be present there, or by contesting a methodology, which, if not corrected, contested, supplemented or properly explained, might result in erroneous or unreliable findings and/or recommendations by the Panel.

- 6. The undersigned person hereby undertakes:
 - 6.1 to comply with the provisions of the Inquiry's Supplementary Guideline No. 2 referred to above, including in particular the access room rules, with such modifications thereof (if any) as are specified in the above-mentioned submitter's consent;
 - 6.2 not to disclose, transmit, communicate or otherwise make the confidential information available in any manner to any other person other than one for whom similar access has been procured by the Panel and who has signed a substantially similar undertaking that is lodged at the Inquiry registry;
 - 6.3 to use the confidential information solely for the purpose stated in paragraph 5 above.

- 7. This undertaking shall not apply to any information which (although it may be found to be included in the confidential information to which the submitter grants access) —
 - 7.1 is to be found in any non-confidential submission to the Inquiry that is made publicly available;
 - 7.2 is in, or subsequently comes into, the public domain (other than through breach of this or any similar undertaking);
 - 7.3 is required by law or regulation to be disclosed by the undersigned person — provided that, if possible, the Inquiry Director and the submitter are informed thereof a reasonable time in advance of any such disclosure.

.....

Date:

Signature of person being granted access