



Better Regulation

Confidentiality Guideline

August 2017

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1 Overview of the Confidentiality Guideline

The Confidentiality Guideline details the scheme for how we will handle confidentiality claims. There is also an Explanatory Statement supporting the Confidentiality Guideline. It sets out our reasons for the Confidentiality Guideline and provides practical guidance on the types of documents Network Service Providers (NSPs) should place in the public domain.

1.1 Purpose of the Confidentiality Guideline

The purpose of the Confidentiality Guideline is to assist in delivering better regulatory decisions. The Confidentiality Guideline will assist the AER to ensure all Stakeholders¹ have access to sufficient information to enable them to understand and assess the substance of all issues affecting their interests. It also aims to make the process for claiming confidentiality clear and consistent. Finally, the Confidentiality Guideline will provide greater certainty on how we will assess confidentiality claims.

We seek to balance protecting confidential information with disclosing information for an open and transparent regulatory decision-making process. We consider the balance involves Stakeholders having access to sufficient information to understand and assess the substance of all issues affecting their interests. This is not equivalent to public disclosure of every piece of information NSPs provide, especially where public disclosure is likely to harm the long term interests of consumers.² However, the complexity of economic regulation means understanding and assessing the substance of all issues requires access to detailed information.

For these reasons, the Confidentiality Guideline aims to provide incentives for Stakeholders to work together. Stakeholders should develop and implement a range of options that both disclose the substance of all issues and appropriately maintain confidentiality where this is in the long term interests of consumers.

¹ Includes: NSPs, consumer/customer groups and other persons whose interests may be affected by an AER decision. Including NSPs within this definition is particularly important for the Confidentiality Guideline as, in regulatory decision making, one NSP may provide information that affects the interests of another NSP for example benchmarking information.

² For example, where it is likely that disclosure would compromise commercial negotiations between NSPs and their suppliers.

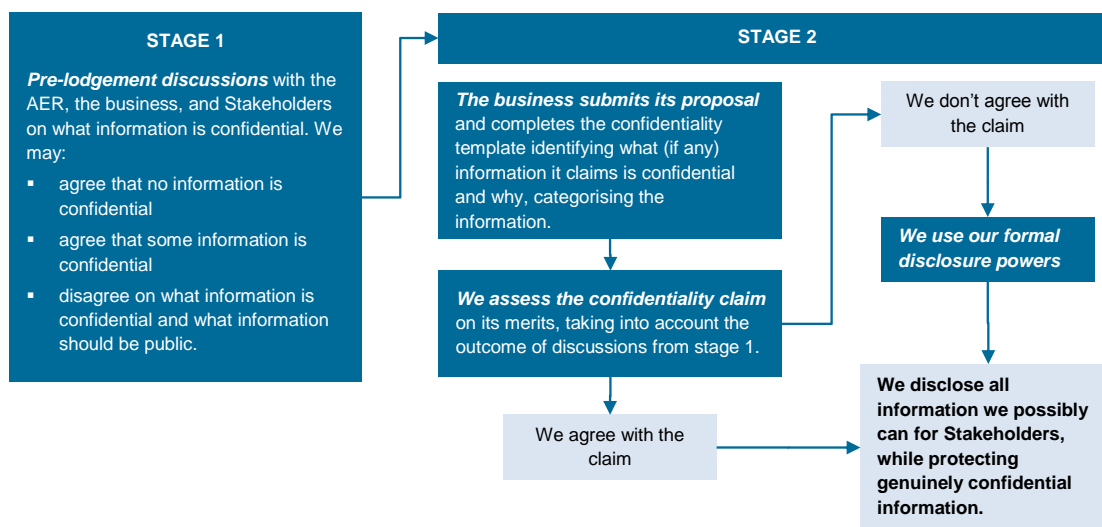
1.2 Scheme for handling confidentiality claims

The Confidentiality Guideline sets out the scheme for how we will handle confidentiality claims. It has three elements:

- Stage one - pre-lodgement discussions. These are the focus of our approach to dealing with confidentiality claims. We want to work with Stakeholders prior to a NSP submitting information to reach a shared understanding of confidentiality issues. We also want Stakeholders to work with each other before information is submitted to resolve confidentiality issues. Our aim is to reach agreement on as many confidentiality claims as possible during this pre-lodgement phase.
- The manner in which NSPs must make confidentiality claims. The Confidentiality Guideline sets out how NSPs must make confidentiality claims. In particular, NSPs must submit a confidentiality template together with public and confidential versions of documents and a notice setting out the proportion of material claimed to be confidential. Making confidentiality claims in this manner provides greater transparency around confidentiality claims, acts as an incentive to only make genuine claims, minimises the risk of accidental disclosure and facilitates easier use of our information disclosure powers where necessary.
- Stage two - information disclosure powers. We aim to resolve as many confidentiality claims as possible in stage one. However, our information disclosure powers provide an incentive for Stakeholders to try to reach agreement and develop their own methods for sharing information. We will take into account any engagement between NSPs and other Stakeholders in relation to confidentiality issues when determining whether to use our information disclosure powers. We consider this provides a balanced incentive for all parties to act reasonably in trying to reach agreement, minimising the need for us to use our powers. We are unlikely to disclose information where we consider an NSP has provided access to information in sufficient detail to allow Stakeholders to understand and assess the substance of all issues affecting their interests.

Figure 1.1 Process for dealing with confidentiality claims

Our process for dealing with confidentiality claims



1.3 Scope and coverage of the Confidentiality Guideline

We will give the Confidentiality Guideline and Explanatory Statement as broad a scope as possible. The Confidentiality Guideline will have a substantial role in all electricity and gas regulatory decisions. However we do not have legislative power to make every aspect of the Confidentiality Guideline and Explanatory Statement binding in all circumstances.

Under the NER, the Confidentiality Guideline applies to and is binding on the following electricity distribution and transmission documents (Regulatory Proposals):³

- initial regulatory proposal
- revised regulatory proposal
- initial revenue proposal
- revised revenue proposal
- proposed negotiating framework

³ NER, cl.6.14A(b) & (d), & cl.6A.16A(b) & (d).

- revised proposed negotiating framework
- proposed pricing methodology
- revised proposed pricing methodology.

The AER's decision making role is much broader than assessing the documents in this list. Limiting the Confidentiality Guideline to the above documents would limit its ability to assist in delivering better regulatory decisions. We consider that there is significant value in having a single well accepted approach for handling confidentiality claims wherever possible. We consider that, in most circumstances, there is little value to having different processes. Therefore, we will use our other powers to extend the scope of the Confidentiality Guideline as far as possible. Table 1.1 includes the most common areas where we will apply the Confidentiality Guideline, whether it will be binding and, if so, the relevant AER power to make it binding under current legislation.

Table 1.1 Scope and Coverage of the Confidentiality Guideline

Element of the Confidentiality Guideline	Context	Binding/Not binding	Relevant Provisions
Stage one - pre-lodgement discussions	All	Not binding - relevant consideration in using information disclosure powers	N/A
The manner in which NSPs must make confidentiality claims	Regulatory Proposals (electricity)	Binding	NEL sections - 28, 28F NER clauses - 6.8.2, 6.14A, 6A.10.1, 6A.16A
	Access Arrangement Proposals and Information (gas)	Binding	National Gas Law (NGL) sections - 42, 48
	Additions or amendments to Access Arrangement Proposals and Information (gas)	Binding	NGL sections - 42, 48
	Responses to requests for information arising out of our gathering powers	Binding	NEL sections - 28, 28F NGL sections - 42, 48
	NSP submissions on Regulatory Proposals (electricity), Access Arrangement Proposals and Information (gas)	Binding	NEL sections - 28, 28F NGL sections - 42, 48
	Pass through applications	Not binding - relevant consideration in using information disclosure powers	N/A

	Pricing proposals	Not binding - relevant consideration in using information disclosure powers	N/A
	Informal discussions and responses to informal requests for information	Not binding - relevant consideration in using information disclosure powers	N/A
Stage two - information disclosure powers	All	Binding	NEL sections - 28W-28ZB NGL sections - 324-329

2 Stage one - pre-lodgement discussions

Prior to a NSP lodging information,⁴ we will work with Stakeholders to reach a shared, practical understanding of confidentiality issues. Our discussions will focus on:

- what information the NSP is claiming confidentiality over and the reasons for this claim
- what specific items should be protected or disclosed and in what form
- NSPs working with third parties to ensure that they limit confidentiality claims and provide confidential and public versions of all documents.

As part of stage one pre-lodgement discussions we expect each NSP to:

- engage with Stakeholders about the types of information they need access to in order to understand and assess the substance of all issues arising from the NSP's information. We would then expect the NSP to have regard to this when making confidentiality claims.
- present information in a way that still maintains confidentiality but simultaneously provides other Stakeholders with enough information to understand and assess the substance of all issues affecting their interests. This could be achieved through any of the following:
 - minimal redactions
 - narrower confidentiality claims
 - provision of detailed information adjusted to protect sensitive elements
 - limited release of confidential information to certain Stakeholders, such as through a NSP initiated confidentiality undertaking.⁵

⁴ For example, at the time we develop our framework and approach paper for electricity Regulatory Proposals and as part of the discussion for RINs for gas access arrangement proposals.

⁵ AER, Explanatory Statement Draft Confidentiality Guideline, August 2013, p.11.

3 Manner in which NSPs must make confidentiality claims

3.1 Confidentiality template

For each piece of information that a NSP claims is confidential, it must make a separate confidentiality claim in accordance with the confidentiality template at Attachment 1. A NSP must ensure that the confidentiality template does not contain confidential information. The details for each of the columns of the confidentiality template are set out below.

Document containing confidential information

A NSP must list the title, name or identification number of the document which contains the information claimed to be confidential.

Page and paragraph number of the document which contains the confidential information

A NSP must clearly identify the page and paragraph numbers of the sections of documents which contain the confidential information.

Description of the confidential information

A NSP must provide a description of the Information which includes enough detail for Stakeholders to fully understand the nature of the confidential information.

Topic the confidential information relates to

A NSP must specify the topic that the confidential information relates to, for example, capital expenditure, operating expenditure or the rate of return.

Confidentiality category

A NSP must categorise the confidential information into one of the following confidentiality categories:

Information affecting the security of the network - information which, if made public, may jeopardise security of the network or a NSP's ability to effectively plan and operate its network.

Market sensitive cost inputs - information such as supplier prices, internal labour costs, and information which would affect the NSP's ability to obtain competitive prices in future infrastructure transactions, such as tender processes.

Market intelligence - information which may provide an advantage to a NSP's competitors for non-regulated or contestable activities.

Strategic information – information such as the acquisition of land and easements, where the release of this information might adversely impact the NSP's ability to negotiate a fair market price for these items.

Personal information - information about an individual or customer whose identity is apparent, or can reasonably be ascertained from the information which raises privacy considerations.

Other - information which the NSP claims is confidential but does not fit into one of the above categories.

Reasons supporting why the information falls within the specified confidentiality category

A NSP must provide an explanation supporting why the Information falls within the selected confidentiality category. If the confidential information falls within the category 'Other' the NSP must explain in this column why the Information should be treated as confidential.

Reasons supporting how and why disclosure would cause detriment

A NSP must provide reasons supporting how and why disclosure of the confidential information would cause detriment to the Information Provider.

Reasons supporting why detriment outweighs the public benefit in disclosure

A NSP may provide reasons as to why it considers the identified detriment is not outweighed by the public benefit in disclosing the confidential information. This is optional, but doing so would assist the AER to understand the NSP's concern and may limit the chances the AER uses its information disclosure powers.

3.2 Confidentiality claims for information provided in compliance with a regulatory information instrument

If a NSP wishes to give information to the AER in confidence when complying with a regulatory information instrument then it must, at the time the information is given, make a claim of confidentiality over the information and provide reasons in support of the claim. These reasons must include information that is reasonably within the person's knowledge and capacity to give and that may be relevant to the AER's consideration, under s. 28ZB of the NEL or s. 329 of the NGL, of whether any detriment may be considered as outweighing the public benefit in disclosing the information: see, NEL s. 28OA(1)(b)(ii) and NGL s. 57A(1)(b)(ii).

3.3 Other matters relating to the manner in which NSP must make confidentiality claims

In addition to completing the confidentiality template, a NSP must also make confidentiality claims in the following manner:

- in confidential versions of documents, highlight the confidential information in yellow shading.
- provide a public version of the documents which contain the confidential information. The public version must clearly identify the Information that the NSP wishes to claim is confidential by redacting or 'blacking out' that confidential information. Public versions must retain the same formatting and page numbers as the confidential version.
- submit the confidentiality template in Microsoft Word format.
- for electronic documents, specify in the filename whether it is "public" or "confidential."

We will publish completed confidentiality templates on our website as soon as possible after receipt.

3.4 Proportion of confidential material notice

NSPs must complete the proportion of confidential material notice in Attachment 2 as part of the manner in which they must make confidentiality claims. NSPs must specify the number of pages in their submissions which contain a confidential claim and the number of pages which do not.

When publishing the notice, we will include a note stating:

"This notice is an approximate indication of the proportion and comparative proportion of material in [insert title of NSP's Regulatory Proposal] that is subject to a claim of confidentiality compared to that which is not."

4 Stage two - information disclosure powers

We aim to resolve as many confidentiality issues as possible in stage one, through pre-lodgement discussions. However, for those confidentiality issues we do not resolve at stage one, we will use our information disclosure powers. The most common circumstances where these powers allow us to disclose confidential information are where disclosure:

- would not cause detriment to the information provider; or the public benefit in disclosing the information outweighs any detriment⁶
- will accord a person affected by our decision natural justice.⁷

We will assess each confidentiality claim on a case by case basis. Where we agree with the claim, we will protect the information. Where we disagree, we will examine the claim against our information disclosure powers. Also, in determining whether to use our information disclosure powers, we will look beyond the content of the information. Specifically, we will take into account:

- how the information claimed to be confidential could affect the interests of any Stakeholder seeking access
- whether the substance of the issue the information relates to is already in the public domain
- Stakeholder engagement during stage one
- if the NSP objects to disclosure, its reasons
- whether, in the past, other NSPs have claimed confidentiality over or publicly disclosed the same type of information.

⁶ NEL, s. 28ZB and NGL, s. 329.

⁷ NEL, s. 28Y(c) and NGL, s. 326(c)

4.1 Disclosure of information if detriment does not outweigh public benefit - s. 28ZB and s. 329

Of the various information disclosure powers we have, we most often use the power provided to us in s. 28ZB of the NEL and s. 329 of the NGL. Under these provisions we must decide whether:

- disclosing the information would cause detriment to the person who has given it to us or to the person from whom that person received it; or
- that, although the disclosure of the information would cause detriment to such a person, the public benefit in disclosing it outweighs that detriment.

If we are considering whether to disclose the information, other than information provided in compliance with a regulatory information instrument, under s. 28ZB or s. 329, we issue the Information Provider with an initial disclosure notice. This notice outlines:⁸

1. our intention to disclose the information
2. the nature of our intended disclosure
3. short, document-by-document reasons as to why we believe:
 - a. disclosing the information would not cause detriment to the Information Provider; or
 - b. the public benefit in disclosing the information outweighs any detriment.
4. that within the timeframe specified, the Information Provider may make representations to us on why we should not disclose the information.

We must give the Information Provider a minimum of five business days to respond to the initial disclosure notice,⁹ but the actual time we allow depends on the volume and complexity of information we propose to disclose.

⁸ NEL, s. 28ZB(2) and NGL, s. 329(2).

⁹ NEL, s. 28ZB(5) and NGL, s. 329(5).

If within the prescribed timeframe, the Information Provider responds to the initial disclosure notice, we consider the response. We disclose any information the Information Provider has consented to placing in the public domain. Also, where we agree with the response, we protect that information. Where we disagree, we issue a further disclosure notice which outlines:¹⁰

1. our intention to disclose the information;
2. the nature of the intended disclosure
3. reasons as to why we consider that:
 - a. disclosing the information would not cause detriment to the NSP (or third party); or
 - b. the public benefit in disclosing the information outweighs any detriment to the Information Provider.

We then proceed to disclose the information.

4.2 Disclosure to accord natural justice - s. 28Y(c) and s. 326(c)

We will use our ability to disclose information for the purposes of according natural justice to a person affected by our decision under s. 28Y(c) of the NEL and s. 326(c) of the NGL. This may involve limited information disclosure subject to a confidentiality undertaking. Having a confidentiality undertaking as a condition for disclosure would give NSPs a remedy for any breach of that undertaking. Disclosure under a confidentiality undertaking involves the following steps:

- as soon as possible after receiving an NSP's completed confidentiality template, we will publish it on our website.
- a Stakeholder that wants access to confidential information would apply to us. The Stakeholder must provide a signed confidentiality undertaking.¹¹ The undertaking must specify the information sought, using the document titles the NSP uses in its confidentiality template. The undertaking must

¹⁰ NEL, s. 28ZB(6) and NGL, s. 329(6).

¹¹ Attachment 4 includes our template undertaking. It is based upon that applying to Consumer Challenge Panel members.

be both to us and the NSP. The Stakeholder must also provide a covering note explaining why they want access to the information

- we would then forward the signed undertaking and covering note to the NSP and seek its views.
- we would consider the covering note and any NSP views and decide whether or not to grant access to all or some of the information requested.

4.3 Disclosure of information provided in compliance with a regulatory information instrument

In relation to information given to us in compliance with a regulatory information instrument for which a claim of confidentiality has been made in accordance with s. 28OA of the NEL or s. 57A of the NGL, we will follow the information disclosure procedures set out in s. 28ZB(1a)-(1e) of the NEL or s. 329(1a)-(1e) of the NGL. If no claim of confidentiality has been made in accordance with s. 28OA of the NEL or s. 57A of the NGL we are authorised to disclose the information.¹²

¹² NEL, s. 28OB(a) and NGL, s. 57B(a).

Glossary

This Confidentiality Guideline uses the following shortened forms.

Shortened form	Full title
AER	Australian Energy Regulator
Confidentiality Guideline	Distribution Confidentiality Guidelines and Transmission Confidentiality Guidelines
Information Provider	<p>Includes both:</p> <ul style="list-style-type: none"> ▪ a person who gives information to the AER and ▪ if the person who gave the information to the AER in turn received the information from another person, that other person.
NEL	National Electricity Law
NER	National Electricity Rules
NGL	National Gas Law
NSP	<p>Includes both:</p> <ul style="list-style-type: none"> ▪ a Network Service Provider (electricity) and ▪ a Service Provider (gas)
Regulatory Proposals	Includes the following: initial regulatory proposal, revised regulatory proposal, initial revenue proposal, revised revenue proposal, proposed negotiating framework, revised proposed negotiating framework, proposed pricing methodology and revised proposed pricing methodology.
the Information	the information claimed to be confidential.
Stakeholders	Includes the following: NSPs, consumer/customer groups and other persons whose interests may be affected by an AER decision.

Attachment 1 - Confidentiality template

Title, page and paragraph number of document containing the confidential information	Description of the confidential information.	Topic the confidential information relates to (e.g. capex, opex, the rate of return etc.)	Identify the recognised confidentiality category that the confidential information falls within.	Provide a brief explanation of why the confidential information falls into the selected category. If information falls within 'other' please provide further details on why the information should be treated as confidential.	Specify reasons supporting how and why detriment would be caused from disclosing the confidential information.	Provide any reasons supporting why the identified detriment is not outweighed by the public benefit (especially public benefits such as the effect on the long term interests of consumers).

Attachment 2 - Proportion of confidential material

Submission Title	Number of pages of submission that include information subject to a claim of confidentiality	Number of pages of submission that do not include information subject to a claim of confidentiality	Total number of pages of submission	Percentage of pages of submission that include information subject to a claim of confidentiality	Percentage of pages of submission that do not include information subject to a claim of confidentiality

Note: This notice is an approximate indication of the proportion and comparative proportion of material in [insert title of NSP's Regulatory Proposal] that is subject to a claim of confidentiality compared to that which is not.