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Corporate

Bulletin No 1 Confidential Information

Guidance on confidentiality claims

CONFIDB1/1

September 2023

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The purpose of this bulletin

The Commission has prepared this bulletin to assist people in making confidentiality claims over information provided to the Commission and to explain the Commission's process for assessing confidentiality claims.

Additionally, the Commission has an important function of informing consumers and stakeholders about its decisions and the operation of regulated industries. As such, the Commission's general position is that it will publish information and submissions received unless there are appropriate reasons not to.

The Commission requires information for its regulatory functions

To perform its regulatory functions, the Commission requires accurate and timely information. Accordingly, the gathering, collection, use, classification and disclosure of information is a crucial part of the Commission's powers and functions. A wide variety of information is required, including information which may not be publicly available and may be sensitive for a variety of different reasons.

Information is obtained by the Commission in several ways, including:

- ▶ from any person by issuing a written notice requiring the provision of information to the Commission pursuant to section 29 of the *Essential Services Commission Act 2002* (ESC Act) and/or using information gathering powers provided to the Commission under other legislation
- ▶ from regulated entities by way of reporting requirements imposed under an Act, licence, industry code or guideline
- ▶ through Data Sharing Agreements or Memorandum's of Understanding with other public sector entities or organisations
- ▶ from any person or regulated entity making a submission to the Commission, and/or
- ▶ from any person or regulated entity on a voluntary basis.

Where information is provided to the Commission, the purposes for which it may be used will be determined by the relevant legal or regulatory context and the purposes for which the information was provided or obtained.

Information obtained by the Commission using written notices

Where information has been obtained by the Commission using its powers under section 29 of the ESC Act, there are legislative protections for information considered confidential information. Sections 30(1)(a) or (b) of the ESC Act provide that information will be considered confidential if it:

- ▶ could affect the competitive position of a regulated entity or some other person, and/or
- ▶ is commercially sensitive for some other reason.

Information obtained in other ways

If information has not been obtained by the Commission using section 29 of the ESC Act (for example, it has been provided by way of a submission, annual report or otherwise voluntarily), then the ESC Act provisions regarding confidential information do not apply.

However, a regulated entity or person may make a claim that the information is confidential information under the common law. Generally, the Commission considers that common law confidential information must meet all the following requirements:

- ▶ be private in nature
- ▶ be received by the Commission in circumstances that impose an obligation of confidence on the Commission

- ▶ not be publicly available, and
- ▶ have the potential to harm your or a third parties' legitimate commercial interests if disclosed.

A person claiming confidentiality in these circumstances must also explain in writing the reasons for that claim (as explained below).

How to claim confidentiality over information obtained using written notices

A person claiming confidentiality in these circumstances must explain why the information requested meets one of the elements of the confidentiality test set out in section 30 of the ESC Act (as specified above). In doing so they must:

- ▶ specifically identify all information which is considered confidential (information must be identified specifically rather than defined in generic or global terms by providing the relevant page or paragraph numbers), and
- ▶ for each item of information:
 - identify the statutory basis (section 30(1)(a) or (b)) relied on
 - explain the reasons for that claim (for example, how a competitor could gain an advantage and/or how you could suffer a loss if the information was made publicly available)
 - confirm that the relevant information is not publicly available and has not previously been published (for example, as part of an ASX announcement or annual report)
 - advise whether any separate confidentiality claims have been made about the information with any other Commonwealth, state or territory regulators and, if so, the outcome of those claims
 - provide reasons explaining why the identified harm that they (or another person) will suffer by publication, is not outweighed by the public benefit and long-term consumer interests in being informed of the information, and
 - advise if there are any legal requirements that prevent or limit the disclosure of the information under any Commonwealth or state law.

In addition, they should provide a separate version of the relevant document(s) with the information subject to confidentiality claims redacted (blacked out), noting the Commission is not bound required to accept any proposed redactions and will assess those redactions as detailed below.

How to claim confidentiality over information obtained by the Commission in other ways

A person claiming confidentiality in these circumstances must explain:

- the reasons for that claim (for example, how a competitor could gain an advantage and/or how they could suffer a loss if the information was made publicly available)
- whether the relevant information is publicly available (for example, as part of an ASX announcement or annual report)
- whether any separate confidentiality claims have been made about the information with any other Commonwealth, state or territory regulators and, if so, the outcome of those claims
- what harm they (or another person) will suffer by publication of the information, and
- if there are any legal requirements that prevent or limit the disclosure of the information under any Commonwealth or state law.

In addition, they should provide a separate version of the relevant document(s) with the information subject to confidentiality claims redacted (blacked out), noting the Commission is required to accept any proposed redactions and will assess those redactions as detailed below.

Disclosure/publication of confidential information

In certain circumstances, the Commission is permitted to disclose confidential information obtained from a regulated entity or person under section 29 of the ESC Act.

Where it has been established that information provided to it is confidential information, the Commission is committed to providing appropriate protections. However, the Commission may disclose or publish confidential information if:

- ▶ the disclosure is made to another who is also performing a function under this Act or a relevant industry regulation Act
- ▶ the disclosure is made with the consent of the person who gave the information or to whom the information relates
- ▶ the disclosure is authorised or required under any other Act or law (for example, disclosure is required under the Freedom of Information Act 1999)
- ▶ the disclosure is authorised or required by a court or tribunal
- ▶ the disclosure is authorised by the ESC Act regulations (for example, the Commission is authorised to disclose confidential information to consultants it engages to assist it in the performance of its functions), and
- ▶ it considers that the public benefit in making the disclosure outweighs any harm that might be suffered by a person because of the disclosure. This may result in the Commission publishing an aggregated version of data it obtains to avoid the risk of specific commercially sensitive being published.

The Commission's assessment of confidentiality claims

The Commission will assess confidentiality claims within a reasonable time, considering the complexity of the matter and whether the claim has been sufficiently explained. The Commission may require further information or clarification to finalise its assessment.

The Commission will provide written reasons explaining its decision relating to confidentiality claim and as noted below, will advise whether it intends to disclose or publish the relevant information prior to any disclosure or publication occurring.

Example confidentiality claims

Below are some example confidentiality claims and assessment outcomes that have been prepared for illustrative purposes only. In making a confidentiality claim, the relevant facts, circumstances and information which support the confidentiality claim should be identified. Additionally, obtaining commercial and/or legal advice in preparing confidentiality claims may be of assistance.

1. A confidentiality claim for information obtained by using ESC Act written notices

ABC Pty Ltd (**ABC**) is a gas retailer providing financial information to the Commission under an ESC Act written notice. It has submitted a claim confidentiality under section 30(1) of the ESC Act over ABC's operating costs, included in the financial information, which includes a list of external companies and persons that undertake work for ABC and the prices charged for these services.

In support of its claim, ABC has explained that:

1. The relevant information is not publicly available.
2. If this information was released, other water retailers may be able to use this information to identify, negotiate with and hire these contractors. This could harm ABC's commercial interests.
3. While ABC accepts that customers benefit from being informed about ABC's operating costs, they do not benefit from learning the identity and specific charges of individual contractors. This may also affect customers if the disclosure of information results in ABC losing contracts or not obtaining value for money from these suppliers.

This information is likely to be considered confidential information by the Commission under s30(1) of the ESC Act and it is likely to form the view that the detriment that would be suffered by ABC outweighs any public benefit in publishing the information.

2. A confidentiality claim for information obtained by the Commission in other ways

DEF Pty Ltd (**DEF**) has submitted a common law confidentiality claim over part of its submission to the Commission's South Australian Ports Review, which it has provided voluntarily. In particular, the claim relates to detailed information about DEF's plans to purchase new stevedoring equipment for use at its ports and its maximum budget to do so.

In support of its claim, DEF has explained that:

1. The relevant information is not publicly available.
2. Commercial negotiations are continuing with different entities that sell stevedoring equipment. The disclosure of ABC's maximum budget would harm ABC's negotiating position.
3. There is limited benefit in the public being informed of this matter at this time (given that the purchase may not occur), and any public benefit in stakeholders being informed is outweighed by the commercial harm that ABC would suffer.

ABC provides a public version of its submission to the Commission with the information relating to the purchase of stevedoring equipment redacted (blacked out).

This information is likely to be considered confidential information by the Commission under s30(1) of the ESC Act and it is likely to form the view that the detriment that would be suffered by ABC outweighs any public benefit in publishing the information

3. Information which might be publicly disclosed for the public benefit

The GHI Council (**GHI**) has submitted a confidentiality claim over information about proposed upgrades to a key piece of its infrastructure, a sewerage treatment plant, which it has provided to the Commission under a written notice as part of the Commission's advisory role under the Local Government Act 1999.

In support of the claim, GHI has explained that:

1. The information is not publicly available.
2. The upgrade is a significant project, which will require a substantial financial investment. If this expense became publicly known, GHI's ability to attract new investors and/or obtain finance would be affected.
3. In its view, it is not important for its rate payers, or the public more broadly, to know about the exact costs of the upgrade.

The Commission accepts that the information is not publicly available and that if this financial information was released, there may be some impact on GHI's ability to attract investors or obtain finance. As such, the Commission considers that the information is confidential information under s30(1) of the ESC Act.

However, the costs to be incurred by GHI in upgrading its treatment plant will be a key factor in the Commission's assessment of GHI's long term asset management and financial plans and the resulting advice the Commission prepares. For GHI's rate payers to understand the Commission's advice and the proposed rate rises in future years, there is a clear benefit in the Commission being transparent about this proposed expenditure.

The Commission is likely to decide that the public benefit in making the information public outweighs any detriment that might be suffered by GHI, and that the information should be released in the public version of the Commission's advice to this council.