

Australian Capital Territory

**Independent Competition and Regulatory Commission (Disclosure Guidelines)
Determination 2021**

Disallowable instrument DI2021–238

made under the

Independent Competition and Regulatory Commission Act 1997, section 46(4)
(Confidential information – general disclosure)

1 Name of instrument

This instrument is the *Independent Competition and Regulatory Commission (Disclosure Guidelines) Determination 2021*.

2 Commencement

This instrument commences on the day after notification.

3 Revocation

The Commission revokes the *Independent Competition and Regulatory Commission (Disclosure Guidelines) Determination 2005 (No 1)*, DI2005-191.

4 Determination of Disclosure Guidelines

The Independent Competition and Regulatory Commission has determined the disclosure guidelines at the Schedule to this instrument for the purposes of section 46(1)(a) of the *Independent Competition and Regulatory Commission Act 1997*.

Joe Dimasi
Senior Commissioner
Independent Competition and Regulatory Commission
23 September 2021

1 Overview

1.1 Background

- 1.1.1 The Independent Competition and Regulatory Commission (“Commission”) has several functions in relation to regulated industries. These functions are set out in Section 8 of the *Independent Competition and Regulatory Commission Act 1997* (“ICRC Act”) and Part 3 of the *Utilities Act 2000*. The former Act concerns the Commission’s role in determining the price of regulated utility services, while the latter provides for the Commission to issue licences for the provision of utility services in the Australian Capital Territory.
- 1.1.2 In undertaking its functions, the Commission consults broadly with the utilities it regulates and those it issues licences to as well as customers and the broader community. During its work the Commission may be provided with information that the provider considers confidential. This is particularly the case where the Commission has used its powers under Section 41 to obtain information or documents considered necessary to assist the Commission in the exercise of its functions.
- 1.1.3 As a rule, the Commission will protect confidential information provided to it but in rare circumstances it may be required to consider whether such information should be made publicly available. Part 7 of the ICRC Act addresses the disclosure of “**confidential information**” and the process the Commission must undertake in considering the release of such information. In particular, section 46 provides that the Commission must take into account any disclosure guidelines it has determined.

1.2 Purpose

- 1.2.1 These Disclosure Guidelines are determined by the Commission under section 46(4) of the ICRC Act and set out the Commission’s approach to the general disclosure of information classified as “confidential information” under the ICRC Act.
- 1.2.2 In providing guidance on the Commission’s approach, the Disclosure Guidelines also set out the matters the Commission may consider in deciding whether to disclose confidential information.

1.3 Objective

- 1.3.1 The objectives of the Disclosure Guidelines are to guide the Commission as to the matters that may be considered when deciding whether confidential information may be disclosed.

1.4 Scope

- 1.4.1 The Disclosure Guidelines relate to the disclosure of confidential information under section 46 of the ICRC Act and do not apply to disclosures that are otherwise provided for under the ICRC Act and other laws.

1.5 Principles for decisions about the disclosure of confidential information

- 1.5.1 In making decisions about the disclosure of confidential information under section 46(1) of the ICRC Act, the Commission will consider whether the disclosure of the confidential information is necessary in a particular case, taking into account of

an open and transparent regulatory decision-making process in accordance with the law and the need to protect confidential information that may be important for the Commission’s current and future work as well as the commercial interests of the affected party or parties.

1.6 Definitions

1.6.1 **Commission** means the Independent Competition and Regulatory Commission

Confidential information means information given to the Commission that was, when it was given —

- (a) stated by the person giving it to be confidential or commercially sensitive; or
- (b) determined to be contrary to the public interest information under the *Freedom of Information Act 2016* (ACT).

Protected confidential information means confidential information the Commission does not have the power to disclose under section 46 or under any law of the Territory other than this Act.

1.7 Test for disclosure

1.7.1 Section 46(1) of the ICRC Act sets out that the Commission must only disclose confidential information if the following (“**section 46(1) test**”) is met:

- (section 46(1)(a)) The Commission considers that, taking into account the disclosure guidelines made under section 46(4) of the ICRC Act, the disclosure of confidential information would not cause detriment, or if disclosure would cause detriment, the public benefit in disclosure outweighs the detriment;
- (section 46(1)(c)) A notice was given under section 45 of the ICRC Act in relation to the proposed disclosure of the confidential information; and
- (section 46(1)(d)) 28 days have elapsed since the notice under section 45 of the ICRC Act was given.

2 Whether the disclosure of the confidential information would cause detriment to any person

2.1.1 The Commission may consider the following factors in determining whether the disclosure of the confidential information would cause detriment to any person:

- (a) the type of information that is to be disclosed;
- (b) the nature of the information;
- (c) to whom the confidential information is to be disclosed;
- (d) the detriment that would be caused to any person if the confidential information was disclosed;

- (e) any other considerations or factors relevant to the circumstances.

2.2 Type of information

2.2.1 The type of information may be an indication as to whether the information would be of a kind that would cause detriment if disclosed and may assist in guiding whether the Commission should protect it from disclosure.

2.2.2 Examples of the types of information that if disclosed may cause detriment include:

- (a) Market sensitive cost inputs—information such as supplier prices, internal labour costs, and information which may affect an entity’s ability to obtain competitive prices in future infrastructure transactions, such as tender processes;
- (b) Market intelligence — information which may provide an advantage to an entity’s competitors for non-regulated or contestable activities.
- (c) Information affecting the security of the network information which, if made public, may jeopardise the security of the network or an entity’s ability to effectively plan and operate its network;
- (d) Strategic information — information such as the acquisition of land and easements, where the release of this information might adversely impact an entity’s ability to negotiate a fair market price for these items;
- (e) Personal information — information about an individual or customer or an individual who is reasonably identifiable from the information which raises privacy considerations;
- (f) Intellectual property — information including trade secrets which relate to an entity’s competitive position.

2.3 Nature of the information

2.3.1 The nature of the information may also indicate whether a detriment would be caused by disclosure.

2.3.2 The examples of the considerations the Commission may consider could include:

- (a) whether the information is trivial or innocuous in nature;
- (b) whether the information has a quality of confidentiality, that is whether it is secret or only known to a limited group;
- (c) whether the information is publicly available in the form provided to the Commission or in another form or is common knowledge;
- (d) whether the information is subject to any requirement under law in relation to its confidentiality, use or disclosure, the disclosure of which would cause a detriment. Examples could include:
 - (i) if there is a contract or an agreement that requires the information to be confidential;

- (ii) if the confidential information includes, or is information within the meaning of the ‘personal information’ under the *Information Privacy Act 2014* (ACT) (“**Information Privacy Act**”), the Commission is obligated to comply with that Act. Where disclosure is permitted under the ICRC Act, its disclosure will also usually be permitted under the Information Privacy Act;
- (iii) whether the disclosure of the information would be contrary to the public interest under the FOI Act;
- (e) whether the information is still current or out of date, for example, the commercial sensitivity of information may have diminished since the time the information was given to the Commission; and
- (f) any other consideration or factor relevant to the circumstances.

2.4 Detriment that would be caused to any person if the confidential information was disclosed

2.4.1 For the purposes of this Disclosure Guideline, “detriment” has the ordinary meaning of the term as defined in the *Macquarie Dictionary Online*, which defines detriment as ‘loss, damage, or injury’. Examples could include:

- (a) prejudice to trade secrets or business affairs of a person, for example financial loss;
- (b) prejudice to a person’s ability to obtain confidential information;
- (c) prejudice to competitive commercial activities of a person, for example the person’s ability to be competitive in relevant markets;
- (d) diminishment or destruction of the commercial value of the information to a person;
- (e) embarrassment, exposure to ridicule or public criticism. Embarrassment, exposure to ridicule or public criticism are usually applicable to private persons and entities, but not to government; or
- (f) threat to health or safety.

3 Is there a public benefit that outweighs the detriment if the confidential information was disclosed?

3.1.1 If the Commission considers the public benefit in disclosure outweighs the detriment that the disclosure would cause to any person, the first limb of the test in section 46(1) of the ICRC Act is met, and the Commission could disclose the information, subject to the other requirements in section 46(1) of the ICRC Act being met.

3.1.2 There is no fixed definition of what will or will not be to the ‘public benefit’. Generally, there will be a public benefit in disclosing confidential information if the disclosure of the information raises for public discussion matters which are properly of public concern.

3.1.3 It will not be enough that the information is interesting to the public—there should be an identifiable benefit to the public that will arise from the disclosure of the

information. The benefit can be direct or indirect. Whether, and to what extent, there will be a public benefit from disclosure can only be decided in the circumstances on a case-by-case basis, with reference to the type and nature of the information and the context in which it is to be disclosed.

4 Does the public benefit of disclosure outweigh the detriment that would be caused by disclosure

- 4.1.1 In releasing information, the Commission must decide in a particular case whether the public benefit outweighs the detriment that would be caused.
- 4.1.2 Beyond the requirements of section 46, there are no specific factors the Commission must consider in deciding whether the public benefits of confidential information disclosure outweigh any detriment. The relevance and weight of the public benefit and detriment considerations can only be determined on a case-by-case basis, taking account of the nature of the confidential information, and its relevance to the public interest.
- 4.1.3 There may be circumstances where the Commission determines that the detriment caused would outweigh the public benefit in the disclosure of the information, but the Commission considers the information could be released in a way that would not cause a person detriment, such as releasing data in an aggregated form.

5 Commission must give notice if confidential information is to be disclosed

5.1 Form of Notice

- 5.1.1 If the Commission has determined that confidential information should be disclosed, it must communicate its decision to the affected person. That communication shall be in writing.
- 5.1.2 The notice provided to the affected person must contain the information described in section 45 of the Act but can include other information the Commission considers necessary in meeting the requirements of the Act.

5.2 Responding to the Notice issued by the Commission

- 5.2.1 An affected person receiving the notice has 28 days to provide a written response to the Commission. An affected person's written response may include:
 - (a) its agreement to the release of the confidential information
 - (b) further information as to why the confidential information should remain confidential;
 - (c) suggesting that the confidential information to be disclosed in another form;
 - (d) any other matters that may be relevant to the Commission's decision.
- 5.2.2 If providing a response to a notice, an affected person must provide that response in writing by email, facsimile or by post.

5.2.3 The Commission is not required to consider written responses received after 28 days from the issue of the notice.

5.3 Commission's consideration of responses to the issue of a Notice

5.3.1 If the Commission receives a written response from the affected person to the issue of a notice within the notice period, the Commission shall consider any additional information provided. The Commission can seek additional information from an affected person in respect of their response to a notice.

5.3.2 In reviewing a written response to a notice the Commission shall consider whether the information provided changes its assessment that the disclosure of confidential information would not cause detriment, or if disclosure of confidential information would cause detriment, the public benefit in disclosure outweighs the detriment.

6 Making and communicating a decision under section 46 of the ICRC Act

6.1 Making the section 46 decision

6.1.1 The Commission, after considering any written response received in respect of a notice, and satisfied that the requirements of section 45 and 46 have been met, may:

- (a) affirm its decision to release the confidential information; or
- (b) revise the scope of the confidential information to be disclosed, the form of disclosure, or timing of the disclosure; or
- (c) decide that the confidential information will not be disclosed.

6.2 Communicating the section 46 decision

6.2.1 Where the Commission has made a decision on whether the confidential information will be disclosed under section 46 of the ICRC Act, the Commission will, where possible, communicate the decision in writing to an affected person that provided a written response to the notice issued under section 45 of the ICRC Act. If confidential information is to be released, the Commission must provide two business days before the Commission discloses the information.