

Entry and Search of Premises with Warrant Guideline

March 2024 (Version 1)

Purpose of this guideline

Under Part 4B of the *Essential Services Commission Act 2001* (the Act), a person appointed by the commission as an inspector may obtain a warrant from a magistrate authorising the inspector to enter a premises, and exercise powers to obtain information, documentation, or evidence at the premises. Powers under warrant are used by the commission to carry out its compliance and enforcement functions.¹

This guideline sets out information about the:

- circumstances in which an inspector may apply for a warrant
- steps that an inspector must take to obtain a warrant
- powers that an inspector may have under a warrant
- obligations and rights of the occupier of the premises, and other persons present at the premises, where a warrant pertaining to the premises is executed by an inspector.

The commission recognises the powers contained in Part 4B of the Act are intrusive. Accordingly, the commission will ensure that the powers are only used in appropriate circumstances and in accordance with the requirements of the legislation.

Who is an inspector for the purposes of the Act?

The commission may appoint one of the following to be an inspector:

- an employee of the commission
- a person employed under Part 3 of the *Public Administration Act 2004*
- any other person employed by the State of Victoria

¹ Note that section 10D of the Act specifies that the inspection powers contained in Part 4B of the Act do not apply in relation to the commission's functions under the *Victorian Energy Efficiency Target Act 2007*. Accordingly, the inspection powers discussed in this guideline do not apply to the commission's compliance or enforcement functions in relation to the Victorian Energy Upgrades scheme.

- any other person who the commission considers has appropriate skills, qualifications and experience.

The commission will only appoint a person as an inspector when it is satisfied that the person has appropriate qualifications, and/or has completed appropriate training.

All inspectors carry formal identification cards recording their appointment by the commission.

When can an inspector apply for a search warrant?

An inspector may apply to a magistrate for a search warrant in relation to a particular premises if the inspector has reasonable grounds to suspect that:

- there is evidence on the premises that a person may have contravened an essential services requirement²
- there may be evidence on the premises within the next 72 hours that a person may have contravened an essential services requirement, or
- there is evidence in digital or electronic format that a person may have contravened an essential services requirement which is accessible from the premises.

A magistrate may issue the warrant if the magistrate is satisfied that there are reasonable grounds to suspect that:

- there is on the premises a document or a computer, or a document or a computer of a particular kind, connected with an alleged contravention by a person of an essential services requirement
- there may be on the premises, within the next 72 hours, a document or a computer, or a document or a computer of a particular kind, connected with an alleged contravention by a person of an essential services requirement, or
- there is information in digital or electronic format connected with an alleged contravention by a person of an essential services requirement which is accessible from the premises.

Information that is included in a search warrant

A search warrant issued to an inspector must state:

- the purpose for which the search is required and the nature of the alleged contravention
- any conditions to which the warrant is subject
- whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night, and

² The phrase 'essential services requirement' is defined in section 3 of the *Essential Services Commission Act 2001*. In broad terms, an essential services requirement includes any obligation or requirement contained in a provision of the Act, the *Electricity Industry Act 2000*, the *Gas Industry Act 2001*, a licence condition (including a statutory licence condition), or a provision of a Code of Practice.

- the day on which the warrant ceases to have effect, which must not be later than 28 days after the issue of the warrant.

Execution of the warrant: entry to premises

The inspector named in a search warrant will ordinarily, before entering the premises, announce that the warrant authorises the inspector to enter the premises, and provide any person at the premises an opportunity to allow entry.

However, if the inspector believes on reasonable grounds that immediate entry to the premises is required to ensure that effective execution of the search warrant is not frustrated, the inspector may enter the premises without warning. The inspector may use force in this circumstance if necessary.

If the occupier is present at the premises when a warrant is being executed, the inspector will identify themselves to the occupier, produce their photo identification card issued by the commission for inspection,³ and provide the occupier a copy of the warrant.

If the occupier is not present, the inspector will identify themselves to a person at the premises, produce their photo identification card issued by the commission for inspection, and provide a copy of the warrant.

Execution of warrant: search and seizure

The search warrant lists the powers the inspector has once on the premises, which may include any of the following.

Powers in relation to documents

Where a document, or a document of a particular kind, is named or described in the warrant, *and* the inspector believes on reasonable grounds that the document relates to the alleged contravention, the search warrant may authorise the inspector to:

- require the document to be produced for inspection
- examine, make copies, or take extracts from the document, or arrange for the making of copies or the taking of extracts from the document, or
- remove the document for so long as is reasonably necessary to make copies or take extracts from the document.

³ Note that under the *Essential Services Commission Act* it is an offence for a person who is not an inspector to, in any way, hold themselves out to be an inspector (s 39ZF). An inspector must produce their identification card for inspection at any time during the exercise of an inspection power if asked to do so (s 39O(b)).

Powers in relation to computers

Where a computer, or a computer of a particular kind, is named or described in the warrant *and* the inspector believes on reasonable grounds that the computer relates to the alleged contravention, the search warrant may authorise the inspector to:

- search for the computer
- seize the computer, or
- secure the computer against interference.

A warrant may also authorise an inspector to make an image of the hard drive of the computer.

Powers in relation to electronic information

Where information in electronic or digital format is described in the warrant and is accessible from the premises, if the inspector believes on reasonable grounds that the information relates to the alleged contravention the inspector may:

- access the information by means of any computer located on the premises
- download or make an electronic copy of that information, or
- make or produce a physical copy of that information.

Powers to require persons at the premises to give assistance

An inspector who is exercising a power of entry pursuant to a warrant may require a person at the premises to:

- give information either verbally or in writing
- produce documents, or
- give reasonable assistance to the inspector.

These powers come from the Essential Services Commission Act, and do not need to be listed in the warrant. The person must comply with any such requirement of an inspector unless the person has a reasonable excuse.

Assistance with computers

However, an inspector may only require a person to provide information or assistance that is reasonable and necessary to allow the inspector or another person to *access, download, or copy information on any computer located on the relevant premises* if this is specifically authorised in the warrant. Where such a power is specified in the warrant, the inspector will only exercise this power if he or she is satisfied that the following two requirements are met.

First, the inspector will only exercise the power if the inspector is satisfied that the person is:

- the person alleged to have contravened the essential services requirement
- the owner or lessee of the computer

- an employee of the owner or lessee of the computer, or
- a person engaged under a contract for services by the owner or lessee of the computer.

Second, the inspector will only exercise the power if the inspector is satisfied that the person has relevant knowledge of:

- the computer or the network which the computer forms part, or
- measures applied to protect information held in the computer (for example, passwords).

Seizure of documents or computers not mentioned in the warrant

An inspector may seize a document or computer which is not described in the warrant if two conditions are met.

First, the inspector will only exercise this power if the inspector believes on reasonable grounds that the document or computer:

- is of a kind which could have been included in a search warrant issued under section 39S(2) of the Essential Services Commission Act, or
- will afford evidence about the alleged contravention by a person of an essential services requirement.

Second, the inspector will only exercise this power if the inspector believes on reasonable grounds that it is necessary to seize the document or computer to prevent:

- its concealment, loss or destruction, or
- its use in the alleged contravention by a person of an essential services requirement.

Copies of seized documents and computers

If an inspector retains a document seized from a person during the inspection of the premises, the inspector will give the person a copy of the document certified as correct by the inspector as soon as practicable.

Return of seized documents and computers

An inspector will take reasonable steps to ensure that any document or computer seized from a person is returned to the person (or to the owner) not later than three months after its seizure if the inspector is satisfied that:

- the document or computer is no longer required for the purpose for which it was seized
- it is not necessary to retain the document or computer to prevent the document or computer being used in connection with a possible contravention of an essential services requirement, and
- the document or computer is not subject to a dispute as to ownership.

An inspector may apply to the Magistrates' Court for an order for an extension (not exceeding three months) of the period for which the inspector may retain the document or computer.

Right to make application for return of seized document or computer

At any time following the seizure of a document or computer from a person by an inspector, the person, or another person who claims to be the owner of the document or computer, may make an application to the Magistrates' Court for the return of the document or the computer. Any person who makes such an application must serve a copy of the application on the commission.

Offences, reasonable excuse and direction to comply

Offence to fail to comply with a requirement of an inspector

It is an offence for a person to fail to comply with a requirement of an inspector without reasonable excuse (penalty: 60 penalty units or approx. \$11,100).

Protection against self-incrimination

It is a reasonable excuse for an individual (but not a corporate entity) to refuse or fail to give information or provide assistance if doing so would tend to incriminate them or expose them to a penalty.

However, it is not a reasonable excuse for an individual to refuse to produce a document on grounds that doing so would tend to incriminate them or expose them to a penalty.

Legal professional privilege

Legal professional privilege may be a reasonable excuse not to give information or produce a document.

Where a person claims privilege in relation to documents or electronic files, an inspector may secure (or ask the claimant to secure) the relevant documents or files in a sealed container clearly marked as containing documents or files subject to a claim of legal professional privilege.⁴

The commission will provide an opportunity for the person to substantiate the claim for legal professional privilege. The commission will then consider whether or not to accept the claim. If the commission accepts the claim the relevant documents or files will be promptly returned. If the commission does not accept the claim the person may withdraw the claim or make an application to a court seeking a declaration that the information is privileged.

⁴ Electronic files will be saved on a USB storage device to be placed in the sealed container.

Duties of confidence

A person is not excused from complying with the requirements of an inspector 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.

Offence to hinder or obstruct an inspector

It is an offence for a person, without reasonable excuse, to hinder or obstruct an inspector who is exercising a power of entry and search.

Offence to give false or misleading information or documents

It is an offence for a person to give an inspector information required by the inspector that the person knows to be false or misleading in any material particular.

It is an offence for a person to produce a document to an inspector that the person is required to give to the inspector if the person:

- knows that the document is false or misleading in any material particular, and
- the person does not indicate the respect in which the document is false or misleading.

If a court finds a person guilty of an offence of providing false or misleading information or documents, the court may make a 'monetary benefits order'. This order may require the person to pay an amount to the commission that the court is satisfied represents the amount of any monetary benefits acquired by the person, or accrued or accruing to the person, as a result of the commission of the offence.

Direction to comply with requirement of an inspector

Where the commission is satisfied that a person has failed, without reasonable excuse, to comply with the requirement of an inspector, the commission may apply to a court for an order directing the person to comply with the requirement. The commission will not make such an application if the person has been charged with an offence of failing to comply with a requirement of an inspector.

Use and disclosure of information or documents obtained under power to enter and search premises

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

Protection for confidential information

The commission does not disclose confidential or commercially-sensitive information obtained during an investigation 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 Essential Services Commission Act or relevant legislation.

Use in proceedings

Any information, document or evidence obtained by an inspector exercising powers to enter and search a premises under the Essential Services Commission Act may be used in a criminal or civil proceeding brought by the commission against a person or body corporate.

Disclosure under information sharing arrangements

The commission has information sharing arrangements with 'relevant agencies'. Relevant agencies include those responsible for fair trading, essential services regulation, and law enforcement.

Under these arrangements, the commission can share information that it obtains during an investigation with a relevant agency, if sharing the information is reasonably necessary to assist in the performance of functions under the Essential Services Commission Act or relevant legislation, or the functions of the relevant agency.

Referral of a matter about fair trading or that affects consumers

The commission may refer any matter with respect to fair trading, or that affects the interests of consumers, to a fair trading agency or law enforcement agency. The power to refer a matter may be exercised, whether or not the commission has an information sharing arrangement with that agency.

Protection of personal information

Where information, documents or evidence obtained by an inspector contains personal or sensitive information about individuals, the commission protects that information in accordance with the requirements of the *Privacy and Data Protection Act 2014*.

Register of exercise of powers of entry

If an inspector exercises a power of entry pursuant to a warrant, the inspector will report the exercise of the power to the commission not later than seven days after the warrant was executed. The report made to the commission will include all relevant details of the entry including:

- the time and place of the entry
- the purpose of the entry
- the things done on the premises, including details of:
 - documents seized, copies made, and extracts taken
 - computers seized, and
- the time of departure.

The commission will keep and maintain a register containing the particulars of all entries of premises undertaken by warrant.

Complaints

A person may complain to the commission about the exercise of a power by an inspector in relation to the entry and search of a premises using the commission's [external stakeholder feedback webform](#). The commission will investigate the complaint and provide a written report to the complainant on the results of the investigation.

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.

Revisions to this guideline

Version no.	Date effective	Nature of amendment
1	March 2024	First published