



Balancing transparency and protection of economic and commercial interests

The Council of Transparency and Good Governance publishes its Interpretive Criteria 1/2019 on the application of article 14.1.h) of Law 19/2013

Background

According to Law 19/2013, of December 9, on transparency, access to public information and good governance, any citizen has the right of access to "public documents", being understood that "public documents" shall mean any content, whatever its medium, held by public authorities and that has been drawn up or received by them while performing their functions. The right of access to public documents is guaranteed in two ways: on the one hand, the law requires public authorities to publish all the information whose knowledge is relevant to guarantee the transparency of their activity on a regular basis. On the other hand, the law specifically regulates the right of any citizen to request the disclosure of public documents held by such authorities.

The Law also provides that the right of access to public information may be limited if disclosure of such information may undermine the protection of economic and commercial interests.

Interpretive Criteria 1/2019 has been approved by the Council of Transparency and Good Governance (CTBG) with the objective to facilitate the uniform application of this exception regarding the protection of economic and commercial interests.

Application of the exception

The protection of the economic and commercial interests operates as an exception

to the right of access to public documents in cases where public authorities actively publish the information and in cases where citizens make an access request.

When public authorities publish the information ex officio, the CTBG indicates that those responsible of such publication must analyze, prior to the disclosure, if such publication can undermine the economic and commercial interests of any subject or group of subjects. Therefore, guidelines offered by the CTBG in this Interpretive Criteria 1/2019 must be applied ex officio by public authorities.

General conditions applicable to the exception

The CTBG refers in this Interpretive Criteria to the general conditions applicable to any exception of the general right of access to public documents. Such general conditions are the following:

- a) Restrictive interpretation. The protection of economic and commercial interests is an exception to the general rule of transparency. This meaning that the exception shall be interpreted restrictively: in case of doubt, transparency prevails.
- b) The exception shall not be automatically applied. The application of the exception is not automatic, it always requires a prior case by case assessment of all the relevant specific circumstances.



The Law does not declare that the right of access “must be” limited if access to the information undermines economic and commercial interests but rather states that this right of access “might be” limited in those cases.

c) “Harm test” and “interest test”. Access to public information can only be denied on the basis of this exception when there is a possible harm arising from the disclosure, and there is a causal link between the access to the information and such harm (harm test). Further, access to public information shall not be denied if there is an overriding superior interest justifying the disclosure (interest test).

d) Proportionality. Access should only be limited with respect to those elements strictly necessary to avoid the harm arising from the disclosure.

Definition of economic and commercial interests

According to the CTBG, economic and commercial interests shall mean the advantageous or relevant position acquired when creating, producing or distributing goods or services.

The CTBG understands that the fundamental objective of the protection of the economic and commercial interests is “to avoid undue damage to the competitive position or the bargaining power” of the companies invoking the exception. Therefore, the application of this exception requires the invoking person to provide evidence supporting the fact that the disclosure of the information may undermine its competitive position or bargaining power in any negotiation processes in which the invoking person may be involved. The criteria of the CTBG is that economic and commercial interests may exist and deserve protection even if they do not derive from intellectual and/or

industrial property rights. When the economic and commercial interests derive from such rights another specific exception applies.

As a conclusion, the exception regarding economic and commercial interests can be invoked even if what is sought to protect is not a trade secret or knowledge covered by the rules governing intellectual and industrial property.

Trade secrets and confidentiality clauses

The CTBG, in this document, also offers guidelines for action for the scenarios where a trade secret is included in certain public information, or the disclosure of certain public information entails the breach of a confidentiality clause.

According to the CTBG, such scenarios should also be protected through the exception regarding the protection of economic or commercial interests. The CTBG adopts this solution based on the Commission Notice on the Rules for Access to the Commission Files in Competition Cases; where it is said that access to documents containing trade secrets or other confidential information should be denied.

For this purpose, “trade secret” means information which meets is not generally known, which has commercial value because it is secret, and which has been duly guarded by its owner.

Therefore, for a trade secret to be protected, such secret must have been subject to reasonable measures, taking into account all relevant circumstances, by the person lawfully in control of the information, in order to keep it secret. Otherwise it will be difficult to defend that the information should be considered as business secret.



On this matter the CTBG reproduces Law 1/2019 on trade secrets. If a company has not adopted such reasonable steps, the information concerned cannot be deemed as a trade secret.

As per the Commission Notice, examples of information that may qualify as business secret include the following: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

Regarding confidential information, the Commission Notice considers that it falls into this category the information whose disclosure would significantly harm a person or company. Depending on the specific circumstances of each case, this may apply to information provided by third parties that, if disclosed, would cause harm to said third parties. This would be the case, for example, of offers received from suppliers.

Therefore, the criteria of the CTBG is that the right of access to information must be denied via the application of the exception of the protection of economic and commercial interest if: (a) the information to be published or the

information whose disclosure is requested by a citizen is, in whole or in part, a business or trade secret as set forth in Spanish Law on Trade Secrets; or (b) such information is affected in whole or in part by a statutory confidentiality provision or a confidentiality provision otherwise established in accordance with the terms foreseen in the applicable law.

Regulations applicable to medicinal products

In the field of medicinal products, especially in connection with the procedures to determine price and reimbursement and other conditions for the acquisition of medicinal products, it is worth to recall some relevant issues. First, according to the provisions of Directive 89/105/EEC, Royal Legislative Decree 1/2015 and Royal Decree 271/1990, price and reimbursement decisions shall be based on objective and verifiable criteria described in the applicable law. Second, the transparency required by Law, which imposes companies the obligation to provide public authorities with a vast amount of information (that afterwards is included in the corresponding administrative files), is acceptable to the extent that the very same Law declares that all the information received by the Ministry of Health in such procedures shall be deemed confidential.