

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

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Independent Communications Authority of South Africa
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GUIDELINES FOR CONFIDENTIALITY REQUEST
IN TERMS OF SECTION 4D of the ICASA Act

PREAMBLE

WHEREAS, the Independent Communications Authority of South Africa (ICASA/ Authority) is mandated in terms of section 192 of the Constitution to regulate broadcasting in the public interest;

WHEREAS, ICASA is further mandated in terms of section 2 of the ICASA Act (Act No. 13 of 2000), as amended, to regulate broadcasting, electronic communications services and postal matters in the public interest; and

WHEREAS, section 4D of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), as amended ("ICASA Act") empowers ICASA to make determinations relating to confidentiality on information provided to ICASA by stakeholders.

WHEREAS, section 9(4)(c) of the Electronic Communications Act 36 of 2005, as amended ("ECA") permits the Authority to grant confidentiality on information submitted by an applicant at the request of an applicant.

1. Introduction

- 1.1 The guidelines on requests for confidentiality, are intended to provide a practical application of section 4D of the ICASA Act and section 9(4)(c) and (d) of the ECA. The guidelines will further explain the process to be followed by ICASA when

dealing with confidentiality of information a licensee may submit to the Authority. A template for requesting confidentiality from ICASA is further provided in these guidelines, in Appendices A and B.

1.2 This document provides guidance to ICASA staff and informs the public of ICASA's policies and procedures. These guidelines are not regulations. They are not legally enforceable and do not create any legal rights or impose any legally binding requirements or obligations on ICASA or the public.

1.3 Section 4D provides as follows:

"4D. Confidential information

(1)

(a) When a person submits information to the Authority, such person may request that specific information be treated as confidential information.

(b) The request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential.

(2) Within 14 days of receiving a request for confidentiality, the Authority must make a determination whether or not confidentiality will be granted and provide the person contemplated in subsection (1) with written reasons for such determination.

(3) Should the Authority determine that a request for confidentiality cannot be acceded to, the party providing the information must be given an opportunity to withdraw the information that is the subject of the confidentiality request.

(4) When considering a request contemplated in subsection (1), the Authority must treat the following information, as confidential information, namely-

(a) trade secrets of such person;

- (b) *financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which is likely to cause harm to the commercial or financial interests of such person;*
 - (c) *information of which the disclosure could reasonably be expected-*
 - (i) *to put the person at a disadvantage in contractual or other negotiations; or*
 - (ii) *to prejudice the person in commercial competition;*
 - (d) *the names of prospective employees; and*
 - (e) *business plans of a licensee.*
- (5) *A determination of confidentiality may not be made in respect of a document or information that is in the public domain or is required to be disclosed by operation of law or a court order”.*

1.4 In addition, section 9(4) of the ECA further provides as follows:

“(4)

- (a) *Applications, representations, responses and other documents relating to an application which are submitted to the Authority are, subject to this subsection, open to public inspection during the normal office hours of the Authority.*
- (b) *The Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish him or her with copies of documents requested by such person.*
 - (i) *The Authority may, at the request of an applicant or person who has submitted representations or responses, decide that –*
 - (aa) *any document or information that is commercially sensitive; or*
 - (bb) *any other matter reasonably justifying confidentiality, is not open to public inspection, if such document or information can be separated from the application, representations or other documents in question.*

(ii) for the purposes of this subsection, commercially sensitive document, information or other matter reasonably justifying confidentiality, excludes documents or information that should, as a matter of law be generally available to the public.

(c) If the Authority refuses a request referred to in paragraph (c)(i), the applicant or person concerned may withdraw the document or information in question."

2. Information required to accompany a request for confidentiality

2.1 The provision in the ICASA Act cited above expressly states that "(t)he request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential".

2.2 This requires more than just stating a category of confidentiality under section 4D (4) of the ICASA Act.

2.3 When requesting confidentiality, the applicant is therefore required to:

2.3.1 identify the confidential information; and

2.3.2 provide a written statement or explanation justifying why the Authority should treat the identified information as confidential.

3. Categories of information that the Authority is required to treat as confidential

3.1 Section 4D (4) of the ICASA Act identifies the following categories:

3.1.1 Trade secrets of such person

Any trade secret must be treated as confidential by the Authority if confidentiality is requested thereon. Unless if apparent to the Authority, the onus is on the applicant to prove that the document is a trade secret.

Trade secrets includes formula, practice, process, design, instrument, pattern, commercial method, or compilation of information not generally

known or reasonably ascertainable by others by which a business can obtain an economic advantage over competitors or customers.

3.1.2 *Financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which is likely to cause harm to the commercial or financial interests of such person;*

In line with section 4D (1) (b) of the ICASA Act, this category requires the applicant, to substantiate and demonstrate that if certain financial, commercial, scientific or technical information were to be in the public domain, it is likely to suffer commercially or financially.

3.1.3 *Information of which the disclosure could reasonably be expected to put the person at a disadvantage in contractual or other negotiations; or to prejudice the person in commercial competition;*

This category is broad. In line with section 4D (1) (b) of the ICASA Act, this category requires the applicant to substantiate and demonstrate that the specific/concerned information will prejudice or disadvantage the applicant in commercial competition if it is not treated as confidential.

The information under this category may include the names of third parties with which the applicant has contracted, the value of such contractual agreements and selling prices.

3.1.4 *The names of prospective employees*

This category refers to prospective employees of the applicant or licensee or any person who submits confidential information to the Authority. Names of prospective employees must be treated as confidential by the Authority if confidentiality is requested thereon.

Unless if apparent to the Authority, the onus is on the applicant to prove that the names, in relation to those confidentiality is requested, are those of prospective employees, not of those individuals already employed by the applicant.

3.1.5 ***Business plans of a licensee***

Any business plan must be treated as confidential by the Authority if confidentiality is requested thereon. Unless if apparent to the Authority, the onus is on the applicant to prove that the document is a business plan.

In each category above, the onus falls on the applicant to demonstrate and substantiate that such information would be fall within any of the above categories. The written statement that accompanies each information should provide such substantiation.

It is worth noting that all the categories mentioned above are subject to the information not being available in the public domain, the operation of law and an order of court.

It is also worth noting that an applicant can request confidentiality on any information not listed in section 4D (4) of the ICASA Act if the information is not in the public domain and the applicant provides reasons as to why specific information must be treated as confidential.

3.2 **Withdrawal of information by the applicant**

3.2.1 If the applicant's request for confidentiality is refused, the Authority is required to grant the applicant an opportunity to withdraw the information. Failure of the applicant to withdraw such information within a stipulated time will result in the Authority not treating the information as confidential.

3.2.2 Should the applicant withdraw the information, the Authority may continue with whatever process the information was required for, without reference to or relying on the withdrawn information.

3.3 **Reasons for refusal of confidentiality by the Authority**

3.3.1 Section 4D (4) prohibits the Authority from making a determination of confidentiality over any document that is in the public domain or required to be disclosed by law or court order.

3.3.2 The Authority must provide the applicant with reasons for making a determination to refuse confidentiality as contemplated in section 4D (2).

3.4 Review of the Authority's decision on the request for confidentiality

3.4.1 The Authority's decision concerning the request for confidentiality is final and binding on the Applicant. An applicant may, in terms of section 3(5) of the ICASA Act, take the Authority's decision on a request for confidentiality on review, to a court with competent jurisdiction.

Authority's process for dealing with confidentiality claims

STAGE 1

1. The applicant/party completes in full the confidentiality form.
2. The applicant must submit the confidentiality form along with the documents which are the subject of the confidentiality request.

STAGE 2

1. The Authority assesses the confidentiality application on its merits, considering the reasons put forward by the applicant.
2. The Authority must communicate its decision to the applicant in writing on the issue of confidentiality within 14 business days. The Authority will advise the applicant of its determination and the reasons thereto.

What happens when the Authority agrees on confidential information?

3. The Authority will proceed to disclose all the information that is not confidential and protect information granted confidentiality by keeping it from the public domain.

What happens when the Authority is not satisfied with the reasons provided by the applicant to treat information as confidential?

4. Where the Authority is not convinced of the reasons given by the applicant, it will inform the applicant of this decision in writing and afford the applicant an opportunity to withdraw the information.

The copy of the GUIDELINES and the FORM to request for confidentiality, is available can be obtained together with the request for confidentiality in terms of section 4D of the ICASA Act, from the ICASA website or ICASA Library or Compliance and Consumer Affairs (CCA) Division of ICASA.

N.B.: When making the request for confidentiality, submit the FORM ONLY. Do NOT submit or attach the GUIDELINES.

END.

FORM TO REQUEST FOR CONFIDENTIALITY
IN TERMS OF SECTION 4D of the ICASA Act

N.B.: When making the request for confidentiality, submit the FORM ONLY.

Do NOT submit or attach the GUIDELINES. Only read those carefully to complete the FORM.

Appendix A

REQUEST FOR CONFIDENTIALITY FORM

Any applicant or other person submitting information to ICASA may request that such information be treated as confidential in terms of section 4D of the ICASA Act.

FORM INSTRUCTIONS: Please fill out all parts of this Form to the best of your knowledge and attach any relevant supporting documents.

ICASA will:

- 1. Decide whether the information is confidential.**
- 2. Take all reasonable steps to treat information as confidential.**
- 3. Notify the party when the information ceases to be confidential at any stage during the proceedings/processes for which the confidentiality was sought and granted.**

I. MATTER:

Application/ Regulatory process:

Applicant/ Licensee name:

II. DOCUMENT(S) CONTAINING CONFIDENTIAL INFORMATION:

Please fill out the items bellow for each document containing confidential information:

1. Name and other details of the document containing confidential information:

2. Please list and mark "confidential" all pages, paragraphs and line numbers where confidential information appears (Page: Paragraph: Line):

3. Reasons why specific information in the document is considered confidential:

Vol./Page No./Par./line No.	Specific Information	Reasons for Requesting Confidentiality

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4. Relevant category in section 4D (4) of the ICASA Act (where applicable):

5. If the applicant would like to list additional documents containing confidential information, the applicant may attach extra sheets (see appendix B), to this form and identify all the pages, paragraphs and line numbers where confidential information appears, reasons why the document/information is confidential and the relevant category in section 4D (4).

III. CONFIDENTIALITY STATEMENT:

I, declare that the information supplied by me to ICASA in this Form is true and accurate to the best of my knowledge.

Print Name: _____

Designation: _____

Company: _____

Signature: _____

Date: _____

**Office Use Only
Received By -**

Print Name: _____

Signature: _____

Date Received: _____

Reference Number: _____

Division / Department/Unit:

Appendix B

Vol./Page No./Par./line No.	Specific Information	Reasons for Requesting Confidentiality

Vol./Page No./Par./line No.	Specific Information	Reasons for Requesting Confidentiality

END