

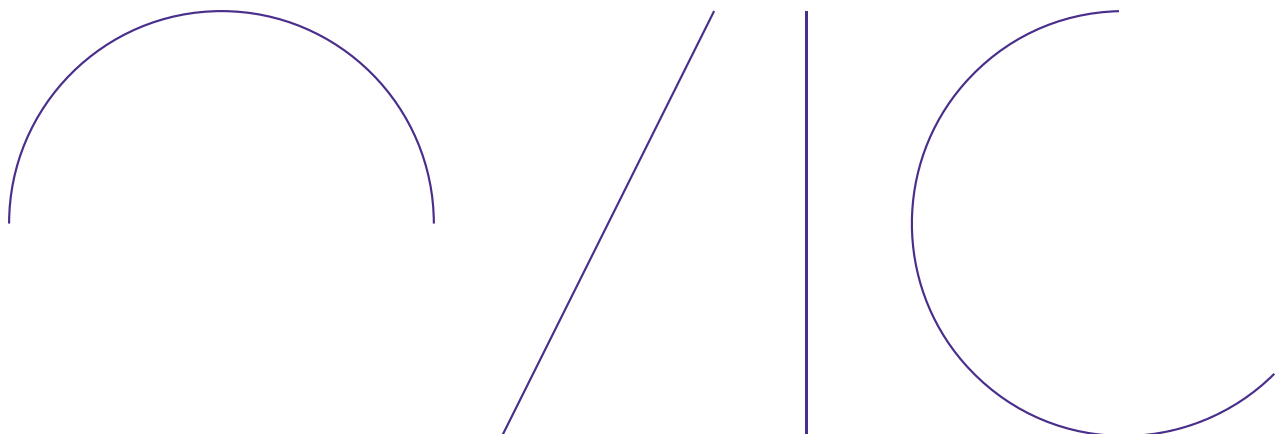


Office of the Victorian  
Information Commissioner

## Part VIC – Coercive Powers

Freedom of Information Guidelines

FREEDOM OF INFORMATION



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### References to legislation

All legislative references are to the *Freedom of Information Act 1982* (Vic) (**the Act**) unless otherwise stated.

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# Section 61U – Notice to produce or attend

## Extract of legislation

### 61U Notice to produce or attend

- (1) A notice to produce or attend may require a person—
  - (a) to produce a specified document to the Information Commissioner by or before a specified time and in a specified manner; or
  - (b) to attend at a specified time and place on a specified date to produce documents to the Information Commissioner; or
  - (c) to attend an examination before the Information Commissioner to give evidence and to produce documents at a specified time and place on a specified date; or
  - (d) to attend the Information Commissioner at a specified time and place to produce a specified document.
- (1A) A notice to produce or attend may specify that attendance required under the notice is to be by means of audio visual link or audio link and in a specified manner.
- (1B) A notice that provides for attendance as described in subsection (1A)—
  - (a) need not specify a place for attendance; and
  - (b) if any documents are to be produced, may specify that those documents are to be produced by secure electronic means and in a specified manner.
- (2) A notice under this section must contain the following information—
  - (a) a statement that—
    - (i) failure to comply with the notice without reasonable excuse may be an offence; and
    - (ii) includes the maximum penalty for that offence;
  - (b) examples of what may constitute a reasonable excuse for failing to comply with the notice.

## Guidelines

### How does OVIC approach taking regulatory action?

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**)<sup>1</sup> takes regulatory action to promote, assure and enforce information rights. It does so to build public trust in government, by committing to Victorians that strong action will be taken to ensure their information rights are respected and upheld.
- 1.2. When taking regulatory action, OVIC is guided by the following principles:
  - **Independent** – OVIC exercises its regulatory powers independent of government;
  - **Collaborative** – OVIC engages with the public and regulated bodies openly and constructively;
  - **Effective and targeted** – OVIC uses its powers to protect the Victorian community from harm caused by infringements of their information rights and responds to possible contraventions of the Act and the *Privacy and Data Protection Act 2014 (Vic)* based on their likelihood and severity. OVIC’s regulatory action leads to changed behaviour on the part of regulated bodies;
  - **Proportional** – OVIC takes action that is proportionate to the issue being addressed. The scale of OVIC’s regulatory response is based on the risk of harm the issue creates for the community or for individuals and whether the issue is systemic; and
  - **Transparent and consistent** – OVIC’s decisions, actions and performance are clearly explained and open to public scrutiny. OVIC’s regulatory action is consistent in similar circumstances.

For more information on how OVIC approaches its regulatory activities, see OVIC’s [Regulatory Action Policy](#).

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<sup>1</sup> The FOI Guidelines refers to ‘OVIC’ to mean the Information Commissioner and the Public Access Deputy Commissioner and OVIC staff who assist in the conduct of investigations under the Act.



## What is a notice to produce or attend?

- 1.3. A notice to produce or attend compels a person (including an individual and an organisation) to provide information to OVIC. For example, OVIC may require a person to:
- produce a specific document within a specified timeframe and in a specific way (for example, provide an electronic version of the document via secure electronic means);<sup>2</sup>
  - attend at a specific date, time, and place to provide a specified document or documents to OVIC;<sup>3</sup> or
  - attend an examination before OVIC at a specific date, time and place (this may be in person or via audio or video-link), to give evidence and to produce a document.<sup>4</sup>
- 1.4. The power to issue a notice to produce or attend is a coercive power, meaning that there are penalties attached if a person does not comply with the notice requirements, unless they have a reasonable excuse for not complying.

For more information on failing to comply with a notice to produce or attend and what a reasonable excuse includes, see:

- [section 61X – Failure to comply with notice to produce or attend](#)
- [section 61Y – Reasonable excuse – self-incrimination](#)
- [section 61Z – Reasonable excuse – documents affecting national security, defence or international relations](#)
- [section 61ZA – Reasonable excuse – cabinet documents and legal professional privilege](#)
- [section 61ZC – Statutory secrecy not a reasonable excuse](#)

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<sup>2</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61U(1)(a).

<sup>3</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61U(1)(b) and 61U(1)(d).

<sup>4</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61U(1)(c).

## Who can issue a notice to produce or attend?

- 1.5. OVIC may issue a notice to produce or attend in relation to reviews, complaints, and investigations.<sup>5</sup>
- 1.6. If a principal officer or a Minister challenges OVIC's jurisdiction to serve a notice to produce or attend, an application to the Supreme Court may be made to decide the question of jurisdiction.

For information on applications to the Supreme Court, see [section 63BA – Application to Supreme Court](#).

## When can a notice to produce or attend be issued?

- 1.7. OVIC may issue a notice to produce or attend:
  - at any stage during a review under Part VI;<sup>6</sup>
  - when handling a complaint under Part VIA (if conciliation has failed, and OVIC decides that the complaint cannot be dealt with informally or without technicality and more information is required to deal with the complaint);<sup>7</sup> and
  - during an investigation under Part VIB.<sup>8</sup>
- 1.8. The Information Commissioner must perform functions and exercise powers with as little formality and technicality as possible.<sup>9</sup> OVIC seeks to engage with the public and regulated bodies openly and constructively. Where appropriate, it seeks to resolve issues by agreement or informally before resorting to formal regulatory action or the use of coercive powers, where doing so will help resolve issues or disputes quickly and efficiently.

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<sup>5</sup> Under sections 6I(2)(d) and (e), the Information Commissioner and the Public Access Deputy Commissioner have the function to conduct reviews and receive and handle complaints. Under section 49KB, the Information Commissioner may issue a notice to produce or attend. Similarly, under section 61I(4), the Information Commissioner may serve a notice to produce or attend. The Information Commissioner may delegate the power to conduct an investigation to the Public Access Deputy Commissioner in accordance with section 6R(2). Under section 6R(1), the Information Commissioner may delegate to OVIC staff functions and powers relating to the conduct of reviews and complaints. Similarly, under section 6R(4), the Public Access Deputy Commissioner may, with the written consent of the Information Commissioner, delegate to OVIC staff any of the Deputy Commissioner's certain functions and powers relating to the conduct of reviews and complaints.

<sup>6</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KB.

<sup>7</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61I(4).

<sup>8</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61P(2).

<sup>9</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 6G(2).

## Providing information voluntarily

- 1.9. Before issuing a notice to produce or attend, OVIC may invite a person to provide information or documents to the Commissioner voluntarily. There may be situations where this is not appropriate, in which case a notice will be issued and served.
- 1.10. A person who voluntarily provides information may seek legal advice, or bring a legal representative or support person to an interview. An interview may be conducted via video-link or in person. It will be conducted in private, but it will be recorded and used by OVIC in relation to the review, complaint, or investigation.
- 1.11. If OVIC conducts an interview or asks for information from a person voluntarily, the person does not have to answer every question, or produce every requested document, and may leave the interview at any time. However, if they do provide information to OVIC, they must tell the truth. Under [section 63F](#), it is an offence to provide information to OVIC knowing that it is false or misleading in a material way.
- 1.12. If a person is concerned about providing information voluntarily, for example if they are concerned about breaching secrecy provisions, OVIC may decide to issue a notice to produce or attend so the person receives statutory protections under the Act.
- 1.13. OVIC may also decide to issue a notice to produce or attend following an unsuccessful attempt to receive the information voluntarily, or if OVIC is concerned that documents will be destroyed.<sup>10</sup>

## Who can be issued with a notice to produce or attend?

- 1.14. OVIC may issue a notice to produce or attend:
  - to a [principal officer](#):
    - during a review of an agency or Minister’s decision, either on behalf of the agency or Minister;<sup>11</sup>
    - in dealing with a complaint, either in relation to the principal officer or on behalf of the agency;<sup>12</sup>
  - to a Minister in dealing with a complaint about the Minister;<sup>13</sup> and

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<sup>10</sup> The Information Commissioner can also require immediate attendance if the Commissioner considers on reasonable grounds that a delay in attendance is likely to result in a document or thing being destroyed (see section 61W(2)(a)(i)).

<sup>11</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KB.

<sup>12</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61I(4).

<sup>13</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61I(4).

- on a person (an individual or a body corporate) during an investigation.<sup>14</sup>

## What kind of information needs to be in a notice to produce or attend?

1.15. A notice to produce will specify:

- the document or documents to be produced;
- the date and time by which the documents must be produced; and
- the manner in which the documents are to be produced.

1.16. A notice to attend will specify the time and place for attendance. OVIC may also outline the intended topics to be discussed at an examination.

1.17. If the notice relates to attendance by audio visual link or audio link, it:

- does not need to specify a place for attendance; and
- may require any documents to be provided by secure electronic means and in a specified manner.<sup>15</sup>

1.18. A notice to produce or attend must provide information explaining that failing to comply with a notice without reasonable excuse may be an offence and outline the maximum penalty for an offence.<sup>16</sup> The notice must also include examples of what may constitute a reasonable excuse.<sup>17</sup>

## Responding to a notice to produce or attend

1.19. A person who has been served with a notice to produce or attend should read the notice carefully as it will set out what they need to do. If the person is not clear about the notice and what they need to do, they should contact OVIC as soon as possible. The person may seek legal advice, or legal representation, in relation to the notice if they wish.<sup>18</sup>

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<sup>14</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61P(2).

<sup>15</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61U(1B).

<sup>16</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61U(2).

<sup>17</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61U(2)(b).

<sup>18</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZF.

## More information

[Section 61X – Failure to comply with notice to produce or attend](#)

[OVIC’s Regulatory Action Policy](#)

[Witness Welfare Management Policy](#)

For more information on what a reasonable excuse means, see:

- [section 61Y – Reasonable excuse – self incrimination](#)
- [section 61Z – Reasonable excuse – documents affecting national security, defence or international relations](#)
- [section 61ZA – Reasonable excuse – cabinet documents and legal professional privilege](#)
- [section 61ZC – Statutory secrecy not a reasonable excuse](#)

# Section 61V – Variation or revocation of a notice to produce or attend

## Extract of legislation

### 61V Variation or revocation of a notice to produce or attend

- (1) The Information Commissioner, by further written notice served on a person, may at any time vary or revoke a notice to produce or attend served on the person.
- (2) A notice varying or revoking a notice to produce or attend must be served in accordance with section 61W.

## Guidelines

### The Information Commissioner may vary or revoke a notice to produce or attend

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**) may vary (change) or revoke (withdraw) a notice to produce or attend at any time. For example, OVIC may vary a notice to:
  - update the documents that the person must produce; or
  - change the time and place for a person to attend to attend an examination.
- 1.2. To vary or revoke a notice, OVIC must serve a new, varied, notice or a notice of revocation on the person who received the original notice.
- 1.3. [Section 61W](#) outlines how OVIC may serve a notice.

# Section 61W – Service of notice to produce or notice to attend

## Extract of legislation

### 61W Service of notice to produce or notice to attend

- (1) Subject to subsection (2), a notice to produce or attend must be served at a reasonable time, being not less than 7 days before the date on which the person is required to attend or otherwise comply with the notice.
- (2) The Information Commissioner may serve a notice to attend requiring immediate attendance by a person if—
  - (a) the Information Commissioner considers on reasonable grounds that a delay in the person's attendance is likely to result in—
    - (i) a document or thing being lost or destroyed; or
    - (ii) the commission of an offence; or
    - (iii) the escape of the person on whom the notice is served; or
    - (iv) serious prejudice to the conduct of the inquiry to which the notice relates; or
  - (b) the person on whom the notice is served consents to immediate attendance.
- (3) A notice to produce or attend directed to a natural person must be served by serving a copy of the notice on the person personally or in accordance with subsection (3A).
- (3A) For the purposes of subsection (3), a document may be served on a natural person by—
  - (a) sending by registered post a copy of the document addressed to that person at the person's last known place of residence or business; or
  - (b) delivering a copy of the document to the person by means of electronic communication that is confirmed as having been received by the person; or
  - (c) sending by registered post a copy of the document, addressed to the person's authorised legal representative, to the place of business of the person's authorised legal representative; or
  - (d) leaving a copy of the document for that person—
    - (i) at the place of business of the person's authorised legal representative; and
    - (ii) with a person who apparently works there and who is apparently not less than 18 years of age; or
  - (e) delivering a copy of the document, addressed to the person's authorised legal representative, to the person's authorised legal representative personally; or

- (f) delivering a copy of the document to the person's authorised legal representative by means of an electronic communication that is confirmed as having been received by the person's authorised legal representative.
- (4) A notice to produce or attend directed to a body corporate must be served by leaving a copy of the notice at the registered office or principal place of business of the body corporate with a person apparently employed at that office or place and who is apparently at least 18 years of age or in accordance with subsection (4A).
- (4A) For the purposes of subsection (4), a document may be served on a body corporate by—
  - (a) leaving a copy of the document at the registered office or principal place of business of the body corporate with a person apparently employed at that office or place and who is apparently at least 18 years of age; or
  - (b) sending by registered post a copy of the document addressed to that body corporate at the registered office or principal place of business of the body corporate; or
  - (c) delivering a copy of the document to the body corporate by means of an electronic communication that is confirmed as having been received by the body corporate.
- (4B) For the purposes of this section, a person may deliver a copy of a document to another person personally by placing a copy of the document on a surface in the presence of that other person.
- (4C) For the purposes of subsections (3A)(b) and (f) and (4A)(c), the receipt of a document may be confirmed by any form of electronic communication.
- (5) Subsections (4) and (4A) are in addition to, and not in derogation of, sections 109X and 601CX of the Corporations Act.

## Guidelines

### What does 'service' mean?

- 1.1. Section 61W outlines how the Office of the Victorian Information Commissioner (**OVIC**) is to 'serve' a notice to produce or attend on a person. A notice to produce or attend must be 'served' on the person to whom it relates.
- 1.2. 'Service' refers to the formal delivery of a document to another person to be satisfied that the other person has received it and has been made aware of it.

For more information on what a notice to produce or attend is, see [section 61U](#).



## When and how is a notice to produce or attend served?

### Timeframes

- 1.3. OVIC must serve a copy of a notice to produce or attend at least seven clear days before the date on which the person is required to attend an examination or produce documents.<sup>19</sup> A notice must also be served at a reasonable time.
- 1.4. However, OVIC may serve a notice to produce or attend which requires immediate attendance if it considers on reasonable grounds that a delay in the person's attendance is likely to result in:
  - a document or thing being lost or destroyed;
  - an offence being committed;
  - the person who was served with the notice escaping; or
  - serious prejudice to the conduct of the inquiry to which the notice relates.<sup>20</sup>
- 1.5. OVIC may also require immediate attendance if the person on whom the notice is served consents to it.<sup>21</sup>

### Serving a notice on a natural person

- 1.6. A notice to produce or attend served on a natural person must be served on the person to whom the notice relates, or their authorised legal representative, in one of the following ways:
  - **electronic service:**
    - by delivering a copy of the notice electronically (such as by email) to the person<sup>22</sup> or to their legal representative<sup>23</sup> that is confirmed as having been received by any form of electronic communication;<sup>24</sup>

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<sup>19</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(1).

<sup>20</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(2)(a).

<sup>21</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(2)(b).

<sup>22</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(3A)(b).

<sup>23</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(3A)(f).

<sup>24</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(4C).

- **personal service:**
  - by delivering a copy of the notice to the person personally;<sup>25</sup>
  - by delivering a copy of the notice to the person’s legal representative personally (the notice must be addressed to the representative),<sup>26</sup>

personal service means handing the person the notice or placing a copy of the notice on a surface in their presence, after establishing their identity,<sup>27</sup>
- **postal service:**
  - by sending by registered post a copy of the notice to the person’s last known home or work address;<sup>28</sup>
  - by sending by registered post a copy of the notice which is addressed to the person’s legal representative and sent to the representative’s work address;<sup>29</sup> or
- **other service:**
  - by leaving a copy of the notice at the person’s legal representative’s work address and leaving it with someone who works there and who is 18 years of age or older.<sup>30</sup>

## Serving a notice on a body corporate

1.7. A notice to produce or attend served on a body corporate can be served by:

- leaving a copy of the notice at the registered office<sup>31</sup> or principal place of business of the body corporate, with someone who works there and who is 18 years of age or older;<sup>32</sup>

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<sup>25</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(3).

<sup>26</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(3A)(e).

<sup>27</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(4B).

<sup>28</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(3A)(a).

<sup>29</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(3A)(c).

<sup>30</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(3A)(d).

<sup>31</sup> A registered office means that registered under section 142 or 601CT of the [Corporations Act 2001 \(Cth\)](#); companies must set up a registered office with the Australian Securities and Investments Commission.

<sup>32</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(4) and 61W(4A)(a).

- sending by registered post a copy of the notice addressed to the body corporate at its registered office or place of business;<sup>33</sup> or
- delivering a copy of the notice electronically (for example, by email) that is confirmed as having been received.<sup>34</sup>

1.8. A notice to produce or attend may also be served in accordance with sections 109X and 601CX of the [Corporations Act 2001 \(Cth\)](#).

## Service by registered post

1.9. If a notice is served on a person or their legal representative by registered post, the person will be ‘deemed’ to have received the notice at the time at which the letter would ordinarily be delivered by registered post, provided OVIC has properly addressed, prepaid, and posted the notice to the person or their representative.<sup>35</sup>

## Service by electronic communication

1.10. Generally, an ‘electronic communication’<sup>36</sup> is any transmission of information by electronic means and includes means such as email and facsimile.

## More information

For information on applications to the Supreme Court about whether the Information Commissioner has jurisdiction to serve a notice to produce or attend, see [section 63BA – Application to Supreme Court](#).

<sup>33</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(4A)(b).

<sup>34</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61W(4A)(c).

<sup>35</sup> [Interpretation of Legislation Act 1984 \(Vic\)](#), section 49(2).

<sup>36</sup> Section 38 of the [Interpretation of Legislation Act 1984 \(Vic\)](#) defines ‘electronic communication’ as having the same meaning as in section 3(1) of the [Electronic Transactions \(Victoria\) Act 2000 \(Vic\)](#). The [Electronic Transactions \(Victoria\) Act 2000 \(Vic\)](#) defines ‘electronic communication’ as the communication of information (including data, text or images) by means of guided or unguided electromagnetic energy, or both. In the case of sound, electronic communication means communication of information by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system. The [Explanatory Memorandum](#) to the [Electronic Transactions \(Victoria\) Act 2000 \(Vic\)](#) notes the definition of ‘electronic communication’ is intended to have the widest possible meaning.

# Section 61X – Failure to comply with notice to produce or attend

## Extract of legislation

### 61X Failure to comply with notice to produce or attend

A person who is served with a notice to produce or attend must not, without reasonable excuse, refuse or fail to comply with a requirement set out in the notice—

- (a) to attend before the Information Commissioner; or
- (b) to give information; or
- (c) to answer a question or produce a document.

Penalty: 60 penalty units.

## Guidelines

### What happens if a person does not comply with a notice to produce or attend?

- 1.1. A person who receives a notice to produce or attend must do what the notice says unless they have a reasonable excuse. If a person does not comply with a notice, penalties apply.
- 1.2. It is also an offence to:
  - wilfully obstruct, hinder or resist the Office of the Victorian information Commissioner (**OVIC**) in performing or attempting to perform a function or duty under the Act or exercising or attempting to exercise a power under the Act;<sup>37</sup>
  - provide information or make a statement knowing it is false or misleading in a material way;<sup>38</sup>
  - mislead or attempt to mislead OVIC.<sup>39</sup>

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<sup>37</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63F(1).

<sup>38</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63F(2).

<sup>39</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63F(3).

## What is a ‘reasonable excuse’ for not complying with a notice?

1.3. The Act outlines examples of what constitutes a reasonable excuse to not comply with a notice to produce or attend. Without limiting what is a reasonable excuse, examples include:

- **self-incrimination** – if the giving of the information or production of the document may tend to incriminate the person;<sup>40</sup>
- **documents affecting national security, defence or international relations** – the information or document to be produced is exempt or is information that, if included in a document, would make it an exempt document under section 29A;<sup>41</sup>
- **Cabinet documents** – the information or document is exempt under [section 28](#) or is information that if included in a document would make that document exempt under section 28. This excuse does not apply in relation to a document claimed to be exempt under section 28 that relates to a decision under review;<sup>42</sup>
- **legal professional privilege** – the information or document is exempt under section 32 or is information that if included in a document would make that document exempt under section 32.<sup>43</sup> This does not apply in relation to a document claimed to be exempt under section 32 that relates to a decision under review.

Statutory secrecy is not a reasonable excuse

1.4. A person cannot claim statutory secrecy as an excuse for not complying with a notice to produce or attend. There are two exceptions to this, which are discussed in [section 61ZC](#).

## What happens if a person believes they have a reasonable excuse?

1.5. If a person believes they have a reasonable excuse, they need to explain to OVIC why the reasonable excuse applies. They should contact OVIC before the date and time outlined in the notice, to advise that they intend to rely on a reasonable excuse to not comply with part or all of the notice. They should provide any information or submissions to support their view in time for OVIC to decide whether a reasonable excuse applies.

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<sup>40</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61Y.

<sup>41</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61Z.

<sup>42</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZA(1)(a).

<sup>43</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZA(1)(b).

## More information

For more information on what a reasonable excuse means, see:

- [section 61Y – Reasonable excuse – self incrimination](#)
- [section 61Z – Reasonable excuse – documents affecting national security, defence or international relations](#)
- [section 61ZA – Reasonable excuse – cabinet documents and legal professional privilege](#)
- [section 61ZC – Statutory secrecy not a reasonable excuse](#)

For more information on producing exempt documents, see [section 63D – Special requirements for production of documents claimed to be exempt under section 28, 29A, 31 or 31A](#).

# Section 61Y – Reasonable excuse – self-incrimination

## Extract of legislation

### 61Y Reasonable excuse—self incrimination

Without limiting what is a reasonable excuse for the purposes of section 61X, it is a reasonable excuse to refuse or fail to comply with a requirement of the notice if the giving of the information or production of the document may tend to incriminate the person.

## Guidelines

### Self-incrimination is a reasonable excuse

- 1.1. A person who receives a notice to produce or attend must do what the notice says, or they may have to pay a penalty.<sup>44</sup> However, the person may not have to comply with the notice if they have a reasonable excuse.
- 1.2. Self incrimination is an example of a reasonable excuse: a person does not have to comply with a notice if producing a document or giving information may tend to incriminate the person who is providing the document or information (for example, doing so would expose the person to being convicted for a crime).
- 1.3. This means a person may:
  - refuse to attend an examination;
  - decline to answer one or more questions during an examination;
  - refuse to produce a document or documents to the Information Commissioner; or
  - refuse to provide information to the Information Commissioner.

## More information

See [section 61X](#) for information on what to do if a person thinks they have a reasonable excuse.

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<sup>44</sup> *Freedom of Information Act 1982 (Vic)*, section 61X.

See the following sections for other examples of what a reasonable excuse includes:

- [section 61Z – Reasonable excuse – documents affecting national security, defence or international relations](#)
- [section 61ZA – Reasonable excuse – cabinet documents and legal professional privilege](#)



# Section 61Z – Reasonable excuse – documents affecting national security, defence or international relations

## Extract of legislation

### **61Z Reasonable excuse—documents affecting national security, defence or international relations**

Without limiting what is a reasonable excuse for the purposes of section 61X, it is a reasonable excuse for a person to refuse or fail to comply with a requirement set out in the notice if the information or document—

- (a) is an exempt document under section 29A; or
- (b) is information that if included in a document would make that document an exempt document under section 29A.

## Guidelines

### Reasonable excuse: documents affecting national security, defence or international relations

- 1.1. A person who receives a notice to produce or attend must do what the notice requires, or they may be liable to pay a penalty.<sup>45</sup> However, the person may not have to comply with the notice if they have a reasonable excuse.
- 1.2. A reasonable excuse includes where the information or a document is exempt under [section 29A](#) (documents affecting national security, defence or international relations). This means a person does not have to produce a document or provide information if the document is an exempt document or including information in a document would make that document exempt under section 29A.
- 1.3. Section 29A contains several exemptions which protect from disclosure, documents:
  - that would or could be reasonably expected to cause damage to:
    - the security of the Commonwealth or any State or Territory;
    - the defence of the Commonwealth; or

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<sup>45</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61X.

- international relations of the Commonwealth;<sup>46</sup>
- held or created by Victoria Police for the purpose of counterterrorism, or a purpose relating to counterterrorism;<sup>47</sup>
- held or created by Victoria Police for the purpose of the protection of critical infrastructure within the meaning of section 74B of the *Emergency Management Act 2013* on the Victorian Critical Infrastructure Register under section 74J of that Act or any corresponding register kept by an agency of the Commonwealth;<sup>48</sup>
- created for, or containing information about, or that could lead to the identification of a document created for the purposes of administering, complying with or enforcing Part 7A of the *Emergency Management Act 2013*, which relates to emergency risk management arrangements for critical infrastructure resilience.<sup>49</sup>

1.4. If one or more of these exemptions apply, then a person does not have to comply with a notice to produce or attend.

## More information

See [section 61X](#) for information on what to do if a person thinks they have a reasonable excuse.

For more information on when the exemption in section 29A will apply, see [section 29A – Documents affecting national security, defence or international relations](#).

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<sup>46</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 29A(1).

<sup>47</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 29A(1A)(a).

<sup>48</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 29A(1A)(b).

<sup>49</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 29A(1B).

# Section 61ZA – Reasonable excuse – cabinet documents and legal professional privilege

## Extract of legislation

### **61ZA Reasonable excuse—cabinet documents and legal professional privilege**

- (1) Subject to subsection (3), and without limiting what is a reasonable excuse for the purposes of section 61X, it is a reasonable excuse for a person to refuse or fail to comply with a requirement set out in the notice if—
  - (a) the information or document—
    - (i) is an exempt document under section 28; or
    - (ii) is information that if included in a document would make that document an exempt document under section 28; or
  - (b) the information or document—
    - (i) is an exempt document under section 32; or
    - (ii) is information that if included in a document would make that document an exempt document under section 32.
- (2) The Secretary to the Department of Premier and Cabinet may certify that information or a document described in subsection (1)(a)—
  - (a) in the case of information, is information which, if included in a document, would make the document an exempt document of a kind referred to in section 28(1);
  - (b) in the case of a document, is or, if it existed, would be an exempt document of a kind referred to in section 28(1).
- (3) If a notice to produce or attend is served on a person during a review of a decision that relates to a document claimed to be exempt under section 28 or 32, it is not a reasonable excuse for a person to refuse or fail to comply with the notice for the reason that the information or document—
  - (a) is an exempt document under section 28 or 32; or
  - (b) is information that if included in a document would make that document an exempt document under section 28 or 32.

## Guidelines

### Reasonable excuse: Cabinet documents and legal professional privilege

- 1.1. A person who receives a notice to produce or attend must do what the notice says, or they may have to pay a penalty.<sup>50</sup> However, the person may not have to comply with the notice if they have a reasonable excuse.
- 1.2. A reasonable excuse includes where the information or a document is exempt under:
  - [section 28 – Cabinet documents](#); or
  - [section 32 – Documents affecting legal proceedings](#).

### Cabinet documents

- 1.3. Section 28 is intended to ensure the Cabinet process remains confidential.<sup>51</sup> It protects the principle of collective ministerial decision making and responsibility, which is central to the working of responsible government.
- 1.4. Section 28(1) exempts five types of cabinet documents from disclosure:
  - the official record of any deliberation or decision of the Cabinet;<sup>52</sup>
  - a document that has been prepared by a Minister, or prepared by an agency on behalf of a Minister, for the purpose of submission for consideration by the Cabinet;<sup>53</sup>
  - a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;<sup>54</sup>
  - a document that is a copy or draft of, or contains extracts from, a document referred to in the above three dot points;<sup>55</sup> or

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<sup>50</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61X.

<sup>51</sup> See *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [16].

<sup>52</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 28(1)(a).

<sup>53</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 28(1)(b).

<sup>54</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 28(1)(ba).

<sup>55</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 28(1)(c).

- a document which, if disclosed, would involve the disclosure of any deliberation or decision of the Cabinet.<sup>56</sup>

1.5. Section 28(1) does not apply to:

- a document more than 10 years old;<sup>57</sup> or
- a document that contains purely statistical, technical, or scientific material, unless it would disclose any deliberation or decision of Cabinet.<sup>58</sup>

The Secretary to the Department of Premier and Cabinet may certify that information or a document is exempt under section 28(1)

1.6. The Secretary to the Department of Premier and Cabinet may certify information or a document (whether it exists or not) would be exempt under section 28(1).<sup>59</sup> This permits the Secretary to certify that, on the face of the notice, the requested information or documents would be exempt under section 28(1).

## Documents affecting legal proceedings (legal privilege)

1.7. Section 32(1) exempts documents that would be privileged from production in legal proceedings on the grounds of either legal professional privilege (**LLP**) or client legal privilege (**CLP**). Both LLP and CLP protect confidential communications between a lawyer and their client, to promote full and frank communication between them.

## An exception to this reasonable excuse

1.8. There is an exception to this reasonable excuse. If the Information Commissioner serves a notice to produce or attend during a review under Part VI, the person must provide the requested information or documents even if section 28 or section 32 applies.<sup>60</sup>

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<sup>56</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 28(1)(d).

<sup>57</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 28(2).

<sup>58</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 28(3).

<sup>59</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZA(2).

<sup>60</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZA(3).

### Example

After reasonable attempts to informally request information from the agency during a review under Part VI, OVIC serves a notice to produce on the agency under section 49KB. The notice requires the agency to produce information relating to a document that the agency claims is exempt under section 28(1)(d).

The notice outlines that the agency cannot rely on the reasonable excuse in section 61ZA(1)(a) because the decision under review relates to a document claimed to be exempt under section 28.

The agency must provide the requested information. If it fails to do so, the person the notice was directed to may be liable for penalties under [section 61X](#).

# Section 61ZB – Production under notice of document claimed to be exempt under section 28, 31 or 31A

## Extract of legislation

### **61ZB Production under notice of document claimed to be exempt under section 28, 31 or 31A**

- (1) This section applies if—
  - (a) a person is required under this Part to produce a document under a notice to produce or attend; and
  - (b) that document is claimed to be exempt under section 28, 31 or 31A.
- (2) The person must produce the document for inspection by the Information Commissioner at the premises of the agency which, or Minister who, made the claim that the document is exempt, within the timeframe specified by the Information Commissioner.
- (3) A person who produces a document for inspection in accordance with subsection (2)—
  - (a) is taken to comply with the notice to produce or attend; and
  - (b) does not commit an offence against section 61X.

## Guidelines

### Producing certain documents for inspection

- 1.1. Where a person claims that a document required to be produced is exempt under either section 28, 31 or 31A, the person must provide access to it by inspection at the agency or Minister's premises or by secure electronic means, instead of providing a copy of the document to the Information Commissioner.<sup>61</sup>
- 1.2. If the person provides access to the document by inspection in accordance with section 61ZB, then they have complied with the notice even if the notice requires the person to produce the document by sending a copy of it to the Office of the Victorian Information Commissioner (OVIC).<sup>62</sup>

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<sup>61</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZB and section 63D(4).

<sup>62</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZB(3).

## What kind of documents does inspection apply to?

1.3. Production by inspection applies to documents that are claimed to be exempt under:

- [section 28](#) (Cabinet documents);
- [section 31](#) (law enforcement documents); or
- [section 31A](#) (documents relating to the Independent Broad-based Anti-corruption Commission).<sup>63</sup>

## How does OVIC inspect the document?

1.4. OVIC may inspect a document by inspecting it at the premises of the agency which, or the Minister who, claims that the document is exempt under section 28, 31 or 31A.<sup>64</sup>

1.5. Alternatively, OVIC may request that the person provides the document for inspection by secure electronic means (for example, by secure file exchange).<sup>65</sup> If OVIC requests to inspect a document electronically, it must destroy the document as soon as practicable after inspecting it.<sup>66</sup> When OVIC has destroyed the document, it must let the agency or Minister know in writing that the inspection is complete and that the document has been destroyed.<sup>67</sup>

1.6. OVIC cannot take or make copies of a document they inspect.<sup>68</sup>

### *Timeframes for inspection*

1.7. A person who provides access to a document by inspection must still comply with the timeframes outlined in the notice.<sup>69</sup>

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<sup>63</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZB(1).

<sup>64</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZB(2).

<sup>65</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63D(4).

<sup>66</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63D(5)(a).

<sup>67</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63D(5)(b).

<sup>68</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63D(3).

<sup>69</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZB(2).



# Section 61ZC – Statutory secrecy not a reasonable excuse

## Extract of legislation

61ZC	Statutory secrecy not a reasonable excuse	
	(1)	It is not a reasonable excuse for the purposes of section 61X for a person to refuse or fail to comply with a requirement of the Information Commissioner as a result of—
	(a)	any obligation imposed on that person, by any enactment or rule of law, to maintain secrecy in relation to the production of the document, information or the answer to a question; or
	(b)	any restriction imposed on that person, by any enactment or rule of law, that prohibits the disclosure of the document, information or the answer to a question.
	(2)	Nothing in this section affects the operation of—
	(a)	Part 7 of the <b>Protected Disclosure Act 2012</b> ; or
	(b)	Division 3 of Part 2 of the <b>Independent Broad-based Anti-corruption Commission Act 2011</b> .

## Guidelines

### Statutory secrecy is not a reasonable excuse

- 1.1. Statutory secrecy is not a reasonable excuse for the purpose of not complying with a notice to produce or attend. This means a person must still comply with a notice to produce or attend, even if another Act prohibits them from disclosing the requested information.

For example, if a person claims a document or information is exempt under section 38 because of a secrecy provision in another Act, that person must still produce that document or information under the notice unless a reasonable excuse applies.

## Two exceptions

1.2. There are two instances where statutory secrecy will be a reasonable excuse:

- assessable disclosures under Part 7 of the [Public Interest Disclosures Act 2012 \(Vic\) \(PID Act\)](#);<sup>70</sup> and
- confidentiality notices under Division 3 of Part 2 of the [Independent Broad-based Anti-corruption Commission Act 2011 \(Vic\) \(IBAC Act\)](#).

1.3. This means if the notice relates to the content of an assessable disclosure under the PID Act or a confidentiality notice under the IBAC Act, the person does not need to comply with the notice and should inform the Office of the Victorian Information Commissioner accordingly.

## More information

For information on what a reasonable excuse does include, see:

- [section 61Y – self incrimination](#);
- [section 61Z – documents affecting national security, defence or international relations](#);  
and
- [section 61ZA – cabinet documents and legal professional privilege](#).

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<sup>70</sup> The reference to the *Protected Disclosures Act 2012 (Vic)* is an outdated reference.

# Section 61ZD – Office of the Information Commissioner to report to the Victorian Inspectorate on issue of notice to produce or attend

## Extract of legislation

### **61ZD Office of the Information Commissioner to report to the Victorian Inspectorate on issue of notice to produce or attend**

- (1) Within 3 days after the issue of a notice to produce or attend, the Information Commissioner must give a written report to the Victorian Inspectorate specifying—
  - (a) the name of the person to whom the notice relates; and
  - (b) the reasons why the notice was issued.
- (2) Within 3 days after the issue of a notice under section 61V varying or revoking a notice to produce or attend, the Information Commissioner must give a written report to the Victorian Inspectorate specifying—
  - (a) the notice to produce or attend to which the variation or revocation relates; and
  - (b) the reasons why the notice to produce or attend was varied or revoked; and
  - (c) in the case of a variation, the nature of the variation.

## Guidelines

### How the Victorian Inspectorate oversees OVIC’s use of coercive powers

#### Reporting to the Victorian Inspectorate when using coercive powers

- 1.1. The [Victorian Inspectorate](#) oversees Victoria’s integrity agencies, including the Office of the Victorian Information Commissioner (**OVIC**). One of the Victorian Inspectorate’s roles is to oversee OVIC’s use of coercive powers including issuing, varying or revoking a notice to produce or attend.
- 1.2. OVIC must give a written report to the Victorian Inspectorate within three days of issuing, varying or revoking a notice to produce or attend to a person.<sup>71</sup>

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<sup>71</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZD.

1.3. A report on the issuing of a notice to produce or attend must include the:

- name of the person to whom the notice relates; and
- reasons why the notice was issued.<sup>72</sup>

1.4. A report on varying or revoking a notice to produce or attend must include:

- the notice to which the variation or revocation relates;
- the reasons why the notice was varied or revoked; and
- where a notice has been varied, the nature of the variation.<sup>73</sup>

### Reviewing notices provided by the Information Commissioner

1.5. The Victorian Inspectorate may review a written report that OVIC prepared under section 61ZD and a copy of an audio or video recording and any transcript of an examination given under [section 61ZH](#) to assess whether:

- the requirements under the Act were met;
- the requirement for a person to produce a document or thing for an investigation or complaint reasonably helped OVIC to achieve the purpose of the investigation or to deal with the complaint; or
- questioning a person at an examination reasonably helped OVIC to achieve the purpose of the investigation, the review, or to deal with the complaint to which the examination relates.<sup>74</sup>

### Reporting on coercive questioning

1.6. The Victorian Inspectorate may require OVIC to provide it with a written report in relation to an appearance by a person before an OVIC officer in an investigation, complaint or review under the Act (whether in response to a notice or otherwise), which includes:

- the name of the person who appeared before OVIC;
- the reasons for the person's appearance;

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<sup>72</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZD(1).

<sup>73</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZD(2).

<sup>74</sup> [Victorian Inspectorate Act 2011 \(Vic\)](#), sections 42C(1) and 42C(2).

- the place and time of the person’s appearance;
- the relevance of the appearance to OVIC’s investigation;
- the name of any other person who was present during the appearance in an official capacity under any Act, including the person’s legal representative; and
- any other prescribed matter.<sup>75</sup>

1.7. OVIC must respond to a request from the Victorian Inspectorate to provide a report as soon as possible after the request is made.<sup>76</sup>

## Making a complaint to the Victorian Inspectorate

1.8. A person may complain to the Victorian Inspectorate about OVIC staff’s use or purported use of coercive powers.<sup>77</sup>

1.9. A person may also complain to the Victorian Inspectorate about how OVIC staff comply with procedural fairness requirements when:

- exercising coercive powers under the FOI Act and the [Privacy and Data Protection Act 2014 \(Vic\) \(PDP Act\)](#);
- conducting investigations under Part VIB;
- making recommendations under [section 61L](#);
- making investigation reports under [section 61Q](#); and
- making compliance notices under Part 3 of the PDP Act.<sup>78</sup>

1.10. A complaint may be made about the exercise or purported exercise of coercive powers and procedural fairness requirements outlined above, including on the basis that the conduct was:

- contrary to law;
- unreasonable, unjust, oppressive, or improperly discriminatory;

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<sup>75</sup> [Victorian Inspectorate Act 2011 \(Vic\)](#), section 42A(1); [Victorian Inspectorate Regulations 2023](#), regulation 19.

<sup>76</sup> [Victorian Inspectorate Act 2011 \(Vic\)](#), section 42A(2).

<sup>77</sup> [Victorian Inspectorate Act 2011 \(Vic\)](#), section 43(9)(a). A reference to ‘OVIC staff’ means a reference to ‘OVIC officer’ which is defined in section 3 of the [Victorian Inspectorate Act 2011 \(Vic\)](#).

<sup>78</sup> [Victorian Inspectorate Act 2011 \(Vic\)](#), section 43(9)(b).

- based on improper motives;
- an abuse of power; or
- otherwise improper.<sup>79</sup>

## More information

For more information on complaints to the Victorian Inspectorate, visit their [website](#).

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<sup>79</sup> [Victorian Inspectorate Act 2011 \(Vic\)](#), section 43(10).

# Section 61ZE – Power to take evidence on oath or affirmation

## Extract of legislation

### 61ZE Power to take evidence on oath or affirmation

- (1) The Information Commissioner may require a person attending an examination, in accordance with a notice to attend, to give evidence or answer questions on oath or affirmation.
- (2) The Information Commissioner, or a person authorised to do so by the Commissioner, may administer an oath or affirmation to a person for the purposes of subsection (1).
- (3) A person must not, without reasonable excuse, refuse or fail to take an oath or make an affirmation when required to do so by the Information Commissioner under subsection (1).  
Penalty: 60 penalty units.
- (4) A person does not commit an offence against subsection (3) unless, before the person is required to take the oath or make the affirmation, the Information Commissioner informs the person that refusal or failure to do so without reasonable excuse is an offence.

## Guidelines

### Requiring evidence or answers to questions on oath or affirmation

- 1.1. Where a person attends an examination under a notice to attend, the Office of the Victorian Information Commissioner (**OVIC**) can require that person to give evidence or answer questions under oath or affirmation.<sup>80</sup> This helps to ensure the integrity of the examination by requiring the person to answer truthfully or risk paying a penalty for failing to do so.
- 1.2. Either the Information Commissioner, or a person authorised by the Information Commissioner (authorised officer), may administer an oath or affirmation.

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<sup>80</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZE(1).

- 1.3. Regardless of whether a person takes an oath or makes an affirmation, it is an offence to provide information to OVIC knowing that it is false or misleading in a material way.<sup>81</sup>

### Choosing between oath and affirmation

- 1.4. The person attending the examination may choose between taking an oath or making an affirmation.<sup>82</sup> When administering the oath or affirmation, the Information Commissioner or authorised officer must let the person know that they can choose, unless it is apparent that the person already knows they have that choice.<sup>83</sup>
- 1.5. If the person attending the examination refuses to choose, or it is not appropriate for them to take the appropriate oath, OVIC may direct the person to make an affirmation.<sup>84</sup>

### *What is the difference between an oath and an affirmation?*

- 1.6. An oath is a promise to tell the truth, usually appealing to a god. When taking an oath, the person may hold a religious text, but they do not have to.<sup>85</sup> Similarly, the oath does not need to refer to a god and may refer to the basis of the person's beliefs instead.<sup>86</sup>

#### **Example of form of oath**

I swear (or promise) by Almighty God (or the person may name a god recognised by the person's religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.<sup>87</sup>

- 1.7. An affirmation has the same effect as an oath,<sup>88</sup> except it does not refer to or have a connection to a person's religion or faith.

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<sup>81</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63F.

<sup>82</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), section 7(1).

<sup>83</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), section 7(2).

<sup>84</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), section 7(3).

<sup>85</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), section 10(1).

<sup>86</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), section 10(4).

<sup>87</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), Schedule 1.

<sup>88</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), section 8(2).



### Example of form of affirmation

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.<sup>89</sup>

*What if a person does not tell the truth under oath or affirmation?*

- 1.8. A person who intentionally makes a false statement, whether orally or in writing, under oath or affirmation may have committed perjury. Perjury is a criminal offence when someone wilfully provides false information and says that it is true, under oath or affirmation.<sup>90</sup>

How is an oath or affirmation made?

- 1.9. A person who takes an oath or makes an affirmation must say the words aloud in the presence of the Information Commissioner or authorised officer. This can be done in their physical presence or by audio visual link or audio link.<sup>91</sup> A person does not need to have a Bible or other religious text or object to make an oath.

What happens if the person does not take an oath or make an affirmation?

- 1.10. It is an offence for a person to refuse or fail to take an oath or make an affirmation when required, without a reasonable excuse.<sup>92</sup> The person administering the oath or affirmation must inform the person attending the examination that refusal or failure to take an oath or make an affirmation, without a reasonable excuse, is an offence.<sup>93</sup> If this is not done, the person will not commit an offence if they subsequently refuse or fail to take an oath or make an affirmation.
- 1.11. What constitutes a reasonable excuse will depend on the facts. If a person to be interviewed believes they have a reasonable excuse to not take an oath or make an affirmation, they should seek legal advice and advise the examiner when they are asked to do so.

## More information

For more information on oaths and affirmations, see Part 2 of [Oaths and Affirmations Act 2018 \(Vic\)](#).

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<sup>89</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), Schedule 1.

<sup>90</sup> [Crimes Act 1958 \(Vic\)](#), section 314.

<sup>91</sup> [Oaths and Affirmations Act 2018 \(Vic\)](#), section 9.

<sup>92</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZE(3).

<sup>93</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZE(4).

# Section 61ZF – Legal advice and representation

## Extract of legislation

### **61ZF Legal advice and representation**

- (1) A person may seek legal advice, and be represented by, a legal practitioner in relation to—
  - (a) a notice to produce or attend that is directed to the person; and
  - (b) the person's rights, liabilities, obligations and privileges in relation to the notice to produce or attend.
- (2) For the purposes of this section, a legal practitioner may represent a person by means of audio visual link or audio link.

## Guidelines

### Right to seek legal advice and representation regarding a notice to produce or attend

- 1.1. A person who is served with a notice to produce or attend can seek legal advice and representation regarding the notice and the person's rights, liabilities, obligations, and privileges in relation to it.<sup>94</sup>
- 1.2. The legal practitioner may represent the person by audio visual link or audio link in addition to being physically present.<sup>95</sup>

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<sup>94</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZF(1).

<sup>95</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZF(2).

# Section 61ZG – Protection of legal practitioners and persons – notice to produce or attend

## Extract of legislation

### **61ZG Protection of legal practitioners and persons— notice to produce or attend**

- (1) A legal practitioner representing the person who is served with a notice to produce or attend has the same protection and immunity as a legal practitioner has in representing a party in a proceeding in the Supreme Court.
- (2) A person who is served with a notice to produce or attend has the same protection and immunity as a witness has in a proceeding in the Supreme Court.

## Guidelines

### Protection and immunity of legal practitioners and witnesses

- 1.1. Section 61ZG protects a person served with a notice to produce or attend, and their legal representative (if they have one), from civil action arising through complying with the notice.<sup>96</sup> Civil action usually involves a dispute between parties involving money and includes matters such as defamation or negligence.
- 1.2. Protecting what a person says during an investigation, or documents produced under a notice, helps to promote the integrity of the process and the Office of the Victorian Information Commissioner's (OVIC) ability to perform its functions by encouraging free and open speech.<sup>97</sup>
- 1.3. The protection is complemented by [section 61ZC](#), which outlines that statutory secrecy is not a reasonable excuse to fail to comply with a notice, and by [section 62\(1\)](#), which protects agencies and Ministers against actions for defamation or breach of confidence where they were required to provide access to a document.

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<sup>96</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZG(2).

<sup>97</sup> [Cabassi v Vila](#) [1940] HCA 41, 140 and 141; [D'Orta-Ekenaike v Victoria Legal Aid](#) (2005) HCA 12.

- 1.4. While a person may be immune from civil action, there may be circumstances where they could be subject to criminal prosecution. For example, a person may be found to have committed perjury if they wilfully say something untrue or make a misrepresentation under oath or affirmation.<sup>98</sup> It is also an offence to provide information or make a statement to OVIC knowing that it is false or misleading in a material way (subject to a penalty).<sup>99</sup>

What does this mean for a person served with a notice?

- 1.5. A person who provides evidence at an examination, or produces documents, under a notice can (and must) tell the complete truth when answering questions from OVIC and when providing evidence.

## More information

For information on how OVIC manages witness welfare, read OVIC's [Witness Welfare Management Policy](#).

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<sup>98</sup> [Cabassi v Vila](#) [1940] HCA 41, 141.

<sup>99</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 63F(2).

# Section 61ZH – Audio or video recording of examination

## Extract of legislation

### **61ZH Audio or video recording of examination**

- (1) This section applies if a person is required under this Part to attend an examination before the Information Commissioner.
- (2) The Information Commissioner must ensure that an audio or video recording of the examination is made.
- (3) Subject to subsection (4), evidence of anything said by the person during the examination is inadmissible as evidence against any person in any proceeding before a court or tribunal unless—
  - (a) an audio or video recording of the examination is made; and
  - (b) the audio or video recording is available to be tendered in evidence.
- (4) A court may admit evidence of anything said by the person during the examination that is otherwise inadmissible because of subsection (3) if the court is satisfied that there are exceptional circumstances that justify the admission of the evidence.
- (5) Unless the Information Commissioner considers on reasonable grounds that doing so may prejudice an investigation under this Act, the Information Commissioner must provide the person attending the examination with a copy of—
  - (a) the audio or video recording; and
  - (b) any transcript created.
- (6) If the Information Commissioner determines not to provide the person with a copy of the audio or video recording and any transcript in accordance with subsection (5), the Information Commissioner must allow the person to listen to or view the recording of the person's evidence at the premises of the Information Commissioner at any reasonable time.
- (7) As soon as possible after the examination, the Information Commissioner must provide the Victorian Inspectorate with a copy of the audio or video recording and any transcript of the examination.

## Guidelines

### Information Commissioner must record examinations

- 1.1. If a person has to attend an examination before the Office of the Victorian Information Commissioner (**OVIC**), OVIC must make an audio or visual recording of the examination.<sup>100</sup>
- 1.2. If the examination is not recorded, then the evidence provided in it may not be admissible before a court or tribunal unless there are exceptional circumstances which justify admitting the evidence.<sup>101</sup>

### Who receives a copy of the examination recording?

#### *The Victorian Inspectorate*

- 1.3. As soon as possible after the examination, OVIC must provide a copy of a recording and any transcript of the examination, to the Victorian Inspectorate. The Victorian Inspectorate may review a copy of an audio or video recording and any transcript of an examination given under section 61ZH to assess why and how the examination was conducted.<sup>102</sup>

For more information on how the Victorian Inspectorate oversees OVIC's use of coercive powers, see [section 61ZD – Office of the Victorian Information to report to the Victorian Inspectorate on issue of notice to produce or attend](#).

#### *The person attending the examination*

- 1.4. Usually, OVIC will provide a copy of the recording, and any transcript that OVIC created, to the person who attended the examination (the person who provided evidence and answered questions under the notice to attend).<sup>103</sup>
- 1.5. An exception to this is if OVIC considers on reasonable grounds that doing so may prejudice an investigation under the Act.<sup>104</sup>

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<sup>100</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZH(2).

<sup>101</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZH(3) and 61ZH(4).

<sup>102</sup> [Victorian Inspectorate Act 2011 \(Vic\)](#), section 42A(1).

<sup>103</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZH(5).

<sup>104</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61ZH(5).

## Section 61ZI – Act applies equally to attendance in person or by audio or audio visual link

### Extract of legislation

#### **61ZI Act applies equally to attendance in person or by audio or audio visual link**

- (1) Except as otherwise provided in this Part, a provision of this Act that applies in relation to attendance of a person required under a notice under section 61U applies in relation to attendance by audio visual link or audio link in the same way that it applies in relation to attendance in person.
- (2) Except as otherwise provided in this Part, a provision of this Act that applies in relation to production of documents required under a notice under section 61U applies in relation to production of documents by secure electronic means in the same way that it applies in relation to production of documents in person.

### Guidelines

#### Attending by audio or audio visual link

- 1.1. Section 61ZI ensures that the Act applies to the attendance of a person required under a notice, and to the production of documents required under a notice, where those acts are done by audio or audio visual link or by secure electronic means.

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