

AER Non-disclosure Guideline 2026

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About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are marginalised and facing disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

Energy and Water Justice

Our Energy and Water Justice work improves regulation and policy so all people can access the sustainable, dependable and affordable energy and water they need. We ensure consumer protections improve equity and limit disadvantage and support communities to play a meaningful role in decision-making. We help to accelerate a transition away from fossil fuels that also improves outcomes for people. We work collaboratively with community and consumer groups across the country, and our work receives input from a community-based reference group whose members include:

- Affiliated Residential Park Residents Association NSW;
- Anglicare;
- Combined Pensioners and Superannuants Association of NSW;
- Energy and Water Ombudsman NSW;
- Ethnic Communities Council NSW;
- Financial Counsellors Association of NSW;
- NSW Council of Social Service;
- Physical Disability Council of NSW;
- St Vincent de Paul Society of NSW;
- Salvation Army;
- Tenants Union NSW; and
- The Sydney Alliance.

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Contents

1.	Introduction	2
2.	Section 4 of the Draft Guideline	2
2.1	Public Interest.....	2
2.2	Confidential and Sensitive Information	3
	Confidential Information	3
	Commercially Sensitive Information	3
2.3	Effects on future competitive assessment processes	4
3.	Practical Challenges	4
4.	Template.....	5
5.	Conclusion	5

1. Introduction

The JEC welcomes the opportunity to comment on the Draft Non-disclosure Guideline - Energy Infrastructure Investment Act 2020 (NSW), developed by the Australian Energy Regulator's (AER).¹

Transparency is a critical foundation to robust regulation which promotes the consumer interest. We support the AER's replacement of the current 2023 draft Confidentiality Guideline. The proposed updated guideline (Draft Guideline) provides a more comprehensive approach to evaluating non-disclosure claims and would better support necessary transparency.

2. Section 4 of the Draft Guideline

Our comments below concern Section 4 of the Draft Guideline - the subject of consultation question 3 – setting out how the AER will interpret the terms 'public interest', 'confidential', 'commercially sensitive' and 'effects on future competitive assessment processes' in relation to the *Energy Infrastructure Investment Regulation 2021* (NSW) (EII Regulation). In particular, we address the changes necessary to clearly define and appropriately limit the grounds for non-disclosure.

2.1 Public Interest

We broadly support the definition of the public interest and factors to be considered as set out in the Draft Guideline but recommend a clearer assertion that the public interest is best served where publishing is the default position.

We acknowledge the determination to not publish part of a revenue determination involves a case-by-case analysis balancing all factors provided in clause 53(6).²

Nonetheless, we believe that the Draft Guideline should assert that the default should be to publish the revenue determination in full, and non-publication in part should only occur when demonstrated to be absolutely necessary.

We note the following in support of this position:

- the starting position is a requirement that the revenue determination is to be published, see clause 53(1);³ and
- there is a strong public interest – with material consumer impact - in transparency of decision making. The AER's revenue determinations directly impact the cost of electricity bills paid by

¹ Australian Energy Regulator, *Non-disclosure Guideline - Electricity Infrastructure Investment Act 2020 (NSW) – DRAFT*, 20 February 2026, < <https://www.aer.gov.au/industry/registers/resources/reviews/review-non-disclosure-guideline-electricity-infrastructure-investment-act-2020-nsw/draft-guideline> >, (Draft Guideline).

² See Cl 53(6), EII Regulation.

³ See Cl 53(1), EII Regulation.

NSW consumers. Electricity is an essential service, and consumers have no choice as to whether to face the network costs which form a substantial proportion of the bill.

The Draft Guideline should be amended to more explicitly state that public interest weighs strongly in favour of transparency and that the starting default is to publish in full.

2.2 Confidential and Sensitive Information

The JEC support requiring network operators to specify which information their non-disclosure claim concerns through the *Non-disclosure claim template* (Draft Guideline Attachment A). This is an important requirement ensuring that only specific information may be determined to be confidential or commercially sensitive – according to demonstration it meets required criteria - as opposed to entire documents.

We also support the Draft Guideline’s intent to publish documents albeit with relevant redactions. We welcome the indication in the draft guidelines that the AER’s view on the commercial sensitivity of particular aspects may change over time as the revenue determination process progresses.

Assessments as to confidentiality could in addition similarly change over the course of the revenue determination processes, for example if a network makes public a document after the initial claim of confidentiality has been made.

Confidential Information

We broadly concur with the Draft Guideline’s explanation at section 4.3.1 as to what constitutes ‘confidential’ information. We welcome the comments made in respect of contract negotiations.

We note the AER specifies factors to be considered when determining if information is confidential include the nature of the information, or the detriment caused to the network operator or a third party.

We recommend further specificity to ensure against this becoming an avenue for general confidentiality claims. It is important to provide guiding examples as to when these factors are relevant. Without this there is a danger that in considering any information which *might* in some way be said to be commercially sensitive, the result is an automatic consideration of information as being confidential.

As the Draft Guideline points out in section 4.3, the concepts of confidential and commercially sensitive information are related but separate and supporting information should ensure this is clearly articulated in the guidelines.

Commercially Sensitive Information

The JEC broadly concur with the Draft Guideline’s description - at section 4.3.2 - of what constitutes ‘commercially sensitive’ information. To promote clarity, we recommend that the Draft

Guideline provide more practical examples and explanatory detail on what is regarded as commercially sensitive information.⁴

2.3 Effects on future competitive assessment processes

We concur with the Draft Guideline’s discussion on the effect of publishing the information on future competitive assessment processes.

We note that the factor of the effect on future competition is related to the public interest consideration. The effect on future competition should not be used as a catch all category to say that the long term interests of consumers / the public interest mean no document of this nature can ever be published. Rather the public interest is a separator and broader factor than the effect on future competition. It may be of use to include this clarification in the Draft Guideline.

3. Practical Challenges

Consultation question 2

The JEC sees the lack of any meaningful disincentive for network operators to make frivolous non-disclosure claims as a significant practical challenge. This is an existential risk to effective disclosure provisions and wider transparency of decision-making. As it stands we see nothing to prevent or discourage a network from making blanket non-disclosure claims, for instance.

While penalties for frivolous claims may be part of an effective framework, this is not likely to be workable in isolation. We recommend the process, through the template, provide for a greater degree of rigour in order to more effectively preclude frivolous claims, rather than relying only on identifying and penalizing them retrospectively. In this context, we welcome the requirements to provide more detailed information regarding the precise claims being made, and the demonstration as to why the claim is material and legitimate. The AER should consider further such measures which can prevent frivolous claims, in addition to any measures to penalise claims found to be frivolous.

We also note that the stage at which a network operator makes a submission to the AER for a revenue determination is not the first time where questions of information confidentiality or commercial sensitivity may arise and may unreasonably limit transparency and engagement.

Well before the revenue determination takes place, network operators undertake engage with consumers and other stakeholders. During these earlier processes, the network is expected to consider and reflect the consumer interest. However, networks often rely on unsubstantiated claims of “confidential” or “commercially sensitive” information to restrict what they disclose to stakeholders and consumers. This impedes the scope for stakeholders to meaningfully interrogate and inform decision-making.

⁴ The AER may wish to draw on the discussion in the Freedom of Information Guidelines. See Office of the Australian Information Commissioner, *FOI Guidelines*, 2 March 2026, <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines>, [5.229] – [5.237].

Robust expectations of transparency when publicising revenue determination decisions and materials is important but there must be more robust measures to prevent unwarranted claims of confidentiality or commercial sensitivity throughout the process, which may preclude consumer consultation and engagement more generally. Where network operators are presenting their proposals as reflecting or promoting the consumer interest, this is particularly critical.

4. Template

Consultation question 4

As noted above, we support the template requiring network operators to identify with specificity the information which their non-disclosure claim pertains to, with robust demonstration as to why non-disclosure is warranted.

5. Conclusion

We thank the AER for the opportunity to provide this submission and would be pleased to provide any additional information to assist in the drafting of this Guideline.