



NON-CONFIDENTIAL

DIGICEL (PNG) LIMITED

Submission to NICTA

**Draft Revised Guidelines on Submissions to Public Inquiries and
Public Consultations**

14 May 2014

*This submission is provided to NICTA for the purpose of the current public
consultation only and may not be used for any other purpose*

Digicel's comments are not exhaustive and Digicel's decision not to respond to any particular issue raised in NICTA's Consultation Paper does not necessarily represent agreement, in whole or in part with NICTA on these issues; nor does any position taken by Digicel in this document mean a waiver of Digicel's rights in any way.

Overview

- 1 Digicel welcomes NICTA's consultation on its draft Guidelines on Submissions to Public Inquiries and Public Consultations.
- 2 NICTA's power to hold public inquiries and public consultations are an important part of NICTA's role as a regulator. Decisions that NICTA is authorized to make under the National ICT Act 2009 often have wide ranging implications, not just for the parties directly affected, but also the general public. It is critical that NICTA adopts processes and procedures that reflect best practice.
- 3 The comments provided here are in addition to submissions previously made by Digicel on NICTA's original Guidelines on Submissions to Public Inquiries and Public Consultations. Digicel reiterates its overall concern that the Guidelines give little guidance on how NICTA will assess claims for confidentiality, how claims for confidentiality can be reconciled with the wider public interest, and how NICTA will balance competing policy considerations. The revised Guidelines do little to provide clarity on these matters.

Specific comments on further revisions proposed by NICTA

- 4 It appears that the further revisions proposed by NICTA concern the following matters:
 - (a) **Submissions to be text searchable:** Digicel does not object to providing submissions in a form that is text searchable and agrees to do so in future. However, it is inappropriate for NICTA to reject submissions unless they are in a form that is text-searchable. We would seek NICTA's assurance that it would rarely exercise its discretion to reject submissions merely because they are not in a form that is text searchable.
 - (b) **Submissions to be in Microsoft Office format if they are subject to confidentiality claims:** Digicel does not understand why submissions must be in Microsoft Office format if they are subject to confidentiality claims. Digicel suggests that this requirement be removed from the Guidelines. **Digicel is happy to provide its submissions in Microsoft Office format on request from NICTA staff.**
 - (c) **NICTA may refuse confidentiality claims in full or in part and will indicate by amending a claimant's proposed redactions:** Digicel has no objections to NICTA providing a version of a claimant's redacted submission that NICTA would propose to disclose provided:
 - the changes made by NICTA are clear; and
 - a claimant is given an opportunity to withdraw the submission if it does not agree with NICTA's amendments.

Confidential information should be protected by a confidentiality regime established by NICTA

- 5 Digicel reiterates that NICTA should generally respect confidentiality claims, and where appropriate, allow access to confidential submissions subject to the interested parties signing written confidentiality undertakings.
- 6 Digicel strongly opposes NICTA's current approach which involves disclosing confidential information to the general public. The public interest in transparency can be served by requiring interested parties to sign confidentiality obligations so that the information provided remains confidential. NICTA's approach of disclosing confidential information without requiring confidentiality undertakings:
 - (a) is a serious threat to a claimant's ability to assure its partners that their confidential information will remain confidential; and
 - (b) discourages claimants from providing confidential information to NICTA, thereby undermining the quality of NICTA's public consultation.

Proposed changes to Guidelines

- 7 Annex 1 contains a version of the Guidelines with Digicel's proposed changes marked up.

Digicel
12 May 2014

Annex 1: Revised Guidelines (with further revisions from Digicel)



**Guidelines
on the submission of
written comments to
public consultations and
public inquiries**

- D R A F T -

Introduction

These guidelines have been made by the National Information and Communications Technology Authority (NICTA) under section 218 of the *National Information and Communications Technology Act 2009* (the Act) to provide guidance to ICT licensees regarding their submission of written comments and documents to:

- any public consultation conducted by NICTA under section 229 of the Act; and
- any public inquiry conducted by NICTA under section 230 of the Act.

Pursuant to section 218 of the Act, these guidelines apply only to ICT licensees. However, NICTA will apply the same arrangements and procedures, including in relation to consideration of claims for confidentiality, to the submissions by parties that are not ICT licensees (although alternative means of submission may be made available to accommodate individual members of the public).

1. Means of submission

1.1 Written comments and documents must be submitted via email to the appropriate email address, which will be:

- (a) consultation.submission@nicta.gov.pg for public consultations under section 229 of the Act; and
- (b) inquiry.submission@nicta.gov.pg for public inquiries under section 230 of the Act.

1.2 Submissions should be in an electronic format that is text-searchable and allows a 'copy and paste' function. ~~NICTA may refuse to accept a submission that is not text searchable or does not allow text to be "copied and pasted".~~


1.3 NICTA prefers to receive submissions in:

- (a) Adobe Portable Document Format (PDF) if the submission is expressed entirely in words and text; or
- (b) Microsoft Office File format (ie Microsoft Word, Microsoft Excel or Microsoft Power Point).

~~1.4 If a submission contains information that is subject to a claim for confidentiality under section 44 of the Act, then that submission must be in a Microsoft Office File format or, if the respondent intends using Adobe PDF format, must be accompanied by a copy that is in a Microsoft Office File format. In the latter case the Adobe PDF version would be regarded by NICTA as the original and the Microsoft Office File format version will be regarded as a copy for use internally within NICTA.~~

- 1.5 NICTA staff may make alternative arrangements for the submission of written comments by members of the public (for example, to accommodate circumstances where they do not have access to computer or email facilities).
- 2. Observation and extension of submission deadlines**
 - 2.1 Submissions must be received before the specified deadline to ensure that those comments are taken into account by NICTA. NICTA may, at its discretion, decide not to consider a late submission or decide to give less weight to a late submission (for example, in circumstances where the timeframe precludes a full and timely analysis of the submission).
 - 2.2 A respondent may request an extension of the specified deadline for submissions. Any such request must be submitted via email to the appropriate email address. A requested extension will apply only if NICTA staff grant the request and communicate the extended deadline to the requestor. If NICTA staff grant an extension of time, the extended deadline will be general and apply to all submissions/respondents.
- 3. Acknowledgement of receipt of submissions**
 - 3.1 NICTA staff will acknowledge via email receipt of all submissions. Any respondent that has not had its submission acknowledged by NICTA staff within 48 hours of submission should contact the nominated NICTA staff member by telephone to draw the matter to the attention of NICTA staff. A submission for which receipt has not been acknowledged by NICTA staff may be taken not to have been formally received by NICTA.
- 4. Publication of submissions on NICTA's public register**
 - 4.1 Submissions will generally be treated as public documents and published on NICTA's public register in accordance with subsection 229(3) and clause 43(1)(k) of the Act unless the respondent has asserted a claim for confidentiality in relation to part(s) or all of the submission and that claim is accepted, in whole or in part, by NICTA pursuant to guideline (5).
 - 4.2 Submissions made on or before the original deadline will not be published until such time as the final deadline has passed.
- 5. Treatment of claims of confidentiality**
 - 5.1 Claims for confidentiality over any written information submitted to NICTA as part of a public consultation or a public inquiry is governed by section 44 of the Act. Under section 44 of the Act, NICTA ultimately determines whether or not it will accept a claim for confidentiality and exclude from publication the information that is subject to that claim.
 - 5.2 A claim for confidentiality must be in writing and received at the same time, and in the same manner, as the submission to which the claim relates. The specific

information that the claimant considers to be confidential should be clearly identified. A blanket claim for confidentiality over the entirety of a submission should not be made unless all such information is truly regarded by the claimant as being confidential.

- 5.3 The specific information subject to the claim for confidentiality must be genuinely of a confidential nature and not otherwise publicly available. Statements of opinion would not generally be considered to be confidential.
- 5.4 A claim for confidentiality must be accompanied by the reasons why confidentiality is being claimed. Where it is asserted that specific direct harm would be caused to the commercial or other interests of the claimant, sufficient details must be provided as to the nature and extent of such harm. If no justification is provided as to why the information should be designated as confidential information, then NICTA may conclude that it is not confidential and may publish the information on its public register.
- 5.5 A respondent may submit information that it considers confidential in one of two ways:
- (a) by way of a separate attachment to its submission that can be withheld from publication; or
 - (b) by submitting two versions of its submission, namely:
 - (i) a version in Microsoft Office File format for NICTA reference; and
 - (ii) a public version in either Adobe PDF or Microsoft Office File format in which the confidential information is redacted. In any such redacted submission, the information or text for which confidentiality is being claimed should be replaced with black bars (for example: ) to enable readers to identify where information has been removed ~~and how much information has been removed~~, and to retain the same formatting and page/paragraph numbering as the confidential version.
- 5.6 In response to a claim for confidentiality, NICTA staff will first determine if the information subject to the claim is relevant to the matter under consultation or under inquiry. If it appears that it is not, NICTA staff will invite the claimant to withdraw that information and lodge a replacement submission.
- 5.6A If the information subject to the claim appears to be relevant, NICTA will then determine whether the information is in fact confidential. In making this determination, NICTA will follow general law principles on confidential information. These may be summarised as follows:
- (a) Confidential information means all information of a party that is not generally available to the public (other than as a result of a disclosure directly or indirectly in breach of confidentiality obligations), in any format, whether having been disclosed to NICTA orally, visually or in any tangible or electronic form or media and whether of a technical, business or other

nature, including, without limitation, any information relating to business or marketing plans, operations, processes, intentions, financial projections, financial reports, technical plans, technical specifications, purchasing requirements or intentions, customers and business affairs, internal reports, marketing plans, opportunities, product information, software, know-how, design, rights, trade secrets, or any information of a market sensitive nature, that has been identified as being proprietary and/or confidential or that by the surrounding circumstances ought to be treated as confidential.

- (b) Confidential information excludes information that is or becomes part of the public domain through no wrongful act or failure to act or breach of confidence on the part of any person to whom the information had been disclosed.

Information that can only be gathered from the public domain at significant cost or effort is not considered to be information in the public domain. Whether gathering the information would entail significant cost or effort is a question of degree. This will depend on the circumstances.

5.6B If the information is confidential, NICTA will ~~examine the claimant's arguments regarding confidentiality to determine if~~ "disclosure of the information is in the wider public interest" pursuant to section 44(4) of the National ICT Act 2009. In making this determination:

- (a) NICTA will take as its starting point, a presumption that the wider public interest is generally served by respecting the confidentiality of information provided to NICTA;
- (b) NICTA will then determine to what extent ~~the claimed harm outweighs~~ the wider public interest in holding ~~an~~ open and transparent consultation or inquiry processes ~~may be achieved without disclosing the confidential information, by:~~
- (i) disclosing only aggregated information such that the confidential information cannot be inferred or estimated by another person using information available to that person; or
- (ii) disclosing the confidential information only on a "need to know" basis in circumstances that retain the confidential character of the information, including by obtaining a written undertaking on confidentiality from the person to whom the information is disclosed; and
- (c) finally NICTA will determine whether the wider public interest in holding open and transparent consultation or inquiry processes (whether or not aggregated, and whether or not on a "need to know" basis) outweighs the wider public interest in respecting the confidentiality of information provided to NICTA.

5.6C In general, NICTA expects that the wider public interest in holding open and transparent consultation or inquiry processes:

- (i) is usually achieved by disclosing only aggregated information in a way that protects the confidential parts of the information from being inferred or estimated by another person using information available to that person;
- (ii) is sometimes achieved by disclosing the confidential information on a “need to know” basis, subject to obtaining a written undertaking on confidentiality from the person to whom the information is disclosed; and
- (iii) is rarely (if ever) achieved by disclosing the confidential information to the general public without any restrictions.

5.6D Where NICTA determines that it is necessary to disclose confidential information on a “need to know” basis subject to confidentiality restrictions, NICTA will first:

- (a) establish a register of interested parties, invite members of the public to apply to be registered as an interested party to the consultation or inquiry, and publish the register; and
- (b) require each interested party to provide a written undertaking to NICTA to comply with any directions that NICTA may give from time to time in connection with the confidentiality of information disclosed to a recipient, being the interested party, and its employees, agents, external consultants and external advisers.

Such directions may entail:

- (c) limiting disclosure of certain highly sensitive information only to the interested party’s external advisers;
- (d) requiring each recipient to provide confidentiality undertakings in a form acceptable to NICTA; and
- (e) requiring interested parties to give NICTA a bond or other surety acceptable to NICTA, which NICTA may forfeit in whole or in part if there is a breach of confidence by a recipient.

Before issuing a direction, NICTA will generally seek comments on a draft direction.

5.7 In determining whether the wider public interest lies in favour of keeping information confidential, NICTA will take account of the commercial sensitivity of the confidential information and the private harm that would be suffered if the information is disclosed.

~~5.7 Where NICTA is satisfied that the specific direct harm likely to result from public disclosure justifies a claim for confidentiality, NICTA will exclude from publication the information that is subject to that claim.~~

~~5.8 In some cases, NICTA may give less weight to confidential information in its determination of matters under consultation or inquiry (for example, where the recognises that accepting a claim of confidentiality will not necessarily prevents the information from being tested).~~ The information can usually be tested by:

- (a) making market inquiries without disclosing the information;

- (b) making market inquiries and disclosing the information in aggregated form;
- (c) making market inquiries and disclosing the information subject to confidentiality undertakings.

It is rarely necessary to test information by publishing the information or disclosing the information without any restrictions. If market inquiries indicate that the confidential information is unreliable, NICTA will inform the person who provided the information that NICTA will discount the information or consider the information unreliable unless the person consents to NICTA disclosing the information publicly.

- 5.9 Where NICTA determines that disclosure of confidential information would be in the wider public interest ~~is of the opinion that no specific direct harm would be likely to result from disclosure, or where any such specific direct harm is shown but the benefits of disclosure outweigh any harm to the claimant, NICTA may decide to refuse the claim for confidentiality or parts thereof.~~ In such an event, NICTA staff will inform the claimant of NICTA's decision(s) and ask the claimant if it therefore wishes to withdraw the information subject to the denied claim. If the claimant requests withdrawal, the information subject to the denied claim will be returned to the licensee and any decision on the matter under consultation or inquiry will be made without any consideration being given to the returned material. (In such a case, if the claimant submitted a redacted version of its submission, then NICTA will consider only the redacted version.)

- 5.10 If NICTA decides to accept only part of a claim for confidentiality (for example, in relation to some statements or figures but not in relation to other statements or figures in the same submission), then NICTA may amend the claimant's proposed redactions in the version referred to in guidelines 5.5(b)(i) above to demonstrate the claimant, for the purposes of informing the claimant pursuant to guideline 5.9, which of its claims for confidentiality have been accepted. The claimant will then have the opportunity to withdraw, pursuant to the guideline 5.9, the information that NICTA does not accept to be confidential.

6 Withdrawal of submissions

- 6.1 A respondent may withdraw a submission that it has made to a consultation or inquiry:
- (a) at the invitation of NICTA staff as per guideline (5); or
 - (b) at any time prior to the specified deadline for receipt submissions.
- 6.2 Unless NICTA staff have specifically invited a respondent to withdraw all or part of its submission, a request for withdrawal of all or part of a submission must be made in writing and communicated to NICTA staff via email to the same email address to which the submission was sent. ~~NICTA will grant all requests for withdrawal that are consistent with guideline 6.1 however, a submission is not formally considered to have been withdrawn (i.e. the withdrawal does not take effect) until NICTA staff have communicated NICTA's acceptance of the withdrawal request to the relevant~~

~~respondent via email and returned the relevant information to the licensee (via email)~~

- 6.3 If a licensee requests the withdrawal only of part of its submission, and that particular part of the submission cannot in the opinion of NICTA staff be separated and withdrawn independently from the rest of the submission (for example, because the submission is in a format that cannot be edited by NICTA staff), then the only option available to the respondent is the withdraw of submission in its entirety.
- 6.4 Requests for extensions of time will be dealt with pursuant to clause 2.2 of these Guidelines. If a respondent requests the withdrawal of all or part of its submission when it has not been invited to do so by NICTA staff, the respondent must submit any replacement submission by the original submission deadline (or the extended deadline if such applies at the time the request is made) in order for that replacement submission to be taken into consideration by NICTA.

7 Protection of confidential information

7.1 Where NICTA determines that disclosure of confidential information is not in the wider public interest:

- (a) NICTA will not publish the information provided on NICTA's public register whether or not the information is aggregated with other industry information;**
- (b) NICTA will not disclose the information to any person outside of NICTA or NICTA's advisors whether or not the information is aggregated with other industry information; and**
- (c) NICTA will not disclose the information to any person within NICTA other than NICTA's people or advisors who are working on the public inquiry and then:**
 - (i) only on a need to know basis; and**
 - (ii) only to those people who have executed a satisfactory confidentiality undertaking.**