



Information Gathering Notice Guideline

November 2022 (Version 1)

Purpose of this guideline

This guideline is provided to assist recipients of information gathering notices to understand and comply with notices issued by the Essential Services Commission.

The commission has compulsory information gathering powers that it may use to require persons to give information, produce documents, or to appear before the commission to give information and produce documents. These powers are critical to the commission's ability to obtain the information and documentation it needs to carry out its regulatory functions.

The commission recognises that exercising its statutory power to issue a compulsory information gathering notice has consequences for a person subject to the requirements of a notice, including an administrative burden and cost. The commission only uses its statutory information gathering notice powers after consideration of the relevant surrounding circumstances and impact on the recipient.

This guideline focuses on the commission's powers to issue compulsory information gathering notices under Part 4 of the *Essential Services Commission Act 2001* (ESC Act),¹ and Division 3, Part 8 of the *Victorian Energy Efficiency Target Act 2007* (VEET Act).

Compulsory notice powers under the Essential Services Commission Act

Sections 36 and 37 of the ESC Act confer power on the commission to issue compulsory notices in two different sets of circumstances.

- The compulsory notice power set out in section 36 may be used by the commission to require a person to provide documents, information, or evidence needed by the commission to perform statutory functions, or to exercise statutory powers, other than the investigation of possible contraventions of regulatory requirements.

¹ The commission has a separate power to request information from regulated entities under Part 4A of the Essential Services Commission Act (see section 39K). Some of the principles outlined in this guideline may be applicable to a notice issued under section 39K.

- Section 37 is a separate power that may only be used by the commission for the specific purpose of investigating a matter that constitutes, or may constitute, a contravention of an essential services requirement. An 'essential services requirement' is defined in section 3 of the ESC Act to include a provision of the ESC Act, a provision of other relevant legislation in respect of which the commission has powers or functions (including the *Electricity Industry Act 2001* and the *Gas Industry Act 2000*), a provision of a Code of Practice, or a condition of a licence issued by the commission to a regulated entity.

Compulsory notice powers under the Victorian Energy Efficiency Target Act

The commission may issue a compulsory notice under section 60 of the VEET Act to any person in circumstances where the commission has reason to believe that the person has information or documentation that is relevant to the operation of the VEET Act. Under such a notice, the commission may require a person to provide information within a specified period (not being less than 10 business days), produce documents, or appear before the commission to provide information or to produce documents.

Responding to a notice

It is a legal requirement to respond by the date, and in the manner, specified in the notice

Any compulsory notice issued by the commission will specify the date and time by which a notice recipient must comply with the notice, or a date, time, and location for a person to appear before the commission. It is a legal requirement for a notice recipient to comply with the requirements of an information gathering notice by the relevant time and date, or to appear at the relevant location at the specified time and date.

Any notice issued by the commission will also specify the manner in which a notice recipient must respond to the notice. Where appropriate, the commission will specify that a response to a notice seeking information or documents may be provided electronically. Where documents are required in electronic format, the commission may specify how the documents are to be formatted, organised, or categorised to enable efficient review and assessment of the documents. For example, the commission may require information to be presented in a spreadsheet within particular fields, or documents to be submitted in a specified format (e.g. searchable PDF) and organised into sub-folders corresponding to particular parameters (e.g. dates) or subject matter (e.g. customer types).

Where information is required under a notice issued under the ESC Act, the information provided must be signed by the notice recipient, or by a competent officer where the notice recipient is a body corporate.²

Offences and court orders for non-compliance

For information gathering notices issued under the ESC Act and VEET Act, it is an offence to fail or refuse to comply with the requirements of the notice by the due date without reasonable excuse.³ It is also an offence to knowingly provide false or misleading information or documents in response to a notice.⁴

Penalties specified for offences in relation to compulsory notices are significant, reflecting the fact that it is critical for the commission to be provided with complete, accurate, and timely information to perform its role in the interests of Victorian consumers.

- Non-compliance with the requirements of a notice issued under section 36 or 37 of the ESC Act may incur penalties of 12 months imprisonment or a fine of 120 penalty units (approximately \$22,200 currently) for individuals, and a fine of 600 penalty units (approximately \$111,000 currently) for corporations.⁵
- Non-compliance with the requirements of a notice issued under section 60 of the VEET Act may incur a fine of 60 penalty units (approximately \$11,100 currently) for individuals, and a fine of 240 penalty units (approximately \$44,400) for corporations.⁶

If a body corporate commits an offence against a provision of the ESC Act or VEET Act, including a provision in relation to a compulsory notice, any officer of the body corporate that knowingly authorised or permitted the contravention is also taken to have committed the offence.⁷

Where the commission is satisfied that a person has failed, without reasonable excuse, to comply with a notice issued under the ESC Act, the commission may initiate prosecution or other enforcement action. The commission may seek to enforce compliance with the notice by making an application to a court for an order compelling the person comply with the notice.⁸ If it is necessary for the commission to take this step, the commission is likely to seek an order for its legal costs from the non-compliant notice recipient.

² Essential Services Commission Act, sections 36(1)(a) and 37(1)(a).

³ Essential Services Commission Act, sections 36(4)(a) and 37(2)(a); VEET Act, section 61.

⁴ Essential Services Commission Act, sections 36(4)(b) and 37(2)(b); VEET Act, section 68.

⁵ Essential Services Commission Act, sections 36(4) and 37(2).

⁶ VEET Act, section 61.

⁷ Essential Services Commission Act, section 60A and VEET Act, section 70.

⁸ Essential Services Commission Act, section 39ZL.

Reasonable excuse

Protection against self-incrimination

Where a notice is issued to a natural person (not a corporation) under section 36 of the ESC Act requiring the person to provide information, the person may refuse or fail to provide the information required under the notice on the grounds that information would tend to incriminate the person or expose the person to a penalty.⁹

Protection against self-incrimination is not a reasonable excuse for a failure or refusal to comply with a notice issued under section 36 or section 37 of the ESC Act in any other circumstances. Protection against self-incrimination is not a reasonable excuse for an individual to fail or refuse to produce a document under a section 36 notice, or information, documents, or evidence required under a section 37 notice.

Protection against self-incrimination does not constitute a reasonable excuse in any circumstances for a body corporate to refuse or fail to provide information, documentation, or evidence under an information gathering notice issued by the commission under section 36 or 37 of the ESC Act.¹⁰

Where a notice is issued to a natural person (not a body corporate) under section 60 of the VEET Act, it is a reasonable excuse for the person to refuse or fail to give information, documentation, or evidence under the notice if doing so would tend to incriminate the person. A body corporate cannot refuse or fail to comply with a notice issued under the VEET Act on grounds of protection against self-incrimination.

Legal professional privilege

Legal professional privilege may apply to information or documents falling within the requirements of an information gathering notice. Where a notice recipient seeks to rely on legal professional privilege, the notice recipient must provide the commission with details of the particulars of the claim.

Duties of confidence

A person is not excused from complying with the requirements of an information gathering notice on the ground that to do so would amount to a breach of any duty of confidence, including in relation to commercially-sensitive documents or information. However, in respect of a notice issued under the ESC Act, a person will not be liable for any loss, damage or injury suffered by a third

⁹ Essential Services Commission Act, section 39A(1).

¹⁰ Essential Services Commission Act, sections 39A(3) and 39B(1).

party because of the giving, in good faith, of any information, document or evidence to the commission in compliance with an information gathering notice.¹¹

Document not in possession, custody, or control

A person is required to produce documents specified in a notice that are within the person's possession, custody, or control. If a document is not within a person's possession, custody or control there is no requirement to produce that document to the commission, but the notice recipient must explain to the commission that is why the document has not been produced.

Variation of a notice

Upon receipt of a notice, a recipient should immediately review its requirements and plan for delivery of the relevant material by the due date.

Where a notice recipient considers there are genuine reasons why it may not be able to comply with a notice on or before the due date, or considers that there are issues raised by the scope or terms of the notice, it should make contact with the relevant commission officer (identified in the covering letter to the notice) as soon as possible after receipt of the notice. A written request should then be made, setting out the reasons for any requested variation and a date by which the notice recipient considers it can comply. All claims made in that request should be supported with evidence.

An administrative burden posed by the notice on the recipient will not generally, in and of itself, be a sufficient reason for a variation to be made to a notice.

In addition, where a notice recipient is seeking a variation to extend the time for compliance, the onus will be on the recipient to demonstrate why the time specified is insufficient.

Late variation applications

It takes time for the commission to properly consider an application for a variation of a notice.

Where a request to vary a notice is made shortly before, or on the due date of the notice, time constraints may mean that the commission is not able to consider the request. Accordingly, a notice recipient should review the requirements of the notice as soon as practicable following service, and any perceived issues or problems with meeting the requirements of the notice should be flagged to the relevant commission officer following receipt of the notice.

If a variation request is made to the commission at a late stage, and it is not practicable for the commission to consider the application due to time constraints, the notice recipient may become non-compliant with the notice. Non-compliance with a notice is a serious matter – prosecution may

¹¹ See Essential Services Commission Act, section 39D.

result, and there may be cost consequences for the notice recipient if the commission elects to seek a court order enforcing the notice. In determining any prosecution or enforcement steps following non-compliance with a notice, the commission may take into consideration:

- the steps that the notice recipient took to communicate with the commission
- the fulsomeness, merit, and timing of any explanation or reasons provided by the notice recipient
- any attempts made by the notice recipient to comply, or partially comply, with the requirements of the notice.

Use and disclosure of information or documents obtained pursuant to an information gathering notice

The use and disclosure of information and documents obtained by the commission pursuant to its statutory information gathering powers will be subject to statutory protections and restrictions.

Protections for confidential information

Information and documents obtained pursuant to section 36 or 37 of the ESC Act will be subject to the prohibition in section 61(1) of the ESC Act in relation to the disclosure of confidential or commercially-sensitive information. This provision makes it an offence for staff of the commission to disclose confidential or commercially-sensitive information unless it is for a permitted purpose, such as use or disclosure that is made in the exercise of a power of the performance of a function in connection with the ESC Act or relevant legislation, or for other permitted purposes. Information and documents obtained pursuant to section 36 is also subject to section 60C of the ESC Act. Section 60C requires that the commission provide the person giving the information or documents an opportunity to make submissions prior to the commission's disclosure of any confidential or commercially-sensitive information (unless the disclosure is to a permitted person or for a permitted purpose).¹²

The commission, including commission staff, must not disclose any confidential or commercially-sensitive information obtained under a notice issued under section 60 of the VEET Act except in particular circumstances set out in section 65(3) and 66 of the VEET Act.

Where a notice recipient considers that information or documents are confidential or commercially sensitive, the notice recipient should clearly identify the document or information, or the relevant part of the document or information, in its response to the notice. A notice recipient who claims that documents or information required under a notice are confidential or commercially sensitive must provide reasons in support of each claim; unsupported blanket claims of confidentiality or commercial sensitivity should not be made.

¹² Essential Services Commission Act, section 60C.

Use in criminal proceedings

Any information or document provided by a person or body corporate to the commission in compliance with an information gathering notice issued under the ESC Act is not admissible as evidence in any criminal proceeding against that person or body corporate, other than:

- in the case of a notice issued under section 36 to a natural person or a body corporate, a proceeding arising out of the false or misleading nature of the information or document, a review under Part 7B of the ESC Act, or a proceeding for a monetary benefits order under section 61B of the ESC Act¹³
- in the case of a notice issued under section 37 to a natural person, a proceeding arising out of the false or misleading nature of information, documents, or evidence provided under the notice,¹⁴ and
- in the case of a notice issued under section 37 to a body corporate, a proceeding arising out of the false or misleading nature of the information or document, or a criminal proceeding under the ESC Act or 'relevant legislation' (as that term is defined in the ESC Act).¹⁵

Any confidential or commercially-sensitive information or document provided to the commission in compliance with an information gathering notice issued under the ESC Act or the VEET Act may be disclosed in legal proceedings at the direction of a court.¹⁶

Disclosure under information sharing arrangements

The ESC Act provides for the commission to establish information sharing arrangements with 'relevant agencies'.¹⁷ The ESC Act defines relevant agencies to include those responsible for fair trading, essential services regulation, law enforcement, or those prescribed by regulation.¹⁸

Under the relevant provisions, the commission is authorised to share and disclose any information that it obtains pursuant to an information gathering notice issued under section 37 of the ESC Act with a relevant agency if:

- the relevant section 37 notice was issued after 1 December 2021
- the commission has entered an information sharing arrangement with the relevant agency under section 60E of the ESC Act, and

¹³ Essential Services Commission Act, section 39A(4).

¹⁴ Essential Services Commission Act, section 39B(2).

¹⁵ Essential Services Commission Act, section 39B(3).

¹⁶ Essential Services Commission Act, section 61(3)(c); VEET Act, section 65(3)(c).

¹⁷ Essential Services Commission Act, section 60E.

¹⁸ Essential Services Commission Act, section 60E(9).

- sharing the information is reasonably necessary to assist in the exercise of functions under the ESC Act or relevant legislation, or the functions of the relevant agency concerned.

The authorisation to share and disclose information contained in the ESC Act extends to any information that the commission has obtained pursuant to a section 37 notice, including information marked as being commercially sensitive or confidential by a respondent.

Disclosure of personal information

Where information obtained pursuant to a compulsory notice contains personal or sensitive information about individuals, it will be dealt with in accordance with the requirements of the *Privacy and Data Protection Act 2014*. For further information please see the commission's [privacy statement](#).

Application to the Victorian Civil and Administrative Tribunal

Persons whose interests are affected by a commission decision to serve a compulsory notice under section 36 of the ESC Act, or to disclose information identified as confidential produced in compliance with such a notice, may apply to the Victorian Civil and Administrative Tribunal for a review of the decision on limited grounds.¹⁹ Such an application must be made within 14 days after a notice under section 36 of the ESC Act is served, or within 14 days after a person is given a notice regarding proposed disclosure of confidential information.²⁰

This guideline has been approved for publication by the commission pursuant to section 13 of the Essential Services Commission Act 2001.

The commission has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information. This guideline is for general guidance only and does not constitute legal or other professional advice and should not be relied on as a statement of law. You should obtain professional advice if you have a specific concern.

¹⁹ Essential Services Commission Act, section 55(2).

²⁰ Essential Services Commission Act, section 55(3).

Revisions to this guideline

Version no.	Date effective	Nature of amendment
1	2 November 2022	First published