

The Russian Federation
Round table “Definition of the notion “confidential information””
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Working Group № 3 on cooperation and enforcement
Competition Committee OECD

According to the Federal Law № 149-FZ of 27.07.2006 “On information, information technologies and protection of information” (hereinafter referred to as “the Law on information”) all information depending on the level of access to it is subdivided into general use information and information access to which is restricted by Federal laws (classified information with restricted access).

In accordance with related federal laws information with restricted access comprise state secrets, commercial secrets, personal data and other information¹.

Issues of circulating and accessing to confidential information are also regulated by provisions of the Civil Code of the Russian Federation, Arbitration Procedure Code of the Russian Federation, Civil Procedure Code of the Russian Federation, Criminal Procedure Code of the Russian Federation.

Under “the Law on information” access to information or data which is restricted by federal laws has to be confidential, and a person who has been granted access to such information has to comply with the requirement not to pass (disclose) such information to third parties without permission of the owner.

Restriction of access to information is established with the aim to protect the basis of constitutional system, morality, health, rights and lawful interests of other person, provision of state safety and defense.

Moreover it is worth mentioning that the Law on information defines the list of information access to which cannot be restricted, namely:

- Normative legislative acts *нормативные* in regards to rights, freedom and duties of a human being and citizen, and those legal acts which institute legal status of organizations and authority of state bodies, local self-governance;
- Information on activities of state authorities and local self-governance institutions, as well on use of budget funds (exclusive of data referred to as state or service secrecy);
- Information collected and stored at open access collections of libraries, museums and archives, as well as in state, municipal and other informational systems, which were created for provision of citizens (physical persons) and organizations of such information;
- Other information, inadmissibility of restriction to which is prescribed by federal laws.

¹ List of normative legislative acts, which ascribe information to the category of classified restricted access data, includes more than 50 legislative acts, regulating access and circulation of different types of information, commercial secret, personal data, banking secrecy, tax secrecy, lawyer secrecy, notary secrecy, insurance confidentiality, patients’ confidentiality etc.

Under Article 25 of the Federal Law № 135-FZ of 26.07.2006 «On protection of competition» (hereinafter referred to as “the Competition Law”) commercial companies and non-commercial organizations (their authorized representatives), federal authorities of executive power (their authorized representatives), federal authorities of the Subjects of the Russian Federation (their authorized representatives), local self-governance authorities (their authorized representatives), other authorities or organizations performing functions of the above mentioned authorities (their authorized representatives), as well as state non-budgetary funds (their authorized representatives), individuals (inclusive of individual entrepreneurs) are obliged to provide to competition authority (its authorized representatives) upon a reasonably motivated request in due time necessary for the antimonopoly body (in accordance to entrusted executive powers) documents, explanations, information (accordingly in written or oral form) (inclusive of confidential commercial or service secrecy information, information under protection of the Law) including deeds, agreements, references, business correspondence, other documents and data executed in digital form or on digital media.

Economic entities has the right to give the confidentially status to information submitted to competition authority on their own will, by marking the material media containing the information with the corresponding classification (“Confidential”, “Commercial secrecy”, “company confidential”) exclusive of cases when such information cannot be classified as information with restricted circulation in accordance with legislation of the Russian Federation.

For illegitimate refusal to provide information to competition authority inclusive of information with restricted circulation which is prescribed by the Competition Law, undue provision of information or deliberate provision of false information, the Administrative Violations Code of the Russian Federation provides for issuing fines for authorized representatives (executive officers).

In turn, in accordance with part 1 of article 26 of the Law on Competition information constituting commercial, official and other secrets protected by the law and obtained by the competition authority in the exercise of their powers, shall not be disclosed, except for cases established by Federal laws.

In this regard part 2 of article 26 of the Law on competition stipulates application of civil, administrative and criminal liability measures to the employees of the Antimonopoly Authority for disclosure of information constituting commercial, official, other secret protected by law.

The damages caused to individual or legal person as a result of disclosure by the Antimonopoly Authority or its officials of information constituting commercial, official, other secret protected by law, shall be reimbursed by the Treasury of the Russian Federation (part 3, article 26 of the Law on competition).

Further, the types of information will be considered, which is at the disposal of the Russian competition authority and used in exercising their powers, access to which is restricted. Separately for each category of confidential information the information on presence of exceptions for ability to restrict access to relevant information.

Commercial secret

The concept of “Commercial secret” is defined in article 3 of the Federal law of 29.07.2004 № 98-FZ “On Commercial Secret” (hereinafter - the Law on Commercial Secret). According to this law a commercial secret is non-disclosure requirement - regime, enabling its possessor to avoid unjustified expenses, save position in the market of goods, works, services or to obtain other commercial benefit, when existing or potential circumstances allow to increase the income;

At the same time, the Law on Commercial Secret classifies as information constituting a commercial secret (secret of production) data of any nature (production, technical, economic, organizational and other), including the results of intellectual activity in scientific and technical sphere, as well as information on ways of realization of professional activity, which have actual or potential commercial value for third persons by virtue of the lack of information, to which third persons have no free access on legal grounds and in respect of which the holder of such information has introduced a regime of a commercial secret.

In accordance with article 5 of the Law on Commercial Secret regime of commercial secret could not be established by persons engaged in entrepreneurial activities, in respect of the following information:

- contained in the constituent documents of a legal entity, the documents confirming the fact of making entries on legal entities and individual entrepreneurs in the relevant state registers;

- contained in the documents entitling to exercise entrepreneurial activity;

- on the property assets of the state or municipal unitary enterprise, state institution and drafting on funds of appropriate budgets by them;

- on environmental pollution, the condition of fire safety, sanitary-epidemiological and radiation conditions, food safety and other factors with negative impact on the safe operation of industrial facilities, the safety of each citizen and the population in general;

- on number and composition of employees, system of remuneration, working conditions, including labour protection; information on industrial injuries and occupational diseases, and about free vacancy;

- debt of employers on payment of earnings and other social payments;

- on violations of the legislation Russian Federation and facts of prosecution for such violations;

- on conditions of tenders or auctions on privatization of objects of state or municipal property;

- the amount and structure of income of non-commercial organizations, on the size and composition of their property, on their expenses, on the number and remuneration of employees, on using of unpaid labor of citizens in the work of the nonprofit organization;

- the list of the persons entitled to act without power of attorney on behalf of the legal person;

- mandatory disclosure of which or the inadmissibility of restrictions of the access to which is stipulated by other Federal laws.

Personal data

According to the Federal Law of 27.07.2006 No. 152-FZ "On personal data" any information related directly or indirectly to the specific or determinate individual person (subject of personal information) is referred to personal data.

The federal law also establishes a prohibition on disclosure to the third parties and distribution of personal information by persons that have got access to such information without a consent of the subject of the personal information except as otherwise provided by the federal law.

Tax secret

According to Article 102 of the Tax Code of the Russian Federation of 31.07.1998 No. 146-FZ, any information on a taxpayer received by the tax authority, law-enforcement bodies, investigative authorities, body of the state off-budget fund and customs authority is a tax secret, except information that is:

- public, including the information that has become public with the consent of its owner-taxpayer;
- on identification number of the taxpayer;
- on violations of the law on taxes and fees and measures of responsibility for these violations;
- submitted to tax (customs) or law enforcement bodies of other states in accordance with international treaties (agreements), a side of which the Russian Federation is, on mutual cooperation between tax (customs) or law-enforcement bodies (regarding information submitted to these bodies);
- submitted to election commissions in accordance with the legislation on elections by results of inspections carried out by the tax authority of information on a size and sources of the income of a candidate and his/her spouse, and also about the property belonging to the candidate and her/his spouse on the property right;
- provided to the State Information System on state and municipal payments, provided by the Federal law of July 27, 2010 No. 210-FZ "On organization of provision of state and municipal services".

The tax secret isn't subject to disclosure except for cases provided by the federal law. Granting by the tax authority to the responsible participant of the consolidated group of taxpayers of data on the participants of this group being tax secret isn't a disclosure of the tax secret.

Information for official use

A separate category of information of limited distribution which the Russian antimonopoly authority deals with is the information for official use.

Definition of concept of this category of information is specified in the Provision on the Procedure of the address with office information of limited distribution in federal executive authorities and authorized body of management of use of the atomic energy, approved by the resolution of the government of the Russian Federation of 03.11.1994 No. 1233 according to which the unclassified information concerning activity of the

organizations belongs to office information of limited distribution, restrictions on which distribution are dictated by office need.

Thus, decree Situation also defines those types of information which can't be carried to office information of limited distribution which including treat:

legislative acts, establishing the legal status of the state bodies, organizations, public associations, as well as the rights, freedoms and duties of citizens, the manner of its implementation;

description of the structure of the Executive power body, of its functions, directions and forms of activity, and its address;

procedure for consideration and settlement statements and applications of citizens and legal persons;

decisions on applications and appeals of citizens and legal persons, considered in accordance with the established procedure;

data on budget implementation and other governmental resources, on the state of economy and the needs of the population.

Decision on determining information for official use as a category of limited distribution is taken by the officials of the Federal Authority, designated by the Head of this Authority. Officials who take decisions on determining information for official use as a category of limited distribution, are personally responsible for the validity of the adopted decisions.

Information for official use of limited distribution without sanction of the appropriate official shall not be disclosed (disseminated).

Documents containing Information for official use of limited distribution are marked as «confidential»

Aiming at regulation of federal authorities' activities with documentation of restricted circulation the corresponding authority elaborates and adopts internal normative legal acts. The Russian competition authority uses the Instruction on circulation of documents containing confidential information for the FAS Russia and its Territorial Offices, adopted by the Order of the FAS Russia № 45 on 18.03.2005 (hereinafter referred to as Instruction).

The Instruction contains:

- Procedure of operational activities with incoming and outgoing confidential correspondence;
- Procedure for accounting, storing of confidential data as well as provision of restricted access to it;
- Procedure for consideration upon classification of documents and assigning them with “Office use only”;
- Procedure for accounting and registering of internal documents assigned with “Office use only” and its circulation in competition authority.

Summing up written all of the above it is possible to say that Russian legislation and normative legislative acts do not contain definition of the notion of confidential information.

Definition of confidential information is closely connected to the character of information (commercial secret, personal data, tax secrecy) used by the competition

authority and nature of information origins (received from outside – by economic entity, other executive authorities, created by competition authority itself).

Moreover such definition is present in the key agreement which is included in the structure of legal framework for establishing the Common Economic Area of Republic of Belarus, Republic of Kazakhstan and the Russian Federation (CEA) – the Agreement on common principles and rules of competition dd.09.12.2010 (hereinafter referred to as the Competition Agreement).

CEA presupposes sufficient degree of integration of member-countries when common rules of competition replace restrictive economic measures in mutual trade relations. In connection to this agreement which formed the shape of antimonopoly regulation within CEA, there is a provision defining a possibility of exchange of confidential information upon competition enforcement on national and super national levels (between national competition authorities) as well as between national competition authorities and Eurasia Economic Commission (EEC).

Moreover in the Competition Agreement the notion of “confidential information” is defined, i.e. all types of information (inclusive of information referred to as commercial secret, personal data, banking secrecy, professional secrecy, or personal secrets) access to which is restricted under legal normative acts of the Parties.

In the context of CEA establishment in recent time the Russian competition authority pays great attention to the issue of protection of confidential information and responsibility for its disclosure. As for the exchange of confidential information between national antimonopoly bodies of CEA member-states all relevant matters are regulated by the Competition Agreement.

As for the exchange of confidential information between national antimonopoly bodies of CEA member-states and EEC and circulation of such information as well as EEC’s treatment of such data within the frameworks of executing its primary duties in the sphere of competition enforcement, currently a special agreement is being elaborated aiming at regulations of all issues related to procedural protection of confidential information and liability for disclosure of confidential information during EEC’s execution of its authority.

Adoption of the above mentioned Agreement is the essential condition for transfer of executive authorities to Eurasian Economic Commission to suppress violations of economic entities from member-states of the CEA, i.e. prohibition of anticompetitive activities which negatively influence competition on trans-border markets.