

29 July 2016

Garth Pennington

By email only: fyi-request-4058-d0245bfa@requests.fyi.org.nz

Dear Mr Pennington,

Official Information Act request: 15.171 – Number of Complaints

1. We refer to your 26 May 2016 request for information under the Official Information Act 1982 (OIA).
2. On 23 June 2016, the Commerce Commission (**Commission**) provided a response to the first three parts of your request dealing with the number of complaints received.
3. Also on 23 June 2016, you clarified the scope of the remaining part of your request to be for copies of any communication:
 - 3.1 relating to the 135 Spark complaints and 25 Chorus complaints the Commission received in the last 12 months;
 - 3.2 with Spark, Chorus and any government department or minister (relating to telcos only).
4. On 24 June 2016, the Commission extended the deadline to decide the remaining part of your request to 29 July 2016.

Our response

Consideration of complaints resulting in communication

5. We reviewed the 135 Spark and 25 Chorus complaints. We searched our enquiries database (i-lign), electronic filing system (FileSite) and internal tracking spreadsheets to see if these complaints led to any communications that would be responsive to your request.
6. We found that none of the Chorus complaints led to communications with Spark, Chorus or any government department or minister.

AUCKLAND

L13, Forsyth Barr
55 Shortland Street
P.O. Box 105-222
AUCKLAND 1143, NEW ZEALAND

WELLINGTON

L9, 44 The Terrace
P.O. Box 2351
WELLINGTON 6140, NEW ZEALAND
Tel: (04) 924 3600 Fax: (04) 924 3700
Main Office

Screening Process

7. In order to get an understanding why a relatively huge number of complaints did not necessarily result in a similar number of investigations involving communication with the relevant traders, we thought it would be helpful to provide you with an overview of the Commission's screening process.
8. The Commission receives a large number of complaints each year. Due to this, a screening process is put in place to decide which complaints will proceed to investigation.
9. Every complaint is initially assessed on the basis of the information provided, and an appropriate course of action recommended. A Screening Panel, made up of five senior managers within the Commission, meet each week, review the recommendations and make final decisions.
10. When initially assessing a complaint, the Commission considers:
 - 10.1 The likelihood of a breach of the relevant legislation;
 - 10.2 The Commission's Enforcement Response Guidelines¹; and
 - 10.3 The Commission's strategic priorities and resourcing constraints.
11. The Commission has the power to act on complaints, but is not required to take action in relation to all possible breaches of the Fair Trading Act (the Act). Instead the Act provides consumers with the ability to take action in the Courts, or Disputes Tribunal to enforce their rights under the Act.
12. Where the Commission decides not to proceed to an investigation, we may recommend that the complainant contact a lawyer, community law centre or another agency that may help with the complaint.

Spark complaints

13. For the Spark complaints, we found three different scenarios where communication resulted from the complaints received.

Current investigations

14. There are two investigations currently on-going that have generated communications. This information will be withheld under sections 6(c) and 9(2)(ba) of the OIA.

¹ More information on the Commission's enforcement response guidelines can be found on the Commission website at: <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines>.

- 14.1 Section 6(c) of the OIA provides that information may be withheld where disclosure of that information may prejudice the maintenance of the law, including the prevention, investigation and detection of offences.
 - 14.2 Under section 9(2)(ba)(i) of the OIA, good reason exists for withholding information where it is necessary to protect information which is subject to an obligation of confidence, and where the making available of that information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that that information should continue to be supplied.
15. The Commission relies on the supply of information during the course of an investigation in order for it to carry out its investigative functions.
 16. We believe that the release of information which was provided under an obligation of confidence would jeopardise the supply of future information, and it is in the public interest that such information should continue to be supplied.

Trader Compliance Programme

17. One of the ways the Commission protects consumer interests is to encourage business to voluntarily comply with the law. The goal of the Trader Compliance Programme (the **Programme**) is to work with traders or industries to encourage compliance.
18. The Programme looks to use education, persuasion and cooperation to encourage trader compliance, rather than relying solely on enforcement.
19. In this context the Commission met with Spark under the Programme in March 2016 and some communication resulted from complaints received about the company.
20. This information will be withheld under Sections 6(c) and 9(2)(ba) of the OIA.
 - 20.1 The programme is designed to encourage traders to put effective compliance systems in place and as such any disclosure of communications that could potentially prejudice the success of the program would impact upon the prevention of offences. This would be a conclusive reason for withholding information under section 6(c).
 - 20.2 The successful outcome of the Major Trader meetings rely on the fact that information is provided in confidence for discussion on a free and frank basis where information exchanged would not be used in an investigative context. The Commission is concerned that the release of the communication involving the programme would prejudice the continued supply of similar information (section 9(2)(ba)(i)).
 - 20.3 In addition, disclosure of communications could discourage future participation by traders in the programme, which would likely damage the

public interest in the open dialogue and improved compliance (section 9(2)(ba)(ii)).

Completed investigation

21. One of the complaints received led to an investigation into Spark's (trading as Bigpipe) standard form contract terms and conditions for compliance with the unfair contract terms (UCT) provisions of the Fair Trading Act.
22. We are providing the communications which relate to this investigation with this letter. A list of these documents can be found in **Attachment A**.
23. We consider that there are good reasons for withholding some of the information contained in the communications in accordance with the provisions of the OIA. Our reasons for withholding that information are set out below.
24. We have redacted information, including the names, addresses and contact details of Spark employees, as well as names of staff of the Commission, under section 9(2)(a) of the OIA in order to protect the privacy of natural persons.
25. The Commission consulted Spark under section 15(5) of the OIA and agree with the request that certain information in the communications be withheld on the basis that:
 - 25.1 It is necessary to protect information where the making available of the information would be likely to unreasonably prejudice the commercial position of Spark (section 9(2)(b)(ii) OIA); and,
 - 25.2 Good reason exists for withholding information where it is necessary to protect information which is subject to an obligation of confidence, and where the making available of that information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that that information should continue to be supplied (section 9(2)(ba)(i) OIA).

Public interest

26. Section 9(1) of the OIA requires the Commission to establish good reason for withholding information, and requires the Commission to balance the reasons for withholding against any countervailing public interest in disclosure.
27. We recognise that there are public interest reasons for disclosure, including the transparency and accountability of the Commission's investigations. On the other hand, the Commission has to consider the effect of disclosure on the integrity and efficiency of its investigations, Programme, the maintenance of the law and future supply of information on a voluntary basis by complainants.
28. Where information has been withheld, we have considered that the reasons for withholding the information outweigh the public interest in disclosure

Further Action

29. We hope that the information provided answers the fourth and final part of your request. If you have any questions with regards to your request, please do not hesitate to contact us at uia@comcom.govt.nz.
30. If you are not satisfied with the Commission's response to your request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and review this response.

Yours sincerely



Bel O'Reilly
OIA Co-ordinator

Attachment A.

No.	Description	Date	Redactions – Relevant section of OIA
Bigpipe Broadband – Contract Terms			
1	Email chain – Commission report on Telco contracts	09.02.2016	9(2)(a), 6(d)
2	Acknowledgment of Compliance Advice Letter	21.12.2015	9(2)(a), 6(d)
3	Compliance Advice Letter	21.12.2015	9(2)(a), 6(d)
4	Email from Spark attaching response letter	01.12.2015	9(2)(a), 6(d)
5	Response Letter	01.12.2015	9(2)(a), 6(d), 9(2)(b)(ii), 9(2)(ba)(i)
6	Email from Spark – will review letter of assessment	23.11.2015	9(2)(a), 6(d)
7	Request for information	23.11.2015	9(2)(a), 6(d)
8	Email from Spark attaching response letter	27.08.2015	9(2)(a), 6(d)
9	Response Letter	27.08.2015	9(2)(a), 6(d), 9(2)(b)(ii), 9(2)(ba)(i)
10	Email attaching request for further information	29.07.2015	9(2)(a), 6(d)
11	Request for further information	29.07.2015	9(2)(a), 6(d), 9(2)(b)(ii), 9(2)(ba)(i)
12	Email from Commission advising we will assess response letter	22.05.2015	9(2)(a), 6(d)
13	Response Letter	22.05.2015	9(2)(a), 6(d), 9(2)(b)(ii), 9(2)(ba)(i)
14	Email attaching request for more information	05.05.2015	9(2)(a), 6(d)
15	Request for more information	05.05.2015	9(2)(a), 6(d)