



independent competition and regulatory commission

Information Sheet: treatment of confidential and personal information by the Independent Competition and Regulatory Commission

August 2005

The Independent Competition and Regulatory Commission (the Commission) was established by the *Independent Competition and Regulatory Commission Act 1997* (ICRC Act) to determine prices for regulated industries, advise government about industry matters, advise on access to infrastructure and determine access disputes. The Commission also has responsibilities under the Act for determining competitive neutrality complaints and providing advice about other government-regulated activities.

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The secretariat may be contacted at the above addresses, by telephone on 6205 0799, or by fax on 6207 5887. The Commission's website is at www.icrc.act.gov.au and its email address is icrc@act.gov.au.

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1 Introduction

The Independent Competition and Regulatory Commission (the Commission) was established under the *Independent Competition and Regulatory Commission Act 1997* (ACT) (ICRC Act). The ICRC Act gives the Commission certain functions in relation to regulated industries, including (but not limited to):

- the provision of price directions
- the provision of recommendations about price regulation
- the provision of advice to the Minister¹ about proposed access agreements
- the maintenance of a register of access agreements
- the arbitration of disputes about access to services under access regimes
- investigation and reporting on matters referred by the Minister and other referring authorities
- functions conferred by other laws of the Territory or the Commonwealth (including the *Utilities Act 2000* (ACT))
- investigating and reporting on competitive neutrality complaints, and
- investigating and reporting on government-regulated activities.

In order to perform these functions, the Commission requires access to a variety of information. The nature of the Commission's functions means that this information will often include commercially sensitive information about regulated businesses, and personal information about individuals.

The Commission is committed to a policy of openness and transparency in the performance of its functions, and wherever possible will make information used by the Commission available to the public. The ICRC Act does, however, make provision for the protection of confidential information, and sets out the procedure the Commission must follow if it proposes to disclose confidential information. The Commission also has obligations under Territory and Commonwealth legislation, including the *Freedom of Information Act 1989* (ACT) (FOI Act) and the *Privacy Act 1988* (Cth) (Privacy Act), which will affect the way in which the Commission will deal with certain classes of information.

This document explains the Commission's powers and obligations in the treatment of confidential and personal information provided to it by third parties.

The following documents may also be of interest, and are available on the Commission's website (www.icrc.act.gov.au) or from the Commission's offices at Level 7, Eclipse House, 197 London Circuit, Civic ACT:

¹ The Minister, for the ICRC Act, is the Treasurer.

- Independent Competition and Regulatory Commission (Disclosure Guidelines) Determination (No 1 of 2005)
- Requests for Information under the *Freedom of Information Act 1989* (ACT)

This information sheet does not constitute legal advice. It is the responsibility of the owner of information to seek independent legal advice as appropriate before providing information to the Commission. Nothing in this information sheet should be taken to limit or otherwise infringe any existing right(s) or obligations under law that a person may have in relation to information required by, or provided voluntarily to, the Commission.

2 Provision of information to the Commission

Information is provided to the Commission in a number of ways. For example –

- it can be provided voluntarily to assist the Commission in conducting an investigation
- interested parties can make submissions in response to reports published by the Commission
- the terms of utility licences require utilities to provide certain information to the Commission in relation to their licensed operations
- requirements under legislation and codes require utilities to submit certain contracts to the Commission for approval
- firms and individuals, including the Commission’s panel of expert consultants, provide corporate and personal information to the Commission when tendering for contracts to provide services to the Commission
- the Commission can, in certain circumstances, require a person to provide information to the Commission, or require a person to attend a hearing before the Commission to give evidence.

The ICRC Act imposes penalties for offences relating to the provision of information to the Commission, including, for example, refusal to provide information to the Commission and the provision of information that is false or misleading. Those penalties are set out in Appendix 1 to this information sheet.

2.1 Commission’s power to require provision of information under the ICRC Act

The ICRC Act gives the Commission the power to require a person to give information or documents to the Commission, where the Commission has reason to believe that the person has information or documents that may assist the Commission in performing its functions.

If the Commission requires a person to provide information, it will give that person a written notice that:

- identifies the information or document required;
- specifies the date by which the information is to be provided;
- specifies the form in which the information or the document is to be given to the Commission (for example - electronic or hard copy, certified copy or original document);
- states that it is made under section 41 of the ICRC Act; and
- is accompanied by a copy of Part 7 of the ICRC Act, which outlines the Commission’s powers and responsibilities with respect to information.

The ICRC Act does not entitle the Commission to:

- require a person to provide any information or answer any question which relates to Cabinet proceedings or confidential proceedings of the Executive²;
- require any person to produce an official record of the Cabinet office or of the Executive; or
- inspect an official record of the Cabinet or the Executive.

2.2 Collection of personal information by the Commission

In keeping with the definition of “personal information” given in the Privacy Act, the Commission defines personal information as information or an opinion, whether it is true or not, that is about an individual as opposed to a corporation. The information must identify the individual, or provide information from which the individual could be identified. Personal information may or may not be recorded in a material form.

The Commission may require personal information about an individual for a number of reasons. For example, the Commission asks an applicant for a utility licence to provide the names and residential addresses of officers, so that they can be checked against the ASIC list of banned and disqualified persons. The Commission may also require information about an individual’s financial standing to determine whether the person can meet the costs of an investigation.

The Privacy Act imposes special requirements on the Commission in relation to the collection, storage, use and disclosure of personal information. These requirements, called the Information Privacy Principles, apply in addition to the requirements under the ICRC Act.

The Commission will only collect personal information for a lawful purpose that is directly related to the Commission’s functions. Personal information is only collected where it is necessary for, or directly related to, the Commission’s functions. The Commission can only collect information by fair and lawful means. When the Commission collects personal information it is required to take reasonable steps to ensure that the information it receives is relevant, up to date, and complete.

If the Commission requires an individual to provide personal information, the Commission must, in addition to the notice given under the ICRC Act, inform the individual:

- of the reason the Commission is collecting the information;
- whether, and under what law, the Commission is authorised or required to collect the information (if this is not section 41 of the ICRC Act); and

² ICRC Act section 48. In the ACT Legislative Assembly, the Cabinet and the Executive are the same group, that is, the five Ministers. Cabinet documents are strictly confidential, and include: agendas and notices of Cabinet meetings; submissions to Cabinet and all documents considered by Cabinet (including copies lodged with the Cabinet Office and copies held elsewhere); addenda and corrigenda to Cabinet Submissions; documents which have been brought into existence for the purpose of being considered by Cabinet, including attachments to submissions; legislation proposals, Bills, explanatory memoranda and presentation speeches; correspondence between Ministers and/or the Chief Minister which is submitted to Cabinet or which proposes matters to be raised in Cabinet, including letters proposing appointments; Cabinet Decisions; Cabinet business schedules; copies of, or extracts from documents referred to above; and Cabinet notebooks. For more information on Cabinet documents, interested persons can refer to the ACT Government Cabinet Handbook, which is available at: http://www.cmd.act.gov.au/Documents/Cabinet_Handbook.pdf

- to whom the Commission usually gives the information.

The Commission will not intrude unreasonably on an individual's personal affairs, and will only collect personal information as required, and within the limits imposed by the Privacy Act.

3 What is confidential information?

The nature of the Commission's role means that some of the information it requires or collects will be confidential information. This may be because the person providing the information to the Commission states that it is to be kept confidential, or because the law requires the Commission to treat the information as confidential. The ICRC Act makes special provision for the identification and treatment of confidential information by the Commission.

The fact that information is confidential does not necessarily mean that the Commission can not disclose it to other parties. The ICRC Act makes provision for the disclosure of confidential information in certain circumstances.

3.1 Confidential information under the ICRC Act

The ICRC Act defines confidential information as information given to the Commission that was, when it was provided to the Commission:

- stated by the person giving it to be confidential or commercially sensitive; or
- contained in an exempt document within the meaning of the FOI Act.

While the ICRC Act does not refer specifically to confidential personal information, the obligations under the Privacy Act apply to the Commission in relation to personal information that the Commission collects or holds. The Privacy Act does not make personal information strictly confidential. However the Privacy Act may, in certain circumstances, cause the Commission to treat such information as though it is confidential, by limiting the circumstances in which personal information can be disclosed or used. If a person providing personal information to the Commission wishes to claim confidentiality in relation to that information over and above the protections provided by the Privacy Act, they must state this clearly at the time the information is provided to the Commission.

The provisions of the ICRC Act reflect general obligations under law in relation to the treatment, and in particular the disclosure, of confidential information. The person claiming confidentiality must show that the information in question is confidential in nature. In order to attract protection, the information must not be trivial or publicly available, and must be identified specifically and not in broad terms. If the Commission receives information in circumstances that clearly indicate its confidential nature, the Commission must not make unauthorised use of that information to the detriment of the person providing it. When the Commission is asked to keep information confidential, it will ensure that the provider of the information understands the likely uses to which the information will be put. The Commission will only accept a request that information be kept confidential subject to the Commission's authority to release that information in the circumstances described in the ICRC Act.

3.1.1 Material to be supplied where information is stated to be confidential or commercially sensitive

It is the responsibility of the person providing information to the Commission to identify those items of information that the person claims are confidential or commercially sensitive.

The statement of confidentiality should be clearly marked on the relevant document, and should:

- specifically identify the particular item of information to which the claim of confidentiality applies (for example – a particular table of figures within a document, or a particular clause of a contract);
- detail the basis on which confidentiality is claimed (for example – that the information has commercial value that would be diminished or destroyed by disclosure, or is personal information about an individual); and
- where applicable, state the period of time for which confidentiality is claimed.

It is unlikely that the Commission will uphold a claim for confidentiality in respect of an entire document. A statement of confidentiality should therefore be precise, identifying only the specific item of information that is claimed to be confidential, and explaining in sufficient detail, with reference to the item of information in question, why confidentiality is necessary.

The fact that the person who provides information to the Commission states that it is confidential will not, of itself, be sufficient to prevent the Commission from disclosing the information.

3.1.2 Exemptions under the *Freedom of Information Act 1989* (ACT)

As a statutory authority, the Commission is subject to the provisions of the FOI Act. The FOI Act provides a legally enforceable right of access by any person to all documents in the possession of the ACT government, including the Commission. However, there are certain types of documents that do not have to be disclosed. The exemptions to the right of access are intended to protect the legitimate interests of the ACT government, and of parties who deal with the ACT government. These exemptions protect essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities. Documents that are exempt under the FOI Act are confidential documents for the purposes of the ICRC Act.

Exemptions under the FOI Act include, but are not limited to:

- documents relating to business affairs
- documents affecting personal privacy
- documents subject to legal professional privilege
- documents containing material obtained in confidence
- documents, disclosure of which would, or could reasonably be expected to, have a substantial adverse effect on the ability of the Government of the Territory to manage the economy of the Territory, and
- documents about the deliberative processes involved in the functions of the Commission, disclosure of which would be contrary to the public interest.

Other exemptions under the FOI Act are listed in the Commission’s “Guidelines for Decision-makers and Action Officers” under the FOI Act, which are available on the Commission’s website.

IN DEFINED CIRCUMSTANCES, THE COMMISSION IS AUTHORISED TO DISCLOSE CONFIDENTIAL OR PERSONAL INFORMATION OR INFORMATION WHICH WOULD OTHERWISE FALL WITHIN AN EXEMPTION IN THE FOI ACT.

PERSONS PROVIDING CONFIDENTIAL INFORMATION TO THE COMMISSION SHOULD FAMILIARISE THEMSELVES WITH THE FOI ACT, PART 7 OF THE ICRC ACT AND THE COMMISSION'S DISCLOSURE GUIDELINES.

PERSONS PROVIDING PERSONAL INFORMATION TO THE COMMISSION SHOULD FAMILIARISE THEMSELVES WITH THE INFORMATION PRIVACY PRINCIPLES SET OUT IN THE PRIVACY ACT.

PERSONS PROVIDING INFORMATION TO THE COMMISSION THAT INCLUDES PERSONAL INFORMATION ABOUT OTHER INDIVIDUALS, OR INFORMATION THAT THE PROVIDER OF THE INFORMATION HAS AN OBLIGATION TO KEEP CONFIDENTIAL, SHOULD SEEK INDEPENDENT LEGAL ADVICE BEFORE PROVIDING THE INFORMATION TO THE COMMISSION.

4 Inspection of information held by the Commission

Members of the public may ask the Commission for access to documents held by the Commission.

If a document does not contain confidential or personal information, the Commission will make it available for inspection.

If a document does contain confidential or personal information, the Commission may make the document available in a form that does not disclose the confidential or personal information. Alternatively, the Commission may release the document in a form that discloses only so much of the confidential or personal information as the Commission has power to disclose.

In some circumstances, the Commission may release confidential or personal information.

For example:

- the ICRC Act permits the Commission to disclose confidential information in certain circumstances. These circumstances are discussed in parts 5 and 6 of this information sheet.
- the Privacy Act allows disclosure and use of personal information in certain situations. The Commission must permit a person to check whether the Commission holds personal information about them. If the Commission does, the person must be told the nature of the information, the purposes for which it is used, and the steps the person should take to obtain access to the information. Access to such information will only be refused if the Commission is required or authorised by law to refuse access. For example, the Commission may refuse access if the information is subject to an exemption under the FOI Act.

Members of the public can also make a request for information under the FOI Act. The Commission's FOI Information Sheet and Request Form are available on the Commission's website.

Before making an application, persons wishing to inspect documents held by the Commission are invited to contact the Commission's information officer, Mr Rod Woolley, on 02 6205 5460. In appropriate circumstances, documents may be inspected by arrangement at the Commission's offices at Level 7, Eclipse House, 197 London Circuit, Civic ACT, without the need to make a formal application under the FOI Act.

5 Special provisions for disclosure of confidential information

The Commission may disclose confidential or personal information with the consent of the person who supplied the information.

The Commission would prefer that any disclosure of confidential or personal information by the Commission occur with the consent of the owner of the information. The Commission will discuss the prospects of disclosure on this basis with the owner of the information before it considers disclosure on any other basis.

There are, however, certain circumstances in which the Commission does not need the express consent of the supplier of information to disclose it. These disclosures, discussed below, occur as a matter of routine. Consent to such disclosures is implied.

5.1 Disclosure by Commissioners and staff

Under section 44 of the ICRC Act, the Commissioners and employees of the Commission may disclose confidential information if:

- the disclosure is permitted in the performance of a function under the ICRC Act or any other law of the Territory. For example, the Commission is required under section 54 of the Utilities Act to give a copy of the technical section of a licensee's annual compliance report to the technical regulator, and a copy of the environment section of the report to the environment management authority;
- the disclosure is made in legal proceedings at the direction of a court; or
- the information is already publicly available at the time that it is disclosed by the Commission.

5.2 Disclosure within the Commission

Under section 47 of the ICRC Act, the Commission may also disclose confidential information to any of the following persons for the purposes of the investigation in relation to which the information was obtained:

- a delegate of the Commission
- a member of staff of the Commission
- a person, body or consultant assisting the Commission with the investigation or another function of the Commission

- a person, body or consultant to whom or which the Commission is providing services within the Commission's field of expertise and relevant to its functions.

A person to whom the Commission discloses confidential information in these circumstances is under the same confidentiality obligations as the Commission itself.

6 Principles for disclosure of confidential information

Unless the ICRC Act makes specific provision otherwise, the Commission may only disclose confidential information if :

- it considers that
 - the disclosure would not cause detriment to any person; or
 - although the disclosure would cause detriment to a person, the public benefit in disclosure outweighs the detriment; and
- it notifies the person that they have an opportunity to object to the disclosure; and
- 28 days have elapsed since the notice was given.

If information is already available to the public, disclosure of that information by the Commission will not be taken to cause detriment to any person.

When determining whether to disclose confidential information or maintain its confidentiality, the Commission is required to balance the rights and interests of the public in favour of disclosure with those of the person claiming confidentiality. In doing so, the Commission will have regard to the disclosure guidelines determined under the ICRC Act, which are discussed below in part 7 of this information sheet.

The Commission recognises that private citizens and corporations have a right to expect that confidential information will be protected. Confidentiality will be maintained where the Commission considers that it is justified by the nature of the information and the public interest does not require its disclosure.

6.1 Notice of disclosure

If the Commission proposes to disclose confidential information in a way that is not specifically provided for under the ICRC Act, it must first give written notice to the person who has supplied the information to the Commission. Notice must also be given to the person who provided the information to the supplier, if the Commission is aware of the identity and address of that person.⁴

The notice will contain:

- details of the proposed disclosure, including the person or persons to whom the confidential information is to be disclosed;
- the reasons relied upon by the Commission to justify the disclosure;

⁴ ICRC Act, section 45

- a copy of the Commission’s disclosure guidelines (see part 7 of this information sheet); and
- a notice that the affected person may, within 28 days after the notice⁵, explain to the Commission why the information should not be disclosed.

In deciding whether to disclose confidential information, the Commission will take into account any response to the notice. The information provided in response to the notice will assist the Commission in determining whether disclosure should occur. The response should therefore address all matters relevant to the Commission’s assessment of the confidentiality of the information with reference to the tests for disclosure set out in the disclosure guidelines.

The requirement to give notice of the Commission’s intention to disclose confidential information applies only in relation to disclosure of confidential information which is not specifically provided for in the ICRC Act. It does not apply to disclosure of confidential information for which specific provision is made under the ICRC Act.

6.2 Special requirements for the disclosure and use of personal information

While the Privacy Act does not automatically make personal information confidential, there are special requirements that apply to disclosure of personal information by the Commission. These requirements apply over and above the obligations imposed on the Commission in relation to the disclosure of confidential information under the ICRC Act.

Under the Privacy Act, the Commission may not disclose or use personal information unless:

- it has the consent of the individual to whom the information refers; or
- there is a serious and imminent threat to a person’s life or health; or
- the disclosure or use is required or authorised by law; or
- disclosure or use is necessary to the enforcement of a criminal law; or
- the individual to whom the information refers has been told, or is otherwise likely to know, that the Commission commonly discloses information of that nature to certain persons, or uses it for certain purposes.

Unless there are exceptional circumstances, for example where the Commission is required to give evidence in proceedings before a Court or there is a serious or imminent threat to life or health, the

⁵ The 28 days starts from the beginning of the day after the notice is given. The date the notice is given is, if the notice is sent by fax or email or hand-delivered, the date on which the notice is sent. If the notice is sent by post the date the notice is given will be the date when it would have been delivered in the ordinary course of post. If the 28th day falls on a weekend or a public holiday, the last day of the notice period will be the first working day after the end of the 28-day period. (See *Legislation Act 2001* (ACT), ss 151, 250).

Commission will seek the consent of the individual concerned before it discloses personal information about that individual. As noted above, the Commission will advise any individual providing personal information to the Commission of the uses to which the information will be put, and of any person or agency to whom the Commission normally discloses such information. A person who provides personal information to the Commission after being so informed will be taken to have consented to any such disclosure. The special provisions for disclosure discussed in part 5 of this information sheet are a useful indication of the circumstances in which the Commission would usually disclose personal information.

If the Commission does disclose personal information, the recipient of that information must only use or disclose it for the purpose for which it was disclosed to them by the Commission.

As required by the Privacy Act, the Commission has safeguards in place to protect against loss of, unauthorised access to, use, modification or disclosure of, or other misuse of personal information it holds.

Where the Commission gives personal information to another person or organisation in connection with the provision of service to the Commission, the Commission will do everything reasonably within its power to prevent unauthorised use or disclosure of the information.

7 Guidelines for disclosure of confidential information

The fact that information falls within the definition of confidential information under the ICRC Act is not sufficient to prevent the Commission from disclosing that information. In the circumstances described in part 6 of this information sheet, the Commission may, with reference to its disclosure guidelines, disclose information despite its classification under the ICRC Act as confidential.

The Commission's disclosure guidelines set out the approach that will be taken by the Commission to the general disclosure of confidential information under the ICRC Act. The guidelines also set out the matters that the Commission will consider in assessing a claim that confidential information which has been provided to the Commission should not be disclosed. It is important to note that the disclosure guidelines relate to disclosure of information that is *confidential information*, as defined by section 3 of the ICRC Act, and do not apply to disclosures that are specifically provided for under the ICRC Act.

Personal information may, but will not necessarily, be confidential information for the purposes of the ICRC Act. In either case, the obligations imposed on the Commission by the Privacy Act apply over and above the provisions of the ICRC Act. Nothing in this information sheet or the Commission's disclosure guidelines should be taken to mean that the Commission will disclose personal information other than as provided for under the Privacy Act.

The disclosure guidelines can be viewed on the Commission's website (www.icrc.act.gov.au), and on the ACT Legislation Register at www.legislation.act.gov.au. Copies of the disclosure guidelines are available during normal business hours from the Commission's offices at Level 7, Eclipse House, 197 London Circuit, Civic ACT.

7.1 Tests for disclosure

In deciding whether to disclose confidential information, the Commission will consider whether the information in question:

- is identified specifically rather than in generic or global terms
- whether the information is subject to any requirement under law in relation to use, confidentiality or disclosure of information.

On that basis the Commission will determine:

- whether disclosure of the information would cause detriment to the owner of the information; and
- whether the public benefit in disclosure outweighs that detriment.

7.1.1 Specific identification of information

The person seeking to maintain confidentiality must specify exactly what information is the subject of the claim. The more general the description of the information, the more difficult it will be for that person to sustain a claim that the information should not be disclosed.

The information must be identified in specific rather than global terms. For example, a particular clause of a contract, or a particular item of information within a document, such as a number or an individual's name, may satisfy the requirement, whereas the contract or document as a whole may not.

7.1.2 Qualities commonly attracting confidentiality

The onus is on the person claiming confidentiality to demonstrate why the information should not be disclosed. The person should set out all matters relevant to the Commission's assessment of whether the particular information that is the subject of the claim should be disclosed.

A person claiming that confidential information should not be disclosed must demonstrate a clear basis for their claim. It is not sufficient that the person simply wishes to protect the information. A desire to avoid public scrutiny or embarrassment will not, of itself, be considered relevant. In assessing a claim that confidential information should not be disclosed, the Commission will have regard to decisions of the Courts regarding confidential information, and to any relevant requirements under law for the protection of information (including, for example, the limitations on disclosure of personal information imposed by the Privacy Act).

In order for confidentiality to be maintained, the Commission must be satisfied that:

- the information is not trivial in nature
- the information is not publicly available (for example - details that already appear in a client charter, published business plan or annual report)
- at the time when confidentiality is claimed, the information is known only by a limited number of parties; and
- the information has continuing sensitivity for the person claiming confidentiality.

There are a number of categories of information which are traditionally treated as confidential. This is not to say that the Commission will *only* protect the confidentiality of information if it falls into one of those categories, or that information that falls within one of those categories will never be disclosed. Any information that is subject to a claim for confidentiality will be treated in accordance with the requirements of Part 7 of the ICRC Act. The following are examples only. They are provided merely as an illustration of the grounds upon which the provider of information could argue that disclosure of information would cause detriment to them.

▪ Trade secrets

A trade secret has three characteristics:

- it must be information used in, or useable in, a trade

- the owner must limit the disclosure of the information, or at least not encourage or permit widespread publication, and
- it must be information which, if disclosed to a competitor, would be likely to cause actual, significant commercial harm to the owner of the secret.

In determining whether a particular piece of information constitutes a trade secret the Commission will consider a number of factors, including, for example:

- whether the information is of a business, trade or technical nature
- the extent to which the information is known outside the business of the owner of that information
- the extent to which the information is known by persons engaged in the owner’s business (for example, employees of the business)
- measures undertaken by the owner to guard the secrecy of the information
- the value of the information to its owner (that is - its importance to the profitability or viability of a business activity)
- the value of the information to the owner’s competitors (that is – the extent to which disclosure of the information to a competitor would be likely to cause significant harm to the owner of the secret)
- the effort and money spent by the owner in developing the information, and
- the ease or difficulty with which others might acquire or duplicate the secret.

Examples of trade secrets include industrial processes, customer lists, and accounting techniques.

▪ **Information that has a commercial value that would be diminished or destroyed if disclosed**

Information has commercial value to an entity if it is valuable for the purposes of carrying on the commercial activity in which that entity is engaged. For example, information may be valuable because it is important or essential to the profitability or the viability of a continuing business or commercial operation. Information may also have commercial value if a genuine arms-length buyer would be prepared to pay to obtain the information. The investment of time and money is not a sufficient indicator (in itself) that information has commercial value. Information can be costly to produce without necessarily being worth anything to an entity’s competitors.

There must be an ongoing commercial benefit to the owner of the information in maintaining the confidentiality of the information. Information that is old or out of date may have no remaining commercial value, even though it was valuable at the time it was created or obtained.

The fact that information has commercial value will not prevent the Commission from disclosing it. Before the Commission agrees to keep the information confidential, it must be demonstrated that the commercial value of the information will be diminished or destroyed by disclosure, and that there is a significant risk of commercial damage to the owner of the information if the information is disclosed.

▪ **Personal information**

While personal information is not strictly confidential, the Privacy Act protects personal information by restricting the circumstances in which it can be used and disclosed. If the information the Commission proposes to disclose contains personal information about an individual, the Commission must comply with its obligations under the Information Privacy Principles in relation to disclosure of that information. These obligations are discussed at 6.2.

7.2 Would disclosure cause detriment to any person?

Subject to the public benefit test discussed at 7.3, the Commission will not disclose confidential information if disclosure will cause detriment to any person.

The party seeking to maintain confidentiality of the information must show that there is a significant risk of loss or damage to its interests if the information is disclosed.

For example, disclosure of information about a company's business affairs (that is, the money-making aspects of its business as opposed to its internal affairs) may cause detriment if it would put the company at an unreasonable competitive disadvantage.

7.3 Does the public benefit from disclosure outweigh the detriment?

There will be occasions where, notwithstanding any detriment that may arise from disclosure, the public benefit in disclosing the information will outweigh that detriment – for example, where disclosure would reveal unlawful activities, or where the subject matter involves danger to or is otherwise of serious concern to the public.

If the Commission considers the public benefit in disclosure outweighs the detriment that the disclosure would cause to any person, the Commission may disclose the information.

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. It will not be enough that the information is interesting to the public – there must 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 on a case-by-case basis, with reference to the nature of the information and the context in which it is to be disclosed.

In assessing the public benefit in disclosing information, the Commission may have regard to a broad range of issues.

The following arguments are examples of public benefits that can arise from disclosure of information:

- Accountability of government

Disclosure of information about how government functions can make agencies and individual officers of the government more accountable for the performance of their official functions.

- Public participation

Disclosure of information about issues currently being considered by government can lead to more informed public debate about the issues.

- Public awareness

Disclosure of information about issues of general public concern can assist individuals to make informed decisions about their own activities, for example, information about public health and safety, or issues of relevance to consumers.

- Justice to an individual

In an appropriate case, there can be a public benefit in an individual obtaining information of particular relevance to them, for example – information that can be used for the purposes of some process that may affect, or has affected, them or information that may assist them to pursue a remedy.

There are also circumstances where there may actually be a public benefit in maintaining the confidentiality of information, for example:

- Exemption provisions

The exemption provisions of the FOI Act are intended to protect the legitimate interests of persons or institutions in respect of whom information is collected and held by departments and public authorities.

- Interests of third parties

There may be a public benefit in maintaining the privacy of information held by government that is about the personal affairs of members of the public (such as information the disclosure of which is restricted by the Privacy Act), and to maintain the secrecy of sensitive commercial information held by government about business operators.

- Flow of information to law enforcement and regulatory agencies

Disclosure of confidential information may discourage members of the public from providing information that law enforcement and regulatory agencies need to perform their functions.

- Fair treatment of individuals

If an individual has been accused of misconduct or unlawful activity, but the accusations have not been proven, it may be contrary to the public interest to disclose information which would adversely affect that individual's reputation.

There are a number of considerations often raised in support of claims of confidentiality that are not valid, or which can be relied on only in limited circumstances. These include:

- Embarrassment

A desire on the part of the provider of information to avoid public scrutiny or embarrassment will not, of itself, justify non-disclosure.

- High office

The fact that the person who provides the information holds high office is not sufficient to justify non-disclosure. An assessment of the consequences of disclosure of the particular matter is required.

- Policy development

The fact that information may relate to policy development does not necessarily mean that there is a public benefit in keeping the information confidential.

These lists provide examples only, and are not exhaustive. Not all of the considerations listed will be relevant in every case. Similarly, the Commission may, where necessary and at its discretion, take into account considerations that are not listed here.

8 Requirements to disclose information

In certain circumstances the Commission may be required to disclose information, regardless of any undertaking to keep the information confidential. In these circumstances the requirements under the ICRC Act will not apply.

8.1 Applications under the *Freedom of Information Act 1989 (ACT)*

Under the FOI Act, a person can make a request for access to information held by the Commission. Unless the information is subject to one of the exemptions under the FOI Act, the Commission will be obliged to disclose it.

8.2 Disclosure to the Legislative Assembly

The Commission may be required to disclose information to the Legislative Assembly or its committees to comply with its accountability obligations. For example, the Commission prepares a special ‘confidential’ version of its annual compliance and performance report on utilities for the Legislative Assembly. The report contains confidential commercial information that is not disclosed in the Commission’s published reports.

8.3 Court proceedings

The Commission is required to disclose any discoverable information that is relevant to a case before a court.

8.4 Public interest disclosures

A person can not take, or make, any action, claim or demand against the Commission or staff of the Commission for making a public interest disclosure or providing information under the *Public Interest Disclosure Act 1994 (ACT)*⁶.

It is not an offence for the Commission, or a member of staff of the Commission, to disclose confidential or personal information when making a public interest disclosure with respect to that matter to a proper authority.

8.5 *Government Procurement Act 2001 (ACT)*

Under the provisions of the *Government Procurement Act 2001 (ACT)*, if the Commission enters into a written contract for the procurement or disposal of goods, services or works, the total consideration for which is \$50,000 or more, that contract must be published on the notifiable contracts register, which is accessible by the public. The Commission is required, for example, to

⁶ *Public Interest Disclosure Act 1994*, s 35(1).

publish contracts for consultancy services provided to the Commission, where the contract price exceeds \$50,000.

Clauses of such contracts will only be withheld from publication if⁷:

- disclosure of the text would –
 - be an unreasonable disclosure of personal information about a person; or
 - disclose a trade secret; or
 - disclose information (other than a trade secret) that has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
 - be an unreasonable disclosure about the business affairs of a person; or
- there is a requirement imposed by law that the Commission keep the information confidential.

⁷ *Government Procurement Act 2001*, section 35

Appendix 1 Offences relating to provision of information to the Commission

The ICRC Act creates a number of offences relating to the provision of information to the Commission:

- a person must not, without reasonable excuse, fail to comply with a written requirement from the Commission under section 41 to provide information to the Commission
- a person must not, without reasonable excuse, fail to comply with a notice given under section 49 to attend a hearing before the Commission, or fail to answer a question that the person is required to answer by the Commission at a hearing
- a person must not give to the Commission, whether orally or in writing, information that the person knows to be false or misleading, unless the person informs the Commission of that fact
- a person must not, at a hearing before the Commission, give evidence that the person knows to be false or misleading, and
- a person must not contravene a direction from the Commission prohibiting or restricting the disclosure of evidence given at a hearing before the Commission, or matters contained in documents or information given to the Commission.

For each of these offences, the **maximum** penalty is a fine of 100 penalty units⁸, imprisonment for one year, or both. Lesser penalties may be imposed, depending on the seriousness of the particular offence committed.

⁸ In the ICRC Act, as in other ACT legislation, the penalty for a particular offence is expressed as a number of “penalty units”. The penalty is a fine of that number of penalty units, the value of which is prescribed in section 133 of the *Legislation Act 2001* (ACT). The value of a penalty unit varies from time to time and is different for individuals and corporations. At 30 June 2005, the value of a penalty unit is:

- i. if the person charged is an individual - \$100; or
- ii. if the person charged is a corporation - \$500.

Glossary and abbreviations

Commission	Independent Competition and Regulatory Commission
disclosure guidelines	The disclosure guidelines determined by the Commission under section 46(4) of the <i>Independent Competition and Regulatory Commission Act 1997</i> (ACT).
FOI Act	<i>Freedom of Information Act 1989</i> (ACT)
ICRC Act	<i>Independent Competition and Regulatory Commission Act 1997</i> (ACT)
Privacy Act	<i>Privacy Act 1988</i> (Cth)

