



سوروهنجاي فرساعيشن برونبي دارالسلام

COMPETITION COMMISSION

BRUNEI DARUSSALAM

Guidelines

APPLYING FOR

CONFIDENTIAL TREATMENT

These Guidelines are intended to be an introductory text and guidance document on how the Commission enforces and administers the provisions under the Competition Act (“Act”). These Guidelines, however, are not a substitute for the Act or any Regulations made pursuant to the Act. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the Competition Commission of Brunei Darussalam (“CCBD”). In applying these Guidelines, the facts and circumstances of each case will be considered in totality. These Guidelines may be revised should the need arise. In the event that any of the provisions in these Guidelines are inconsistent or incompatible with the provisions of the Act, the provisions of the latter shall take precedence.

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1. Introduction

- 1.1. The Competition Act (“Act”) includes a provision relating to Preservation of Secrecy under Section 70 that requires the protection, and aid in the protection of information laid out herein, except in some circumstances, which will be detailed further in this Guidelines.
- 1.2. These Guidelines provide guidance for identifying confidential information, as well as outline the Competition Commission Brunei Darussalam (“CCBD”)’s power to acquire necessary information and the means to obtain such information.
- 1.3. These Guidelines also set out detailed processes and procedures for parties who wish to apply for confidential treatment of any documents or any part of the documents which are claimed to be confidential to the CCBD.

2. Power to Acquire Information

The Competition Act provides the CCBD with the power to acquire information, which are further detailed below:

- (a) The CCBD may require any person to furnish such returns and information as may be necessary for implementing the provisions of the Competition Act¹.
- (b) The CCBD or an authorised officer may, by notice in writing to any person, require that person to produce to the CCBD a specified document, which is considered related to any matter relevant to the investigation². As such, the CCBD or the authorised officer is allowed to³:
 - Take copies of the document or extracts from it;

¹ Section 2 under the Second Schedule of the Competition Act

² Section 36 of the Competition Act

³ Section 36 (4) of the Competition Act

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- Require explanation of the document from any person who is a present or past officer of his, or is or was at any time employed by him; or
 - Inquire about the location of the document, if it is not produced.
- (c) The CCBD or any authorised officer and person may enter any premises with⁴ or without⁵ warrant, in connection to an investigation under Section 35 of the Competition Act.
- (d) The CCBD may request for information from a person, under a requirement made of him under any provision of the Competition Act, even though the disclosure of such information or document might tend to incriminate him⁶, except when the person is represented by a professional legal adviser. In such case, the legal adviser is not obliged to disclose or produce a privileged communication, or a document, or other material containing a privileged communication⁷. He shall only be obliged to give the name and address (if known to him) of the person to whom, or by or on behalf of whom, that privileged communication was made⁸.

3. Means of obtaining information

The CCBD may obtain information through any of the following means:

- (a) Application / Complaint forms submitted to the CCBD
- (b) Subsequent questionnaire to request for additional information
- (c) Any documents relevant to item 3 (a) and / or 3 (b)
- (d) Documents acquired from investigation (as specified in items 2 (a), 2 (b), and 2 (c))

⁴ Section 38 of the Competition Act

⁵ Section 37 of the Competition Act

⁶ Section 39 (1) of the Competition Act

⁷ Section 39 (3) (a) of the Competition Act

⁸ Section 39 (4) of the Competition Act

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- (e) Submissions from Leniency applicants⁹
- (f) Documents or any submissions required from a person, for implementing the provisions of the Competition Act

It is important for the individual who submits information through any of the above means to identify any confidential information upon submission, according to item 4. However, in some cases, such as when a document is acquired via the CCBD's power to enter a premise, the individual may request¹⁰ for a copy of the seized document from the CCBD and use such copy to identify any confidential information upon submitting the application for confidentiality treatment to the CCBD. Application of confidentiality treatment is required in order for the CCBD to preserve any information that is considered confidential, subject to item 8¹¹. However, several information including the identity of those who furnished information to the CCBD will, by default, be safeguarded and be given confidentiality treatment, as per stated in items 4.1 (a) to 4.1 (d) below.

4. The Definition of Confidential Information

4.1. Confidential information is depicted as follows:

- (a) Commercial information the disclosure of which would, or might, in the opinion of the CCBD, significantly harm the legitimate business interests of the undertaking to which it relates¹²;
- (b) Information relating to the private affairs of an individual the disclosure of which would, or might, in the opinion of the CCBD, significantly harm the individual's interest¹³;

⁹ Section 44 (1) (b) of the Competition Act

¹⁰ Section 38 (4) of the Competition Act

¹¹ Section 70 (1) of the Competition Act

¹² Section 2 (a) of the Competition Regulations

¹³ Section 2 (b) of the Competition Regulations

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- (c) Information the disclosure of which would, in the opinion of the CCBD, be contrary to the public interest¹⁴;
- (d) All matters relating to the identity of persons furnishing information to the CCBD¹⁵; or
- (e) Information that are expressly established as confidential when provided to the CCBD, following the procedures outlined under item 5¹⁶.

4.2. In regards to item 4.1 (e) above, such information should meet the criteria below:

- (a) The information must be known to only few people;
- (b) Its disclosure must be liable to cause serious harm to the person who has provided it or to third parties. The potential harm should show that it is objectively worthy of protection. It is also important to note that historical data is not commercially sensitive information; and
- (c) Not classified as evidence to an infringement of the Competition Act.

Examples of information described in item 4.2 (b) above may include technical and/or financial information relating to an undertaking's know-how; methods of assessing costs, margins calculations and price structure; production secrets and processes; supply sources; quantities produced and sold; market shares; customers and distributors lists; marketing plans; cost and methods of assessing cost and sales strategy.

4.3. Information not considered as confidential

The assessment of whether a piece of information constitutes confidential information is carried out by the CCBD on a case-by-case basis. Generally, information that is not covered by the above definitions or does not meet the

¹⁴ Section 2 (c) of the Competition Regulations

¹⁵ Section 70 (1) (c) of the Competition Act

¹⁶ Section 70 (1) (b) of the Competition Act

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criteria of “confidential information” will not be considered as confidential. Examples of information not considered as confidential are as follows:

- (a) Information relating to an undertaking which is publicly available or made known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking (including information such as price targets, price increases, dates of implementation of such increases and customer names).
- (b) Information that has lost its commercial importance, for instance due to the passage of time. Confidential treatment of information may only exceptionally be granted to such data, if its provider can show that, notwithstanding its historical nature, it still constitutes an essential element of the commercial position of the undertaking concerned.
- (c) Facts relating to an application for immunity or a reduction of fines, where these facts aim to provide evidence of an alleged infringement, unless the disclosure of such facts could harm the CCBD’s leniency policy.
- (d) Names and positions of individuals related to the subject matter of the investigation. If the individuals in question were allegedly involved in or received information about the suspected infringement, their names and positions cannot be redacted from accessible versions of the submissions/documents.
- (e) CCBD’s own assessment, as long as it does not explicitly refer to information falling into the category of “confidential information”. This covers, for instance, the CCBD’s analysis of evidence and of the results of its investigation.

In reference to item 4.1 (e) above, for any information that fits the definition and meets the criteria of confidential information as per mentioned in item 4.2, and which an individual wishes to claim as confidential, such individual is required to apply for confidentiality treatment by adhering to the procedures detailed in item 5.

5. Procedures Relating to Application of Confidential Treatment

5.1. First stage: Applicants provide non-confidential version of the submission

An individual who wishes to submit any forms or questionnaires – which are believed to consist of information that are considered confidential; or in the case of document, contains confidential information, and meet the criteria in item 4.2, must apply for confidential treatment at the time of submission, as detailed below:

(a) In the case of information

The individual has to:

- (i) Identify the confidential information to the CCBD by **highlighting** the said information in a way that it remains legible (example is provided in Annex A); and
- (ii) Provide written statement explaining why the information is confidential as well as meaningful non-confidential description of the highlighted information, by using the Confidentiality Template (**Annex A**).

(b) In the case of document

The individual has to:

- (i) Provide a confidential version of the document which clearly identifies the confidential information by **highlighting** the said information in a way that it remains legible (example is provided in **Annex A**); and
- (ii) Provide written statement explaining why the information is confidential as well as meaningful non-confidential description of the highlighted information, by using the Confidentiality Template (**Annex A**).

(c) In general, the individual cannot claim confidentiality for an entire document or whole sections thereof as it is normally possible to protect

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confidential information with limited redaction. As a minimum, leave the headings of the documents and/or the headings of the columns contained in tables and pictures as well as any list of annexes intact.

- (d) Additionally, do indicate ranges when redacting figures such as market shares or turnover figures. Regarding sales and/or turnover data, provide ranges not wider than 20% of the respective total amounts. Relative figures such as market shares (in %) should be indicated in ranges not wider than 5%.
- (e) Standard confidentiality stamps in letterheads, or automatic disclaimers in e-mails, are not regarded as requests or application for confidentiality treatment.

5.2. Second stage: Review by the CCBD

The CCBD will review the highlighted information as well as the justifications for confidentiality claim provided, to derive a decision if the information do indeed meet the criteria of confidential information, according to item 4.2.

5.3. Third stage: Decision on confidentiality claims and final submission

- (a) In the event where the CCBD agrees that the information is confidential, applicants can then hand in the final submission, which will be the non-confidential version of the submission.
- (b) The non-confidential version of the document should have the confidential information blacked out and if necessary – to understand where redactions have been made, add indications such as “business secret”, “confidential” or “confidential information”, as shown in **Annex A**.
- (c) If applicants only claim confidentiality for some parts of a document, an accessible non-confidential version of the entire document is required:
 - The non-confidential version should mirror exactly the original full document / carbon copy in terms of number of pages, format, etc, while ensuring that the confidential information is blacked out.

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- (d) The non-confidential version, as well as its non-confidential summaries and the justifications of the confidentiality claims will be included in the case register (file). Therefore, it is important to ensure that the non-confidential summaries and the justifications of the confidentiality claims do not contain any confidential information.
- It is the applicant's responsibility to ensure that the non-confidential versions provided are technically reliable and redacted information cannot be retrieved by any means, including forensic tools. The CCBD does not take any responsibility for insufficiently blacked-out non-confidential versions.
- (e) The CCBD reserves the right to reconsider at a later stage of its investigation, its initial evaluation of the confidentiality claims.

5.4. Procedure when no written statement received by the CCBD

If the applicant have not provided written statement to its confidentiality claim, as per items 5.1 (a) (ii) and 5.1 (b) (ii) the applicant may be given notice by the CCBD. The notice may entail a requirement for the individual to submit the written statement within an appropriate time limit set by the CCBD.

5.5. Procedure when the CCBD requires written clarification to the written statement

In the event where the applicant has submitted a written statement to the CCBD and the CCBD requires clarification on it, the applicant may be given a notice by the CCBD to provide a written clarification (of the statement) within an appropriate time limit set by the CCBD.

5.6. Failure to submit requested written statement and/or clarification

If the applicant fails to provide the requested written statement and/or clarification in the manner specified by the CCBD within the set time limit, the information submitted will not be considered as confidential under Section 70(1)(b) and will then be included in the CCBD's file.

6. Access to file

Right to access and inspect the relevant documents in the CCBD's file is granted for an individual who has been served notices or direction, however no access should be given for any confidential information or confidential full report. Such notices or direction refer to the following:

- (a) Proposed Decision Notice (after an investigation)¹⁷
- (b) Direction for interim measures¹⁸
- (c) Block Exemption Cancellation Notice¹⁹

7. Power to Furnish Information

- 7.1. The CCBD may furnish information to the Minister responsible for competition matters with respect to its activities in such manner and at such times as the Minister may require²⁰.
- 7.2. Through a co-operation agreement made with other regulatory authorities on competition matters, the CCBD may furnish information in its possession if the information is required by that other party for the performance by it of any of its functions²¹.
- 7.3. Where such disclosure is lawfully required by any court or the Tribunal, or lawfully required or permitted under the Competition Act or any other written law²².
- 7.4. Subject to item 8, through a co-operation agreement made with any foreign competition body (upon approval given by the Minister in charge of competition

¹⁷ Section 4 of the Competition Regulations

¹⁸ Section 6 of the Competition Regulations

¹⁹ Section 9 of the Competition Regulations

²⁰ Section 5 (3) of the Competition Act

²¹ Section 68 (3) (a) of the Competition Act

²² Section 70 (1) (c) (ii) of the Competition Act

matters), the CCBD may furnish information to them in the condition that the CCBD requires of, and obtains from, that body an undertaking in writing by it that it will comply with terms specified in that requirement, including terms that correspond to the provisions of any other written law concerning the disclosure of that information by the CCBD²³.

8. Circumstances enabling the disclosure of Confidential Information

8.1. After an individual has applied for confidential treatment and such application has been approved by the CCBD, the information must then be preserved by law. However, there are circumstances where the CCBD may disclose such information identified as per item 4.1, such as those circumstances listed in item 7, as well as additional circumstances listed below²⁴:

- (a) Where the CCBD has attained consent of the individual to whom the information relates; or
- (b) For the purposes of:
 - (i) A prosecution under the Act; or
 - (ii) Enabling the CCBD to give effect to any provision of the Act, with also considering the extent to which the disclosure is necessary for the CCBD's purpose, except in some cases whereby the disclosure of such:
 - information: be contrary to the public interest
 - commercial information: brings significant harm to the legitimate business interests of the undertaking to which it relates

²³ Section 69 of the Competition Act

²⁴ Sections 70 (5) and 70 (6) of the Competition Act

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- private affairs of an individual: bring significant harm to an individual's interest
- (iii) Enabling the investigation of a suspected offence under this Act or the enforcement of a provision thereof by the CCBD or an authorized officer; or
- (iv) Complying with such provision of an agreement between Brunei Darussalam and a foreign country or territory, as may be prescribed, so long as the following conditions are satisfied²⁵:
- The information or documents requested by the foreign country or territory are available to the CCBD;
 - The foreign country or territory commits or undertakes to keep the information given confidential at all times (unless the Government otherwise allows); and
 - The disclosure of the information is not likely to be contrary to the public's interest.

8.2. Procedure for the disclosure of confidential information

Hence, when the CCBD proposes to disclose an information which was submitted to the CCBD and identified as confidential, the CCBD may –

- (a) Inform its proposed action to:
- The individual who submitted the information; or
 - The individual from whom the information or document originated; and
- (b) Give the individual a reasonable opportunity to make representations to the CCBD.

²⁵ Section 70 (7) of the Competition Act

9. Breach of Confidentiality

Any individual who is found to have committed breach of confidentiality and fails to comply with Section 70 of the Act is guilty of an offence²⁶. Such offence is prescribed as a compoundable offence, which may carry a maximum composition sum of \$5,000²⁷.

10. Consideration of the confidential information

The CCBD has the right to consider the confidential information or documents it received, in determining any matter which involved the confidential information or document.

²⁶ Section 70 (2) of the Competition Act

²⁷ Schedule 1 regulation 2 of the Competition (Composition of Offences) Regulations

In the case of information (submission upon approval): 28

Case:39XXX Doc:ID0015 Page:1 of 11

THE ROYAL FOOD-TASTER
THE PALACE, ROOM 04/1054

Little Red Riding Hood Cookies
Ms Stepmother
5, Haunted Castle
EX1 2QJ Far Far Away

London, June 7th 20XX

Subject: → Cookie recipe for Royal Wedding
→ Ref: 4829924, please quote this reference in any correspondence

Dear Ms Stepmother,

I confirm receipt of the specimens and recipe proposal for strawberry shortbread submitted as part of your tender for the Royal Wedding.

In order to be able to further process your tender, I should be grateful if you could answer the following questions at your earliest convenience.

1. → In your proposal, you explain that part of your recipe includes [Redacted] and essence of [Redacted] which apparently will make the consumers of your cookies think of their "favourite things". Please could you explain what exactly goes into making essence of [Redacted]?
2. → You indicate that the eggs used in your recipe are ethically sourced from free range chickens raised by a Mr. [Redacted]. Our research has shown that Mr. [Redacted] is prone to chlamydia. Please could you confirm that he is a reliable source for the provision of eggs?
3. → You have indicated that the strawberries used in your shortbread are grown in a magic garden which is [Redacted] In this garden you state that there are also [Redacted] and [Redacted] which are grown by a rather irritable young woman called [Redacted]. Please confirm that neither of these two latter items is included in the ingredients for your strawberry shortbread.

Yours sincerely,
THE ROYAL FOOD-TASTER

In the case of information (submission upon application): 29

Case:39XXX Doc:ID0015 Page:1 of 11

THE ROYAL FOOD-TASTER
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Little Red Riding Hood Cookies
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Dear Ms Stepmother,

I confirm receipt of the specimens and recipe proposal for strawberry shortbread submitted as part of your tender for the Royal Wedding.

In order to be able to further process your tender, I should be grateful if you could answer the following questions at your earliest convenience.

1. → In your proposal, you explain that part of your recipe includes "Pamkops on noses" and essence of "Whiskers on kittens" which apparently will make the consumers of your cookies think of their "favourite things". Please could you explain what exactly goes into making essence of "Whiskers on kittens"?
2. → You indicate that the eggs used in your recipe are ethically sourced from free range chickens raised by a Mr. H. Dumpty. Our research has shown that Mr. Dumpty lives on a wall and is prone to chlamydia. Please could you confirm that he is a reliable source for the provision of eggs?
3. → You have indicated that the strawberries used in your shortbread are grown in a magic garden which is guarded by gnomes in red hats who discreetly look as though they are fishing. In this garden you state that there are also "silver bells" and "coddle stails" which are grown by a rather irritable young woman called Mary. Please confirm that neither of these two latter items is included in the ingredients for your strawberry shortbread.

Yours sincerely,
THE ROYAL FOOD-TASTER

28 DG Competition informal guidance paper on confidentiality claims, March 2012

29 DG Competition informal guidance paper on confidentiality claims, March 2012, page 4

In the case of document
(submission upon approval):

30

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RHM 1/11

May 3rd, 20xx

Call from grandmother - we should watch out
Mr Wolf called her yesterday - he will
eat her if she does not respect the agreement
of 29 April! - Warn other managers!

Grandmother's secret cookie recipe for
royal wedding

**"BUSINESS
SECRET"**
indication

352,7
82,6
185,1

372,4
82,4
A 437,5

Check availability
of chocolate for
end of May

In the case of document
(submission upon application):

31

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RHM 1/11

May 3rd, 20xx

Call from grandmother - we should watch out.
Mr Wolf called her yesterday - he will
eat her if she does not respect the agreement
of 29 April! - Warn other managers!

Grandmother's secret cookie recipe for
royal wedding

600 kg sugar
2000 kg chocolate
480 egg
80 l rum
120 kg of the secret ingredient
1800 kg flour

352,7
82,6
185,1

372,4
82,4
A 437,5

Check availability
of chocolate for
end of May

**For this piece of
information
confidentiality will not
prevail as it constitutes
proof of the
infringement.**

**This piece of
information must
stay in as it
summarizes the
information deleted
below.**

**This piece of information cannot
be claimed as confidential as
disclosure would (on the basis of
the information available) not
cause serious harm.**

³⁰ DG Competition informal guidance paper on confidentiality claims, March 2012, page 3

³¹ DG Competition informal guidance paper on confidentiality claims, March 2012, page 15

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Confidentiality Template³²:

ID no. (if available) / Page no. of original version / paragraph no. (please indicate annex no. where relevant)	Reasons for confidentiality request (How the disclosure of the information would cause serious harm to your undertaking or would significantly harm a person or undertaking)	Suggested non-confidential summary version

Sample:

<i>ID no. (if available) / Page no. of original confidential version / paragraph no. (please indicate annex no. where relevant)</i>	<i>Reasons for confidentiality request (How the disclosure of the information would cause serious harm to your undertaking or would significantly harm a person or undertaking)</i>	<i>Suggested summary version</i>
<i>ID0015, point 1</i>	<i>Business secret: ingredients and their properties which are not known to third parties. If disclosed our company is likely to suffer significant losses since our competitors would be able to manufacture similar products. Our knowhow is not legally protected.</i>	<i>Company strategy</i>
<i>ID0015, points 2 and 3</i>	<i>Our supplier's identity is not known to third parties and it would give a competitive advantage to our competitors if details of individual recent business relations were disclosed. This is likely to cause serious harm to us and our supplier.</i>	<i>Suppliers' details</i>

³² DG Competition informal guidance paper on confidentiality claims, March 2012, page 5



March 2023